

# MAINE STATE LEGISLATURE

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April 4, 1974

Henry F. Lowe, Manager

Maine Guarantee Authority

Martin L. Wilk, Assistant

Attorney General

Attached Bill

This will respond to your memorandum dated April 1, 1974 regarding the attached bill from the Department of Commerce and Industry. This will also respond to the request from the members of the Authority for our opinion on the question whether the Authority may lawfully pay the bill, or any portion thereof.

The bill professes to be for (a) "costs incurred by the Department of Commerce and Industry for administering the entire MGA Program for 4 months" and (b) "developing procedures, descriptive literature and marketing for the implementation of the Community Investment Building Act."

We have been unable to find any statutory or other authority, express or implied, which would justify the submission or payment of that portion of the bill described by the Department of Commerce and Industry as representing "costs incurred . . . for administering the entire MGA Program for 4 months." As you quite properly recognize, payment for such administrative expenses would, in effect, constitute an unauthorized transfer of funds from one State entity to another, and would represent an intrusion upon a matter which is exclusively within the legislative domain. See Formal Opinion of Deputy Attorney General George West dated March 15, 1974, regarding inter-departmental transfer of funds.

Accordingly, in our opinion, it would not be proper for the Authority to pay any portion of the bill which relates to expenses described in item "a" above.

Costs properly incurred by the Department of Commerce and Industry in connection with the promotion and development of community industrial buildings present a different question which turns on the meaning of two statutory provisions, namely, 10 M.R.S.A. § 674 and 10 M.R.S.A. § 677, each of which shall be discussed in turn.

10 M.R.S.A. § 674, which relates to the creation of a non-lapsing revolving fund\* to be used solely for the purposes of

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\* The maximum amount available for the fund at this juncture is \$400,000. However, the amount actually allotted to the fund could be less since the legislature appropriated the \$400,000 for dual purposes - (a) for the assumption of liabilities and responsibilities of the former MIBA, MRA and MMSAB and (b) Community Industrial Buildings. See P.L. 1973 Chapter 633, § 27.

Chapter 102 (Community Industrial Buildings) expressly provides that the funds may be charged with:

"all expenses incurred by the Department of Commerce and Industry in the promotion and development of a community industrial building which has received a loan pursuant to this chapter." (Emphasis added)

To our knowledge, no loan has been made to<sup>a</sup> community industrial building to date, and therefore it would not appear that the Authority could find support for the payment of any portion of the bill in § 674. While it may be argued that the language quoted above would authorize the payment of expenses incurred in the promotion and development of those community industrial buildings which the Department of Commerce and Industry anticipates will ultimately receive a loan, we would regard such a reading of the statute as a strained construction, at best; and, in any event, the bill is not broken down in a fashion which would readily enable the Authority to allocate to any specific community industrial building which may, at some point in the future, receive a loan, such portion of the expenses actually incurred by the Department of Commerce and Industry which may properly relate to such buildings.

Accordingly, it does not appear that any portion of the present bill could be justified on the basis of § 674.

Section 6777, entitled "Promotion and Development" provides:

"The Department of Commerce and Industry shall undertake promotional and publicity activities on behalf of community industrial buildings to properly market such community industrial buildings to prospective purchasers or tenants. The department shall maintain a constant and continual effort to secure suitable tenants or purchasers for such buildings and shall prepare such advertising and promotional material as necessary. All expenses necessarily incurred by the department in carrying out the purposes of this section shall be charged to the Community Industrial Building Fund." (Emphasis added)

It is not clear whether the foregoing language was intended to embrace customary administration and overhead expenses or whether it was rather intended to be limited to only actual

out-of-pocket expenditures. The latter construction would appear to be more persuasive for several reasons.

First, while the Department of Commerce and Industry has a responsibility to undertake promotional and publicity activities, these activities obviously must be in conjunction with and under the direction of the Authority, who has ultimate responsibility for the disposition and administration of the Community Industrial Building Fund. Were the situation otherwise, the Department of Commerce and Industry could, through exuberance or otherwise, make demands upon the fund which would seriously affect the prime purpose of the Chapter, namely: to provide a source of funds to build community industrial buildings.

Second, if the legislature had intended § 677 to apply to operating expenses, it could have, and presumably would have, said so. Indeed, three sections earlier (§ 674) the legislature expressly provides that "all operating expenses of the Authority" (emphasis added) shall be charged to the fund. Reading these two sections together, the implication is that the legislature did not intend the Department of Commerce and Industry to have access to the fund to defray its operating expenses.

Based upon the foregoing, we conclude that it would not be proper for the Authority to pay any portion of the bill which may relate to customary operating expenses of the Department of Commerce and Industry, even though those expenses were incurred directly in connection with the promotion of community industrial buildings. In our view, § 677 relates only to out-of-pocket expenditures incurred to promote, publicize and find purchasers and tenants for such buildings.

We should add that § 677 would appear to authorize out-of-pocket expenses incurred by the Department of Commerce and Industry with respect to general promotion and advertising of the program as well as expenditures relating to specific buildings. In other words, the fund could properly be charged with legitimate expenditures incurred before any buildings were actually available, provided the expenditures were incurred to publicize the program to prospective purchasers. We emphasize the phrase "to prospective purchasers" for we do not read § 677 as authorizing the payment of any expenditures which may have been made to publicize the program to municipalities. In our view, as a matter of law, such expenditures would not be "necessarily incurred by the department in carrying out the purposes of this section." 10 M.R.S.A. § 677.

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Since the bill does not disclose which items, if any, relate to out-of-pocket expenditures incurred to publicize the program to prospective purchasers, we would recommend that the Authority request that the Department of Commerce and Industry furnish it with that information so that it may make a reasoned determination whether it may pay such items. We would also recommend that in the future the Department of Commerce and Industry approach the Maine Guarantee Authority in advance of making any sizable expenditures so both departments will be in a position to know exactly where they stand before, and not after, the fact.

We trust that the foregoing opinion will be of assistance to you. If you have any further questions, please let us know.

Martin L. Wilk  
Assistant Attorney General

MLW:H

Enclosure

cc: Edward F. Wilson,  
Chairman MGA  
cc: James F. Keefe, Commissioner,  
Dept. of Commerce and Industry

**AN INFORMAL OPINION**