

MAINE STATE LEGISLATURE

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OPINIONS OF THE ATTORNEY GENERAL

January, 1982

OPINION NUMBER	PRINCIPAL AUTHOR	SUBJECT MATTER
82-1	Macri	Amendment to Me. Const., art. IV, pt. 3, § 18, requiring that signatures on initiative petitions be no more than one-year old, took effect Nov. 23, 1981; amendment applies only to initiatives begun after that date; initiative petitions may be submitted to Secretary of State before convening of Legislature.
82-2	Buckley/ Larouche	Tree growth penalty must be paid if landowner does not fulfill new statutory filing requirements.
82-3	Janelle	P.L. 1981, c. 535 does not allow for reimbursement under Elderly Low Cost Drug Program for drug expenses incurred prior to effective date of legislation; State Tax Assessor may accept applications for certification prior to effective date.
82-4	Janelle	Passamaquoddy Tribe responsible for municipal services in those portions of Indian Territory which either are owned by the Tribe or were owned by a member of the Tribe on December 12, 1980.
82-5	Brann	Maine Clean Indoor Act prohibits smoking at polling places.
82-6	Diamond	28 M.R.S.A. §152 prohibits State Liquor Commission from licensing a special agency store which would be located within 10 miles of a state liquor store.
82-7	Macri	Under "Maine Water District Act," 25 M.R.S.A. §3223(4) and (5) apply to all water districts; other provisions of the Act apply to water districts formed before January 1, 1982 only if provisions not inconsistent with district's charter.

OPINIONS OF THE ATTORNEY GENERAL

February, 1982

OPINION NUMBER	PRINCIPAL AUTHOR	SUBJECT MATTER
82-8	Macri	"Maine Water District Act" does not require district to follow election procedures of the municipalities in which it is located; Act also does not mandate that persons who are served by water district, but who reside outside of the district, be allowed to vote for trustees; Act permits municipal officers to amend trustees' salary recommendations.
82-9	Macri	Merely technical changes made by Director of Legislative Research in section numbers of initiated bill do not give rise to a "competing measure."
82-10	Janelle	Tribal School Committee may hire a private auditor, but this does not relieve State Auditor of his statutory duty to conduct an audit.
82-11	Buckley	As a federal instrumentality, the American Red Cross is exempt from property taxation under 36 M.R.S.A. § 651(1).
82-12	Janelle	Elimination of fishing license fee exemption accorded members of Passamaquoddy Tribe and Penobscot Nation by 30 M.R.S.A. § 6207(3) (3rd ¶) requires approval of the Tribes under federal law.
82-13	Macri	Positions of member of town council and water district trustee are incompatible.
82-14	Smith	Crematories not required to be licensed by Board of Funeral Service; crematories are subject to 32 M.R.S.A. § 1401 which establishes requirements for prearranged burials; 32 M.R.S.A. § 1401 may be enforced by district attorneys.

OPINIONS OF THE ATTORNEY GENERAL

March, 1982

OPINION NUMBER	PRINCIPAL AUTHOR	SUBJECT MATTER
82-15	Diamond	By virtue of Home Rule, municipal spending authority is not limited to the purposes enumerated in 30 M.R.S.A. §§5101 to 5108.
82-16	Buckley	36 M.R.S.A. §610-A, prescribing method for assessing watercraft, impliedly repeals 36 M.R.S.A. §§609 and 610; §§609 and 610 violated Me. Const., art. IX, § 8, because they provided for assessment at other than just value.
82-17	Harrington/ Bickerman	Prohibition against discrimination against families with children (14 M.R.S.A. §6024) applies to rental of mobile homes, but not to rental of mobile home park lots.
82-18	Diamond	L.D. 1999, which would amend law on Municipal Development Districts, does not require reimbursement under Me. Const., art. IV, pt. 3, §23, because the bill does not create a property tax exemption or credit.
82-19	Butler	Depending upon resolution of certain factual questions, L.D. 2048, which would effectively prohibit operation of Bangor Dam, might be found either to result in a taking without just compensation or to unlawfully impair an existing contract (the opinion analyzes the legal principles relevant to each issue); in any case, granting of FERC license would render the legislation unenforceable.
82-20	Macri	Since it is doubtful that money remaining from 1973 appropriation for Biddeford Airport (P. & S.L. 1973, c. 143) may still be expended, particularly in absence of federal matching funds, legislation should be sought clarifying permissible uses of funds.
82-21	Diamond	Enactment of L.D. 2030, a bill dealing with the decommissioning of nuclear power plants, would not create a "competing measure" under Me. Const., art. IV, pt. 3, §18, with L.D. 1989, an initiated bill to end use of nuclear power.

OPINION NUMBER	PRINCIPAL AUTHOR	SUBJECT MATTER
82-22	Brann	Under legislation repealing and replacing statute establishing the Board of Dental Examiners, the members of the Board appointed under the prior law continue to serve until the expiration of their original terms.
82-23	Buckley	The proposed mining excise tax (L.D. 2043) is not a disguised property tax even though the value of mining property is used as an alternative measurement of the tax; thus, the fact that the valuation of the mining property may not reflect just value would not violate Me. Const., art. IX, §8.

OPINIONS OF THE ATTORNEY GENERAL

April, 1982 - December, 1982

Opinion
Number

Synopsis

- 82-24 32 MRSA §4903 (prohibition against practice of geology or soil science without certification) prohibits a site evaluator, licensed only to do subsurface sewage evaluations under 22 MRSA §42(3-A), from investigating, evaluating, and reporting to the Board of Environmental Protection soil conditions for septic tank sludge disposal on the surface of land. (April 6, 1982) (Foster).
- 82-25 Article III of Maine Constitution (separation of powers) bars simultaneous holding of the positions of Active Retired Justice and Maine Indian Tribal State Commission Chairman. In addition, Art. VI, §5 prohibits any Justice from holding any other state office except justice of the peace or member of the Judicial Council. (April 28, 1982) (Janelle).
- 82-26 Forest rangers have the authority to require the aid of private citizens in the suppression of fires within and outside the Maine Forestry District (12 MRSA §9202; 12 MRSA §8901(3)). The opinion recommends that the Dept. of Conservation seek legislation to address unresolved issues of state liability for injuries. (May 5, 1982) (Stern).
- 82-27 A deputy sheriff who is compensated wholly from fees for the service of civil or criminal process is a "public official" under the Freedom of Access Law (1 MRSA §401, et seq.) and any records kept by him relating to such service or compensation are therefore "public records." (May 5, 1982) (Macri).
- 82-28 The Legislature may constitutionally exempt minerals from the payment of the penalty required by Me. Const., Art. IX, §8 but only prospectively. The provisions of L.D. 2043, if enacted into law, which seek to include lands on which exploratory activity is occurring or has occurred within the terms "forest land," "timberlands" and "woodlands" would be an unconstitutional attempt to avoid the penalty. (May 11, 1982) (Buckley)

Opinion
Number

Synopsis

- 32-29 28 MRSA §599(1)(C), permitting open burning of solid waste material at municipal solid waste disposal sites serving fewer than 1,000 persons, does not prohibit the opening of new open burning sites in such towns. (May 17, 1982) (Tierney/Howard).
- 82-30 The 111th Legislature must establish a reapportionment commission within three days after the Legislature convenes in December, 1982 pursuant to Art. IV, pt. 3, §§ 1 and 1-A of the Me. Const. The other constitutional provisions concerning reapportionment (Art. IV, pt. 1, §2; Art. IV, pt. 2, §2) containing the phrase, "Legislature which shall convene in 1982," are interpreted as describing which Legislature shall accomplish the apportionment, rather than when that Legislature must accomplish its task. (May 18, 1982) (Brann).
- 82-31 The offices of election warden and member of a municipal board of registration of voters are not incompatible. As a practical matter, however, it would be inadvisable for a person to serve in both capacities since it would be difficult for one person to act as both without disruption of the election process. (May 21, 1982) (Macri).
- 82-32 P.L. 1981, c. 312, "An Act to Require that Industry Wide Taxes be Derived Only After Referendum Approval of the Persons who Would be Required to Pay the Tax," codified at 36 MRSA §§ 31-35, is an unconstitutional surrender of the Legislature's power of taxation in violation of Me. Const., Art. IX, §9 because of the recent Law Court decision in Boston Milk Producers v. Halperin. (June 1, 1982) (Foster).
- 82-33 The state holds certain submerged lands and the waters of the state in trust for the people of Maine. The public trust doctrine limits the Legislature's power to authorize the use of the waters of the state and its submerged lands for hydropower development. Express legislative authorization is necessary for a private party to acquire use rights or title to such waters and submerged lands. The opinion also discusses the Legislature's ability to amend or rescind a corporate charter permitting the construction and maintenance of a dam. (June 2, 1982) (Butler).

Opinion
Number

Synopsis

- 82-34 Secretary of State has statutory authority to promulgate rule requiring signatures of all owners for sale of jointly or commonly owned vehicles. Furthermore, the Secretary may assume a tenancy in common relationship in such cases, rather than a joint tenancy. (June 11, 1982) (Bowie).
- 82-35 In order to maintain staggered terms of the nine member State Board of Education, required by 21 MRSA §51, it is necessary to view a term as attaching to the office and not to an individual board member. A new term begins the day after expiration of the previous term, not at the time of a member's appointment. (July 29, 1982) (Macri).
- 82-36 30 MRSA §403-A, enacted by P.L. 1981, c. 406, prohibits only the use of county-wide funds for municipal-type services in the unorganized territory, not the use of county-wide funds for county-type services. Further, §403-A and 36 MRSA §1601, et seq., enacted in 1978, impliedly repealed provisions in 23 MRSA §4051 that authorize the separate assessment on each township for road expenses up to 3% of that township's state valuation and allow an assessment against the county for expenses greater than the 3% limit. (June 25, 1982) (Buckley).
- 82-37 Funds raised pursuant to so-called "public services" taxes, prior to the creation of the Unorganized Territory Tax Fund in 1979, may only be spent for the purposes which the Legislature has permitted them to be spent. Thus, County Commissioners of Washington County may not use surplus funds in the Edmunds Township public services tax account for the payment of improvements to a recreation center located in the township, since those funds are limited by 30 MRSA §1202 to fire protection and solid waste disposal purposes. (July 9, 1982) (Janelle).
- 82-38 Penalties for violation of the Sales Tax Law should be paid to the State Tax Assessor; fines for violation of the Use Fuel Tax Law should be paid to the State Tax Assessor and dedicated to the General Highway Fund; and fines under the Maine Highway Transportation Reform Act, when collected by the State Police or the Department of Transportation, should be dedicated to the new Highway Safety Fund. (July 16, 1982) (McKenna).

Opinion
Number

Synopsis

- 82-39 Because they are "law enforcement officers," liquor inspectors, fire inspectors, capitol security police, and special investigations are entitled to be compensated on an hourly basis at the rate they are paid for normal working hours when they appear in court during off-duty periods. (August 5, 1982) (Dyer).
- 82-40 A proposed constitutional amendment which would exclude the value of minerals from the constitutional penalty, required by Art. IX, §8 of the Me. Const., for withdrawal of land from tree growth classification could be applied retroactively. (August 9, 1982) (Buckley).
- 82-41 Because the Legislature did not intend to discriminate between in-state and out-of-state trucks, the fuel use identification decal requirements of 29 MRSA §246-A apply to in-state carriers who may be exempted from the Gasoline Road Tax reporting requirements of 36 MRSA, Chapter 453 by the State Tax Assessor acting pursuant to 36 MRSA §2965. (August 17, 1982) (Howard).
- 82-42 Although the Commissioner of the Department of Educational and Cultural Services is authorized by 5 MRSA §554(2)(E) to withhold a portion of a report concerning the Baxter School for the Deaf, the Freedom of Access Law, 1 MRSA §401, et seq., did not prohibit the disclosure of the report and its underlying documents. Moreover, because release of the report and its supporting documents would not invade the privacy interests of the persons who were the subjects of the allegations of misconduct, the persons who made specific charges of misconduct, or the victims of the alleged misconduct, the Commissioner could release the report and its accompanying documents. (August 18, 1982) (Larouche/Brann).
- 82-43 A town withdrawing from a school administrative district is prohibited by 30 MRSA §2061 from holding an election for a new school board any less than 75 days after its vote to withdraw. (August 20, 1982) (Buxchmann).

Opinion
Number

Synopsis

- 82-44 In releasing a revised report on the Baxter School for the Deaf, the Commissioner of Educational and Cultural Services should delete all references to persons covered by 5 MRSA §554(2)(E) if such persons have not been identified publicly. (August 25, 1982) (Larouche/Brann).
- 82-45 If a proposed St. John River Resources Protection Plan is found by the Land Use Regulation Commission to meet the requirements for a resource plan set forth in the Commission's regulations, since those requirements do not involve an illegal surrendering of the Commission's statutorily mandated regulatory responsibility, the plan does not constitute the private regulation of land and therefore would not violate the Commission's enabling legislation. (September 10, 1982) (Stern).
- 82-46 A report prepared by the Office of Advocacy within the Department of Mental Health, which contained information concerning a client of the Department, and any related information, including written statements generated by the Advocate's investigation, are confidential under 34 MRSA §1-B, and are therefore exempt from disclosure pursuant to Maine's Freedom of Access Law, 1 MRSA §401 et seq., to an employee and/or his union representative for purposes of a grievance proceeding. (September 24, 1982) (Macri).
- 82-47 A rule promulgated by the Department of Personnel regarding the eligibility of retired state employees for state employment is in conflict with a provision of the State Retirement Law, 5 MRSA §1123, which governs the computation of benefits for retired employees who return to state employment, and is therefore invalid. (October 5, 1982) (Macri).
- 82-48 If a tax indexing initiative is approved by the electorate, the shortfall in revenue occasioned thereby would justify the State Budget Officer to declare that insufficient funds are available to implement the accelerated cost recovery benefits which were conditionally enacted by the 110th Legislature. P.L. 1981, c. 704. (October 13, 1982) (Olson).

Opinion
Number

Synopsis

- 82-49 The revenues derived from a "premium" on the sale of gasoline may not be diverted to non-highway uses, because such a charge, however designated, clearly falls within the spirit if not the exact letter of the limitation in Me. Const., Art. IV, §19, on the expenditure of revenues generated from highway related taxes. (November 5, 1982) (Macri).
- 82-50 In view of the long-standing administrative practice and the evident legislative purpose of including the entire administrative structure of the vocational-technical institutes within the unclassified service, §711 of the Maine Personnel Law, 5 MRSA §551, et seq., should be interpreted to include "Financial Aid Coordinators" and "Adult Education Coordinators" at the institutes. (November 23, 1982) (Buschmann/Macri).
- 82-51 Municipal reimbursement, pursuant to Art. IV, pt. 3, §23 of the Me. Const., is required for real estate tax revenues lost, because of the enactment of the Mining Excise Tax Act, P.L. 1981, c. 711, only after the expiration of ten years after the opening of the mine. In addition, in making calculations for municipal reimbursement, the State may not consider any increase in funds which a municipality may experience as the result of a decrease in valuation resulting from a legislatively created property tax exemption. (December 3, 1982) (Buckley).
- 82-52 While it is possible that the Maine Forestry District tax might be found to violate Art. IX, §8 of the Me. Const., which requires generally that all property taxes be assessed equally, the Attorney General is unable to answer the question conclusively because it would require the resolution of a number of factual questions which are beyond the scope of the inquiry. (December 8, 1982) (Stern).
- 82-53 None of the members of the Governor's cabinet are required to be reconfirmed by the Legislature should an incoming governor choose to retain them from his or another's expiring term. (December 23, 1982) (Howard).