STATE OF MAINE

# REPORT

OF THE

# ATTORNEY GENERAL

For the Years
1967 through 1972

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:*

1. Yes.

2. Since question No. 1 is answered in the affirmative, there is no need to answer question No. 2.

*REASONING:*

1. The Wetlands Control Act, provides that no person may alter a coastal wetland without the dual approval of the "municipality affected" and the Wetlands Control Board. The Act requires that the applicant notify the Board and the municipal officers prior to the alteration, and that the municipality hold a public hearing. Either the municipal officers or the Board may withhold approval should they conclude that the proposed alteration would result in certain adverse effects as enumerated in § 4702 of the Act.

Nowhere does the Act specifically limit the powers of the Board to acting only after the municipality has conducted a hearing and rendered a decision. Nor does the Act require that the Board must determine which municipality must issue the permit. The only provision which appears to touch on this issue is found in § 4701, paragraph 4, which requires the municipal officers to notify the Board within 7 days of the results of their decision. There is no reason to conclude from this language that the Legislature intended to prohibit the Board from acting prior to such municipal notification. Rather, the provision appears to be designed for the purpose of keeping the Board apprised of the decision of the municipal officers. The local decision has no evidentiary value to the Board in making its decision. It is likely, of course, that the Board may desire to know the decision of local officials prior to formulating its own decision. In fact, that has been the informal practice of the Board. Nevertheless, the language of the statute does not compel the Board to wait.

What little legislative history there is on the act seems to support the conclusion that the notice by the municipality to the Board is purely for informational purposes. The original Act, Chapter 348 of the Public Laws of 1967, contained no such requirement. It did, however, require the permit to be issued by the municipality within 7 days after the public hearing conducted by the municipality, provided both the municipality and the Board approved. In Chapter 379 of the Public Laws of 1969, the 7-day limitation was changed to 30 and the notification provision was added. Presumably the notification section was added so that the Board might be advised as to when the hearing had been held and the decision of the municipality rendered.

It is also evident from the Act that the Board is free to act without any hearing or evidence. The Board's decision is not in any way dependent on the municipal decision or evidence developed at such hearing. Since the Board meets *in camera,* it may consider such evidence as it chooses. It is irrelevant to the Board which community has jurisdiction over the application or whether the municipal hearing comported with the statutory notice provisions in § 4701. The Board merely examines the activity in light of the statutory criteria and renders its decision. The Board itself does not issue permits. It merely has the authority to approve, disapprove or approve with conditions. The actual permit itself is issued by the municipal officers. See § 4702, first sentence and § 4702, paragraph 2. Though this procedure is rather unusual, it supports the conclusion that the Board is independent of the municipality, both in the procedure it follows and in the substance of its decision. The issue of municipal jurisdiction is one to be resolved by the applicant and the communities involved. Any other conclusion would require the Board to act as a court of law and determine in each case the meaning and scope of the words "municipality affected."

If any other municipality wishes to assert its jurisdiction over the activity in question it must resolve the issue with the applicant. If it is determined that the proposed dredging requires a permit from other municipalities, then of course, such permits must be obtained prior to undertaking the proposed work.

2. In view of the above conclusion, it is not necessary for us to decide the meaning of "municipality affected".

JOHN M. R. PATERSON
Assistant Attorney General

October 18, 1971
Bureau of Taxation

Neal Bodwell, Director, Excise Tax Division

Subject: Taxability of Variable Annuity Insurance

*SYLLABUS:*

THE PAYMENTS RECEIVED EACH YEAR BY AN ANNUITY COMPANY ON ANNUITY CONTRACTS FROM THE CONTRACT OWNER ARE TAXABLE AS ANNUITY CONSIDERATIONS IN THE YEAR WHEN RECEIVED AND NOT AT A SPECIFIED TIME IN THE FUTURE WHEN THE ACCUMULATED PAYMENTS ARE CONVERTED TO PURCHASE ANNUITIES.

*FACTS:*

The ITT Variable Annuity Insurance Company is a South Carolina Corporation licensed by the State of Maine Insurance Commissioner to do business in the State of Maine. The company sells annuity contracts, individual and group, fixed and variable. The annuity contracts considered in this opinion are those in which the prospective annuitants are Maine residents and under the contract terms there are provisions for an accumulation of funds until a specified time in the future, at which time the funds are applied to purchase an immediate life annuity. The ITT Variable Annuity Insurance Company contends that the periodic purchase payments by the contract owner to the company in the case of the individual annuity contracts and the periodic contributions by the contract owner to the company on behalf of prospective Maine Resident annuitants in the case of group contracts are not subject to the tax on annuity considerations under the provisions of 36 M.R.S.A.§2513 until the specified time in the future when the accumulated purchase payments or contributions are used to purchase an immediate life annuity.

The ITT Variable Annuity Insurance Company has provided annuity contract forms which are attached hereto and are referred to in this opinion. The funds used to purchase the fixed annuities are kept in so-called general accounts and the funds used to purchase the variable annuities are placed in so-called separate accounts. The annuities purchased are measured in annuity units for accounting purposes, the number of units varying with the amount of funds that have accumulated in the general or special accounts.

*QUESTION:*

Are annuity contracts issued by an out-of-state annuity company licensed to do