Published on *The National Law Review* https://natlawreview.com

The Law Court and Human Error

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There were a slew of decisions issued by the Law Court last Thursday. Let's take a peek and discuss a few.

A smelly oops

State of Maine v. Dubois Livestock, Inc., 2017 ME 223. The holding is that when someone has a license issued by the DEP permit, at least under 38 M.R.S. s. 347-C or s. 1304(4-A), the DEP can enter into the non-curtilage part of your property without consent or a warrant, as long as it does so "at a reasonable time" and for the purpose of determining compliance with the license or the laws that the DEP administers.

As to the merits, the "open fields" doctrine has long protected only the area inside a curtilage. *Oliver v. U.S.*, 466 U.S. 170 (1984). As to whether the Constitution extends *quite* as far as the statutes and some of the Court's language would take it, the issue when you can undertake a warrantless search *inside* a commercial building involves a lot of factors, not just this doctrine, so we will leave that question for another day. In this case, the DEP stayed *outside*, in the fields, which can clearly be searched under the Fourth Amendment without a warrant.

More interesting, perhaps, is footnote 1. (It's often the footnotes that have the most interesting tidbits.) The on-line version of the DEP's rule, 2 CMR 06 096 410-4(E), relating to odor control for solid waste composing facilities, including manure spreading, differs from the version in the written CMR, even though the most recent amendments to chapter 410 were enacted before the last official publication of section 4(E) in 2015. Apparently, the DEP went through rulemaking with superseded language from chapter 410 and only realized its goof after the amendments were adopted and filed. The DEP asked the Secretary of State to accept a "corrected" filing that reinserted multiple pages of the inadvertently omitted language but – ahem – didn't go through rulemaking again. The Secretary accepted the filing, but the

"corrections" to 4(E) don't appear in the CMR's published version.

The difference in language between the two versions wasn't material in *Dubois*, so the Court didn't say anything more about this problem than "this series of events may affect other enforcement actions." Do I sense litigation and/or some rulemaking in the offing?

A big pat on the back to the clerk who spotted this difference. Good going!

I guess the takeaway is, if you want to be prudent, you need to check both versions, the official written publication and the on-line version, and if you see any differences, start figuring out why. Apparently the Secretary of State keeps a "rule adoption log," which is what the Court looked at to see what happened. This must be some sort of administrative record-keeping, perhaps as a part of the Secretary's archiving duties. But beyond that, it's a mystery to me. It would be nice to know if this is a record that should be routinely requested in a Freedom of Access Act request when looking into rulemaking. Another decision issued the same day related to documents requested under FOAA by Dubois but withheld by the DEP on privilege grounds, but had nothing to do with this. *Dubois v. DEP*, 2017 ME 224. (That decision provides a useful reminder that FOAA was amended in 2015 so the Court doesn't always have to hold a trial, but rather a "review, with taking of testimony and other evidence as determined necessary." 1 M.R.S. s. 409(1).)

A taxing oops

Town of Eddington v. Emera Maine, 2017 ME 225. The taxpayer made an error, but could correct it through an abatement request.

The taxed entity gave lists to two towns of the length and value of the transmission lines it owned in the towns. One year, it made a mistake, including lines it didn't actually own. The assessors for each town, seeing a jump in the amount of the lines reported, called to confirm the new numbers were right, which the entity's accountant did. Assessments came out accordingly. Subsequently, the accountant realized the mistake and the taxpayer applied for abatements. The State Board of Property Tax Review granted the abatements and the towns appealed.

The question, the Court said, revolved around language in 36 MRS s. 841. (The towns also argued estoppel, which the Court dismissed without discussion.) Under this statute, municipal officers may make a reasonable abatement to correct "any illegality, error or irregularity" in an assessment, but can't grant an abatement "to correct an error in the valuation of property." This kind of mistake was the former, not the latter, the Court said, because it affected the taxability of the property itself or an impropriety in the manner in which the property was assessed. Because the taxpayer didn't own

the property, the town couldn't impose a double tax burden, taxing this entity and the one that really owned it.

The language about correcting illegality, error or irregularity says that the assessors "**may** make such reasonable abatement **as they consider proper** to correct any" such illegality etc. "provided that the taxpayer has **complied** with section 706." 36 M.R.S. s. 706 requires the taxpayer to list property when requested by the assessor, and was presumably what the taxpayer was responding to when the accountant submitted the (erroneous) list of property. Thus, even though this language is precatory – assessors "may" abate "as they consider proper" – and even though the list provided under Section 706 list was factually wrong, there had to be an abatement. The implication is that a taxpayer "complies" with section 706 when it submits incorrect information, at least if the error is inadvertent, and that there is no discretion for the assessor not to grant an abatement if the error resulted in double taxing, *i.e*. another taxpayer paid a tax on the property, too.

The MMA and State Chamber of Commerce also weighed in, filing amici briefs.

National Law Review, Volumess VII, Number 347

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