STATE OF MAINE

REPORT

OF THE

ATTORNEY GENERAL

For the Years
1967 through 1972

It seems clear that the legislature did not create an equitable servitude appurtenant to the land from whence the effluent emanated, which might pass with the transfer of such land, but rather conferred a uniquely personal and limited privilege upon a specified, limited and existing class to continue using the public waters of the State for the disposal of waste – a privilege which, it cannot be argued, exists of right.

Given this view of the statute, it follows that such privilege cannot continue from owner-of-effluent-source to successive owner. It is inapt to attempt an analogy to the "non-conforming use" in zoning law, a use which, although outlawed by ordinance, may nonetheless continue in existence after the effective date of the ordinance under successive owners as long as such use is not abandoned. It is the *use*, in the zoning situation, which is protected and allowed to continue. See *Toulouse v. Bd. of Zoning Adjustment,* 147 Me. 387, 87 A.2d 67 (1952); see generally 2 Metzenbaum, *Law of Zoning* 1210, 2 Yokley, *Zoning Law and Practice* §16-2. Such use, further, has been held to run with the land and to be entitled to constitutional protection. See Yokley, *op. cit.,* §16-3 and cases there cited.

In the situation at hand, it is not the *use* (*i.e.,* the discharge– which is protected. Rather, it is the *users* – who have been granted license [perhaps "franchise" would be a more appropriate term – see *Madden v. Queens Jockey Club,* 296 N.Y. 249, 255, 72 N.E.2d 697, 699 (1947)] to continue the use, which they do not possess of right, so long as they do not materially increase or change it. This license being granted to a specified, limited and existing class, there being no provision in the statute providing for transferability, either as a matter of law or by a purported assignment, and there being no compelling reason of public policy apparent to imply such transferability, we conclude that transfer was not intended to be capable of accomplishment. See Restatement, *Property* §517, American Law of Property §8.122.

ROBERT G. FULLER, JR.
Assistant Attorney General

January 16, 1969
Education

Kermit S. Nickerson, Deputy Commissioner

School Construction Aid; Subsidy on Interest Accrued re Temporary Borrowing Prior to Sale of Bonds by Administrative Unit.

SYLLABUS:

Interest paid by a school administrative district on temporary borrowing, done in anticipation of receiving state aid for school construction, is eligible for school construction aid under 20 M.R.S.A. § 3457.

FACTS:

The voters of a particular school administrative district authorized its Board of Directors to issue bonds totaling $2,000,000 for the purpose of constructing a high school. The vote occurred between May 11, 1966 and April 27, 1967, at a time when the statutes provided for a lump sum payment of the State's share of such capital outlay expenditures. Too, at the time the voters of the district authorized the directors to issue bonds, the State's percentage of school construction aid for this particular district was

set at 46%. Prior to the issuance of bonds by the district, the directors borrowed funds to meet construction expenditures as they became due; and this was done by the district in anticipation of receiving state aid. Had the lump sum payment plan remained in the statutes, the district would have issued bonds totaling $1,080,000 representing 54% of the $2,000,000 total cost figure of the school; and the State would have paid the district $920,000 representing 46% of the cost of the project.

QUESTION:

Whether or not the interest paid on the district's temporary borrowing prior to its sale of bonds is reimbursable as a capital outlay expenditure?

ANSWER:

Yes.

REASON:

According to the provisions of 20 M.R.S.A. § 3457, school administrative districts are to report capital outlay expenditures to the Commissioner of Education, which expenditures shall include " * * * the amount of interest to be paid each year and the rate of interest * * * ." On the basis of all the reports on file in the office of the Commissioner of Education, state aid for school construction is paid to eligible administrative units, " * * * including principal and interest payments * * * ." The language of the Maine Statutes relating to public education intends that the amount of interest paid on temporary borrowing by a school administrative district be reimbursable as are other capital outlay expenditures.

It is true that the subject school administrative district was obligated to fund 54% of the cost of the project ($1,080,000) and that the State, according to the appropriate Maine Statutes relating to state aid for school construction, was responsible for funding the remaining 46% of the project ($920,000). However, capital outlay expenditures are defined in the statutes relating to public education, and we find no basis in the law for a determination that capital outlay expenditures may be the district's "share" at one time, and the State's "share" at another time.

In the event that state aid is paid to this particular district recognizing that the district has incurred interest due to temporary borrowing, then this extent of payment of state aid re interest will be no different from the manner in which state aid has been paid for interest on borrowing for school construction in the past; as well as for interest on borrowing for present school construction.

JOHN W. BENOIT, JR.
Assistant Attorney General

January 16, 1969

Honorable Louis Jalbert
House of Representatives
State House
Augusta, Maine

Re: Transferability of Longevity and Sick Leave Credits