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August 21, 1991

Hon. John L. Martin
Speaker of the House
Maine House of Representatives
State House Station #2
Augusta, Maine 04333

Hon. Sumner H. Lipman
Maine House of Representatives
House District No. 90
State House Station #2
Augusta, Maine 04333

Dear Speaker Martin and Representative Lipman:

On March 12, 1991, Speaker John L. Martin wrote to this Department requesting its Opinion whether there was any legal impediment to the appointment of Representative Sumner H. Lipman to the Special Committee on the New Capitol Area Master Plan, created by Resolves 1989, ch. 60, in view of Representative Lipman's land holdings in the district which is the subject of the Special Committee's responsibilities. On March 21, 1991, Deputy Attorney General Cabanne Howard advised Mr. Jonathan Hull, counsel to the Speaker, on behalf of this Department, that there was no legal impediment to the appointment of Representative Lipman. This Department has now received a letter from Representative Lipman, dated July 29, 1991, advising it that, notwithstanding the informal advice rendered in March, Representative Lipman has still not been appointed to the Special Committee, and requesting this Department's written views. For the reasons which follow, it remains the Opinion of the Department that there is no legal impediment to the appointment of Representative Lipman to the Special Committee.

As indicated above, the Special Committee was created at the First Special Session of the 114th Legislature in 1989.

Its purpose is broadly to retain a master planner and oversee the production of a new master plan for the development of the capitol area in Augusta. Resolves 1969, ch. 60, §§ 2, 3 and 6. The Special Committee consists of 25 members, one of whom is to be a "member of the House of Representatives to be appointed by the Speaker of the House of Representatives . . . [who represents] the capitol planning district; . . ." Id. § 4(A). The capitol planning district is contained entirely within House District 90.

The questions raised by Speaker Martin concerning the legality of the appointment of the current representative from House District 90, Representative Lipman, derive from the fact that Mr. Lipman owns a significant amount of real estate in the capitol area. Essentially, Speaker Martin asked two questions: whether the ownership of such real estate creates a "conflict of interest" for Representative Lipman, preventing his appointment to the Special Committee, and if not, whether that result is altered by the fact that Section 11 of the legislation creating the Special Committee authorizes the Department of Administration to ascertain the costs associated with acquiring certain specific parcels of land, one of which is owned by Representative Lipman.

With regard to the first question, it is the Opinion of this Department that there exists no legally disqualifying conflict of interest preventing Representative Lipman from serving on the Special Committee. There are two reasons for this view.

First, as explained more fully in the attached Opinion of the Attorney General of February 4, 1983, the doctrine of "conflict of interest" is of common law origin, and therefore may be modified by statute. Op. Me. Att'y Gen. 83-4 at 1-2. Thus, even if Representative Lipman would have a "conflict of interest" in the common law sense between his private interests and the public responsibilities of the Special Committee, the Legislature is fully capable of authorizing him to serve on the Special Committee, notwithstanding that conflict. Since, as indicated above, the Legislature directed that the member of the House of Representatives representing the capitol planning district be a member of the Special Committee, and since members of the House of Representatives are required by the Constitution to reside in the districts for which they are elected, Me. Const. art. IV, pt. 1, § 4, the Legislature must be found in this instance to have intended that the representative from District 90 serve on the Special Committee, notwithstanding the fact that he or she may very well own property which could be affected by the activities of the Special Committee.

Second, even if the Legislature were found not to have so intended, Representative Lipman's service on the Special Committee would still not necessarily be illegal since the

Committee's powers are completely advisory in nature. As set forth more fully in the above referenced Opinion, common law principles of conflict of interest apply most forcefully in the context of quasi-judicial activities of the administrative agencies. Op. Me. Att'y Gen. 83-4 at 2-3. They apply with much less force to quasi-legislative activities, and it is difficult to see how they apply at all to purely advisory activities. For this additional reason, therefore, there would appear to be no legal impediment to Representative Lipman's appointment.

This conclusion is not disturbed by the fact that Section 11 of the Resolve creating the Special Committee expressly authorizes the Department of Administration to determine what the cost would be of acquiring land owned by Representative Lipman. The principal reason for this conclusion is that the activity authorized by Section 11 concerns only the Department of Administration and has nothing to do with the Special Committee. Therefore, Representative Lipman's presence on the Committee would have no effect on the activities of the Department of Administration pursuant to Section 11.

I hope the foregoing satisfactorily answers your joint inquiry. Please feel free to reinquire if further clarification is necessary.

Sincerely,

MICHAEL E. CARPENTER
Attorney General

MEC:lm

cc: Jon S. Oxman, Chairman
Special Committee on the New Capitol Area Master Plan

JAMES E. TIERNEY
ATTORNEY GENERAL

STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
STATE HOUSE STATION 6
AUGUSTA, MAINE 04333

February 4, 1983

Honorable Larry M. Brown
Maine State Senate
Augusta, Maine 04333

Dear Senator Brown:

You have requested the opinion of this Department on two questions. The first is the extent to which common law conflict of interest rules apply to the members of the Board of Pesticides Control, in view of the manner in which the Board is composed by the statute creating it, 22 M.R.S.A. § 1471-B. The second question is whether, if the statute does authorize such conflicts, it violates constitutional guarantees of due process of law. For the reasons which follow, it is the opinion of this Department that in creating the Board of Pesticides Control, the Legislature intended to displace the common law rules relating to conflicts of interest with regard to the pesticide registration activities of the Board, and that such displacement is not unconstitutional. The Department thinks, however, that the traditional rules were intended to remain applicable to the Board in its licensing and enforcement activities.

The Opinion will first set forth the general common law principles of conflicts of interest. It will then describe the statutory powers and the structure of the Board. It will next analyze the extent to which the Legislature, in establishing the Board, intended to displace the common law. It will conclude with a review of the constitutionality of the statute as so interpreted.

I. The Common Law of Conflict of Interest

The common law has developed a set of principles governing conflicts of interest which apply to members of an administrative agency in the absence of statute. This body of law rests on an analogy drawn between a public officer and a

legal trustee. A public servant occupies a position of confidence and responsibility; he is, in essence, a trustee for the public. Imposed upon him is that broad equity principle which requires all fiduciaries to act in good faith for the benefit of those whose affairs are in their care. An officer is not permitted to place himself in a position in which his individual interest may clash, or appear to clash, with the duty which he owes the public. As the English Courts held in the early seventeenth century, "no man shall be a judge in his own case." Bonham's Case, 8 Co., 113b, 118a, 77 Eng.Rep. 646, 652 (K.B. 1610).1/

Individual interests which may give rise to illegal conflicts are of two types: associational or pecuniary. Associational conflicts arise when a person's private loyalties or responsibilities are incompatible with the duties of a public office; pecuniary conflicts involve private financial interests which may be advanced or hindered by official actions of the individual. Opinion of the Justices, 330 A.2d 912, 918 (Me. 1975). In either instance, the conflict must be "direct, definite, and capable of demonstration; not remote, uncertain, contingent or unsubstantial, or merely speculative and theoretic." Selectmen of Andover v. County Commissioners, 86 Me. 185, 188, (1893). In any case, whether a conflict exists depends upon the precise facts of the situation. Opinion of the Justices, supra. at 917. In assessing whether disqualification is required in a specific instance, consideration must be given to the official's "opportunity to step aside and allow other independent persons to perform the duties involved as a means of avoiding the conflicts of interests actually occurring when action must be taken." Opinion of the Justices, supra, at 917. See In re Maine Clean Fuels, 310 A.2d 736 at 751, n. 16 (Me. 1973).

The common law also makes one other distinction of particular relevance to the question presented here. It has been frequently held, most notably in a series of decisions from the State of New Jersey, that the common law rules apply

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1/ These basic tenets of common law conflict of interest have been outlined in several recent opinions by this Department. See, Op. Me. Att'y Gen., June 13, 1979, at 5-6; Op. Me. Att'y Gen., December 3, 1974, at 1-3; Op. Me. Att'y Gen., March 16, 1973, at 6-12. The trust analogy is further explicated in Marsh v. Town of Hanover, 313 A.2d 411 (N.H. 1973).

with less force to administrative agencies when they are acting in quasi-legislative (or rulemaking), rather than quasi-judicial (or adjudicatory) capacities. Aldom v. Roseland, 127 A.2d 190, 197 (N.J.App.Div. 1956); Stevens ex rel. Kuberski v. Haussermann, 172 A. 738 (N.J. 1934); Van Gilder v. Board of Freeholders of Cape May, 83 A. 500 (N.J. 1912); State v. Board of Public Works of City of Camden, 29 A. 163 (N.J. 1894). See also Davis, Administrative Law, § 12.03 at 155, 161 (1st ed. 1958); Op. Me. Att'y Gen., December 3, 1974 at 1-2; Op. Me. Att'y Gen., March 16, 1973 at 13-15. The basis for this distinction is that while the common law has long imposed strict conflict of interest rules on the judiciary, it has never done so with regard to the legislature, where the public's only recourse against legislation enacted for the benefit of particular legislators is exclusively political. As Justice Holmes put it, the rights of the public with regard to legislative procedures "are protected in the only way they can be in a complex society, by their power, immediate or remote, over those who make the rule." Bi-Metallic Investment Co. v. State Board of Equalization, 239 U.S. 441, 445 (1915). Thus, when administrative agencies act in a quasi-judicial manner, they have been traditionally held to the same conflict of interest standards as apply to judges. But when they are exercizing delegated legislative power, the reasons for the application of such strict standards are much weaker.2/

II. The Statutory Powers and Structure of the Board of Pesticides Control

As presently constituted, the Board of Pesticides Control, under its enabling legislation, 22 M.R.S.A. § 1471-A, et seq. discharges both quasi-legislative and quasi-judicial

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2/ See generally Association of National Advertisers v. F.T.C., 627 F.2d 1151, 1165-70 (D.C.Cir. 1979), in which the court, in determining the extent to which the Due Process Clause of the Fourteenth Amendment of the United States Constitution applies to the quasi-legislative activities of a federal agency, drew a clear distinction between the agency's quasi-judicial and quasi-legislative functions, and held, in the latter area, that disqualification of a commissioner for bias should occur "only when there has been a clean and convincing showing that the agency member has an unalterably closed mind on matters critical to the disposition of the proceeding." Id. at 1170.

functions. First, it is responsible for registering pesticides which may be used in the State. See 22 M.R.S.A. § 1471-O, transferring, in 1981, to the Board the powers of the Commissioner of Agriculture under the Maine Pesticides Control Act of 1975, 7 M.R.S.A. § 601 et seq. Second, it has the authority to grant various certificates and licenses to persons seeking to apply, supervise the application of or distribute pesticides. 22 M.R.S.A. § 1471-D. Since the second of these functions deals with the rights of specific persons, it is quasi-judicial in character. The first, however, does not relate to any particular person; it is therefore quasi-legislative in nature, and has been designated as such by the Legislature. 7 M.R.S.A. § 609(1).3/

As to its composition, the Board has undergone several metamorphoses. The Legislature first created the Board in 1965 as an independent agency comprised of the heads of the departments of Agriculture, Forestry, Inland Fisheries and Game, Highway, Sea and Shore Fisheries, Health and Welfare, Water Improvement, and Public Utilities. P.L. 1965, c. 447. The limited activities undertaken by that Board were funded by the member agencies. Although there were changes in the identity of Departments which were represented on the Board, the concept of agency participation prevailed for fifteen years. During the general reorganization of state government in the mid-1970's, the Board became a division of the Maine Department of Agriculture, which provided it with a permanent staff. P.L. 1973, c. 678.

In 1980, the Legislature substantially changed the structure of the Board. P.L. 1979, c. 644, § 3. The concept of a Board comprised of heads of other agencies serving ex officio supported by Department of Agriculture personnel was replaced by a Board comprised of private individuals interested in and knowledgeable about the use and control of pesticides.

3/ Technically, section 609 specifies that only the refusal to register, or the cancellation or suspension of, a pesticide is to be considered rulemaking. The Board, however, has interpreted this provision to mean that any action limiting the use of any pesticide in any way is quasi-legislative in nature and requires utilization of the procedures governing rulemaking set forth in the Maine Administrative Procedure Act, 5 M.R.S.A. § 8001 et seq.

The original version of the 1980 legislation, Legislative Document 1966,[4] contemplated a Board composed of seven members, appointed by the Governor, and drawn from diverse sectors of society:

> "To provide the knowledge and experience necessary for carrying out the duties of the board, one person shall be appointed who has practical experience and knowledge from each of the following: Forest management, agriculture, application of pesticides and medicine or public health. Three persons shall be appointed to represent the public."

109th Maine Legislature, Legislative Document 1966, § 2 (1980). The reason for the change in composition was articulated in a statutory directive for appointment: members were to have experience and knowledge in broad occupational areas. Id. The Legislative Document itself was captioned "An Act to Provide Broad Public Representation on the Board of Pesticides Control and to Improve the Level of Information Available to it and to the Public."

The legislative intention to bring more informed participants on to the Board intensified as the bill passed through the Legislature. One amendment further refined the Board composition by substituting a University of Maine scientist for one of the public representation positions.[5] In addition, the amendment clarified the Legislature's intent that members' expertise would be focused in the area of pesticide use and problems within the broad occupational areas already delineated. Thus, it completely revised the section of the bill establishing the Board, enacting what now appears as 22 M.R.S.A. § 1471-B(1):

> 1. Board established. There is established within the Department of Agriculture a Board of Pesticides Control. The board shall be

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[4] L.D. 1966 was a committee redraft of Legislative Document 1905, a bill which, inter alia, would have created a seven-member Board of public representatives appointed by the Governor. 109th Maine Legislature, Legislative Document 1905, § 2 (1980).

[5] 109th Maine Legislature, House Paper 829 (House Amendment "A" to Legislative Document 1966) (1980).

> composed of 7 members, appointed by the Governor, subject to approval by the Joint Standing Committee of the Legislature having jurisdiction over the subject of agriculture and confirmation by the Legislature. To provide the knowledge and experience necessary for carrying out the duties of the board, one person shall be appointed who has practical experience and knowledge in chemical use in the field of agriculture, one who has practical experience and knowledge in chemical use in the field of forest management, a commercial applicator, a person from the medical community, a scientist from the University of Maine specializing in agronomy or entomology and 2 persons appointed to represent the public. The public members shall be selected to represent different economic or geographic areas of the State.

From the foregoing, it is quite clear that the Legislature intended that the Board be comprised of persons, a majority of whom were to have actual experience in pesticide use, and one of whom (the commercial applicator) might well possess a license issued by the Board itself.[6/] Some relaxation of the common law of conflict of interest must thus have been

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6/ The sentiment of the Legislature was summed up by Senator Carpenter:

> As the good Senator from Androscoggin, Senator Trafton, pointed out, the public membership on the board, has now been narrowed to 2 persons. What you have is a forest user, a farm user, an applicator, there are two persons who do know the delivery system, 2 public members, a scientist from the University of Maine specializing in those two fields, and somebody from the medical community. So I think that it is a pretty broad based board, if you will. At least you have got some people who have knowledge in the area as opposed to at the present time you have the people like the Commissioner of the Department of Fish and Game, who may or may not know anything about pesticides, and you have a number of commissioner level persons on there who may or may not know.

1980 Maine Legislative Record at 327.

contemplated. The problem presented here is the extent of such relaxation.

III. Degree of Displacement of Common Law under Board of Pesticides Control Statutes

Other than the indications just described that the Legislature intended that persons actually engaged in the use of pesticides be on the Board of Pesticides Control, the legislative history of the statutes governing the new Board is silent as to the degree to which the Legislature intended to displace the common law of conflict of interest. The intended degree of displacement must therefore be determined by making inferences from existing expressions of legislative intent exist. This Opinion will make of such inferences separately for the two types of common law conflicts described in Part I of this Opinion - associational and pecuniary, as well as for the two general types of activities in which the Board engages described in Part II, supra - quasi-judicial and quasi-legislative.

The clearest inference that can be drawn from the legislative history is that the Legislature did not intend that there be any associational conflicts when the Board is acting in its quasi-legislative capacity in registering pesticides. By entrusting such responsibilities to a board containing several persons whose private associational loyalties would be directly affected by its decisions, most notably the agricultural and forestry users and the commercial applicator, the Legislature apparently contemplated that those associational loyalties would not disqualify those members from participation. To find that such persons would be disqualified from determining whether a particular pesticide should be registered because the business in which they are engaged might be affected would be to defeat the clear purpose for which the Legislature put them on the Board in the first place: the utilization of their specialized knowledge. Consequently, the Lgislature must be found to have intended to displace the common law rules regarding associational conflicts of interest with regard to the registration activities of the Board.

The question of whether displacement of the common law rules as to pecuniary conflicts should be found to have occurred as to the Board's quasi-legislative activities is not so clear. On the one hand, it might be thought that if a Board member stands to realize personal financial gain directly from the registration of a pesticide, that member ought not to be able to participate in the registration decision. That is the common law rule. On the other, it is probably the case that it

would be difficult to find, at least in a State as small as Maine, persons knowledgeable in the application of pesticides or in their use for agricultural and forestry purposes whose financial circumstances would not be affected by the registration or non-registration of a particular pesticide. In view of that difficulty, of which the Legislature was apparently aware, and in view of the common law rule discussed above that conflicts of law applies with less force in the quasi-legislative context, of which the Legislature is presumptively aware, it may be concluded that the Legislature did not intend that members of the Board be required to disqualify themselves from such quasi-legislative activities as the registration of pesticides because they may stand to experience personal financial gain if a particular pesticide were registered.

The situation is somewhat different with respect to pecuniary conflicts which might arise in the course of the licensing (or quasi-judicial) activities of the Board. The clearest kind of common law conflict would be presented if the member of the Board who also is a commercial applicator were to sit with the Board on the issuance of his own license. The severity of this conflict is so great that it would be difficult to find that the Legislature intended that it be legally sanctioned, particularly when it is remembered that the problem is easily cured by the member's disqualification for the particular proceeding, a disqualification which, unlike the situation which would prevail in registration proceedings where three or four members might have conflicts, would deprive the Board of only one member.7/

A similar result should also be reached with regard to associational conflicts in quasi-judicial proceedings. Just as a member of the Board should not, absent a strong expression of legislative intent to the contrary, be permitted to sit in judgment of his own license, neither should a person who is, for example, an employee of a particular company be permitted to participate in the licensure of another employee of the same company. As indicated above, such a rule would deprive the Board of no more than one member in any particular proceeding, and thus would not impede its ability to act.

7/ In this regard, it is significant to note that in 1982 the Legislature reduced the number of members whose affirmative vote would be required for the Board to take any action, thus contemplating that disqualifications might occur. P.L. 1981, c. 632, § 1.

In summary, then, it is the opinion of this Department that in creating the Board of Pesticides Control, the Legislature intended to displace the application of the common law of conflicts of interest to the Board when the Board is acting in its quasi-legislative capacity. Such displacement was not intended, however, in quasi-judicial proceedings. Thus, while the Board should insure that conflicts of interest do not arise in its licensing (and enforcement) activities, it need not concern itelf about such matters when discharging its pesticide registration responsibilities.

IV. Constitutionality of Displacement of Common Law in Quasi-Legislative Proceedings

Having determined that the Legislature intended to displace common law conflict of interest principles for the quasi-legislative activities of the Board of Pesticides Control, it remains only to determine whether such displacement is constitutional. The question appears to be one of due process: at what point does the Fourteenth Amendment of the United States Constitution limit the power of the Legislature to prescribe the qualifications of members of an administrative agency on the ground that the agency's composition is so biased as to render its discharge of its quasi-legislative duties fundamentally unfair?

Research discloses no judicial decisions applying the Due Process Clause to the composition of public agencies engaged in quasi-legislative activities. However, in the quasi-judicial area, where, as indicated in Part I of this Opinion, supra, the policy for applying the common law conflict of interest rules is much stronger, the courts have been quite reluctant to overturn particular legislatively-prescribed schemes. In the recent case of Friedman v. Rogers, 440 U.S. 1 (1979), the United States Supreme Court denied the existence of any "constitutional right to be regulated by a Board that is sympathetic to [that is, not structured to be financially biased against] the commercial practice of optometry." Id. at 18.

In Maine, the latitude given state legislatures in their creation of qualifications for administrative offices was discussed by the Supreme Judicial Court in In Re Maine Clean Fuels, Inc., 310 A.2d 736 (Me. 1973). An unsuccessful applicant for development of an oil refinery sought judicial review of the Environmental Improvement Commission's denial of

his application, a quasi-judicial act. Composition of the Commission was dictated by P.L. 1969, c. 499, § 1 which provided that the Commission be composed of:

> 10 members appointed by the Governor with the advice and consent of the Council, 2 of whom shall represent manufacturing interests of the State, 2 of whom shall be representatives of municipalities, 2 of whom shall represent the public generally, 2 of whom shall represent the conservation interest in the State and 2 other members kowledgeable in matters relating to air pollution.

Petitioner charged that the five membership groups established by the statute for EIC participation amounted to a "built-in" opportunity for the arbitrary exercise of power. The Court noted that:

> It is an established concept of administrative law that a state legislature has the right, absent some unique constitutional prohibition, to determine the qualifications of those who are appointed to hold administrative offices.

Maine Clean Fuels, supra, 310 A.2d at 750. Legislative discretion is not completely unfettered: qualifications for administrative office so established by the Legislature cannot be arbitrary, "but considering the functions and duties entailed in carrying out the purposes of the agency they must meet the test of reasonableness." Id. The court found petitioner's charge of compositional prejudice too vague to overcome the presumption of regularity accorded to legislative enactments.8/

8/ See also, Me. Op. Att'y Gen., June 13, 1979 discussing the application of conflict of interest common law to the State Harness Racing Commission. Note 10, page 7 of that Opinion cites the case law supporting and rejecting statutory creation of membership qualifications. The Opinion points out, in upholding a state statute which requires one member of the Commission to have some connection with agricultural societies which conduct pari-mutuel racing, that statutory requirements that a board reflect, through its composition, legislatively prescribed policies are not uncommon and have been held to be valid.

In the present situation the Legislature, in an effort to secure that knowledge and experience essential to agency decisionmaking, has dictated Board qualifications. Its motivation is apparent from both the statutory language and the departure from past practice. The advantages and disadvantages of the present Board composition were weighed by the Legislature; the resulting directive is a matter of public policy. The qualifications for Board members are reasonable. They are designed to provide diverse knowledge and experience for the decisionmaking process in an extremely complicated area. They reflect the interests to be served and the concerns to be addressed by the Board in its actions. It must be assumed, unless clearly demonstrated otherwise, that the Board members are persons "of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances." United States v. Morgan, 313 U.S. 409, 421 (1941); In Re Maine Clean Fuels, Inc., 310 A.2d 736 (Me. 1973). The scheme cannot be found unconstitutional on its face.

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I hope this response answers your questions satisfactorily. Please feel free to reinquire if further clarification is necessary.

Sincerely,

JAMES E. TIERNEY
Attorney General

JET/d

cc: Hon. Edgar Erwin, Senate Chairman,
Joint Standing Committee on Agriculture
Hon. Luman Mahany, House Chairman,
Joint Standing Committee on Agriculture
Stewart Smith, Commissioner of Agriculture,
Food & Rural Resources
William Ginn, Chairman, Board of
Pesticides Control