

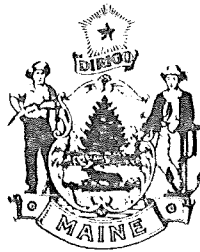
MAINE STATE LEGISLATURE

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RICHARD S. COHEN
ATTORNEY GENERAL



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

February 4, 1981

Honorable Polly Reeves
House of Representatives
State House
Augusta, Maine 04333

Dear Representative Reeves:

This will respond to your letter of January 2, 1981 in which you seek our opinion on the following question:

"May a municipality invest its funds in shares of a trust where the investment of the trust assets are limited to certificates of deposit, repurchase agreements, treasury bills or other government securities in which municipalities are currently permitted to invest?"

At the outset, we must acknowledge that the answer to your question is not entirely clear and, consequently, we do not believe we can provide a definitive response to your inquiry. Nevertheless, for the reasons discussed below, we conclude that municipal funds may not be invested in the type of trust arrangement described above.

With respect to the investment of municipal funds, the Legislature has enacted 30 M.R.S.A. §5051(1978) which specifies the types of investments the municipal officers, acting through the municipal treasurer, may make. In particular, section 5051 provides, in relevant part:

"Reserve funds, trust funds and all funds shall be deposited or invested by the treasurer, by direction of the municipal officers, as follows:

1. Banks. Deposited in savings banks, trust companies and national banks in the State.
2. Building and loan associations. Invested or deposited in state or federal building and loan or savings and loan associations.
3. Savings banks investments. Invested according to the law governing the investment of funds of savings banks in Title 9-B, chapter 55.

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4. Trust company or national bank. The municipal officers are authorized and may, where the terms of the instrument, order or article creating the fund do not prohibit, designate in writing a trust company or national bank having its principal office within the State, for the purpose of investment and may consent to the investment of such funds in a common trust fund maintained by said trust company or bank for investment under the rule of prudence set out in Title 18, section 4054.¹

* * *

6. Credit unions. Invested in credit unions located in this State organized under the laws of this State or of the United States."²

An examination of the foregoing statutory provisions reveals that there is no specific authorization for the investment of municipal funds in the manner described in your opinion request. While 30 M.R.S.A. §5051(3) permits the investment of municipal funds "according to the law governing the investment of funds of savings banks in Title 9-B, chapter 55," the provisions of the latter statute simply authorize savings banks to invest in certain types of "securities," and do not purport to authorize investments in a trust. Moreover, the only reference in section 5051 to the investment of funds in any type of "trust" appears in subsection (4), the plain language of which only applies to a "common trust fund" maintained by a trust

1. The "rule of prudence" which formerly appeared in 18 M.R.S.A. §4054 has been recodified in 18-A M.R.S.A. §7-302 (1980 Pamphlet) as part of the Maine Probate Code.

2. 30 M.R.S.A. §5051 (3)(A) places a limitation on the maximum amount which may be invested in any security or type of security while 30 M.R.S.A. §5051(5) requires that collateral or insurance be provided in the event municipal deposits exceed a certain amount.

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company or national bank having its principal office in the State of Maine.³ Thus, our reading of 30 M.R.S.A. §5051(1978) leads us to conclude that there is no specific statutory authorization to invest municipal funds in the manner you have described.

We have also considered whether a municipality may invest its funds in the manner you have described pursuant to its "home rule" powers, notwithstanding the fact that 30 M.R.S.A. §5051 (1978) does not provide statutory authority to do so. Article VIII, pt. 2, §1 of the Maine Constitution provides:

"The inhabitants of any municipality shall have the power to alter and amend their charters on all matters, not prohibited by Constitution or general law, which are local and municipal in character. The Legislature shall prescribe the procedure by which the municipality may so act."

In accordance with this constitutional provision, the Legislature, by virtue of Chapter 563 of the Public Laws of 1969, has enacted 30 M.R.S.A. §§1911-1920 (1978) "to implement the home rule powers granted by the Constitution of the State of Maine...." 30 M.R.S.A. §1911 (1978). In particular, 30 M.R.S.A. §1917 (1978) provides in pertinent part:

"Any municipality may, by the adoption, amendment or repeal of ordinances or bylaws, exercise any power or function which the Legislature has power to confer upon it, which is not denied either expressly or by clear implication...."

As a result of both the constitutional provision adopted by the people and the implementing statutes enacted by the Legislature, municipalities have been granted "very broad Home Rule powers," pertaining to matters which are local and municipal in character provided such powers have not been prohibited or denied either expressly or by clear implication. Begin v. Inhabitants of the Town of Sabattus, Me., 409 A.2d 1269, 1274(1979).

3. We would point out that the term "common trust fund" has a highly technical legal meaning under federal law. See 26 U.S.C.A. §584. For a discussion of the origins of the "common trust fund," see Mechanicks National Bank of Concord v. D'Amours, 100 N.H. 461, 129 A.2d 859 (1957); Stephenson, Participating Investments - The Common Trust Fund Device, 12 Ohio St. L.J. 522 (1951). We should also point out that the Legislature has provided statutory authorization to banks and trust companies to establish and operate "common trust funds." See 18-A M.R.S.A. §7-501 (1980 Pamphlet).

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In the context of your opinion request, we have no difficulty in concluding that the matter of municipal investments is "local and municipal in character." See Art. VIII, pt. 2, §1. Contrast Schwanda v. Bonney, Me., 418 A.2d 163 (1980); School Committee of Town of Winslow v. Inhabitants of the Town of Winslow, Me., 404 A.2d 988 (1979). Moreover, nothing in either the Constitution or the general law expressly denies or prohibits a municipality from investing its funds in the manner described in your opinion request. Thus, our task is to determine whether the Legislature denied municipalities such authority by "clear implication."

Initially, we would observe that the Legislature has stated that municipal funds "shall be deposited or invested" in accordance with the provisions of 30 M.R.S.A. §5051 (1978). (emphasis added). Thus, in describing the authority of a municipality to invest its funds, the Legislature has employed language which indicates that the provisions of section 5051 are mandatory. Moreover, in several other statutes relating to the investment of municipal funds, the Legislature has consistently directed that the investment of such funds shall be in accordance with 30 M.R.S.A. §5051 (1978). For example, 13 M.R.S.A. §§1223 and 1261 (1974) require that trust funds for the care of cemetery lots be invested in accordance with 30 M.R.S.A. §5051; 30 M.R.S.A. §1903(2) (1978) requires the municipal officers to invest other types of trust funds "according to section 5051;" 30 M.R.S.A. §1904(3) (1978) requires that a conditional gift of money to a municipality be invested "according to section 5051;" 30 M.R.S.A. §5202 (1978) requires the municipal officers to invest the reserve fund "according to section 5051." Additionally, section 5051 itself contains express limitations on the authority of a municipality to invest its funds, thereby suggesting that the Legislature intended to regulate this aspect of municipal affairs. 30 M.R.S.A. §5051(3)(A) places a limit on the maximum amount a municipality may invest "in a security or type of security under Title 9-B, Chapter 55." Subsection 5 of 30 M.R.S.A. §5051 mandates that municipal deposits exceeding a certain amount be secured by adequate collateral or fully covered by insurance. In light of the foregoing, it would appear that the Legislature views 30 M.R.S.A. §5051 as controlling the manner in which municipal funds are to be invested and has, by clear implication, denied municipalities the authority to invest such funds in a manner not specified in that statute.

We also believe that the recent legislative history of 30 M.R.S.A. §5051 supports this conclusion. In 1973, subsequent to the adoption of the home rule amendment and the enactment of the implementing statutes, the Legislature enacted Chapter 407 of the Public Laws of 1973, being "An Act to Encourage Investment of Revenue Sharing Funds in Local Interest Bearing Accounts." Chapter 407 was enacted as emergency legislation and repealed and replaced 30 M.R.S.A. §5051 to read substantially as it presently

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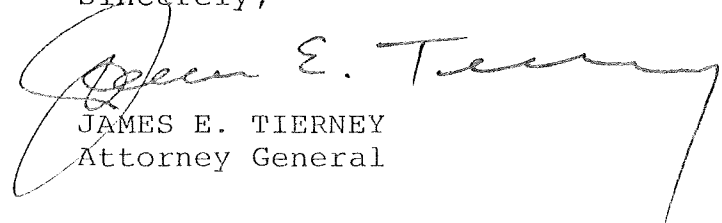
does.⁴ The emergency preamble accompanying Chapter 407 stated that as a result of the influx of large amounts of federal revenue sharing funds, "it becomes prudent to both encourage local investment in order to keep Maine money invested in Maine while at the same time insure the safety of the funds." Thus, once again, the Legislature's treatment of 30 M.R.S.A. §5051 implicitly suggests that it intended that statute to comprehensively regulate the manner in which municipal funds are to be invested.

On the other hand, we recognize that whether 30 M.R.S.A. §5051 reflects a legislative intent, by "clear implication," to deny municipalities the authority to invest their funds in a manner not specified in that statute, is a close question particularly in light of the express statement of the Legislature that the home rule statutes are to be "liberally construed to effect the purposes thereof." 30 M.R.S.A. §1920 (1978). Nevertheless, based upon the language of 30 M.R.S.A. §5051 and related statutes, as well as the manner in which the Legislature has historically dealt with municipal investments, we are inclined to conclude that a municipality does not have the authority to invest its funds in the manner described in your letter.

In any event, we believe the authority to make such an investment of municipal funds is, at best, uncertain. Given this uncertainty, and recognizing that with respect to public money the municipal officers occupy a status analogous to that of a fiduciary or trustee, we believe the municipal officers must avoid any investment of such money where their legal authority to do so is questionable.

I hope this information is helpful to you. Please feel free to call upon me if I can be of further assistance.

Sincerely,



JAMES E. TIERNEY
Attorney General

4. Subsequent to the enactment of P.L. 1973, c. 407, the Legislature enacted various statutes to clarify and correct errors in 30 M.R.S.A. §5051. See P.L. 1973, c. 625, §§ 206, 207; P.L. 1973, c. 639, §2; P.L. 1975, c. 770, §§ 176, 177.