STATE OF MAINE

REPORT

OF THE

ATTORNEY GENERAL

For the Years
1967 through 1972

produced in any manner and however characterized, for the one expressed purpose only and to "accumulate" the income produced by that Fund pending such expenditure.

Accordingly, it is clear beyond cavil that *none* of the "income" produced by such Trust Fund, whether it be termed direct investment income, short-term income, or by any other characterization, can be diverted to any other purpose, including to the General Fund of the State. Such diversion to the General Fund is neither an application for the sole expressed purpose of this Trust Fund, nor is it an "accumulation" in a "separate and distinct Fund" as required by the donor of this Trust. Such diversion would constitute a breach of trust.

CHARLES R. LAROUCHE
Assistant Attorney General

July 26, 1972
Land Use Regulation Comm.

James S. Haskell, Jr.

Maine Land Use Regulation Commission Law; Subdivision Permits.

SYLLABUS:

Only persons who had commenced use of or construction on or sold an interest in any subdivision located in the unorganized and deorganized townships and mainland and island plantations of the State before September 23, 1971 are not required to receive a permit prior to such use, construction or sale from the Maine Land Use Regulation Commission.

FACTS:

12 M.R.S.A. § 682.2. defines "subdivision" as follows:

"A subdivision is a division of an existing parcel of land into 3 or more parcels or lots, within any 5-year period, whether this division is accomplished by platting of the land for immediate or future sale, or by a sale of the land by metes and bounds or by leasing."

12 M.R.S.A. § 682.7. defines "development" as follows:

"Development shall mean any land use activity or activities directed toward using, reusing, or rehabilitating air space, land, water or other natural resources."

12 M.R.S.A. § 685-B.1.B. states:

"No person shall commence development of or construction on any subdivision or sell or offer for sale any interest in any subdivision without a permit issued by the Commission."

QUESTION:

Under what circumstances is a person not required to apply for a permit from the Commission prior to engaging in development of or construction on or prior to selling or offering for sale any interest in a subdivision.

ANSWER:

Only those persons who commenced use of or construction on or who actually sold subdivided land prior to September 23, 1971 are not required to obtain a permit from the Commission prior to such use, construction or sale.

REASONING:

12 M.R.S.A. § 685-B.1.B. is best viewed as being directed to three types of activities involving subdivided land, i.e., (1) Development of or construction on any subdivided land; (2) Selling any interest in subdivided land; and (3) Offering to sell any interest in subdivided land. We shall deal with each of these types of activities separately:

(1) Development of or construction on any subdivided land – The statute requires a permit from the Commission before "commencing" development or construction. Obviously, therefore, those who have "commenced" development of or construction on any subdivided land prior to the effective date of the law, September 23, 1971, need not apply for a permit to continue with *such* development or *such* construction. In the absence of any contrary provisions, all laws are construed to commence in futuro and act prospectively only.[1] However, the statute by its own terms requires a permit of any development of or construction on any subdivided land "commencing" after September 23, 1971 regardless of when the land itself was subdivided within the meaning of 12 M.R.S.A. § 682.2.

(2) Selling any interest in subdivided land – It is important to note that Section 685-B.1.B. does *not* state that any person *creating* a subdivision need apply for a permit but rather that it states any person selling an interest in a subdivision[2] must apply for a permit. In other words, the emphasis in this portion of the statute is upon the act of sale of an interest in a subdivision rather than upon any act preparatory to sale, such as subdividing the land on paper by plat plan or metes and bounds description or physically subdividing the land by survey markers or roads. Thus regardless of how or when the land was subdivided, the sale of any interest in a subdivision must be preceded by the issuance of a permit by the Commission, when such sale occurs after September 23, 1971. To require a permit for sales prior to September 23, 1971 would violate the rule against retroactive application of statutes, without language to indicate otherwise.

(3) Offering to sell any interest in subdivided land – It is important to note that the word "commence" contained in Section 685-B.1.B. relates only to "development of or construction on" any subdivision. Hence, it is obvious that the legislative intent was not to exempt persons who commenced offering subdivided land for sale prior to September 23, 1971, from the requirement that such offering be preceded by a Commission permit. In addition, such a construction of this portion of the statute is consistent with the requirement of a permit preceding the actual sale of subdivided land.

Finally, I would note that while a permit may be required, each case must be evaluated on its own merits and whether or not a permit may be denied or issued with stringent conditions, in addition to being a function of the applicant's ability to meet the

1) *Dalton v. McLean,* 137 Me. 4, 14 A.2d 13 (1940).

2) Subdivision must be construed as relating to undeveloped land for it would serve absolutely no useful purpose to require a permit from the Commission to sell, for example, a house legally constructed on a portion of land which has been previously legally subdivided.

statutory criteria for approval, will also be a function of constitutional protections of vested interests.

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August 1, 1972
Environmental Protection

Henry E. Warren

Effect of Failure to Comply with Time Limits.

SYLLABUS:

Failure of the Board of Environmental Protection to comply with time limits for decision making does not divest the Board of its jurisdiction to make such decisions.

FACTS:

Various statutes defining the authority of the Department of Environmental Protection require the Board to render decisions within specified periods of time. Those statutes include Title 38 §§483, 484, 590, 593 and Title 12 §4802.

The burden of work and delay in preparation of transcripts by the official reporters apparently causes great difficulty in meeting such deadlines.

QUESTION:

Does the failure of the Department of Environmental Protection to issue an order or make a decision within the time limit as specified divest the Board of jurisdiction or render its decision unenforceable?

ANSWER:

No.

REASONING:

Statutes which require the performance of an act in a certain fashion or by a certain time and which attach no penalties for failure to so act are termed "directory." On the other hand, statutes which impose conditions for failure to act within a specified time period are termed "mandatory." The distinction rests on the consequences which result from the action or non-action. 82 *C.J.S.*, Statutes, § 379. In general, a statute with a mandatory time provision will provide that if the official fails to act within the time specified then that failure to act will have the same effect as if the official had made a particular decision. See for example 30 M.R.S.A. § 1953(5) which provides that failure of the Attorney General to approve an interlocal cooperation agreement "within 30 days of its submission shall constitute approval thereof."

None of the statutes defining the authority of the Department of Environmental