STATE OF MAINE

REPORT

OF THE

ATTORNEY GENERAL

for the calendar years

1959 - 1960

One may run for election to an office incompatible with one which he holds if there is no statutory or constitutional prohibition. I was unable to find such prohibition in this case. If one accepts the second incompatible office, it will constitute an abandonment of the other. I note that in Chapter 4, Sections 52-54 of the Revised Statutes of 1954, a candidate must accept the nomination in writing and agree not to withdraw before the date of election. He also agrees, if elected, to qualify as to such office. This is a statement of intent and is an indication to his constituents of what he will do in the future.

If a man is elected to an office which is incompatible with the one which he holds, he must choose the office he wishes to hold. In *Lesieur v. Lausier*, 148 Me. 500, the court enunciated the rule that when one serves in his first incompatible office beyond the time that he should have qualified for the second office, he impliedly waives his right to the second office. Therefore, applying these rules to your situation, I believe you may run for the unexpired term and continue to exercise your powers and duties as a representative unless a special session of the 99th Legislature is called. In the event of a special session, you would be required to choose the office of Senator or that of Representative. It would seem that there would be no question of the choice, but at that time your choice would be final. It is interesting to note that the same fact situation occurred in 1951 in which a representative was elected to serve the unexpired term of a senator and continued acting on House Committees after being elected Senator but prior to qualification as such.

If there are any more questions concerning this, I would be happy to attempt to give you an answer to them.

Very truly yours,

GEORGE A. WATHEN
Assistant Attorney General

March 18, 1960

To: Robert S. Linnell, Esquire
192 Middle Street
Portland, Maine

Dear Bob:

I have your letter of March 4, 1960 in which you ask if the committee established under the provisions of Chapter 149, Private and Special Laws of 1959, has the authority to proceed so far as to execute an option for the purchase of land.

For the reasons hereinafter set forth we believe the committee had the authority to execute an option.

The Act referred to, after creating the committee, outlines the duties of the committee as follows:

"Sec. 2. Duties. The committee shall:

. . .

"V. Determine the best site for relocation of the State School for Boys in terms of purpose, program and physical plant needs; and

"VI. Employ an architect or architects to translate into plans, specifications and cost estimates the thinking of the committee;

. . .

"The committee shall report to the 100th Legislature with plans, specifications and cost estimates of construction and relocation of the State School for Boys. *Such plans, specifications and cost estimates shall be complete to the extent that if the 100th Legislature* or any future Legislature *should appropriate the necessary funds, such school could be constructed on the basis of such plans and estimates* and with plans, specifications and cost estimates of the relocation of the State School for Boys at Fort McKinley."

In brief, the committee must present to the 100th Legislature such complete plans, specifications and cost estimates as would permit the Legislature to appropriate funds for the construction based upon such plans and estimates.

A site plan could not be prepared unless authority were granted to the State to permit entrance upon the property in question, with permission to make surveys, site investigation, sub-surface borings, and to have a definite plot on which to prepare their design and make estimates in order to carry out the intent of the Legislature that the committee make a realistic report. A report to the Legislature, so indefinite as to cost of land, nature of subsoil (ledge, sand, etc.), necessity of excavation and the like, that cost would depend upon unknown factors, would be useless.

The Act in question could not be construed as granting authority for the committee to enter upon private land, so such authority must be obtained in some manner — lease, license, options, etc. In order to comply with the legislative request that the committee determine the best site and return to the Legislature with the other information desired, the committee decided an option was necessary. This option will not only permit the committee to do its necessary survey work, but will hold that site for the consideration of the Legislature.

The required work could not be accomplished without the necessary authority to enter upon land, and plans and specifications along with cost estimates based upon a site certain would be useless to the Legislature if the site in question was no longer available.

For the above reasons we think that the committee had authority to execute an option.

From our experience with the Maine School Building Authority we point out to you an analagous situation. In order for the Maine School Building Authority to enter into negotiations with a town, site plans and

specifications must be prepared, and a title examination made. Occasionally, a person says that upon approval of a project by Maine School Building Authority, he will donate land to the municipality involved. However, the necessity of having a site plan and other material prohibits the Authority from giving its approval until a definite piece of land is either conveyed, or an option given, so that the Maine School Building Authority knows it is dealing with a known quantity; title searched, etc.

In reference generally to the authority of a State agency to execute options, we are of the opinion that either express authority, or, as in the instant case, compelling implied authority, should be present in a statute before land can be purchased or an option executed.

We hope the above fully answers your question.

Very truly yours,

FRANK E. HANCOCK
Attorney General

March 25, 1960

To: Roland H. Cobb, Commissioner of Inland Fisheries & Game

Re: Flowage of State Lands

We have your letter of February 23, 1960, in which you ask if a public utility company has the right to flow state-owned land. Your inquiry deals specifically with the possibility of a dam being built on the Saco River, between Hiram and East Brownfield, and the possible resulting flowage of over 3,000 acres of land owned by the State. Such land is to be developed for duck marshes.

We assume that your question relates to such flowage under "Mill Acts" Chapter 180, Revised Statutes of 1954, as is authorized to certain persons who erect mills and dams to raise water for working it.

It is our opinion that the public utility company does not have the right to flow lands owned by the State and in the control of your department for the purposes of development for duck marshes.

The ordinary method authorized by the legislature by which land, or the use of land, may be taken, is eminent domain. Private property may be taken for a public use upon payment of compensation, and when public exigencies require it. Article I, section 21, Maine Constitution. The procedure known as eminent domain has as its authority the above-mentioned constitutional provision.

Our court, in its early years, justified the Mill Acts as being based on the power of eminent domain. *Ingram v. Maine Water Co.*, 98 Me. 566. In later years our court has said the Mill Acts are not based on the principle of eminent domain, but such acts are an adjustment and regulation to assure development of reasonable use of such lands among riparian owners. *Bean and Land Co. v. Power Co.*, 133 Me. 9, 27-28.

As stated in *Brown v. deNormandie*, 123 Me. 535, 541 —

> "It is too late now to challenge the constitutionality of the Mill Act. Whether its validity rests upon its great antiquity and long