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April 23, 2009

The Honorable Kevin L. Raye
Senate Minority Leader
3 State House Station
Augusta, ME 04333-0003

Dear Senator Raye:

You have asked whether a General Fund bond issue to provide funds to pay outstanding MaineCare settlements owed to hospitals would be constitutional. Your question specifically refers to article V, part 3, § 5 of the Maine Constitution ("Section 5"), which provides (in pertinent part) that "the Legislature shall enact general law prohibiting the use of proceeds from the sale of bonds to fund current expenditures..."

For the reasons that follow, we believe that MaineCare hospital settlements are current expenditures and that Section 5 prohibits the use of bond proceeds to make those payments.

Facts

We begin by setting out our understanding of the hospital settlements that are the focus of your inquiry. The Department of Human Services ("DHHS"), through the joint federal-state Medicaid program known as "MaineCare," pays hospitals and other providers for medical services to individuals of limited income. 22 M.R.S.A. §§ 10, 12, 3173 (2007). If a State elects to participate, as Maine has, it must adopt a Medicaid State Plan and comply with certain requirements and restrictions imposed by federal Medicaid statutes and regulations. 42 U.S.C.S. §§ 1396, 1396a, 1396k (2007). The State Plan must include a method for reimbursing health care providers for the medical services they provide to MaineCare members. 42 U.S.C.S. § 1396a(a)(13)(A). Each State establishes a methodology for Medicaid hospital reimbursement, which is set forth in its State Plan. 42 U.S.C.S. § 1396(a)(13)(A).

Pursuant to 22 M.R.S. §§ 3172-3193 (2007), Maine adopted a State Plan that establishes a three-step process for reimbursing hospitals. First, prior to a particular fiscal year, DHHS estimates the total amount of Medicaid reimbursement a hospital will be owed for the fiscal year and makes weekly interim payments over the course of the year. Second, at the close of the hospital's fiscal year, DHHS issues an Interim Settlement based on cost data in the hospital's as-filed (but un-audited) Medicare cost report. Third, DHHS issues a MaineCare Final Settlement

after it receives both the Notice of Program Reimbursement and the audited Medicare cost report from Medicare.

We take your use of the term “hospital settlements” to encompass both the Interim and Final Settlements issued by DHHS pursuant to this procedure, as there does not appear to be any legally significant distinction between the two for purposes of your question.

Legislative History of Section 5

Section 5 was added to the Maine Constitution effective November 16, 1976 and has remained unchanged since that time. It provides, in its entirety:

Section 5. Bonding regulations; prohibiting use of proceeds from sale of bonds to fund current expenditures. The Legislature shall enact general law prohibiting the use of proceeds from the sale of bonds to fund current expenditures and shall provide by appropriation for the payment of interest upon and installments of principal of all bonded debt created on behalf of the State as the same shall become due and payable. If at any time the Legislature shall fail to make any such appropriation, the Treasurer of State shall set apart from the first General Fund revenues thereafter received a sum sufficient to pay such interest or installments of principal and shall so apply the moneys thus set apart. The Treasurer of State may be required to set apart and apply such revenues at the suit of any holder of such bonds. The prohibition on use of proceeds from the sale of bonds to fund current expenditures shall only apply to those bonds authorized on or after July 1, 1977.

The sponsor of the bill proposing the addition of this language to Maine’s Constitution described its purpose to his colleagues in the Senate as follows:

Mr. CORSON: Mr. President, this constitutional amendment is designed to add greater insurance to bonds issued by the State of Maine. It is done with one primary purpose, and that is to aid in increasing our bond credit rating from this “AA” to “AAA” by putting it into the constitution that the repayment of bond interest and principal has a first lien, so to speak, on tax income, and by insuring that the government of Maine will not be tempted to utilize bond proceeds to fund current expenditures.

Legis. Rec. 403 (1976).

The final sentence did not appear in Section 5 as initially proposed by L.D. 2206 (107th Legis. 1976). That sentence, providing that these new constraints would be applicable only to bonds authorized after July 1, 1977, was added by amendment, Sen. Amend. B to L.D. 2206

(107th Legis. 1976), in order to avoid an adverse impact on bond issues that were already scheduled at that time. *See* Legis. Rec. 528, 1001, and 1002 (1976).

Discussion

Section 5 contemplates that the Legislature would enact general law prohibiting the use of proceeds from the sale of bonds to fund current expenditures. It does not appear that any such general law was enacted after this amendment to the Constitution was approved by the voters; certainly we are not aware of any current statute of this kind. Thus, as a threshold issue we consider whether that part of Section 5 prohibiting the bonding of current expenditures is effective in the absence of an implementing statute.¹

When Section 5 was submitted to the voters, the Intent and Content prepared by the Attorney General for publication in the Secretary of State's guide for voters described the current expenditure limitation in this way:

It is intended to...prevent the use of proceeds of the sale of bonds authorized by the Legislature on or after July 1, 1977, to pay current expenditures which goal it accomplishes by requiring the Legislature to pass legislation to that effect...

Intent and Content, Proposed Constitutional Amendment No. 4 (1976), at 6.

This language is ambiguous, though it can be read to suggest that the implementing legislation is necessary to give effect to the prohibition. However, the legislative history suggests an alternate reading: that the general law to be enacted by the Legislature is intended to provide further detail about its application.

The constitutional amendment requires by its terms a general law which would have to be enacted by a later legislature to define some of the terms in the constitutional amendment.

Legis. Rec. 404 (107th Legis. 1976).

[W]hat this amendment would do is state that we will not be bonding for current expenditures. In other words, we will not borrow money over a long term to meet current obligations.

Legis. Rec. 1001 (107th Legis. 1976).

We are stating unequivocally that the State of Maine will not use bonding procedures to fund current expenditures, that whatever is

¹ This opinion does not address that part of Section 5 giving bond interest and principal payments first priority against general revenues in the State's Treasury. We note that the language requiring enactment of implementing statutes appears to apply only to the current expenditure provision.

going to be spent is going to be raised through present tax resources.

Legis. Rec. 1002 (107th Legis. 1976).

The Law Court has held that constitutional provisions are accorded liberal interpretation in order to carry out their broad purpose, because they are expected to last over time and are cumbersome to amend. *Allen v. Quinn*, 459 A. 2d 1098 (Me. 1983). Applying this principle here, we believe that Section 5 is best read as a direct limitation on the authority of the Legislature to propose that bonds be used to cover current expenditures, with or without any implementing legislation that might be enacted.

We have found no Maine case interpreting the phrase “current expenditure.” The Justices of the Supreme Judicial Court have stated that established principles of constitutional construction require that the views of the framers be given great consideration, and that “whenever a constitutional provision may be considered ambiguous its interpretation “must be held to be settled by the contemporaneous construction, and the long course of practice in accordance therewith...” *Opinion of the Justices*, 146 Me. 316, 80 A.2d 866, 869 (1951), quoting *State v. Longley*, 119 Me. 535, 540, 112 A. 260, 262 (1921).

We are aware that the Legislature, as well as the Treasurer and this Office, have observed the prohibition on use of bond proceeds for current expenditures, establishing custom and general usage that are relevant to the interpretation of Section 5. For this purpose, a distinction is drawn between current and capital expenditures.

Black’s Law Dictionary defines “current expenses” as “[o]rdinary, regular, and continuing expenditures for the maintenance of property, the carrying on of an office, municipal government, etc.” Black’s Law Dictionary 458 (4th Ed. 1968). Several courts have concluded that “current expenses” are the equivalent of “running expenses.” See *State v. Board of Education*, 68 N.J.L. 496, 53 A. 236 (N.J. 1902), and *Meridien Life Drainage System v. Wiss*, 258 Ill. 600, 101 N.E. 941 (1913).

In contrast, “capital expenditures” is defined as the “[c]ost of construction made with expectation of existence for an indefinite period...expenditure in nature of an investment for the future.” Black’s Law Dictionary 263 (4th Ed. 1968), citing, *inter alia*, *E.W. Edwards & Son v. Clarke*, 29 F.Supp. 671 (N.D.N.Y. 1939) (concluding that construction of a pedestrian tunnel between department store buildings generated capital costs rather than ordinary expenses for federal tax purposes).

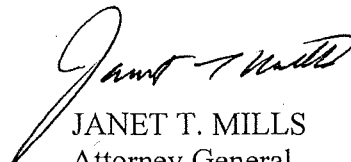
Applying this distinction here, hospital settlements are payments made by DHHS for regular, recurring qualified expenses incurred by hospitals in serving MaineCare recipients. They are not capital expenditures because they are not paid for the purpose of constructing a building, highway or bridge, for example. Settlement payments fit the concept of current expenditures, or “running expenses,” as they represent payment of costs for services as they occur fiscal year by fiscal year.

Conclusion

The Law Court has not yet interpreted Section 5, or provided any guidance concerning the meaning of the term “current expenditures” in any context that we have been able to find. While we have not done historical research on the project costs that have been funded by general obligation bonds since Section 5 was approved by the voters, in recent periods the Legislature has interpreted this restriction by limiting its bond proposals to capital and development projects, establishing a custom that would be relevant to a court’s consideration of this issue. Given the nature of the hospital settlements, we think it likely that a court would conclude that they are in the nature of current expenditures and thus cannot be paid with proceeds from general obligation bonds.²

I hope this information is helpful.

Sincerely,



JANET T. MILLS
Attorney General

cc: The Honorable Elizabeth Mitchell, Senate President
The Honorable Hannah Pingree, Speaker of the House
Patrick Ende, Chief Legal Counsel to the Governor

² In light of this conclusion, we do not reach your question concerning other possible constitutional issues. However, we note that there are practical considerations outside the scope of this opinion that would attach to the use of bond proceeds to fund current expenses, including the possibility that the resulting bonds would be taxable rather than tax exempt outside the scope of this opinion.