

# MAINE STATE LEGISLATURE

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December 30, 1965

Keith L. Crockett, Secretary-  
Treasurer, Maine School Bldg. Authority  
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Education  
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Right of Way from Maine School Building Authority Property to  
Adjoining Properties.

FACTS:

The Maine School Building Authority project located in Lisbon, Maine contains a strip of land 50 feet wide and approximately 400 feet long which abuts Main Street in Lisbon. This strip of land is part of the Authority's project; and was deeded to the Authority at the time the original school lot was transferred. Recently, two persons have requested that the Authority grant them a right-of-way across the subject strip so that access may be had to a proposed nursing home site which abuts the project. Presently, a portion of the strip is being utilized as a driveway into the school lot.

The Trust Agreement existing between the Maine School Building Authority and the trustee bank contains the following provision:

"Section 707. The Authority covenants that, except as provided in Section 595 of this Agreement, it will not sell, lease or otherwise dispose of or encumber any Project or any part thereof and will not create or permit to be created any charge or lien on the rentals derived therefrom."

QUESTIONS:

1. Whether the Maine School Building Authority may legally grant the subject easement?

2. Inasmuch as the citizens of the Town of Lisbon, by their vote, purchased this land to be used as a school site, does any official board of the town have the right to give any party permission to use any part of this site for their own interest?

ANSWERS:

1. No.

2. No.

REASONS:

According to an applicable provision of the Trust Agreement, the Authority has covenanted with the trustee bank that the former will not encumber any portion of the project. (See Section 707 of the Trust Agreement.)

The following cases hold that an easement generally constitutes an encumbrance within a covenant against encumbrances. Taxman v. McMahan, 21 Wis. 2d 215, 124 N.W. 2d 68; Bertrand v. Jones, 58 N.J. Super. 273, 156 A. 2d 161. There being no real legal distinction between the word "encumbrance" and the word "incumbrance", we therefore advance the following cases which hold that an easement constitutes an incumbrance. Brownback v. Spangler, 101 N.J. eq. 388, 139 A. 524; Lavey v. Graessele, 245 Mich. 681, 224 N.W. 436. The case of Lavey v. Graessele, supra, holds that the right to an easement of any kind is an incumbrance. It has been held that the existence of an easement upon land is an incumbrance which will give rise to an action on covenant of warranty. Schmisser v. Penn, 47 Ill. App. 278.

We must conclude, in view of the existence of the above authorities and Section 707 of the Trust Agreement, that the Authority is precluded from encumbering the project through the grant of the subject easement. Too, that the citizens of the Town of Lisbon have no authority to grant the easement in view of the fact that the title to the site rests in the Authority, and not in the Town.

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John W. Benoit  
Assistant Attorney General

JWB/eh