

MAINE STATE LEGISLATURE

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STATE OF MAINE

REPORT
OF THE
ATTORNEY GENERAL

For the Years
1967 through 1972

Toomer v. Witsell, 68 S.Ct. 1156, 334 U.S. 385, 92 L.Ed. 1460. Rehearing denied 69 S.Ct. 12. 335 U.S. 837, 93 L.Ed. 389, (1948). See also *Russo v. Reed*, 93 F. Supp. 554 (1950). Where a Maine statute which discriminated against non-residents was struck down.

The fact that the right here involved is one given by state statute and not one necessarily guaranteed by the Federal Constitution, does not insulate that right from the dictates of the 14th Amendment. U.S. ex rel. *Keating v. Bensinger*, 322 F.Supp. 784 (1971).

The reasonableness of the discrimination between residents of six months or more and those who are residents for less than six months must, in the final analysis, be tested in light of this State's interests.

This State's interests are disclosed through an analysis of the purposes of the real estate brokerage laws.

In general the purposes underlying such laws are to protect the public against fraud and incompetency in real estate transactions. *Dupeck v. Union Ins. Co. of America*, 329 F.2d 548 (1964); *Wickersham v. Harris*, 313 F.2d 468 (1963). *State v. Rose*, 97 Fla. 710, 122 So. 225 (1929).

Consistent with those purposes, this State could, as it has done, require that applicants for a broker's or salesman's license meet certain minimum educational requirements, demonstrate minimum competence in real estate transactions and demonstrate their honesty and good character. Assuming that one has satisfied all of the standards established in the above areas, what legitimate reasons could that legislature have for imposing an additional six month and three month waiting period? How can it be said that one person who has met all of the requirements, other than the waiting period, is any less qualified to practice in the profession than one who has completed the waiting period?

The resident for a day is entitled to the same rights and privileges under this State's laws as the resident of six months unless there appears at least a reasonable basis for denying him those rights.

I find no reasonable basis for such a denial and must therefore conclude that the six month and three month residency requirements for obtaining a broker's or salesman's license is unconstitutional.

CLAYTON N. HOWARD
Assistant Attorney General

September 23, 1971
Education

Kermit S. Nickerson, Deputy Commissioner

Legality of Construction Subsidy Paid District on Basis of Lease-Purchase Payments.

SYLLABUS:

State construction subsidy can legally be paid an administrative unit on the basis of individual "lease-purchase payments" made to a building contractor by the unit for capital outlay purposes (two-bay addition to school bus garage).

FACTS:

School Administrative District No. 9 directors have voted the purchase of a two-bay addition to the existing schoolbus garage under a "lease-purchase agreement". The plan calls for lease payments to the construction contractor over a 5-year period. The directors have requested that the Department of Education seek a ruling from the Attorney General on the question of legality of such a plan. The Department of Education will be involved in the matter when processing the district's request for State construction assistance (subsidy) on the individual lease-purchase payments made by the District.

QUESTION:

Whether State construction subsidy can legally be paid the district on the basis of individual "lease-purchase payments" made to a building contractor by the district for capital outlay purposes?

ANSWER:

Yes, provided applicable statutory provisions are met, a copy of the proposed agreement is presented to the State Board of Education, and the statutory debt limit is not exceeded.

REASON:

Initially, the district must apply to the State Board of Education for construction subsidy on the project. *20 M.R.S.A. § 3458*. Such an application should be accompanied by a copy of the proposed lease-purchase agreement. Too, the statutory debt limit must not be exceeded.

The arrangement contemplated by the district is analogous to the lease-purchase procedure utilized by the Maine School Building Authority with administrative units for the construction and acquisition of school buildings. We do not rest the legality of the reference plan upon the cited analogy; but rather upon the fact that none of the provisions appearing in the statutes relating to education (Title 20) bar the payment of State subsidy for capital outlay purposes under a lease-purchase plan. The term "capital outlay purposes", as used in *20 M.R.S.A. § 3457*, means, among other things, the cost of new construction. The fact that the district's cost of new construction will be expended in installments does not bar the project from qualifying for construction subsidy.

We have noted in the facts that the directors of the district requested the Department of Education to obtain a ruling from the Attorney General on the legality of the plan. We answer that question indirectly by ruling that if the district enters into a valid lease-purchase agreement with a contractor for acquisition of capital improvements, payment of State subsidy to the district on the basis of the district's lease-purchase payments is not barred by statute.

The State's payment of subsidy is protected in this matter by reason of the fact that the Governor and Council, whenever they have reason to believe that an administrative unit has neglected to faithfully expend school money received from the State or has failed in any way to comply with the law prescribing the duties of administrative units, may direct the Treasurer of State to withhold an amount of money, as they may deem expedient, from the moneys apportioned to that administrative unit, until the Governor and Council are satisfied that the administrative unit has complied with statutory

requirements. 20 M.R.S.A. §'854. Thus, in the event State construction subsidy were paid the district under such a lease-purchase plan which was not (for some reason) later fully performed, so that the administrative unit did not realize acquisition of a capital construction fixture, reimbursement of the State subsidy would be in order; and failure of the district to so reimburse the State would be grounds for withholding the sum under the cited statute.

JOHN W. BENOIT, JR.
Deputy Attorney General

October 5, 1971
Wetlands Control Board

Ronald Greene, Chairman

Municipal Jurisdiction of Proposed Dredging in Coastal Wetlands

SYLLABUS:

The question of which municipality has jurisdiction over a proposed dredging activity is one that must be resolved among the applicant and the municipalities, and the Wetlands Control Board may render its decision without regard to this issue.

FACTS:

Pursuant to the provisions of Title 12 M.R.S.A. §§ 4701-4709, the so-called Wetlands Act, Maine Yankee Atomic Power Company has applied for a permit to dredge a channel in coastal wetlands within the Town of Wiscasset. The applicant notified the municipal officers of Wiscasset and the Wetlands Control Board and requested a permit for the dredging. A hearing was held by the municipal officers of Wiscasset, at which time the municipal officers of two adjacent towns appeared and alleged that they represented "municipalities affected" within the meaning of § 4701, and thus rightly had concurrent jurisdiction with municipal officers of Wiscasset to conduct a public hearing and rule on the application.

The neighboring municipalities allege that they will be "affected" by changes in tides and current patterns, siltation, loss of clam and marine worm flats utilized by local fishermen, and other indirect effects resulting from the proposed dredging. They have petitioned the Board to withhold its decision on the grounds that procedural defects occasioned by the failure of the applicant to apply to each "community affected" prevents the Board from rendering a decision.

No evidence was presented disputing the allegation that the dredging would occur solely within the boundaries of the Town of Wiscasset. For purposes of this opinion, it is assumed that the proposed dredging will take place solely within the municipal boundaries of Wiscasset.

QUESTION:

1. May the Wetlands Control Board rule on an application for a permit without regard to the issue of municipal jurisdiction?
2. What is the meaning of "municipality affected" as used in § 4701?

ANSWER: