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Inter-Departmental Memorandum Date September 26, 1973

To Henry E. Warren, Jr. Dept. Environmental Protection

From Jon A. Lund, Attorney General Dept. Attorney General

Subject Application of 38 M.R.S.A. §§ 481-488 to an Expansion of the Maine Turnpike

SYLLABUS:

Enlargement of a section of the Maine Turnpike commenced before June 2, 1972, does not require the approval of the Board of Environmental Protection under the Site Location of Development Law, 38, M.R.S.A. §§ 481-488. Any further construction or enlargement which otherwise constitutes a development as defined in § 482(2) requires such approval.

FACTS:

The Maine Turnpike Authority is a body corporate and politic of the State created by the Legislature in Chapter 69 of the Private and Special Laws of 1941. As of January 1, 1970, the Authority owned, operated and maintained an existing four-lane toll road from Kittery to Augusta, Maine.

The Authority plans to add two additional lanes from York (the present southern terminus of the Turnpike) to the Scarborough-Portland line. This project involves the construction of those two lanes, and the expansion and reconstruction of existing underpasses and overpasses to accommodate the widened road surface, such project to be undertaken in six sections. The construction of the first six-mile section began in 1971. All construction is anticipated to be complete by 1980. All construction is taking place within the right of way owned by the Authority since before 1970.

The construction is being financed by monies from the Reserve Maintenance Fund, which Fund was established under a Trust Indenture from the Authority to the First National Bank of Boston and the National Bank of Commerce of Portland. According to the terms of the Indenture, the Reserve Maintenance Fund is comprised of operating revenues. No bonds have been sold for this project. No funds from any prior bond issue have been used for this project since all funds from any prior issue have been expended.

QUESTION:

Does the above-described construction on the Maine Turnpike require review and approval of the Board of Environmental Protection prior to construction and operation?

ANSWER:

That six-mile section of the Turnpike under construction as of June 2, 1972, does not require review of the Board of Environmental Protection. Any further development which exceeds 20 acres or 60,000 square feet requires review and approval of the Board.

REASONING:

The Site Location of Development Law, 38 M.R.S.A. §§ 481-488 (hereinafter referred to as the "Site Law"), as originally enacted by P.L. 1969, c. 571, requires review and approval by the Board of Environmental Protection of any "developments which may substantially affect the environment." Since its enactment, the Site Law has undergone revision, particularly in regard to the scope of developments requiring such review. Section 482(2) now defines "development" to include "any state, municipal, quasi-municipal, educational, charitable, commercial or industrial development. . . which occupies a land or water area in excess of 20 acres. . . or which occupies on a single parcel a structure or structures in excess of a ground area of 60,000 square feet." The first question which must be answered is whether the facts as outlined above constitute such a development.

It is self-evident that since the actual road surface area will cover in excess of 20 acres or 60,000 square feet, the area or size requirement of the definition is satisfied. The road surface covered by the initial 6-mile section covers in excess of 60,000 square feet. It is plain from the statute that roads were contemplated as within the definition of "development" since the Legislature felt constrained to excempt "state highways and state aid highways."

The second question is whether the Maine Turnpike Authority project is a "state, municipal, quasi-municipal, educational, charitable, commercial or industrial development." We believe it is a "state" project. In First National Bank of Boston v. Maine Turnpike Authority, 153 Me. 131, 136 A.2d 699 (1957), the court said that the Authority is "a governmental agency, with police power plainly conferred." The Law Court further stated that the Authority "shall be regarded as performing a governmental function." In Nelson v. Maine Turnpike Authority, 157 Me. 174, 170 A.2d 687 (1961), the court expanded upon First National Bank and recognized that the "governmental function of constructing, operating and maintaining the Turnpike is delegated to the Authority as an agency of the State." The Law Court noted that "the Authority is a separate corporate entity from the State to be sure, but this does not deny that the State is the real party in interest in its activities." See also Morris County Industrial Park v. Thomas Nicol Co., 35 N.J. 522, 173 A.2d 414 (1961). We conclude, therefore, that the project in issue is a "state" project within the meaning of § 482(2).

It should be noted that in Opinion of the Justices, 146 Me. 249, 80 A.2d 417 (1951), the Court concluded that the Authority was not a "State Department" within the meaning of Article IX, § 19 of the Maine Constitution (then Article LXII). The Court in Nelson, however, expressly limited the earlier Opinion of the Justices to the narrow constitutional issue previously before the Court.

Having concluded that the expansion of the Turnpike constitutes a "state" development, the next question is whether the Turnpike is a "state highway" and thereby exempt from the Site Law. The definition in § 482(2) provides only three exemptions for developments: "state highways," "state aid highways," and borrow pits regulated by the State Highway Commission (now the Department of Transportation hereinafter referred to as "DOT"). From our examination of the cited language, we conclude that the Maine Turnpike Authority is not within the ambit of these exemptions.

The Authority, though an agency of state government, is separate and distinct from the DOT. "The Legislature could have placed the Turnpike under the control of the State Highway Commission. It chose, however, doubtless for financial reasons, to make use of an instrumentality or agency." Nelson v. Maine Turnpike Authority at 689. The Court acknowledged this distinction and separation again when it stated:

> "In brief, the State established an instrumentality or agency to construct, operate and maintain a great highway, financed through tolls, and eventually to be a part of the state highway system." Nelson v. Maine Turnpike Authority at 688 (Emphasis supplied.)

This language is important. The Maine Turnpike is not a "state highway" though it is manifestly "a type of public highway." The Turnpike is not now but "eventually" will be a part of the "state highway system."

It is, of course, reasonable to argue that the Legislature used the terms "state highway" and "state aid highway" in a generic sense to mean public highways. However, a review of the general highway laws reveals that the terms "state highway" and "state aid highway" are in fact terms of art. Title 23 M.R.S.A. §§ 701-705 and §§ 751-754 refer to state highways as that system of roads built and maintained by the DOT. Similarly "state aid highways" as found in §§ 801-803 and §§ 1101-1109 of Title 23 are those municipal roads built and maintained with the financial and technical assistance of the DOT. Section 53 of Title 23 authorizes the DOT to classify the road system in the State into "state highways," "state aid highways" and other categories. Our

inquiries to the Department revealed that the Turnpike has always been included in a class by itself and has not been categorized by DOT as a state or state aid highway. While this is not necessarily dispositive of the issue, it at least sheds light on how the DOT and its predecessor, the Highway Commission, have viewed the Turnpike. Further, in an unrelated statutory provision, the Legislature, in defining the interstate highways system, again recognized the distinction between the Turnpike and state highways.1/

We agree, of course, with the proposition that the Turnpike is a "highway." Detroit International Bridge Co. v. American Seed Co., 249 Mich. 289, 228 N.W. 791 (1930); Sieling v. Uke, 160 Md. 407, 153 A. 614 (1931); Sentle Trucking Corp. v. Bowers, 173 Ohio 31, 179 N.E.2d 346 (1962); Weirich v. State, 140 Wis. 98, 121 N.W. 652 (1909); and 39 Am. Jur.2d Highways, § 7. However, while turnpikes are regarded as public highways, they are not "highways of the state." Arkansas State Highway Commission v. Southwestern Bell Telephone Co., 206 Ark. 1099, 178 S.W.2d 1002 (1944).

> "For most purposes a turnpike is regarded as a highway; and it may be said to be generally so regarded, when the term highway is used in a statute, unless the words and purposes of the act display a different legislative intent." Atlantic & S. Ry. Co. v. State Board of Assessors, 80 N.J.L. 83, 77 A. 609 (1910). (Emphasis supplied.)

Reference to other statutory provisions is consistent with the general rule of statutory construction that statutes in pari materia should be construed together. Inhabitants of Town of Amity v. Inhabitants of Town of Orient, 153 Me. 29, 134 A.2d 365 (1957); Steele v. Smalley, 141 Me. 355, 44 A.2d 213 (1946); Stuart v. Chapman, 104 Me. 17, 70 A. 1069 (1908) and 82 C.J.S., Statutes, § 366(1). If we apply this rule of construction to the instant case, then "state highways" would be construed to mean those highways under the exclusive jurisdiction of the DOT as described generally in Title 23 and applied by the DOT and not "highways of the state" in a broad sense.

1/ 30 M.R.S.A. § 2451-B(3) provides:

> "'Interstate system' as used in this subchapter shall mean those portions of the Maine Turnpike and the state highways system. . . . "

The charter of the Authority defines the relationship between the DOT and the Authority. Section 4(C) of the charter provides that the DOT shall approve contracts and agreements relating to construction and supervise all construction of the Turnpike and any "tunnels, bridges, overpasses and underpasses." This provision might initially be interpreted to mean that the DOT was merely the alter ego for the Authority and that for all intents and purposes the Authority was a subordinate of DOT. However, we believe that complete analysis of the relationship does not support this argument. Such provision was presumably inserted to insure that DOT would provide technical assistance to the Authority and that any construction would not result in interference with the State highway system. Since the Turnpike would be cutting across a complex network of State highways, it appeared desirable to provide some review process to make sure that final design and construction provided for adequate underpasses, overpasses and connections between these two separate systems. In order to avoid conflict between two autonomous bodies, DOT was made the arbiter of these issues. Section 4(C) states in conclusion that "such supervision of the [DOT] shall not extend to the control of the location or course of the Turnpike." The Authority, therefore, has exclusive power to decide whether, where and how the Turnpike shall be built and cannot be deemed to be subordinate to the DOT. Finally, section 16 of the charter, entitled "Termination of the Authority," provides that upon dissolution of the Authority, the Turnpike becomes "property of the State of Maine" as any other state highway, and subject to control of DOT. This would seem to confirm that the DOT and the Authority were to be viewed as wholly separate entities.

As further evidence of the fact that the Turnpike is not a state highway within the meaning of § 482(2), it is instructive to look again at the three exemptions in that subsection. All borrow pits over five acres require DEP approval except such pits regulated by the "State Highway Commission." Clearly, a borrow pit of the "State Highway Commission" could not be deemed to include a borrow pit of the Authority. If, however, we read the term "state highway" broadly enough to include the Turnpike, we have the incongruous result that five-acre borrow pits operated or regulated by the Authority are not exempt from review, but the Turnpike is. We do not believe the statute should be read to have such an effect.

Although we have not been asked the question, we believe that the Legislature could, within the constitutional limits of the Equal Protection Clause, draw a distinction between the Turnpike and state highways. When enacted, the Site Law had a "grandfather" date of January 1, 1970. As of that date the National Environmental Policy Act (NEPA) took effect. 42 U.S.C. § 4321, et seq. NEPA requires a comprehensive environmental assessment of any "major federal action" that will "significantly effect the human environment." Such major federal action has been judicially construed to include highways built with federal funds from the Federal Highway

Administration of the United States Department of Transportation.[1/] Conservation Society v. Texas, 2 ERC 1871, 446 F.2d 1013 (5th Cir., 1971) and Arlington Coalition on Transportation v. Volpe, 458 F.2d 323 (4th Cir., 1972). The Maine Legislature could have reasonably determined that all state highways which would receive such funds would, at some point prior to construction, require a comprehensive environmental assessment under NEPA. Since the Turnpike is and has been ineligible for such federal funds, no NEPA assessment would take place for Turnpike additions. 23 U.S.C. § 301. Therefore, the Legislature in its wisdom decided to subject the Authority to the jurisdiction of the Board of Environmental Protection under the Site Law. We believe that this is sufficient basis to satisfy the requirement of equal protection. "It is elementary that the Legislature may, in its judgment, create classifications so long as they are not arbitrary and are based upon actual differences in classes which bear a substantial relation to the public purpose sought to be accomplished by the statute." In the matter of Spring Valley Development by Lakesites, Inc., Me., 200 A.2d 736 (1973). Further, and as we shall discuss infra, the Legislature would not have expected any expansion of the Turnpike beyond its dimensions as they existed on January 1, 1970, since the Authority lacked the power to construct or extend any portion of the Turnpike not then existing.

The final issue is whether under the applicability provision, § 488, the Turnpike is otherwise exempt from the Site Law. We understand that the Authority claims exemption from the Law on the grounds that the project "was specifically authorized by the Legislature prior to May 9, 1970." In order to fully answer this question, we must, of necessity, inquire into the power of the Authority to undertake this project. That requires a full examination of the Authority's enabling legislation.

In order to finance the project in question, the Turnpike had several apparent options: (1) sell new revenue bonds, or revenue refunding bonds, (2) use the excess proceeds from prior bond issues, or (3) use the revenues generated from operation. Of these three the Authority selected the last. In our judgment, the Authority had no power to utilize Turnpike revenues for the project in question.

Since the first two options were not employed, we will not pursue any lengthy analysis of such alternatives. However, two matters must be noted. First, as stated above, the second option was unavailable since it is our understanding that all prior bond proceeds were expended on the Augusta Extension, which was complete

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1/ Without going into a comprehensive discussion of the federal aid program, it should suffice to note that a variety of highways are eligible for federal funds, including interstate, primary, secondary, some state aid, urban, and forest, to name a few. Highways eligible for federal funds are designated pursuant to a complex federal/state system.

The Turnpike, as a toll road, is not eligible for federal funds under any of the above-named programs.

in 1955. Second, the Authority could not legally sell any new bonds. In P. & S.L., 1963, Ch. 76, the Legislature amended § 6 of the enabling act by providing: "No bonds shall be issued on or after the effective date of this Act [September 21, 1963] for the purpose of constructing any unit or extension of the turnpike not already constructed on said date." While the amendment did not define "new unit" or "extension," we view extension as meaning extension in any direction, i.e., lengthening or widening. Webster's New International Dictionary (2d Ed., 1955) defines "extension" as: "1. Act of extending, or state of being extended; a stretching out, enlargement in dimension, area, duration or scope; increase; augmentation; expansion. 2. A part constituting an addition or enlargement, as an annex, as, to build an extension to a house." Although this amendment was not also added to § 10 regarding refunding bonds, § 10, as amended by P. & S.L., 1951, Ch. 153, already provided that "issuance of such [refunding] bonds. . . shall be governed by the provisions of this act insofar as the same may be applicable." Logically, if the Authority could not issue new revenue bonds for such construction or extension, it could not indirectly incur additional debt for such purpose by the sale of refunding bonds. In any event, the Authority elected not to sell revenue or revenue refunding bonds for the project in issue.

The enabling act and Trust Indenture have several sections regarding the powers and limits of the Authority. Section 4(a)(4) of the enabling act empowers the Authority to "construct, maintain, reconstruct and operate a toll turnpike." Section 4(a)(8) authorizes the collection of fees subject to the terms of agreement with the bond holders (i.e., the Trust Indenture). Section 4(a)(14) empowers the Authority "to do all other lawful things necessary and incidental to the foregoing powers" [i.e., the powers enumerated in § 14(a)]. Section 6(15) provides that the Authority, in issuing bonds, may make covenants regarding the fixing of tolls and other charges to provide funds for, among other things, payment of "all costs of operation and maintenance of the turnpike." Section 11(c) authorizes the fixing of tolls to provide a fund at least sufficient to pay "the cost of maintaining, repairing and operating the turnpike," payment of the principal and interest on the bonds and the establishing of a sinking fund. Finally, Section 11(d) provides for the use of tolls and all other revenues.

Although the Trust Indenture, in section 509, purports to authorize the use of revenues deposited in a "Reserve Maintenance Fund" for "resurfacing, replacing or reconstructing the Turnpike," the power of the Authority is determined not by the language of the Indenture but by the language of the enabling act. We do not, therefore, deem it necessary to this opinion to comment on the language found in such Trust Indenture.

The power of the Authority is limited to those purposes expressly stated in the enabling act. The general rule of statutory construction is that power such as those granted to the Authority are to be strictly construed. City of Auburn v. Paul, 110 Me. 192, 85 A. 571 (1912).

However, where a public agency such as the Authority has as its purpose "the promotion of a great public enterprise," the power of the agency will be liberally construed in order to effectuate those purposes. Sutherland, Statutory Construction, § 6406 (3d Ed. 1943). Nevertheless, such rule of construction does not permit the agency to exercise authority plainly not conferred and not necessary to accomplishment of its purposes. "[W]herever there is a fair and reasonable doubt as to the existence of a power in such corporation, the courts will not uphold or enforce execution." City of Auburn v. Paul, supra.

Although the Authority undeniably has the general power under § 4(a)(4) to construct and reconstruct the Turnpike, it may exercise this power only with funds authorized to be spent for those purposes. While bond proceeds could, if available, be used for such purpose, operating revenues could not. Section 11(d) discusses the manner in which tolls and revenues may be spent. The section uses unequivocal and unambiguous language. The second sentence of that section states:

> "The tolls and all other revenues derived from the turnpike except such part thereof as may be required to pay the cost of maintaining, repairing and operating the turnpike and to provide such reserves therefor as may be provided for in the resolution authorizing the issuance of the bonds or in the trust indenture, shall be set aside at such regular intervals as may be provided in such resolution or such trust indenture, in a sinking fund which is pledged to, and charged with the payment of, (1) the interest on such bonds as such interest shall fall due; (2) the principal of such bonds as the same shall fall due; (3) the necessary fiscal agency charges for paying principal and interest; and (4) any premiums on bonds retired by call or purchase as herein provided." (Emphasis provided.)

Only two uses of revenues are contemplated: (1) maintenance, repair and operation, and (2) payment of costs related to the bonded indebtedness. Although § 11(d) does not explain the purpose for this limitation, we would surmise that it was inserted in order to insure that the revenues would be pledged to meet the primary obligation to the bondholders and to keep the Turnpike, as the source of revenues and the principal asset of the Authority, in good operating condition.

This limitation is also found indirectly in sections 6(15) and 11(c). Section 6(15) permits the Authority to covenant in the Trust

Indenture for the fixing of tolls sufficient to pay the same costs as are enumerated in § 11(d). Clearly, the Authority cannot agree to fix tolls to reflect some other unspecified costs absent authority to make such agreements. Additionally, § 11(c) also limits the purposes for which tolls and revenues may be charged. Although it would, on first blush, seem to imply from the use of the phrase "at least sufficient" that tolls in excess of such purposes may be charged, we do not believe the language authorizes the fixing of tolls for any other unstated purpose. In fact the use of such language would seem desirable in order to provide the Authority with sufficient flexibility to insure that the income generated through tolls and other charges is not deficient, and that the Authority would not be liable for charging tolls which may be somewhat in excess of that absolutely necessary. In other words, section 11(c) provides that the Authority may exercise prudent business judgment and provide for some extra margin of income, hence the use of the words "at least sufficient."

Neither the terms "maintain," "repair" or "operate" can be construed to include a project of the scope described in the factual statement. Maintain means "to hold or keep in a particular state or condition." Webster's, New International Dictionary (2d ed., 1955). Repair means "to restore to a sound or good state after decay, injury, dilapidation or partial destruction, as to repair a house, a road, a shoe." Webster's. (Emphasis supplied.) Operate means, in the context of this statute, "to put into, or to continue in, operation or activity; to manage; to conduct; to carry out or through; to work; as, to operate a machine or motor vehicle." Webster's. We think it unnecessary to cite exhaustively all conceivable citations defining these terms. See Words and Phrases, "Repair," "Maintain" and "Operate." Loose-Wilkes Biscuit Co. v. Deering, 142 Me. 121, 48 A.2d 715 (1946); Homer v. The Lady of the Ocean, 70 Me. 350 (1879); Carlton v. Newman, 77 Me. 408, 1 A. 194 (1885), and State of Maine v. Canadian Pacific Railway Company, 25 Me. 350, 134 A. 59 (1926). In no case has either word been construed to mean the doubling in size of an existing structure.

Further, we believe that the expenditure of funds for the described project has the result of extending the life of the Authority beyond that intended by the Legislature. It is obvious from § 16 of the enabling act, as amended by P. & S.L. 1963, Ch. 7, § 2, that the Legislature intended that at some point in time the Authority would "become dissolved." That point would arrive after construction was complete and (1) the bonds had been paid, or (2) a sufficient amount for the payment of such bonds had been set aside, in trust, for that purpose. To the extent that use of revenues retard either the payment of bonds or the creation of a sufficient trust fund, the described project and use of revenues therefor has the result of breathing a longer life into the Authority than § 16 contemplated. Similarly to the extent that the tolls charged for use of the Turnpike reflect other than those purposes enumerated in §§ 6(15) and 11(c), they are excessive and prohibited.

Based upon this statutory analysis, it is our conclusion that the Authority was not specifically authorized to expand the Turnpike as discussed. If we read the entire enabling act, particularly as amended in 1963, it is our view that the Authority had effectively been limited to simply maintaining the Turnpike as it existed in 1963 and paying of the debt. It had no authority whatsoever to sell bonds or use revenues to finance this project. Ipso facto the project was not "specifically authorized."

An alternative argument to this entire line of reasoning may be fashioned to support the proposition that despite the lack of authorization to use revenues for new construction, the Authority still retained "specific authorization" for this project. That argument would separate the powers of the Authority as found generally in § 4(a) of the enabling act from the means provided the Authority to finance and implement its general powers. What the Legislature did in 1963, so the argument goes, was not to take away the Authority's powers, only its resources. While this is a persuasive argument, we believe it fails to recognize the essential meaning of the 1963 amendment. As reflected in the legislative debate over that amendment, the real intent was to bring the Turnpike to an end. The Legislature knew that alternative means were now available to fund major interstate highways. Rather than tinkering with essential elements of the enabling act, the Legislature probably selected the most expedient vehicle to "wind up" the Authority. The Legislature took away the heart of the Authority's powers yet left it essentially intact in order that it could continue to meet existing contractual obligations to bondholders.

The legislative debate over the 1963 amendment reflects a clear recognition by the Legislature that the effect of the bill would be to halt further interstate construction and instead finance such highways through so-called "90-10" funds. See Legislative Record, 1963, pages 572-578, 598-603. Absolutely no thought was given to the possibility that revenues would or could be used to finance further new construction. Indeed, fear was expressed by some legislators that passage of the bill would prevent the Authority from dealing with unforeseeable developments in the future. Apparently the Legislature's understanding of the bill was summed up in the opening remarks of Representative Turner.

> "Now if this bill is passed, it will not affect the bonds of the Maine Turnpike Authority. The Maine Turnpike Authority will continue to collect toll revenues for the purpose of maintaining, operating and paying off the bonds of the Authority until such time as the bonds are entirely paid, which is estimated to be in the 1980's. Passage of L.D. 106 will not affect this procedure in any way and I move this bill be passed."

Indeed, one further point should be made. Even if the 1963 amendment were never enacted, it appears unlikely that the Legislature intended to have granted the Authority an unlimited life. The termination provision was included in the original act and there must have been some understanding that at some point the Turnpike would be complete and the task and life of the Authority at an end, presumably when the initial four lanes reached Fort Kent. Even if the 1963 amendment were never enacted, the Authority could not simply have gone on forever bonding and building new additions and "extensions." Such a never-ending cycle would be irreconcilable with the concept of a termination of the Authority's life. Such being the case, it appears all the more likely that the 1963 amendment was merely a legislative effort to further shorten the entire life of the Authority.

It is our conclusion that the reasons above stated the Authority did not and does not possess specific legislative authorization to undertake the project in question and therefore is not exempt from the Site Law by virtue of that provision in § 488. Further, we would note that there appears to be substantial doubt as to whether the Authority has authority to spend income for any purpose other than repair, maintenance, operation and debt servicing.

Section 488 of the Site Law goes on to provide exemptions for any development in existence, under construction or in possession of applicable state and local permits[1] on January 1, 1970. Since, however, the Site Law did not apply to "state" projects until June 9, 1972, the effective date of P.L. 1972, Ch. 613, it is reasonable to conclude that such developments prior thereto were exempt. This is consistent with the general rule of statutory construction that prospective application of the laws is to be favored. Sutherland, Statutory Construction, § 2201 (3d Ed., 1943); Dalton v. MacLean, 137 Me. 4, 14 A.2d 13 (1940); Miller v. Fallon, 134 Me. 145, 183 A. 416 (1936). Since as of June 9, 1972, the Authority had commenced construction on one six-mile section of the Turnpike, we believe that the Site Law could not apply retroactively or retrospectively to that section.

As to any construction subsequent to June 9, 1972, such sections are to be considered as separate developments and will necessitate review under the Site Law. This interpretation and application of the Site Law comports with long standing interpretation and application of the statute by the Board. Although the Site Law is not zoning, an instructive analogy for purposes of construing the intent of § 488 is the concept of existing nonconforming uses as found in zoning law. That concept recognizes that certain uses which may predate the ordinance should not be prohibited if they are in nonconformance with the uses permitted in a particular zone. In general, it has been recognized that uses in existence, under construction or in possession of all applicable permits may be treated as existing uses or uses under a zoning ordinance. However, extensions of existing uses or uses under construction have, in the great majority of cases, been rejected. Anderson, American Law of Zoning, § 6.46 (1968);

1/ Other exemptions found in § 488 would not be applicable to this project.

87 A.L.R.2d 22, 31 and cited cases therein; Jensen's Inc. v. Plainville, 146 Conn. 311, 150 A.2d 297 (1959); Minquedale Civil Association v. Kline, 212 A.2d 811 (Del., 1965); Roseville v. Markham, 267 Minn. 517, 127 N.W.2d 507 (1964); Burmore Co. v. Champion, 124 N.J.L. 548, 12 A.2d 713 (1940); Appeal of Tadlock, 261 N.C. 129, 134 S.E.2d 177 (1964).

It may be argued that the entire Turnpike enlargement from York to Scarborough was "in existence" on June 9, 1972, on the grounds that a comprehensive plan had been developed for this entire project. Again, we do not believe such is the case. As the Law Court said in King Resources v. Environmental Improvement Commission, 270 A.2d 863, 869 (1970), an existing use should mean the utilization of the premises so that it may be known in the neighborhood as being employed for a given purpose. Further, the Court recognized that "a mere contemplated use standing alone is not sufficient" to constitute an existing development. We construe in existence as meaning actually in place or complete.

Another instructive analogy would be to the interpretation Federal Courts have given to NEPA. Numerous such courts in construing the applicability of NEPA have ruled that the environmental review required by NEPA is applicable to ongoing federal projects, including projects in various stages of planning and construction on the effective date of NEPA. See e.g., Calvert Cliffs Coordinating Committee v. Atomic Energy Comm., 449 F.2d 1109 (D.C.Cir., 1971); Environmental Defense Fund, Inc. v. Corps of Engineers, 325 F. Supp. 728 (E.D. Ark., 1971); Nolop v. Volpe, 333 F. Supp. 1364 (S.D., 1971); Greene Country Planning Board v. F.P.C., 455 F.2d 412 (2nd Cir., 1972); and Arlington Coalition v. Volpe, 458 F.2d 1323 (4th Cir., 1972). We believe that a similar rationale applied to the instant case leads to the conclusion that the portion of the enlargement not in progress requires approval of the Board and that such interpretation does not constitute retroactive application of the law.

Finally, the Site Law exempts developments in possession of applicable state and local permits on the grandfather date, in this case, June 9, 1972. The intent of this provision was probably to grandfather developments which had proceeded to the stage that permits had been issued and the developer had taken action in reliance thereon. The obtaining of a permit amounts to restatement of one of the elements of a nonconforming use in zoning. Its use as a "grandfather" test in the Site Law was probably based on the justifiable and sensible grounds that projects which had received all necessary approvals had proceeded to such a stage of commitment that they should be permitted to continue without further delay. Where no permits were required, as in the instant case, the exemption should not be deemed to apply, and the statute should be read as if it exempted developments in possession of applicable state and local permits if any are required.

We conclude, therefore, that only that section on which construction had commenced and contractual commitments made prior to June 9, 1972 is "grandfathered."

To summarize this memorandum, we have concluded that: (1) the Turnpike is development within the size requirements of § 482(2); (2) the Turnpike is not a "state highway" or "state aid highway"; (3) the initial six-mile section of the Turnpike enlargement under construction is "grandfathered" but the remainder of the enlargement project is not; and (4) that there is substantial doubt as to whether the Authority may spend revenues on the development in issue regardless of the Site Law requirements.

JON A. LUND
Attorney General

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