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August 22, 2003

Mr. Christopher H. Roney
Finance Authority of Maine
5 Community Drive
P.O. Box 949
Augusta, Maine 04332-0949

Dear Mr. Roney:

This will respond to your letter of June 4, 2003, in which you request an Opinion of this Department concerning the following questions:

1. May the Finance Authority of Maine (FAME) provide loan insurance under the Small Business and Veteran's Insurance Programs on a loan made to a Maine Limited Liability Corporation formed for the purpose of purchasing land and constructing a church thereon?

2. May FAME make a direct loan under the Economic Recovery Loan Program, or similar direct funding source, to a church for the purpose of purchasing land and constructing a church thereon?

For the reasons discussed below, it is the opinion of this Department that under the relevant statutes, FAME has not been authorized by the Legislature either to insure loans made to a church or to make direct loans to a church for the purposes set forth in the statement of the issues. Further, a direct subsidization of the construction costs of a church with State tax revenues through either loan insurance or direct loans would likely violate the Establishment Clause of the First Amendment of the United States Constitution. The Legislature is presumed to be aware of the requirements of the Establishment Clause and would not, therefore, have enacted the relevant statutes in contravention of such requirements.

In 1985, the 112th Legislature amended 10 M.R.S.A. § 962, to empower FAME to encourage mortgage loans to "finance the planning, developments, acquisition, construction, improvement, expansion and placing in operation of

industrial, manufacturing, recreational, fishing, agricultural and other business and natural resource enterprises." (P.L. 1985, ch.344, § 4). Section 962(4) specifically authorizes FAME to "[e]ncourage the making of mortgage loans to small businesses and veteran-owned small businesses." (P.L. 1985, ch. 344, § 4). In furtherance of FAME's statutory obligation to encourage mortgage loans to eligible businesses, the legislature enacted 10 M.R.S.A. §§ 1026-A through 1026-E. (P.L. 1985, ch. 344, § 49). In your first question, the mortgage insurance sought would be provided under section 1026-B.

With respect to any mortgage insurance program covered by sections 1026-B through 1026-E, section 1026-A(2)(A) provides that, in order for a mortgage to be eligible for insurance, there must be a lien on, or security interest in, eligible collateral owned, leased, used or held by an "eligible enterprise." An "eligible enterprise" is defined under section 963-A to be "an agricultural enterprise, fishing enterprise, industrial enterprise, manufacturing enterprise or recreational enterprise."

The Economic Recovery Program, enacted in 1991 as 10 M.R.S.A. § 1026-J (P.L. 1991, ch. 849, § 1), referred to in your second question, was created to assist businesses to gain access to credit through direct extension of loans by FAME. Similar to the program contemplated under section 1026-B, eligible projects under 1026-J must pertain to manufacturing, industrial, recreational or natural resource enterprises. 10 M.R.S.A. § 1026-J(A) and (B). Unmistakably, both sections 1026-B and 1026-J contemplate borrowers that are commercial enterprises.

A fundamental principle of statutory interpretation is that the words of a statute are to be given their common meaning. See State v. Vaino, 466 A.2d 471 (Me. 1983), cert. denied, 104 S. Ct. 2385 (1983). Churches are not commonly thought of as commercial enterprises, and, accordingly, would not, absent clear legislative language, be deemed to be included with the purview of these statutes. Accordingly, it is the opinion of this Department that FAME is not authorized under applicable State law to insure or make direct loans to a church under the provisions of 10 M.R.S.A. §§ 1026-B and 1026-J.

Further, providing direct credit enhancements or loans through programs supported by state taxes for the purpose of church construction would, we believe, constitute a violation of the Establishment Clause of the First Amendment to the Constitution of the United States.[1] While the body of decisional law surrounding the Establishment Clause may fairly be characterized as in transition, see Zelman v. Simmons-Harris, 536 U.S. 639, 649 (2002) and Agostini v. Felton, 521 U.S. 203, 236 (1997), there has never been any question that this constitutional provision prevents the federal

[1] The First Amendment reads, in relevant part, as follows: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...".

government or a state from enacting laws that have the "purpose" or "effect" of advancing or inhibiting religion. Agostini v. Felton, 521 U.S. 203, 222-223. While there may be some argument that the predominant legislative purpose of the statutes involved in this case is not to advance religion, we have found no support for the argument that the making or guaranteeing loans for construction of a church facility used principally for religious worship does not have the effect of advancing religion. Such an undertaking is not an incidental advancement of a religious mission. See Zelman v. Simmons-Harris, 536 U.S. 639, 652.[2]

In view of the foregoing, it is the Opinion of this Department that FAME is not authorized by its statute to insure under the Small Business and Veteran's Insurance Programs or to extend loans under the Economic Recovery Loan Program for church construction.

I hope this information is helpful to you. Please feel free to contact this office if we can be of further assistance.

Sincerely,

G. STEVEN ROWE
Attorney General

[2] Tilton v. Richardson, 403 U.S. 672 (1971) provides a clear example of permitted and prohibited governmental activity. In this case, the Supreme Court permitted governmental construction grants to sectarian universities where there was a contractual prohibition against religious use of the facilities funded through the grants. This prohibition, however, expired at the end of 20 years under the terms of the agreement. The court struck down this provision because it "opens the facility to use for any purpose at the end of that period." The court stated: "If, at the end of 20 years, the building is, for example, converted into a chapel or otherwise used to promote religious interests, the original federal grant will in part have the effect of advancing religion." 403 U.S. 672, 683. A fortiori, if the Supreme Court struck down a provision lifting a prohibition against potential use of a facility as a chapel 20 years in the future, it would not be permissible to finance the construction of an active church for immediate use.