

# MAINE STATE LEGISLATURE

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# NOT A FORMAL OPINION

September 19, 1972

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Public Improvements

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Below are our answers to your questions 1 through 5 contained in your letter of May 16, 1972 with regard to the matter of Lease-Purchase Agreement for a new State Office Building. Questions will be answered seriatim.

1. Would a "lease-purchase" or "installment-sale" agreement be considered a Public Improvement as defined under Title 5, M.R.S.A., Chapter 151, Section 1741 and thereby subject to competitive bid under Section 1743?

ANSWER:

Yes.

REASONS:

5 M.R.S.A. § 1741 sets forth a definition of a "public improvement" which includes buildings "constructed, acquired or leased, in whole or in part with state funds . . . ." Hence, a "lease-purchase" or "installment-sale" agreement for a building would constitute a "public improvement." Accordingly, the requirement of 5 M.R.S.A. § 1743 for competitive bids would apply to such an agreement.

2. Can private interests construct an office building and support facilities on State-owned land and under what conditions?

ANSWER:

Yes, by a lease authorized by the State Legislature.

REASONS:

Such construction would involve a major alteration of State land for a substantial period of time. A lease of the land for that specific purpose would be required to grant authority to make such use of State land. Since this involves the grant of an interest in State land, albeit for a temporary period (Section 1015, Thompson on Real Property) the Legislature must authorize such a grant.

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See 36 M.R.S.A. § 1283 and Opinions of the Attorney General in Report for the years 1951-1954 at page 150 and Report for the years 1961-1962, at pages 125-126.

3. Could the State acquire property by condemnation for the aforesaid purpose?

ANSWER:

Yes, with qualifications.

REASONS:

The land in question is situated on Lower Capitol Street opposite Capitol Park and is within the area described in 1 M.R.S.A. § 814, which the Legislature has stated may be taken by eminent domain "whenever the Governor and Council determine that public exigencies require the construction of additional buildings . . . for the expansion of State Government in the Capitol Area . . . ."

It is assumed that question 3 refers to question 2 when it refers to "the aforesaid purpose." Since question 2 is answered in the affirmative, it seems to follow that the land referred to therein may be acquired by eminent domain as provided in 1 M.R.S.A. § 814.

Although the proposed use is for private benefit as well as for public use as an office building, this does not necessarily invalidate a taking by eminent domain, if the court should hold that the private benefit is only incidental to the public use.

See 26 Am. Jur. 2d "Eminent Domain" § 35. If, however, a taking by eminent domain were held to be for essentially private purposes, then there is a violation of M.R.S.A. Constitution of Maine, Article I, § 21.

The above answer does not refer to the "lease-purchase" situation presented by question 4, since the answer there is that the State cannot enter into a so-called "lease-purchase" arrangement.

4. Can the State enter into a long-term "lease-purchase" or "installment-sale" agreement with private owners of such a building and under what conditions?

ANSWER:

No.

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REASONS:

While the State can enter into a genuine "lease" of a building, the question posed expressly contemplates a "lease-purchase" or "installment-sale." On March 13, 1951, the Justices of the Supreme Judicial Court answered a similar question in the negative. See Opinion of the Justices, 146 Me. 183, a xerox copy of which is attached. In most pertinent part, the Justices stated:

"Being a contract of purchase, obligating the State to pay the purchase price, unless the entire amount thereof is to be paid pursuant to an appropriation presently made from funds or revenues currently available therefor, such contract of purchase would in the constitutional sense be a liability created by the Legislature on behalf of the State. It would constitute a liability which would have to be included with the existing debts and liabilities of the State in determining whether or not they exceed the \$2,000,000 limit set forth in Section 14 of Article IX of the Constitution. If such contract price in and of itself, or together with the existing debts and liabilities of the State, should exceed the constitutional debt limit, the so-called lease would be void."

They concluded by answering in the affirmative four questions as to whether or not the proposed lease agreement would pledge the faith and credit of the State in violation of the Maine Constitution and create a liability of the State in violation of the limits thereon in the Constitution of Maine.

5. See attached memorandum of Jerrold B. Speers.

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Assistant Attorney General

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Attached