

MAINE STATE LEGISLATURE

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OPINIONS OF THE ATTORNEY GENERAL

January, 1981

Opinion Number	Principal Author	Subject Matter
81-1	Messerschmidt	"Electronic poker" is a game of chance subject to licensing by the State Police. Opinion interprets the terms "machine" and "slot machine" under the games of chance law.
81-2	Butler	Pre-APA regulations on trans-shipment of lobsters invalid under 5 M.R.S.A. § 8057 because no record of notice or opportunity for hearing.
81-3	Diamond	APA (5 M.R.S.A. § 8053(2)(D)) requires that text of proposed rule be in existence when notice of rulemaking given. Text must either appear in notice or be available upon request.
81-4	Janelle; Diamond	30 M.R.S.A. § 1051(11) entitles deputy sheriffs to reimbursement for actual mileage in the service of civil process; reimbursement not necessarily limited to one round trip.
81-5	Stewart	26 M.R.S.A. § 9 authorizes, but does not require, collective bargaining over benefits to rehired employees; opinion suggests that State would be preempted from enacting such a requirement.
81-6	Paterson	State valuation to include Indian Reservations and other lands in Indian Territory; State Tax Assessor to prepare municipal property value for Indian Territory; Tree Growth Tax Law applies in Indian Territory.
81-7	Howard	Under Commerce Clause, State may not prohibit transportation, treatment and disposal of hazardous wastes solely on the basis that they originate outside the State. Possible, however, that State-owned treatment or disposal site might be limited to residents or charge substantially higher fees to non-residents.

Opinion Number	Principal Author	Subject Matter
81-8	Nugent	P.L. 1979, c. 717, § 3, mandating that surplus Energy Assistance funds be used for Congregate Housing Project, does not preclude use of other funds for that Project; Sept. 1, 1980 date in § 3 was not intended as a deadline after which the surplus funds could not be appropriated for Congregate Housing Project.
81-9	Macri	Airport bond issue (P.&S.L. 1967, c. 178) permits unexpended monies to be used for debt service even though all projects not technically completed; since bond proceeds may be used only as authorized in referendum, same bond issue does not allow their use to clear runway approaches.
81-10	Diamond	Sheriff not required, by either State Constitution or statutes, to patrol entire county.

OPINIONS OF THE ATTORNEY GENERAL

February, 1981

Opinion Number	Principal Author	Subject Matter
81-11	Diamond	Under a decision of the Maine Labor Relations Board, deputy and assistant district attorneys are exempt from coverage under the State Employees Labor Relations Act.
81-12	Paterson	Positions of legislator and Maine Indian Tribal State Commission member incompatible as a violation of separation of powers.
81-13	Stokes	Under 30 M.R.S.A. §5051, municipalities may invest funds in a common trust only if the trust is maintained by a trust company or national bank. Since §5051 prohibits, by clear implication, other types of common trust investments, home rule does not mandate contrary conclusion.
81-14	Stokes	Deputy sheriffs may retain compensation received from private security guard work performed during off-duty hours, if such work not prohibited by county officials.
81-15	Diamond	Under legislation abolishing York Harbor Village Corp., P.&S.L. 1975, c. 63, Town of York may amend ordinances originally adopted by Village Corp.
81-16	Diamond	General Highway Fund may be used to fund only that portion of State Police budget used for traffic enforcement. Essentially reaffirms Opinion #80-41.
81-17	Janelle	While revenue bills must originate in House, they may be co-sponsored by members of the Senate.
81-18	Diamond	Constitution does not prohibit Legislature from establishing, by statute, home rule for counties.
81-19	Diamond	Advice on solicitation and acceptance of funds by a legislator on behalf of proposed Kennebec River Future Commission.
81-20	Diamond	Informal advice to the effect that appointed county finance committees would not violate requirement that there be republican form of government (U.S. Const., Art. 4, §4) since that requirement does not appear to apply to local government.

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Opinion Number	Principal Author	Subject Matter
81-21	Macri	Method used by Retirement System to compute military service credit for State Police officers who retired prior to July 1, 1976 is consistent with the applicable statutes.
81-22	Macri	Proposed constitutional amendment (L.D. 685) which would require that certain counties constitute at least 51% of the electorate of a State Senate district would not violate U.S. Constitution. Requirement would have to yield, however, if in a particular instance it could not be implemented without violating one man-one vote principle.
81-23	Macri	Penobscot Nation public safety officer may become member of the Retirement System if the Tribe joins as a participating local district. Based on conclusion that Tribe's employees have same status as municipal employees under Maine Implementing Act.

OPINIONS OF THE ATTORNEY GENERAL

March, 1981

Opinion Number	Principal Author	Subject Matter
81-24	Stokes	Non-lawyer who is sole owner of a corporation may not appear in court for corporation except in small claims cases.
81-25	Diamond	Offices of County Treasurer and town manager (of a town within the same county) are incompatible.
81-26	Macri	Under retirement statutes, change of beneficiary not permitted after commencement of retirement allowance.
81-27	Diamond	Under 20 M.R.S.A. §§ 161(1) and 221, superintendent of SAD not required to personally take minutes at every school board meeting.
81-28	Buckley	Neither gifts nor deeds of distribution are exempt from real estate transfer tax.
81-29	Butler	Marine Resources Advisory Council may not compel Commissioner of DMR to promulgate specific regulation.
81-30	Stokes	Person over 18 years of age, adjudicated to have committed juvenile crime prior to 18th birthday, may be committed to Youth Center.
81-31	Downs	"Administrative appeal" of certificate of need decision not required under federal law; provisions of P.L. 96-79 and P.L. 96-538 requiring state legislative action take effect on January 6, 1983.
81-32	Stern	Bill granting 30-year easement in State lands may not be enacted as emergency legislation under art. IV, pt. 3, § 16 of Maine Constitution.
81-33	Stokes	5 M.R.S.A. § 196, as amended, gives Attorney General complete authority to set salaries of research assistants and deputy attorneys general, as long as legislative appropriation not exceeded.

OPINIONS OF THE ATTORNEY GENERAL

April, 1981

Opinion Number	Principal Author	Subject Matter
81-34	Macri	Under Retirement Statute, credit may be transferred between special plans if new employer consents to pay the additional cost.
81-35	Janelle	Proposed excise tax on watercraft could be used to reimburse municipalities for property tax exemption under art. IV, pt. 3, § 23; Legislature may not delegate to municipalities power to create property tax exemptions; Legislature must reimburse for new tax exemption even if municipality failed to collect tax in prior year; State Tax Assessor could be empowered to determine value of all watercraft subject to property tax.
81-36	Diamond	Proposed 30-day durational residency requirement for voting unconstitutional since it could not be justified as necessary to complete registration process.
81-37	Greason	Recovery of general assistance payments by a municipality does not require specific provision in municipal ordinance nor is it necessary that persons have been informed of this possibility at time of application; recovery does not give right to an administrative hearing since defenses can be raised in court action.
81-38	Stokes	Name of candidate's town not required for a write-in candidate at a municipal election.
81-39	Stern	Boundaries in an approved subdivision plan may still be contested according to customary rules of construction.
81-40	Stern	Under Home Rule, municipality may provide for elected planning board; municipality may not, however, vest in planning board the authority to grant zoning variances.

OPINIONS OF THE ATTORNEY GENERAL

May, 1981

Opinion Number	Principal Author	Subject Matter
-40A	Diamond	Under Me. Const., art. V, pt. 1, § 8, 2/3 vote required to change legislative committees responsible for recommending confirmation of civil officers.
-41	Stokes	Eight questions regarding applicability of conflict of interest law (5 M.R.S.A. § 18) to Dep. A.G. joining private firm. Major conclusions - disqualification attaches to any matter within supervisory responsibility, but disqualification does not extend to law firm.
-42	Bickerman	Although law unsettled, arguments exist to defend bill (L.D. 1150) which would limit individual and committee contributions to referendum campaigns. (Conclusion now doubtful in light of <u>Citizens Against Rent Control v. City of Berkeley</u> , 50 U.S.L.W. 4071 (12/15/81)).
-43	Butler	APA applies to rulemaking activities of Maine Sardine Council.
-44	Diamond	Interpretation of HUD requirement that certain activities be performed by an "architect" - opinion discusses Maine law applicable to restrictions on the performance of architectural functions by engineers.
-45	Diamond	Proceeds generated by repeal of sales tax exemption for gasoline would be restricted to highway use. Me. Const., art. IX, § 19.
-46	Stokes	Proposed prohibition on sale and use of drug paraphernalia (L.D. 104) constitutionality defensible.
-47	Matus	Use tax applies to defective merchandise donated to charity by a retailer.
-48	Stokes	Write-in "stickers" may be used at a municipal election, but they may not contain a pre-printed cross or checkmark.

Opinion Number	Principal Author	Subject Matter
1-49	Stokes	Other than through impeachment or address, legislative and executive branches have no power to discipline judges; Supreme Judicial Court has inherent power to discipline judges short of removal.
1-50	Diamond	Unorganized territory tax may be used to fund only those state services which provide special benefit to unorganized territory - opinion indicates types of services which may or may not be funded from this tax.
1-51	Janelle	Privilege of Tree Growth Tax Law status is not a valid basis for the imposition of an excise tax.
1-52	George	State contractually bound to continue funding under New England Higher Education Compact until 2 years after notice of withdrawal; fact that obligation may violate debt limit provision (Me. Const., art. IX, § 14) would probably not justify noncompliance since compact ultimately controlled by federal law.
1-53	Buckley	Bill which would defer part of the property tax on homesteads owned by elderly persons (L.D. 1512) would not violate Me. Const., art. IX, § 8 or equal protection clause, nor would it require reimbursement by State under Me. Const., art. IV, pt. 3, § 23.
1-54	Diamond	Governor's authority to curtail allotments (5 M.R.S.A. § 1668) applies to shortfalls in the Highway Fund.

OPINIONS OF THE ATTORNEY GENERAL

June, 1981

Opinion Number	Principal Author	Subject Matter
-55	Macri	Absent contract to the contrary, county must provide same custodial services to the courts as it provided prior to January 1, 1976.
-56	Diamond	Bill to change terms of PUC members (L.D. 1652) would be "competing measure" with initiated bill to create Maine Energy Commission (L.D. 522); bill to establish Public Advocate (L.D. 1673) would not be "competing measure;" L.D. 1652 could not be enacted as emergency legislation; L.D. 1673 could be enacted as emergency legislation.
-57	Diamond	1 M.R.S.A. § 204 does not prohibit sale of show ribbons bearing facsimile of State seal to agricultural societies.
-58	Diamond	Generally held that legislative day terminates at midnight; Legislature may schedule "veto day" by vote of simple majority taken any time before final adjournment.
59	Macri	Maine Maritime Academy may adopt the current standard [retirement] plan for its employees now under prior standard plan.
-60	Macri	Me. Const., art. IV, pt. 3, § 10 does not prohibit legislator from being secretary to D.A. since latter position is not a State "office;" in addition, positions are not incompatible.
1-61	Macri	Interpretation of scope of 4 M.R.S.A. § 5, limiting ability of retired Law Court Justice to engage in private practice without loss of retirement benefits.

OPINIONS OF THE ATTORNEY GENERAL

July, 1981

Opinion Number	Principal Author	Subject Matter
81-62	Macri	Under 4 M.R.S.A. § 5 (judicial retirement), question of whether widowed spouse is "dependent of another person" is one of fact; test is whether spouse receives more than one-half of support from other person.
81-63	Macri	Statute providing that membership in Retirement System is optional for officials appointed for "fixed terms" applies to officials serving at the pleasure of the appointing authority.
81-64	Stokes	Municipal officers may not place proposed charter amendments on the ballot as a "competing measure" with initiative for charter revision, but such amendments may be voted on at the same election as a separate and independent question.
81-65	Howard	Statute (12 M.R.S.A. § 6701) unclear as to whether scallop license may be issued to boat owner who is not actually on board when the boat is engaged in scallop fishing; decision should be made by DMR as a matter of administrative discretion.
81-66	Macri	Two-percent cost-of-living adjustment in P.&S.L. 1981, c. 73 is optional for participating local districts.
81-67	Diamond	Wording of initiative questions is essentially within the discretion of the Secretary of State.
81-68	Stokes	Since F.Y. 1981-82 has 27 biweekly paydays, payments to employees with statutorily fixed annual salaries should be adjusted so as not to exceed statutory limit; salaries subject to range and step pay plan should not be so adjusted.
81-69	Pistner	Employers associated as group self-insurer for payment of workers' compensation benefits are jointly and severably liable for the satisfaction of awards against any employer member of the group.

1-70

Diamond

29 M.R.S.A. § 1368 does not authorize use of blue lights on vehicle owned by town constable and used in performance of his duties.

OPINIONS OF THE ATTORNEY GENERAL

August-September, 1981

Opinion Number	Principal Author	Subject Matter
1-71	Buschmann	Under 20 M.R.S.A. § 220(6), SAD directors have final authority to decide on purchase of school buses, as long as they act within limits of school budget.
1-72	Stokes	Legislation changing ranges and steps for PUC commissioners and other officials (P.L. 1981, c. 452) should not be read to deprive them of cost of living increase enacted at same session (P.L. 1981, c. 453).
1-73	Stokes	Recording fee payable to register of deeds for documents for which no specific fee is provided is \$6 for first page and \$2 for each additional page; opinion relies on principle that later of two irreconcilable statutes controls.
1-74	Diamond	Hancock County Commissioners may not pay sheriff, register of deeds, register of probate and judge of probate salaries in excess of amounts specified in 30 M.R.S.A. § 2, notwithstanding fact that personal service lines in county budget were computed with the understanding that these salaries would be increased.
1-75	Diamond	P.L. 1981, c. 167, requiring that debt service estimates accompany bond issues on the ballot, not applicable to bond issues passed at the First Regular Session of the 110th Legislature (Note that emergency legislation enacted subsequent to this opinion made the requirement applicable.)
1-76	Brann	Maine Capital Corp. may amend its articles of incorporation as long as amendments are consistent with its enabling legislation.
1-77	Brann	Since they are not legal tender, so-called Public Office Money Certificates not acceptable as payment of fees due to Secretary of State.
1-78	Howard	Inland Fisheries and Wildlife wardens have concurrent authority with sheriffs to retrieve bodies of drowned persons.

OPINIONS OF THE ATTORNEY GENERAL

October - December, 1981

Opinion Number	Principal Author	Subject Matter
-79	Howard	Members of Inland Fisheries & Wildlife Advisory Council not required to attend public hearings on proposed rules; fact that Dept. rules are published annually in booklet does not eliminate requirement that agency act to adopt them within 120 days of closing of the record; failure to comply with Executive Order No. 11 (requiring additional information in basis statement for new rule) does not affect legal validity of rule.
-79A	Macri	Retirement System trustees advised to secure legislative authorization before implementing proposal to invest in low-cost mortgages for System members since investment may violate prudent man rule; rule generally interpreted as not allowing consideration of the social utility of an investment.
80	Diamond	Except when expressly authorized, voting by secret ballot is prohibited by Freedom of Access Law; law does not require preparation and dissemination of agenda prior to meeting.
-81	Diamond	Milbridge Water District legislation (P.&S.L. 1981, c. 55) requires that at least 20% of the district voters cast ballots for referendum on approval of district to be valid; second referendum may be held after Nov. 1, 1981.
-82	Diamond	Under initiated bill to establish Maine Energy Commission (L.D. 522), Commission would not be authorized to issue general obligation bonds, to borrow money, to make appropriations or to issue revenue bonds, nor could such authority be acquired through state energy budget procedure set forth in the bill.
-83	Paterson/Janelle	Under 30 M.R.S.A. § 6211(2), State not required to reimburse Indian Tribes for General Assistance expenditures made solely from funds provided by Federal Government; State Tax Assessor responsible for establishing State valuation of Indian Reservations and Indian Territory.

Opinion Number	Principal Author	Subject Matter
-84	George	SAD Board does not have the authority to recall its representative to Vocational Cooperative Board.
-85	Brann	Even though it performs some quasi-governmental functions, the "Advocates for the Developmentally Disabled" is not a state agency for purposes of the lobbyist disclosure law and thus must register as a lobbyist.
-86	Stokes	Provisions of 21 M.R.S.A. c. 35-A ("Reports on Referendum Campaigns") do not apply to municipal referenda.
-87	Foster	Opinion responds to eight questions pertaining to the Potato Licensing Law (7 M.R.S.A. § 1011, et seq.) - subject matter includes the licensing requirement; the verified complaint procedure; and the provisions dealing with guarantees as to potato specifications.
-88	Diamond	Failure of legislative delegation to meet with county commissioners to finalize county budget estimates before convening of the Legislature does not by itself have legal ramifications on the county budget process or on the apportionment of the county tax.
-89	Ahrens	Under 17-A M.R.S.A. § 605 ("Improper gifts to public servants"), person deemed to be "subject to or interested in" a matter before a public agency when the person holds a permit with conditions requiring further approval by the agency; opinion also advises that to insure compliance with § 605, public servant should not solicit or accept pecuniary benefit from a person whenever it is likely that the person will come within regulatory authority of public servant's agency in the reasonably foreseeable future or whenever the person holds a license or permit which subjects him to continuing review or oversight by the public servant's agency.