

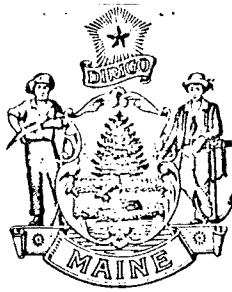
# MAINE STATE LEGISLATURE

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RICHARD S. COHEN  
ATTORNEY GENERAL



79/2-12  
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DEPUTY ATTORNEYS GENERAL

STATE OF MAINE  
DEPARTMENT OF THE ATTORNEY GENERAL  
AUGUSTA, MAINE 04333

December 19, 1979

To: Harold Reynolds, Jr., Commissioner  
Department of Educational & Cultural Services

From: Waldemar G. Buschmann, Assistant Attorney General

Re: Windham Jr. High School Construction Project.

FACTS:

On April 10, 1975, the State Board of Education granted "Tentative Approval" (Appendix #1) to the Town of Windham for the construction of a new junior high school. After receiving "Tentative Approval", the voters in the Town of Windham approved the proposed project and the sale of bonds in the amount of \$3,615,000. On June 10, 1975, the State Board voted to issue the final "Certificate of Approval" (Appendix #2) to the Town of Windham for the purpose of constructing the new junior high school. On January 6, 1976, in accordance with the State Board policy adopted on May 8, 1975, and presently codified as 05-071 CMR 061.2(A) (Appendix #3), the approved figure was reduced by the Commissioner to \$3,390,000 (Appendix #4). The junior high school remains an ongoing construction project which has not been completely accepted by the Town of Windham.

As evidenced in Exhibit V-C (Appendix #5), which was presented to the State Board of Education on December 12, 1979, "problems developed in terms of roof structure and roof leakage." The Town of Windham has initiated litigation against the contractor and others to recover damages based upon the faulty construction. Pending the outcome of that litigation, the Town of Windham is seeking State Board approval to expend an additional \$50,000 on the project to make emergency repairs. It is also understood that any damages which the Town of Windham might recover from the litigation would be used to reduce any debt service payments incurred as a result of the State Board having approved the expenditure of the additional \$50,000.

At the December 12 meeting of the State Board, Mr. Halkett moved, and was seconded by Mrs. Adams, "to approve the request of the Windham school committee for \$50,000 to make safety repairs on the Windham Jr. High School. This action is contingent upon the receipt of a letter of intent from the school committee and the town council to repay these funds to the State Board of Education." Mr. Halkett's motion carried by a vote of 4 to 2.

QUESTION:

Does the State Board have authority to approve the Windham school committee's request to expend an additional \$50,000 on the Windham Jr. High School project to make safety repairs as set forth in Mr. Halkett's motion of December 12, 1979?

ANSWER:

The State Board does have the authority to approve the Windham school committee's request to expend an additional \$50,000 on the Windham Jr. High School project to make the necessary safety repairs.<sup>1</sup>

REASONS:

It is important to note that the State Board's action on December 12, 1979, authorizes the Town of Windham to expend an additional \$50,000 to make necessary repairs to an ongoing project.<sup>2</sup> Also, the \$50,000 is within the \$3,615,000 approved by the State Board on June 10, 1975. In reaching its decision, the State Board heard testimony from the Town of Windham and presumably had the benefit of input from the Bureau of Public Improvements ("BPI"). A letter dated September 13, 1979 from the Department of Educational and Cultural Services to Superintendent Foss, a copy of which was in the possession of the State Board, clearly indicates that an additional amount of money should be expended by the Town of Windham to make the safety repairs (Appendix #6). Accordingly, the impact of the State Board's action is one of requiring the Commissioner to amend the January 1, 1976, directive by restoring \$50,000 of the \$225,000 which were cut from the project. The Commissioner's amendment should establish that the \$3,390,000 figure will be increased by \$50,000. The result will be that the Town of Windham is now authorized to issue bonds and notes up to \$3,440,000 on the Jr. High School project. Once the Town of Windham has raised the \$50,000, then Windham would be eligible to have that amount computed within the State reimbursement scheme for debt service retirement. The Commissioner's amendment should also note that this approval is contingent upon

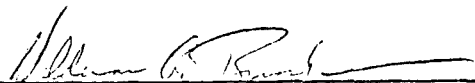
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<sup>1</sup> This opinion applies only to the unique facts surrounding the Windham Jr. High School project which include the recognition by BPI of the need to make these repairs, the fact that the \$50,000 was within the original amount approved by the State Board of Education and by the voters of the Town of Windham, and the fact that the project has not been finally accepted and will not be until the structural problems with the roof are cured.

<sup>2</sup> Although the building was accepted for use on August 2, 1977, that acceptance was contingent upon the completion of check list items which included the roof leaks. Accordingly, it is clear that the acceptance was not final.

receipt by the Commissioner of the letter of intent referred to in the December 12 motion and upon the requirement that any damages recovered in litigation will be used to reduce the additional \$50,000 debt service.<sup>3</sup>

It should be noted that the additional \$50,000 would have to be included within the \$30,000,000 ceiling mandated by the Legislature pursuant to 20 M.R.S.A. §3471.2(A).

  
\_\_\_\_\_  
Waldemar G. Buschmann  
Assistant Attorney General

WGB:lm

cc: Members of State Board  
Bill Diamond, State Representative  
Bill Foss, Superintendent

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<sup>3</sup> Although advance payments by the State for school construction projects are possible under 20 M.R.S.A. §3460, the Legislature has required that a project is only eligible for advance payments if it is specifically set forth on the Certificate of Approval that the project is to be financed in accordance with §3460. Since the Windham Jr. High School project was approved in accordance with 20 M.R.S.A. §3457 and not §3460 and since there is nothing in the Certificate of Approval stating that the "alternate method of payment of school construction aid" would be utilized, there is no authority for the State to make advance payments of the \$50,000 to the Town of Windham.

STATE OF MAINE  
STATE BOARD OF EDUCATION

CERTIFICATE OF TENTATIVE APPROVAL OF CONSTRUCTION AID PROJECT  
PRIOR TO PRESENTATION FOR LOCAL ACTION

Windham

Issued to:

The State Board of Education after examining the following project:  
New Junior High School.

found that:

1. Preliminary plans and costs estimates based on long-range planning for the project have been submitted.
2. The project is consistent with guidelines and priorities as adopted by the State Board of Education.
3. Windham hereby has concept approval of the (Administrative Unit) above project. Accordingly, authorization is given to proceed with further development in anticipation of submission for final approval.

Voted by the State Board of Education on the 10th day of April, 1975 this Certificate of Tentative Approval of the proposed project is issued.

Dated this 14th day of April, 1975.

STATE BOARD OF EDUCATION

By

[Signature]  
(Secretary)

(Board Seal)

STATE OF MAINE  
STATE BOARD OF EDUCATION

CERTIFICATE OF APPROVAL OF PROJECT FOR SCHOOL CONSTRUCTION AID

Issued to: Windham

The State Board of Education after examining the following project,  
New Junior High School.

found that:

- . The administrative unit and the proposed project are eligible for school construction aid under Section 3457, Title 20 of the Revised Statutes of 1964, as amended;
- . The proposed project and the authorized method of financing it are in the best interest of the administrative unit;
- . The total estimated capital outlay expenditure is \$ 3,615,000;
- . That the administrative unit and the proposed project are in compliance with R.S. Title 20, Chapter 404, Section 3125 as it relates to the provisions of special education facilities.

Pursuant to Section 3458, Title 20 of the Revised Statutes of 1964 as amended, and in accordance with the vote of the State Board of Education on the 10th day of June, 19 75 this Certificate of Approval of the proposed project is hereby issued with the following conditions:

- 1) The project must be completed within the above specified amount.
- 2) The bonds to finance this project must be sold within one year of the signing of the construction contract.
- 3) The bond term period shall be 20 years.

Dated this 13th day of June, 19 75.

STATE BOARD OF EDUCATION

By

*[Signature]*  
(Secretary)

(Board Seal)

- b) Approval by local voters.
  - c) Approval by the State Board of Education - projects may be submitted for consideration to any State Board of Education monthly meeting with a fifteen day notice.
- 2) Criteria for approval shall include, but not be limited to, the following:
- a) Need for construction.
  - b) Consideration of area needs.
  - c) Long-range planning.
  - d) Adequacy of facility to meet identified needs.
- 3) State Board of Education approval shall be contingent upon the state agency approvals required under Title 20, Section 3483.

## 2. SURPLUS PROJECT FUNDS AND USE OF BUDGET CONTINGENCY:

- A. When it is determined, following the opening of school construction bids, that there are surplus funds contained in a project budget, the State Board of Education directs the Department of Educational and Cultural Services, with the advice of the Bureau of Public Improvements, to initiate a process to lower the approved budget to the appropriate funding level, thus providing additional funds for other projects awaiting concept approval.
- B. The Board also wishes to state that the contingency item of each construction budget is a State Board of Education contingency and may be committed only with the approval of the Department of Educational and Cultural Services.

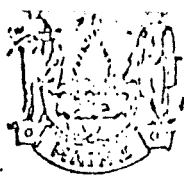
## 3. INTER-AGENCY (STATE OR LOCAL GOVERNMENT) COOPERATION:

It is declared to be the policy of this Board to foster cooperation between any of the schools or institutes it operates and any other agencies of the state or local government to the end that greater service can be provided to the people of Maine with the most efficient expenditure of tax dollars.

## 4. THE ADMINISTRATIVE REVIEW PROCESS:

Procedures for school construction projects when differences occur:

- A. Review and development by owner, architect, Department of Educational and Cultural Services, and the Bureau of Public Improvements.
- B. Recommendation of the Department of Educational and Cultural Services made available to local system.
- C. Administrative Review if differences exist.
  - 1) Review with Commissioner and two members of staff outside Bureau of School Management.



STATE OF MAINE

Department of  
Educational and Cultural Services

AUGUSTA, MAINE 04330

Date: January 6, 1976

TO: Superintendent William Foss  
FROM: H. Sawin Millett, Jr., Commissioner  
SUBJECT: Reassessment of Construction Project Funds

The proposed project New Junior High School  
(Title of Project)  
at Windham was approved for funding by the State Board of  
Education on June 10, 1975 for a total estimated cost of \$ 3,615,000  
(Date)  
The recently accepted bid for construction was \$ 2,635,163. Using this contract  
amount, a reassessment of total funds needed for the project now amounts to  
\$ 3,390,000 and includes a sum of \$ 207,240 set aside to meet any contingency  
during construction (subject to Maine State Department of Educational & Cultural  
Services approval). A revised project budget reflecting the contracted construction  
cost is attached for your review.

You will note that the revised total project cost shown above is a sum less than  
that previously estimated at the time of approval by the State Board of Education.  
Accordingly, you are advised that expenditures on this project should not exceed the  
reassessed total funds indicated. Any adjustment of this figure will require agree-  
ment by this Department of the existence of extenuating circumstances sufficient to  
warrant the change.

This directive is consistent with policy action by the State Board of Education  
on May 8, 1975. Any questions you may have should be directed to the Division of  
School Facilities.

cc: for Mr.



Department of  
Educational and Cultural Services

AUGUSTA, MAINE 04333

Exhibit # V. C.Date December 12, 1979

TO: Members of the State Board of Education

FROM: Commissioner Harold Reynolds, Jr. \*

SUBJECT: Windham Junior High School - Administrative Review

On June 10, 1975, The State Board of Education granted funding approval to the Town of Windham in the amount of \$3,615,000 for the purpose of constructing a new junior high school. Subsequent to this approval, final plans and specifications were approved and the project was put out to bid. Bids were favorable to the extent that the Commissioner was able to reduce the funding level under the provisions of State Board of Education Policy for School Construction #11 to \$3,390,000. This action allowed a contingency of \$207,240 (approximately 7.9 per cent).

Unfortunately, during the period of and subsequent to the completion of the building, a number of problems developed in terms of roof structure and roof leakage. While there is some disagreement on the extent of corrective work needed, all concerned agree that the building is not completely satisfactory. The Windham School Committee has initiated litigation against the architect and general and roofing sub-contractors in order to cover costs of corrective work. The State Board of Education in the meantime is being asked to provide additional funds to pay for the corrective work with the understanding that any monetary settlement achieved as a result of this litigation will revert to the State.

Attached are several documents which have been selected to provide Board members with a brief review of project activities from concept funding level to the present. These documents are as follows:

1. Certificate of Tentative Approval dated April 14, 1975.
2. Certificate of Approval of Project (Funding Approval) dated June 13, 1975.
3. Letter from L. Nisbett to W. Foss dated November 5, 1975.
4. Project Budgets (BPI) dated December 15, 1975.
5. Memorandum from H. Sawin Millett, Jr. to William Foss dated January 6, 1976.
- 6; Letter from L. Pineo to W. Foss dated September 13, 1979.
7. Letter from Harold Reynolds, Jr. to W. Foss dated November 21, 1979.

I recommend that the State Board of Education deny any additional funds for this project at this time.

\* Prepared by: Leroy O. Nisbett, Director  
Division of School Facilities

STATE OF MAINE

Department of  
Educational and Cultural Services

AUGUSTA, MAINE 04333

September 13, 1979

Mr. William Foss  
Superintendent of Schools  
P.O. #1  
South Windham, Maine 04082

Dear Bill,

This will serve to document my position regarding the Windham Junior High school roof and structure problems. It is unnecessary to detail the history of this project leading to the current situation. There appears to be no disagreement that there are problems at the school which need attention with varying degrees of urgency.

We have worked with the Bureau of Public Improvements (BPI) very closely in this matter and have received its observations and recommendations on a continuing basis, but most recently and finally on Tuesday, September 11, 1979. The Bureau's recommendation result, in part, from a review by Professor Richard Whitingale.

In briefest terms, the BPI recommends an initial, and perhaps temporary, solution to the leakage in Buildings A and B would be the installation of heat tapes. It is also recommended that Building C should have the insulation restored and improved positive ventilation. The most serious situation and one which BPI deems a potential safety hazard under certain conditions, based upon the architect's judgment, is the bowing and the potential for rolling of the gurlins in A and B. They believe, and I concur, that this situation should be corrected immediately. Firm cost figures are not available yet, but BPI estimates less than \$100,000 perhaps nearer \$80,000 should accomplish the preceding. I recommend you contact BPI directly for the details of the recommendations and firmer cost estimates as the Bureau was in the process of developing them when this was written.

I recognize the substantive contents of this letter fall far short of your initial statements relating to the scope of work necessary for an adequate and satisfactory building. However, I believe the implementation of the above recommendations will result in a reasonably satisfactory building.

The financing of the work should be handled in the manner described in Title 20, Sections 3477 and 4743. This will allow you to proceed immediately without the approval of the State Board of Education to prepare the building for winter.

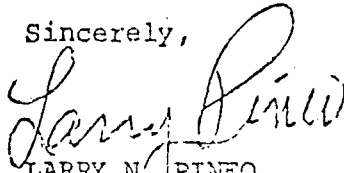
My recommendations:

1. Proceed with litigation.
2. Implement BPI's recommendations.
3. Secure financing for the work in the manner described above.

I believe the above represents the best and most appropriate way to accomplish an adequate building. I realize you believe the costs of the work should be a part of the project. I have enclosed a listing of similar projects in various units financed in the manner being recommended to you.

If I can be of further assistance to you, do not hesitate to call me.

Sincerely,



LARRY N. PINEO  
Associate Commissioner  
Bureau of School Management

NP:lwt