STATE OF MAINE

Inter-Departmental Memorandum Date April 11, 1974

To William R. Adams, Commissioner Dept. Environmental Protection

From Donald G. Alexander, Assistant Dept. Attorney General

Subject Questions of Title, Right and Interest

Following is the response to the questions stated in your memo of April 4, 1974, relating to application of the "Title, Right and Interest" requirement and related matters. "Title, Right and Interest" is hereinafter referred to as "TRI."

Question 1. What must an applicant show to prove title, right or interest?

Answer: An applicant should be required to provide proof of TRI by submitting copies of his deed or deeds to the property, or an enforcible option to purchase the property, or a lease or some other contractual agreement for use of the property. Where a lease or other contractual agreement is presented to show TRI, it should be prima facie deemed sufficient to show TRI only if it is for a duration of 99 years. A lesser term should be allowed only where the applicant can demonstrate that the lease or other contractual agreement for the shorter time period is sufficient to cover the duration of the proposed development on the property.

However, the actual documents need not be presented if, by other means of proof, the applicant can demonstrate the nature and scope, duration and enforcibility of his TRI with sufficient precision to give standing. This proof must be more than an oral or written statement by the applicant.

Discussion: In Walsh v. City of Brewer, Me., 315 A.2d 200 (1974) the court refused to accept, as sufficient evidence of TRI, a stipulation that the owners of the property - the wife and mother of the applicant - would allow the applicant to use the property for desired purposes. The Court held this stipulation as to TRI inadequate because it did not show the "nature and source" of the authority or that it had "sufficient duration" or "legal enforcibility" (pp. 207-208). Other courts have also held that a simple statement of the existence of a purchase option is insufficient, Tripp v. Zoning Board of Review of City of Pawtucket, 123 A.2d 144 (R.I. 1956) and that proof of the "precise nature" of the agreement is required, Packham v. Zoning Bd. of Review of City of Cranston, 238 A.2d 387 (R.I. 1968). However, where proof has been presented, the Courts have accepted, as showing sufficient standing, leases Ralston Purina Co. v. Zoning Board, 12 A.2d 219 (R.I.) and contracts to purchase the property, Slamowitz v. Jelleme, 130 A. 883 (N.J.), Shulman v. Zoning Board of Appeals, 226 A.2d 380 (Conn.). Also an owner can apply, even though he has contracted to sell the property, contingent on a use permit being obtained. City of Baltimore v. Cohn, 105 A.2d 482, 204 Md. 523.

I was unable to find any case which absolutely required submission of the actual documents which formed the basis of TRI and excluded other methods of proof. Walsh v. City of Brewer and Tripp and Packham, supra, all indicated simply that more proof of TRI was needed, without actually specifying what that proof should be. Thus the conclusion that some proof other than actual documents is adequate to show TRI, if that proof, which must be more than a statement by the applicant, can demonstrate the "nature and source," "sufficient duration," "legal enforcibility" and "precise nature" of the TRI. For example, the Department might accept written certification from a person expert in examining interests in property which (a) states that such person has examined the applicants claim of TRI, and (b) sets forth the facts upon which the judgment as to TRI is based in sufficient detail to show the precise nature of the applicant's TRI. The Department may, however, as a matter of policy determine that it does not choose to rely on such a written statement of TRI in lieu of the actual documents. Other means of proof, meeting the above standards, can also be allowed.

However, a requirement of submission of actual deeds, contracts or other agreements to prove TRI may be the only way that the Department can gain the necessary proof of jurisdiction in all cases without discriminating among applicants. As the Opinion of the Attorney General in the Pittston Case indicates: "Since contracts or options to purchase land may vary widely, the details of such contract, option or agreement are of critical importance. There are an infinite variety of such contracts . . . ." To allow summaries of what an applicant's basis for TRI is raises the possibility of inaccuracy in such statements which, when discovered later, could render the whole proceeding on the application null and void. To require actual copies of documents in some instances and allow alternate proof of TRI in others raises the possibility of charges of discrimination in application of the law. Whether the Department will accept such written summary statements is, however, a matter of policy not a matter of law.

Leases and other contractual agreements which allow major capital improvements on a property while not transferring title are rare in Maine in cases other than those involving rights-of-way. It is common legal practice to make leases, easements or other contractual agreements permitting use of property for capital improvements for terms of at least 99 years. Therefore, this term is specified for the prima facie case as to adequacy of TRI where leases or other contractual agreements are presented to show TRI.

Question 2. Does a public agency with eminent domain powers have to prove title, right or interest?

Answer: The Department may take jurisdiction of applications from public agencies possessing eminent domain powers without requiring proof of TRI. Public agencies which do not have complete TRI in an involved property at the time of application may demonstrate TRI by a statement that such public agency is prepared to exercise its eminent

domain powers, if it is unable to acquire the property by other means.

Discussion: The Walsh v. City of Brewer decision was based principally on the question of standing and interpreted the question of standing by analogy to the issue of justiciability before the courts (p. 206). The Court listed several tests for determining if a matter was justiciable; whether the matter was a case or controversy or an "improper" advisory opinion, was the issue "ripe" for decision, are the parties the proper parties to be presenting the case, are there other policy reasons for exercising "judicial restraint" (p. 206). In a footnote the Court stated that absent a clear legislative mandate "governmental officials and agencies should not be required to dissipate their time and energies in dealing with persons who are 'strangers' to the particular governmental regulation and control being undertaken." (p. 207, note 4)

Because of the existence of eminent domain powers, the policy reasons the Court set out for refusing to consider a private applicant without adequate TRI do not apply to public agencies. A public agency without TRI would not present an application as a "stranger" but as an applicant fully capable of implementing any project approved by the Department.

It should be noted, however, that if anywhere in the record of an application a public agency indicates that it will not use eminent domain powers to acquire all or part of the property which is the subject of the application, then the status of that public agency, for the purposes of establishing standing, becomes the same as that of a private applicant. The policy reasons for making the distinction no longer apply.

Question 3. Does an application for a permit to operate a facility (e.g. air emission and waste discharge license, oil terminal permits, etc.) require a showing of title, right or interest?

Answer: There is no basis in the decided cases for a distinction between applications for permits to construct and applications for permits to operate on the issue of necessary proof of TRI. However, the Department may wish to make a policy distinction in terms of the degree of proof required.

Discussion: The four criteria that must be met to achieve standing, demonstrating the "nature and source," "sufficient duration," "legal enforcibility" and "precise nature" of the TRI are simpler to meet for one seeking to operate an existing facility for a relatively limited and specified time period. Further, applicants for operating permits generally are in possession of the facilities which are the subject of the application and: "Possession shows a prima facie title," Brookings v. Woodin, 74 Me. 222 (1882). Thus there is a policy basis for requiring an applicant in possession and merely seeking permission to operate to provide different proof, if the Department choses, than is required of an applicant for actual construction and alteration of land.

But the four criteria of adequate proof of TRI still must be met. The distinction between construction and operation is not always apparent. The question in the Walsh case was over an application for a license to maintain and operate a mobile home park (p. 202), and Walsh was in possession of the property but failed to qualify as an applicant.

Question 4. Can the Department process applications where there is a dispute as to title, right or interest?

Answer: The Department can only process applications where the applicant has TRI. Making a finding to that effect would be possible, but difficult, in a case where TRI is contested.

Discussion: Maine courts have held that they have both the power and the duty to examine jurisdictional questions in any case, Niles v. Marine Colloids, Inc., Me. 249 A.2d 277 (1969), Look v. State, Me. 267 A.2d 907 (1970). In other states this same duty to examine jurisdictional issues has been extended to administrative agencies; Hearn v. Cross, 80 A.2d 285 (D.C. 1951), 2 Am. Jur.2d., Administrative Law, § 332. However, I was able to find no decision stating that once an agency had considered the jurisdictional question and determined that it had jurisdiction it could not proceed further simply because its jurisdiction was contested. Such a decision to proceed could, however, be contested in court, and any agency which did proceed would risk having a court later declare its proceedings null and void because of lack of jurisdiction, 2 Am. Jur.2d, Administrative Law, §§ 489-491. To protect itself from wasted proceedings, therefore, the Department may wish to adopt a policy that it will not act on matters where TRI is questioned until the question has been judicially resolved or the question is deemed frivolous. The Department could defer nonfrivolous questions of this kind as the burden of proof of jurisdiction is on the applicant, and a serious question as to TRI would make the burden difficult to sustain.

Question 5. Is an application and an approval void if a dispute as to title, right and interest is discovered after Board approval?

Answer: An approval is not automatically void if a dispute as to jurisdiction develops after the approval. The approval would only be void if the jurisdictional issue were decided against jurisdiction.

Discussion: The Walsh case is clear that "lack of subject matter jurisdiction is always open at any stage of the proceedings" (p. 210). Thus, presumably the Department's duty to examine its jurisdiction is a continuing one, but simply raising a question as to jurisdiction is not identical in effect to a negative answer. Once the question is raised, the Department's options are to make a factual determination as to TRI, as was ordered in Walsh, and proceed accordingly or to refuse to act pending court determination of the issue. As in #4, the Department's refusal to act in this case would be based on the burden of going forward and the assumption that in a valid dispute,

the burden of going forward had not been sustained until the issue is finally determined in Court.

Question 6. Do tax liens or other liens or claims against the property affect an applicant's title, right or interest?

Answer: Yes, but where such clouds on title are discovered, the applicant still may demonstrate that he has sufficient TRI to pursue the application.

Discussion: 74 C.J.S., Quieting Title, § 14 lists numerous claims against property which constitute clouds on title and which thus can compromise TRI. These include attachments or liens placed on property by court order, taxes and other assessments against the property, easements, leases or other contracts affecting the property, contracts or options to purchase the property, conflicting deeds, and mortgages. The impact of each of these on TRI can vary greatly from case to case.

Walsh v. City of Brewer did not rule that any compromise of TRI would deprive an applicant of standing. It simply ruled that the applicant, on the facts presented, had not demonstrated "sufficient" TRI (p. 211). As the Attorney General's opinion in the Pittston Case noted, the sufficiency of TRI is a matter of fact for the Board to decide. Thus, where a cloud on title exists, the Board would have to determine if the applicant retains sufficient TRI to have standing.

The Department of Attorney General is continuing to examine the issues raised by questions 7 and 8; an answer on these points will be provided shortly.

Donald G. Alexander

DONALD G. ALEXANDER
Assistant Attorney General

DGA:mfe