April 1, 1974

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Procedural questions regarding wetlands application

You have asked the opinion of this office regarding two questions raised by the applicant's attorney at a hearing held earlier this month by the Board of Environmental Protection on the application of Messrs. H. Lehtinen and T. Hall for a permit to fill a wetland.

1. Does the Board have the right to hold its own hearing on such applications?

The problem raised by the applicant's attorney here is that while the Wetlands Act (12 M.R.S.A. § 4701) mandates that a public hearing must be held by the approving municipality in every case of an application to alter a wetland, it is silent as to the manner in which the Board, which must also approve such applications, is to develop the information necessary to enable it to exercise its independent judgment. All that is provided is that the municipality shall give notice to the Board of its hearing and that it shall report the "results of the public hearing" to the Board within 7 days thereafter (Section 4701), and that Board must approve the proposed alterations (Section 4702). Presumably the applicant's argument here is that the Board had the opportunity to participate in the municipality's hearing, at which time it could have developed whatever information it may have felt necessary to enable it to reach its decision, but that having failed to have done so, the Board may only base its decision on the documentary information presented to it by the applicants and others interested in the project, and the "results of the public hearing" held by the municipality, unless perhaps the applicant himself, in the exercise of his due process rights, requested a hearing before it as well.

The argument has some force in that it appears somehow unfair to require an applicant to sustain the expense and loss of time involved in two distinct and to a large extent duplicative proceedings. It would therefore no doubt be better administrative practice for the Board, in cases where it thought a hearing advisable to assist it in developing information to pass on an application to seek to hold a joint hearing with the municipality, if the municipality could accommodate its procedures for those of the Board.

The question raised by the applicant, however, is whether it is illegal, that is, whether it is somehow a denial of due process, for the Board to hold an independent hearing itself. It cannot be said that it is. One of the fundamental purposes of any administrative agency, in fact one of the principal justifications commonly put forth for the existence of such an agency at all, is to gather information to enable it to employ its expertise in the resolution of problems entrusted to it by the legislature. This argument applies most strongly when an agency is acting in a quasi-legislative capacity, but it is applicable as well when it discharges its quasi-judicial responsibilities. It would appear quite absurd to say that a legislature could entrust an administrative agency with regulatory authority and then deny it the power to hold hearings when it applies its statutory mandate to individual cases. At the very least, such a legislative intention would have to be very clearly expressed in the statute, and not merely implied, as the applicant would seek to suggest here. If the Wetlands Act requires two separate hearings in certain cases, that is simply an unavoidable result of the legislature's decision to entrust concurrent responsibility for the Act in two different governmental bodies.

Please note that this justification for the Board's power to hold a hearing is based upon general principles of administrative law, and not upon the Board's general enabling legislation, 38 M.R.S.A. § 361. It has been suggested that paragraph 8 of that statute gives the Board the general authority to hold a hearing, as it grants the Board the power to "adopt. . . reasonable regulations. . . to carry out . . any . . . laws which it is charged with the duty of administering." It could further be argued that pursuant to this statute, the Board has given itself the power to hold independent hearings on wetlands applications in promulgating regulation number 4 of its Regulation #200(for the processing of Land Bureau applications). The only difficulty with this argument is that it, too, would be subject to the challenge that the regulation somehow constitutes a denial of due process. Thus, the Board would be on safer ground relying on the general principles of administrative law outlined above, rather than on 38 M.R.S.A. § 361 and Regulation 4 alone, as a justification for its having held a hearing in this case.

2. Does the Board have the power to order restoration of a wetland which has already been altered in violation of the statute?

It would appear that the applicant has raised a valid point here. Unlike, for example, the Site Location Law (38 M.R.S.A. § 481, et seq.), the Wetlands Act does not empower the Board itself to order restoration, but rather entrusts that function to the court. 12 M.R.S.A. § 4709. The only question then seems to be whether the Board can hear evidence at hearing regarding the feasibility of restoration. In response to the first question above, the point was made that the Board is entitled to gather information on any subject relevant to the exercise of any of its functions. One of those functions is deciding whether to request the Attorney General's office to seek an order compelling restoration in cases of violations of the Wetlands Act. Thus the Board would be justified in adducing information on the feasibility of restoration at a hearing on an ex post wetlands permit.

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