



2012-01

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February 9, 2012

Beth L. Ashcroft, Director
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Dear Ms. Ashcroft:

On behalf of the Government Oversight Committee, you have asked for an update of the opinion issued by the Attorney General on September 4, 1996 (Op. Me. Att'y Gen. 96-11, hereafter "Op. 96-11," attached) concerning the legality of using Highway Fund money to support certain costs of the Maine State Ferry Service. That opinion concluded that the Highway Fund "may be used for the support of ferries whose principal purpose is the transportation of motor vehicles." Subject to the ambiguities and uncertainties discussed below, I believe that opinion remains defensible.

The Maine Constitution and the Highway Fund

Section 19, in its entirety, reads:

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 propulsion of such vehicles shall be expended *solely for cost of administration, statutory refunds and adjustments, payment of debts and liabilities incurred in construction and reconstruction of highways and bridges, the cost of construction, reconstruction, maintenance and repair of public highways and bridges under the direction and supervision of a state department having jurisdiction over such highways and bridges* and expense for state enforcement of traffic laws and *shall not be diverted for any purpose*, provided that these limitations shall not apply to revenue from an excise tax on motor vehicles imposed in lieu of personal property tax.

Me. Const. art. 9, § 19 (emphasis added).

The legislative history of this provision is clearly summarized in this passage from the Law Court's decision in *Portland Pipe Line Corp. v. Environmental Imp. Com'n*, 307 A.2d 1 (Me. 1973):

In 1934 Congress became convinced that it was unfair to tax motor vehicle transportation unless the revenues thus derived were applied to the construction and maintenance of highways. To further this end, Congress passed what is now 23 U.S.C. § 126, which provided that federal highway funds would be withheld from any state which did not apply gasoline taxes and other taxes on motor vehicle owners and operators to highway purposes.

The Maine Legislature responded in 1936 by reserving for highway purposes the taxes derived from the 'tax imposed on internal combustion fuel.' The Legislature, shortly thereafter, amended the statute to allow these funds to be used for other than highway purposes pending the collection of general revenues. The constitutional provision now in question was adopted by the people in 1943.¹ The Legislative Record does not indicate that the anti-diversion amendment was to be any broader in scope than the 1936 statute. The Legislature and the people had been accustomed since 1923 to the 'gasoline tax,' a tax imposed on highway users. It was this revenue that was protected from diversion to non-highway uses.

307 A.2d at 13.²

In *Portland Pipe Line* the Court also noted the approach to be used in interpreting constitutional provisions:

The fundamental rule of construction of statutory and of constitutional provisions is that the language shall be interpreted in accordance with the intention with which it was used, if that result may be accomplished by giving words their ordinary and usual significance... It is proper in construing constitutional language to give decisive weight to the history of its development.

307 A.2d 1, 12 (Me. 1973) (citation omitted).

Judicial Interpretations of Section 19

The Justices of the Law Court have read the language of Section 19 strictly. The language, "under the direction and supervision of a state department having jurisdiction over such highways and bridges," became the focus of a 1951 Opinion of the Justices, which was the first to examine section 19. The Justices were asked whether a proposed law providing for payment to the Maine Turnpike Authority of funds derived from the tax on the gasoline consumed on the turnpike was constitutional. The Justices determined that:

The Maine Turnpike Authority *not being a state department within the meaning of said provision of the Constitution*, the payment to it of any part of the revenues referred to in said provision of the Constitution... would constitute a diversion thereof contrary to said provision of the Constitution.

¹ The resolve proposing the amendment was passed in 1943. Resolves 1943, ch. 53. It was approved by the people in September, 1944. 1945 Me. Laws at 1072 (Proclamation of Governor Sewall).

² In that case the Law Court held that fees for transferring oil from ships to storage facilities at oil terminals were not subject to Section 19.

Opinion of the Justices, 146 Me. 249, 256, 80 A.2d 417, 420 (Me.1951)

In 1957, the Justices found that an act authorizing the reimbursement of utility companies for relocation costs due to highway construction would violate Section 19. Interestingly, as the Justices noted, federal law permitted these payments. *Opinion of the Justices*, 152 Me. 449, 454, 132 A.2d 440, 442-443 (1957). But, for the Justices, the plain language of section 19 did not:

In our opinion the relocation of a utility facility is not to be construed as construction or reconstruction of a highway within the meaning of Art. IX, Sec. 19 of the Constitution.

We do not commonly consider that a power company in erecting a pole line or a water district in laying a pipe in a highway is constructing a highway. To an even lesser degree would we consider the construction of a pole line or a water pipe across country to be the construction or reconstruction of a highway, although the reason for the relocation was occasioned solely by changes in the highway.

The language of the Constitution should not, in our view, be extended beyond its plain and ordinary meaning.

Id. at 152 Me. at 455-456, 132 A2d 443 (emphasis added).

The same year, the Justices of the New Hampshire Supreme Court reached the opposite conclusion: that the comparable provision in the New Hampshire Constitution did permit funds to be “used exclusively for the construction, reconstruction and maintenance of public highways in this state” to be used to reimburse a utility company for relocations costs associated with moving a highway. *Opinion of the Justices*, 101 N.H. 527, 530-531 (1957).³

Federal Law Relevant to Ferry Service Funding

Prior to 1960, ferries were not eligible for highway funds under federal law. Between 1944, when Section 19 was passed, and 1960 federal highway funds could not be used for that purpose. In 1960, Congress amended the federal highway fund statute to permit the use of funds for certain ferry approaches.

Notwithstanding the provisions of section 301 of this title, the Secretary may permit Federal participation under this title in the *construction of a project constituting an approach to a ferry*, ... Such ferry may be either publicly or privately owned and operated, but the operating authority and the amount of fares charged for passage shall be under the control of a State agency or official, and all revenues derived from publicly owned or operated ferries shall be applied to payment of the cost of construction or acquisition thereof, including debt service, and to actual and necessary costs of operation, maintenance, repair, and replacement.

³ More recently, the New Hampshire Supreme Court held that, giving their constitutional provision the strict construction it required, use of these funds for a commuter rail project would be unconstitutional. *New Hampshire Motor Transport Association v. State of New Hampshire*, 846 A.2d 553 (N.H. 2004).

23 U.S.C. § 129(f) (1990) added by Pub. L. 86-657, §§ 4(b), 5(b), July 14, 1960, 74 Stat. 523, as 23 U.S.C. § 129(e). See now, 23 U.S.C. 129(b) (emphasis added).⁴

Ferry Service in Maine

In 1944, when Section 19 was approved by the voters, ferries were owned and operated by private parties or by towns. As far as we have been able to determine, the State did not own or operate any ferry terminal, ferry boat or ferry service at that time. Maine law provided for the licensing of persons to operate ferries by county commissioners. R.S. 1944, ch. 79, § 77. The law also provided that “[w]hen no person is found to keep them for the tolls, the towns in which they are established shall provide a person to be licensed to keep them, and shall pay the expenses, beyond the amount of tolls received, for maintaining them.” R.S. 1944, ch. 79, § 78. Maine’s Private and Special Laws also contain numerous acts chartering ferry companies or authorizing towns to establish ferries. P. & S. L. 1909, ch. 258 (Island Ferry Co., Casco Bay), P. & S. L. 1872, ch. 153 (People’s Ferry Co., Bath & Woolwich).

Even if ferries were considered to be within the definition of highways and bridges, Section 19 requires that Highway Fund money must be expended “under the direction and supervision of a state department having jurisdiction over such highways and bridges.” In 1944, the State Highway Department had no jurisdiction over, nor any duties respecting, ferries. *See*, R.S. 1944, ch. 20, State Highway Department. The Public Utilities Commission regulated and inspected “every corporation or person ...owning...operating ... any vessel regularly engaged in the transportation of persons or property for compensation....” R.S. 1944, ch. 40, § 15 (XII).

State Operated Ferry Service Begins

In 1957, the provision of modern ferry service to Penobscot Bay islands under state auspices was taken up by the Maine Legislature. L.D. 242, presented by Mr. Baird of North Haven, provided “[i]t shall be the duty of the State Highway Commission to operate a ferry line...*as part of the state highway system* between the mainland and the towns of North Haven, Vinalhaven, Islesboro and Swan’s Island” L.D. 242, § 1 (98th Legis. 1957) (emphasis added). The bill also provided for a bond issue of \$2,500,000 and a referendum for its ratification. The Highway Committee reported out L.D. 1555 substituting the Maine Port Authority for the State Highway Commission in section one and removing the reference to the state highway system. L.D. 1555 was passed. P. & S. L. 1957, ch. 190. The voters approved the bond issue in September, 1957. 1959 Me. Laws at 1118. (Proclamation of Governor Muskie, September 19, 1957).

⁴ In 1970, section 129 was amended to allow federal funds to be spent for the construction of ferry boats and further amended in 1991 to permit ferry terminal facilities. Pub.L. 91-605, §§ 133, 139; Pub.L. 102-240, § 1012(c)(3) & (4). In 1993, section 410 of the FY 1993 DOT Appropriations Act (Public Law 102-388) amended 23 U.S.C. 129(c) to expand eligible uses of Federal-aid highway funds to ferries on any route classified as a public road except an Interstate route, and to include passenger-only ferries as well. We do not address here the current federal law applicable to the eligibility of these ferry related costs.

In a January, 1958 special session, the Legislature passed a bill, L.D. 1640, clarifying administrative procedures for the new ferry service given the passage in September 1957 of the bond issue. P. & S.L. 1957, ch. 210. The summary statement accompanying the bill explained the change from the State Highway to the Maine Port Authority:

The original bill seeking to establish the ferry service to the four Penobscot Islands was written to be a function of the State Highway Commission. During the session the sponsors, *because of the constitutional limitations on the use of the highway funds*, changed the responsibility from the Highway Commission to the Maine Port Authority, *a general fund operation*.

L.D. 1640, Summary (98th Legis. 1958) (emphasis added).

Our earlier opinion contained little discussion of the legislative history of Article 9, § 19 (“Section 19”) of the Maine Constitution, or the state of the law in Maine in 1944 when it was adopted and in 1957 when the state began to operate a ferry service to certain Penobscot Bay islands. In researching these issues, we found legislative history demonstrating that in 1957, when that ferry service was created and put under the Maine Port Authority, the initial bill before the Legislature placed the proposed ferry service under the State Highway Commission. The final bill as enacted, however, replaced the Highway Commission with the Maine Port Authority. Both bills provided for a bond issue to purchase equipment and property for the ferry service. Both bills also provided that the ferry line be operated as a “toll system to retire the bonds issued ... and to provide for all the expenses and maintenance incurred.” In a later special session of the same Legislature held in January 1958, following ratification of the bond issue, L.D. 1640, a bill clarifying certain administrative and financial provisions for the ferry service contains a summary statement indicating that the change from the Highway Commission to the Port Authority was made because of Section 19. This subsequent legislative history may indicate that the members of the 98th Legislature believed that the ferry service could not constitutionally be placed within the Highway Commission, and we cannot predict with certainty what the outcome of a challenge would be since the courts in Maine have not addressed the issue.

The Maine State Ferry Service was made a part of the Department of Transportation in 1981. 23 M.R.S. § 4401 (enacted by P.L. 1981, c. 456, pt. A, § 88). The Ferry Service is responsible for operating ferry routes between the mainland and the towns of North Haven, Vinalhaven, Islesboro, Matinicus Isle and Swan's Island for the purpose of transporting vehicles, freight and passengers to and from these towns, and the department may also operate the ferry route to and from Frenchboro. The Department of Transportation has authority to adopt rules establishing tolls for the use of ferry lines by vehicles, freight and passengers, revenues from which are to be kept in a separate fund to be used for the operation and debt retirement of the ferry service. 23 M.R.S. § 4404.

On September 4, 1996, the Attorney General issued Op. 96-11, concluding that Highway Funds “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 not for passenger ferries which are not part of that system. Op. 96-11, p. 1. Subsequently, in 2005, the Legislature created a Marine Highway account in the Highway Fund, describing the purpose of the account as follows:

2. Purpose of account. The purpose of the account is to allow the Highway Fund to provide support to the Maine State Ferry Service that was previously provided by the General Fund *because ferries are an integral part of the highway system and carry motor vehicles and are the only method of vehicular transportation available to and from the islands.* The state support to the Marine Highway account may not exceed 50% of the budgeted revenues that support the operating cost of the Maine State Ferry Service.

23 M.R.S.A. § 4210-C(2).


Creation of the Marine Highway Account in 2005 demonstrates that the 122nd Legislature believed that it is constitutional to provide some degree of financial support to the Ferry Service from the Highway Fund. However, the Court has not had occasion to address Section 19 since 1973 and we cannot predict with certainty what its view of these matters would be today. The Maine Supreme Judicial Court has found that the language of Section 19 “should not, in our view, be extended beyond its plain and ordinary meaning.” *Opinion of the Justices*, 152 Me. 449, 456.

Conclusion

You have asked us to update Op. 96-11, in which the Attorney General concluded that the Highway Fund may be used for the support of ferries with a principal purpose of transporting motor vehicles without violating Section 19. The Law Court has made clear that Section 19 is to be strictly construed; moreover, subsequent to its adoption by the voters, legislators did not believe that Section 19 permitted Highway Funds to be used for the ferry service. On the other hand, those ferries that take cars from mainland highways to island highways are necessary for motor vehicles to operate on the islands and can reasonably be considered a direct benefit to those highway users. For these reasons, we continue to believe that spending Highway Funds on ferries with a principal purpose of transporting motor vehicles is defensible and not unconstitutional.

I hope this information is helpful.

Sincerely,



William Schneider
Attorney General