

MAINE STATE LEGISLATURE

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September 4, 1996

Senator Susan W. Longley
RR 1, Box 1108
Liberty, ME 04949

Dear Senator Longley:

I am writing in response to your inquiry as to whether funds from the General Highway Fund established by Article IX, Section 19 of the Maine Constitution may be used for the support of ferries and related facilities. For the reasons which follow, it is the Opinion of this Department that the Fund may be used for the support of ferries whose principal purpose is the transportation of motor vehicles as part of the highway system in the State, but that the Fund may not be used for the purpose of supporting passenger ferries which are not part of that system.

Article IX, Section 19 of the Maine Constitution provides, in pertinent part:

All revenues derived from fees, excises and license taxes relating to registration, operation and use of vehicles on public highways, and to fuels used for the propulsion of such vehicles shall be expended solely for . . . the cost of construction, reconstruction, maintenance and repair of public highways and bridges (emphasis added)

The question which you pose is whether a ferry may be considered a "highway or bridge" within the meaning of this provision.

This precise question has not been addressed by the Supreme Judicial Court, or in any prior Opinion of this office. Generally, however, the Court, and therefore this office, have construed the provisions of Article IX, Section 19 strictly. The

provision, which was added to the Constitution in 1944, Me. Const., Amendment LXII (1944), was the subject of three Opinions of the Justices in the 1950's, but has not been interpreted by the Supreme Judicial Court since.¹ Two of these Opinions dealt with the purposes to which the Highway Fund may be put. In Opinion of the Justices, 152 Me. 449, 455-56 (1957), five justices were of the view that the Highway Fund could not be used to compensate a utility company for the relocation of its facilities required by highway construction. One justice, on the other hand, felt that such expenditures could be considered incidental to the construction or reconstruction of highways and could be met out of the Highway Fund. Id. at 456-57. In Opinion of the Justices, 157 Me. 104, 110-111 (1961), the Justices unanimously advised that the payment to an automobile dealer for loss of business due to bridge construction could not be made out of the Highway Fund.

Based on this authority, this Department has advised the Legislature that the Highway Fund may not be used for the acquisition of public transportation equipment or facilities, Op. Me. Att'y Gen. 85-4, but that the Highway Fund could be used for the construction of such things as special highway lanes for buses and for commuter parking lots immediately adjacent to highways, id. at 3, as well as for bikeways adjacent or parallel to highways. Op. Me. Att'y Gen. (Mar. 21, 1974). The principle running through this advice is that if a acquisition or construction project can fairly be construed to be part of a "highway or bridge" within the meaning of the constitutional provision, it can be funded by the Highway Fund. If, on the other hand, the proposed expenditure is for such things as vehicles which would operate on the highways, like buses, vans or trolleys, those expenditures could not be funded from the Fund because they do not involve the construction of a highway (or bridge) itself.

As indicated above, however, neither the Supreme Judicial Court nor this Department has focused on the possibility of using the Highway Fund for the purpose of supporting ferries or related facilities. There is substantial judicial authority, however, both in Maine and elsewhere, for the general proposition that a ferry is closely allied to a highway. Thus, in Inhabitants of the Town of Beal v. Beal, 149 Me. 19, 23 (1953), the Law Court observed that a ferry "is a continuation of a highway," and therefore cannot be maintained except with permission of the State. See also Inhabitants of the Town of Beal v. Beal, 150 Me. 80, 84 (1954). Similarly, in other jurisdictions, a ferry has been determined to be a "state highway" as that term appeared in state statutes. Savage Truck Line, Inc. v. Commonwealth, 68 S.E.2d 510,

¹In Portland Pipe Line Corp. v. Environmental Improvement Commission, 307 A.2d 1, 12-14 (Me. 1973), the Law Court determined that fees for transferring oil from ships to storage facilities at oil terminals were not "revenues derived from . . . [the] use of vehicles on public highways," and thus not subject to the constitutional provision, an issue not relevant to your inquiry.

513-514 (Va. 1952); Jeff Hunt Machinery Co. v. South Carolina State Highway Department, 60 S.E.2d 859, 862-863 (S.C. 1950); Wilmington Shipyard, Inc. v. North Carolina State Highway Commission, 171 S.E.2d 222, 225-27 (N.C. Ct. App. 1969), cert den., 276 N.C. 327 (1970). Finally, in United States v. Washington Toll Bridge Authority, 190 F. Supp. 95, 97 (W.D. Wash. 1960), the Court observed that:

Where a ferry serves as an essential link in a highway, clearly it is as much an integral part of the highway system as a bridge. (citations omitted)

See generally 36A C.J.S. Ferries, § 1(2) ("Ferries are generally regarded as highways and are continuations of the highways with which they connect.")

Based on this authority, this Department is inclined to conclude that if it can be shown that a particular ferry is part of the State highway system, it could be supported from the Highway Fund in the same manner that a bridge, which is an alternative way of crossing a body of water, may be supported. At a minimum, therefore, in order for a ferry to be eligible for such support, it would have to be demonstrated that its purpose was the conveyance of motor vehicles across a body of water so as to permit them to continue to travel on public highways on the other side. If, on the other hand, a ferry were solely for the use of passengers, it could not be supported from the Highway Fund, since such a conveyance would be more akin to the kind of public transportation facility which our office has earlier advised could not receive such support.

This conclusion is supported by the legislative history of the enactment of Article IX, Section 19. When the proposed amendment was before the Legislature at its regular session in 1943, several of its proponents made it clear that one of the purposes of the amendment was to enable the State to qualify for federal highway assistance and that federal highway legislation required that in order to receive federal funds, the states would have to ensure that the proceeds of such things as motor vehicle registration fees and taxes on motor vehicle fuels be restricted solely for highway purposes. Legis. Rec. 657-58 (1943) (statement of Sen. Dunbar); 1056 (statement of Rep. True); 1058-59 (statement of Rep. Murchie); 1059-60 (statement of Rep. Lackee); 1061-63 (statement of Rep. Ward).² It therefore becomes a relevant

²This conclusion as to legislative intent is not disturbed by the fact that on two occasions in the 1970's, when the Legislature had before it bills which would have expanded the scope of Article IX, Section 19 to permit the Highway Fund to be used for public transportation facilities, both proponents and opponents of the proposals assumed that it was necessary in order to permit the highway fund to support ferries. Legis. Rec. 473 (1974) (statement of Sen. Berry (opponent)); 627 (statement of Rep. McTeague (proponent)); 1 Legis. Rec. 1038 (1977) (statement of

question whether the federal government would permit the expenditure of federal highway funds on ferries. In this regard, under current federal law, the Secretary of Transportation is authorized to provide federal funds not only for the construction of highways, bridges, tunnels and the approaches thereto, 23 U.S.C. § 129(a), but also ferries and the approaches thereto, so long as, among other things, it is not feasible to build a bridge, tunnel or other highway structure in lieu of a ferry. 23 U.S.C. § 129(b), (c). Consequently, the legislative intention of ensuring that the State's eligibility for federal highway funds not be endangered by the diverting of State highway revenues to nonhighway purposes would not be violated by the use of such funds for the support of ferries and related facilities.

In summary, therefore, so long as a particular ferry can be shown to be fairly part of the highway system of the State, it is the Opinion of this Department that it may be supported with funds from the Highway Fund. On the other hand, passenger ferries which do not involve the transportation of motor vehicles on the highway system of the State would not, in this Department's view, be eligible for support from the Highway Fund.

Rep. MacEachern (opponent)); 1040 (statement of Rep. Jensen (proponent)). The context of these remarks demonstrates that when the speakers referred to ferries they were not distinguishing between passenger ferries and motor vehicle ferries, and more likely were referring to the former, in view of the fact that the objectives of the bills before the Legislature were to permit the highway fund to be used for public transportation purposes. L.D. 2166 (106th Legis. 1974); L.D. 1758 (108th Legis. 1977). Moreover, it is a well-established principle that "the views of a subsequent [legislature] form a hazardous basis for inferring the intent of an earlier one." Consumer Product Safety Comm'n v. GTE Sylvania, 447 U.S. 102, 117 (1980), quoting United States v. Price, 361 U.S. 304, 313 (1960). See also Bakala v. Town of Stonington, 647 A.2d 85, 87 (Me. 1994) ("construction by a later Legislature of a statute passed by a previous Legislature is not conclusive evidence of the latter's intention in enacting the statute.") Thus, even if the remarks regarding ferries in 1974 and 1977 were construed to refer to ferries which were a continuation of highways as well as passenger ferries, those remarks could not be found to be reflective of the intention of the Legislature in enacting Article IX, Section 19 in 1943.

I hope the foregoing answers your question.

Sincerely,



ANDREW KETTERER
Attorney General

AK:sw

cc: John G. Melrose
Commissioner of Transportation
Sen. Albert G. Stevens
Rep. Donald A. Strout
Co-chairs, Joint Standing Committee on Transportation