

MAINE STATE LEGISLATURE

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February 10, 2012

Representative Mark Dion
2 State House Station
Augusta, Maine 04333-0002

Dear Representative Dion:

I am writing in response to your letters of January 17, 2012 and January 30, 2012, in which you inquired whether the State Treasurer has engaged in "any business of trade or commerce" within the meaning of the Maine Constitution, art. V, pt. 3, § 3 ("Section 3"). Your question focuses on the Treasurer's ownership of the Popham Beach Club located in Phippsburg, Maine.¹ Subsequent to our receipt of your letters, we became aware that a similar question has been raised concerning the Treasurer's real estate development activities through his company Dirigo Holdings, LLC.

There is very little guidance concerning the proper application of Section 3. The Maine courts have never addressed it. The two Attorney General opinions that have been issued consider the broad question of what is prohibited by Section 3 but do not apply it to any actual fact pattern. The United States Attorney General issued an opinion in 1929 in which he concluded that Secretary of the Treasury Andrew Mellon's ownership of stock was not in violation of a federal statute with language very similar to that of Section 3, but there do not appear to be any subsequent opinions or any judicial analysis of this language. 36 U.S. Op. Atty. Gen. 12 (April 18, 1929).

As a result, it is difficult to predict how a court would address the question before us. The federal authority, as well as the language of Section 3 and Maine statutes governing the Treasurer, supports his ability to continue to hold stocks during his tenure in office, provided that he does not undertake activity on behalf of any entity in which he owns stock. In this regard, we note that in the U.S. Attorney General's 1929 opinion, he commented favorably on Andrew Mellon's ceasing to be an officer or director before he became Secretary of the Treasury and

¹ While the focus of your inquiry is art. V, pt. 3, § 3 of the Maine Constitution, Title 5, Section 122, of the Maine Revised Statutes, is also relevant to the issue you have raised. This section provides in relevant part: "The condition of the Treasurer of State's bond shall be for the faithful discharge of all the duties of his office, and that during his continuance in office he will not engage in trade or commerce, or act as broker, agent or factor for any merchant or trader..." We note that the bonds now in effect do not expressly address engagement in trade or commerce.

further noted that although he owned stock in a number of corporations, in none of them did he own a majority interest nor did "he give his time or attention to the active conduct of any incorporated business." *Id.* at 3.

FACTS

A. Popham Beach Club. Our inquiry into the Popham Beach Club (the "Club") reveals the following: The Treasurer, Bruce Poliquin, is the owner of the Club, which is located on a parcel of land located in Phippsburg, Maine. The real estate on which the Club is located also is owned by the Treasurer. All revenues and expenses of the Club are attributed personally to Mr. Poliquin.

The Club employs a manager who is responsible for the day-to-day operation of the Club. The manager's duties include the hiring of personnel, arranging for work at the Club with private contractors and making decisions on membership applications. The manager is not involved with the finances of the Club and does not have a role with regard to local permit applications. The Club has three employees, including a groundskeeper and a bookkeeper. According to the manager, she rarely speaks with Mr. Poliquin and he does not give her direction with regard to the management and operation of the Club. Mr. Poliquin states that he visits the Club infrequently, that he considers the Club to be a "passive investment" and that he has no active involvement in the management of the Club. He has further stated that he does review financial records of the Club.

The Club maintains a checking account; Mr. Poliquin alone has signatory authority for the account. All invoices for the Club are paid from the Club checking account. The real estate taxes on the property are paid from the Club account; all utilities for the Club are in the name of Mr. Poliquin. For any Club initiative, work or invoice not in the ordinary course of business, the bookkeeper or the manager contacts Mr. Poliquin. The Club is not organized as a separate entity and does not file a separate tax return. All expenses of the Club are paid by Mr. Poliquin.

B. Dirigo Holdings, LLC. Dirigo Holdings, LLC, is a Domestic Limited Liability Company organized under the laws of Maine and registered in Maine (the "Company"). Documents on file with the Maine Secretary of State indicate that Bruce L. Poliquin is the Clerk/Registered Agent and that the management of the Company is vested in the members. Mr. Poliquin has stated that he is the sole member of the Company.

The primary business of the Company is the development of the Popham Woods Condominiums located in Phippsburg, Maine. The Phippsburg Real Estate Tax Commitment Book for 2012 lists five properties in the name of the Company, "ATTN: Bruce L. Poliquin, 186 Ledgemere Rd., Georgetown, Maine." Properties at the Popham Woods Condominium are currently being marketed by Allen & Selig Realty. A Site Location Development Order issued by the Maine Department of Environmental Protection issued in April 2007 states that Dirigo Holdings (the "Applicant") planned to develop a 183 acre parcel with a 69-unit condominium development; that the estimated project cost is \$17,279,000; and that the Applicant intended to self-finance the proposed project.

Mr. Poliquin has stated that he periodically provides funds for payment of expenses of Dirigo Holdings and Popham Woods Condominium and that Dirigo Holdings employs a manager and bookkeeper who are responsible for the operation and management of the Company. Mr. Poliquin further states that he periodically consults with the manager and bookkeeper. The bookkeeper for the Company is the bookkeeper for the Popham Beach Club. As is the case with the Popham Beach Club, there is a Company bank account for which Mr. Poliquin alone has signatory authority. Mr. Poliquin is the president of the Popham Woods Condominium Unit Owner's Association.

ANALYSIS

Article V, part 3, section 3 provides in its entirety as follows:

The Treasurer shall not, during the treasurer's continuance in office, engage in any business of trade or commerce, or as a broker, nor as an agent or factor for any merchant or trader.

There is no judicial decision construing this provision of the Constitution, which has remained the same since its adoption in 1820. An opinion of the Attorney General dated January 23, 1923 sought to define the key terms in Section 3 with reference to the dictionary and court decisions construing "trade" or "business" in other contexts, and reached this conclusion:

...[O]ne holding the office of treasurer of the State of Maine is prohibited from engaging during his term of office in any business, and by that is meant any occupation or employment pursued as a calling, not of course including the learned professions, in which a person is engaged for procuring subsistence or for profit.

Op. Me. Att'y Gen. (January 23, 1923).

The only other Attorney General opinion we have found on the proper construction of Section 3 was issued in response to a general question from the Treasurer; neither opinion seeks to apply the language of Section 3 to a specific set of facts. This 1978 opinion notes that the original statute authorizing the office of Treasurer contained language similar to that of Section 3 prohibiting engagement in any business of trade. The original laws governing the office of the Treasurer also provided for his removal from office if he was absent from the State or from the duties of his office; these provisions were both grounded in the requirement that the Treasurer give full time to the duties of his office. Op. Me. Att'y Gen. (December 1, 1978) at 2. The language prohibiting the Treasurer from engaging in business was then adopted as part of the Maine Constitution. The opinion concludes:

... [W]e must conclude that the position of Treasurer, by operation of the provisions of Article V, Part 4 [sic], Section 3, requires a full-time commitment and full fidelity to the job such that other employment or the seeking of income through the regular practice

of a profession outside of the office of Treasurer would not appear to be consistent with the intent of the original Constitution.

Op. Me. Att'y Gen. (December 1, 1978) at 2.

The opinion also considers the ability of the Treasurer to receive income from other sources during his tenure in office.

The laws and constitution of the State do not bar the Treasurer from receiving income from other sources during his tenure in office. However, the practices which result in receipt of that income and sources of the income would have to be examined on a case-by-case basis to determine whether the Treasurer was engaging in business to gain the income or whether the source of the income created a conflict of interest for the Treasurer...

Id.

The 1929 opinion of the U.S. Attorney General construes language in federal law that is similar to that of Section 3.

No persons appointed to the Office of Secretary of the Treasury, or Treasurer, or Register, shall directly or indirectly be concerned or interested in carrying on the business of trade or commerce...

5 U.S.C. § 243 (formerly), see now 31 U.S.C. § 329.²

Unlike Section 3, at the time of the U.S. Attorney General's opinion, the federal prohibition applied to direct or indirect interests, and might therefore be read as stricter than the provision in the Maine Constitution. However, the only issue considered in this context was the ability of the Treasurer to own stock, given that before becoming Secretary of the Treasury Mr. Mellon had ceased to be an officer or a director in any corporation, did not own a majority of the stock, and he did not give his time or attention to the active conduct of any incorporated business. 36 U.S. Op. Atty. Gen. 12 (April 18, 1929) at 3. The U.S. Attorney General concluded that the Treasurer could receive income from stocks under these circumstances. We believe it is reasonable to read the language of Section 3 to be consistent with that conclusion.

² Current 31 U.S.C. § 329 reads in pertinent part:

Limitations on outside activities

(a)(1) The Secretary of the Treasury and the Treasurer may not--

(A) be involved in trade or commerce;

(B) own any part of a vessel (except a pleasure vessel);

(C) buy or hold as a beneficiary in trust public property;

(D) be involved in buying or disposing of obligations of a State or the United States Government; and

(E) personally take or use a benefit gained from conducting business of the Department of the Treasury except as authorized by law.

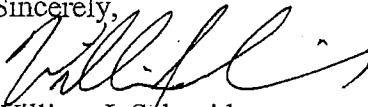
CONCLUSION

The prohibition in Section 3 of the Constitution is general and without limitation. The history of Section 3 and its predecessor statute demonstrates the intent to require the Treasurer to make a full-time commitment, to give full fidelity to the job of Treasurer, and to preclude him from engaging in or carrying on a trade or business that would divert his attention from this commitment. It is reasonable to conclude that Section 3, like the comparable federal statute, permits the Treasurer to continue to hold personal investments, such as stocks and bonds, while in office, given that there is nothing in the Maine Constitution or in statute that requires divestiture. It is also clear that the Treasurer cannot accept other employment or provide services to others while in office. There is no language, history or precedent identifying any activities the Treasurer may engage in with respect to his personal investments and business ventures without violating Section 3.

With respect to the Treasurer, any activities related to the active management of stock or other ownership interests should be handled by third persons in the absence of any authority suggesting that such activities are acceptable when undertaken directly. During the Treasurer's term in office he should take steps to disassociate himself from the active management of any of the entities in which he is invested and any entities in which he is the sole owner or principal or agent. Furthermore, he should not appear before any governmental bodies on behalf of entities that he owns.

I hope that this information and analysis proves to be useful.

Sincerely,



William J. Schneider
Attorney General

cc: Bruce, Poliquin, State Treasurer
Paul LePage, Governor
Senator Kevin Raye, Senate President
Representative Bob Nutting, Speaker of the House
Senator Barry Hobbins, Senate Minority Leader
Representative Emily Cain, House Minority Leader