

MAINE STATE LEGISLATURE

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STATE OF MAINE

Inter-Departmental Memorandum Date December 5, 1975

To Rodney Scribner, Treasurer Dept. Treasury
Stephen W. Locke, Sr., Director Central Computer Services
From Martin L. Wilk, Deputy Dept. Attorney General

Subject Issuance of Mortgage Note to Finance Computer Purchase

This will respond to your memorandum dated November 10, 1975, requesting our opinion whether it would be permissible for the State to issue a mortgage note for \$600,000 payable over a period of five years pledging computer equipment as collateral as a method of acquiring computer hardware presently being leased from IBM by the University of Maine. You indicate in your memorandum that the State would not guarantee the note or pledge any portion of its revenues toward repayment of the note and that the note would contain a clause indicating that the State reserves the right to discontinue the use of any or all equipment so mortgaged at the beginning of any fiscal year without penalty for either: (1) lack of appropriation of funds for the data processing equipment; or (2) lack of further need to perform the functions on electronic data processing equipment.

You further indicate that the proposed procedure for obtaining such a mortgage note would be as follows:

"a.) A Council Order requesting permission to issue the note would be prepared and submitted to the Governor and Council for approval.

"b.) A mortgage note would then be drafted, submitted for Council Approval, and then the State Treasurer would solicit bids from financial institutions.

"c.) Once the successful bidder was determined, Central Computer Services would proceed to exercise the State's option to purchase the computer equipment."

For the reasons which follow it is our opinion that neither the Governor and Council, the Treasurer nor the Bureau of Central Computer Services has authority to issue a mortgage note for the purposes and under the circumstances described above.

The only statutory provision relating to the power of the Governor and Council to authorize the State Treasurer to issue temporary notes is set forth in 5 M.R.S.A. § 150, which provides in pertinent part as follows:

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"The Treasurer of State, with the approval of the Governor and Council, may negotiate a temporary loan or loans in anticipation of taxes levied for that fiscal year but not exceeding a total of \$10,000,000. The Treasurer or State is directed to pay such loan or loans in anticipation of taxes during such year. . . . "

This provision could not be relied upon as authority for the transaction in question since (1) the note in the proposal would not be repaid within one year, and (2) the statute does not, in any event, authorize pledging State property as collateral.

Nor does the Bureau of Central Computer Services have authority to carry out the proposed transaction. The statutes relating to the authority of the Bureau of Central Computer Services are set out in 5 M.R.S.A. § 1851 to 1861. The Bureau has express statutory authority "to establish, maintain and operate a central data processing bureau" (§ 1852) and "to effect the centralization and consolidation of existing electronic data processing equipment" (§ 1852, sub-§ 2). The Act also authorizes the Director to enter into certain types of agreements as follows:

"The director, with the approval of the Commissioner, is authorized and empowered to enter into such agreements with the Federal Government, the University of Maine and other agencies and organizations as will promote the objectives of this Chapter, and to accept funds from the Federal Government, municipal and county agencies, or from any individual or corporation to be expended for purposes consistent with this Chapter." § 1853.

Upon a broad reading of the foregoing provisions, it could be argued that the Director of the Bureau has authority to enter into an agreement to purchase the University equipment over a period of years by pledging the equipment as collateral for a mortgage. However, the rule of construction with respect to the power of State officials to create a debt or liability is that in the absence of express authority, a State's credit may not be pledged nor may liabilities be created. See generally C.J.S. "States" §§ 137 and 148; Bauernfeind v. Nestos, 189 N.W. 506, 48 N.D. 1218. Mortgaging State property is the legal equivalent of creating a liability, since the State may only retain its title to the mortgaged property by discharging the debt. Conversely, the obligation of the State to pay the entire amount of the mortgage note out of tax revenues over a period of five years creates a liability. See State v. Florida State Improvement Commission, 60 So.2d 747 at 754.

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A possible more fundamental difficulty with the proposed transaction from the standpoint of the Governor and Council, the Treasurer and the Bureau of Central Computer Services stems from Article IX, Section 14 of the Maine Constitution, which provides in pertinent part as follows:

"The Legislature shall not create any debt or debts, liability or liabilities, on behalf of the State, which shall singly, or in the aggregate, with previous debts and liabilities hereafter incurred at any one time, exceed two million dollars. . . . "

It follows from this provision the Legislature may not authorize the Executive Branch to exceed constitutional debt limitations. See Opinion of the Justices, 146 Me. 183 at 189, 79 A.2d 753 (1951). Thus, if the debt incurred or liability created by mortgaging the computer as proposed, together with all other existing debts and liabilities exceed two million dollars, the transaction would be expressly forbidden by the Constitution.

Throughout the foregoing discussion we have assumed that in the event the State failed to appropriate funds for the data processing equipment during the five-year term of the note, the mortgaged property would become the property of the mortgagee, and that the State can only achieve unencumbered ownership upon paying the full \$600,000 plus interest. That being the case, the proposed language in the note that would authorize the State to discontinue use of the equipment without penalty in the event the requisite appropriation in any particular year were not forthcoming, would not serve to avoid the \$600,000 liability created at the outset of the transaction.

If, on the other hand, the parties to the transaction contemplated that the State's obligation was limited solely to the amounts appropriated by the Legislature toward the acquisition each year, and that in the absence of an appropriation ownership of the property would nevertheless remain in the State, the transaction would not violate constitutional debt limitations. A mortgage under such circumstances, even if one could be given by the State, would be of doubtful utility.



MARTIN L. WILK
Deputy Attorney General