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July 5, 2007

Hon. Dennis Damon, Senate Chair
Hon. Boyd Marley, House Chair
Joint Standing Committee on Transportation
100 State House Station
Augusta, ME 04333-0100

Dear Senator Damon, Representative Marley, and Members of the Committee:

You have asked for my opinion as to the obligations of both the Committee on Transportation and the Legislature as a whole with respect to the allocation of Highway Funds to the State Police in the budget. Your question arises in the context of certain conclusions reached by the Office of Program Evaluation and Government Accountability ("OPEGA") in a report it issued in February 2007 entitled, "Highway Fund Eligibility at the Department of Public Safety—an Analysis of Select Departmental Activities" ("OPEGA Report").

This Office has previously opined that the Legislature has a responsibility to make a good faith, fact-based determination as to the uses of Highway Fund money that comply with the limitations of Article IX, section 19 of the Maine Constitution ("section 19") (*see* discussion in Part II, below). We have also opined that in making this determination, the Legislature was not bound to accept the factual findings of the State Auditor concerning the proper allocation of Highway Fund money to the State Police. Op. Me. Att'y Gen. 80-41. We believe that these conclusions are equally applicable in the instant circumstances. The Legislature is obligated to make a good faith effort to determine what portion of the State Police budget can be allocated to activities that come within the limitations of section 19, but in making that determination neither the Transportation Committee nor the Legislature is bound by the conclusions reached by the OPEGA Report. Since it is the Legislature that bears the responsibility for deciding how to

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allocate Highway Fund revenues, it is within the Legislature's power to decide whether the conclusions presented in the OPEGA Report provide a sufficient factual basis upon which to make that allocation.

We begin with a description of the history of section 19. We then outline the case law and prior opinions of the Attorney General that are relevant to your question.

I. The Highway Fund in the Maine Constitution, Article IX, Section 19

Article IX, section 19 of the Maine Constitution 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.

The Law Court discussed the history of section 19 in *Portland Pipe Line Corp. v. Environmental Improvement Commission,* 307 A.2d 1, 16-22 (Me. 1973). While section 19 was adopted by the people in 1943, the motor vehicle fuels tax ("gas tax") began in 1923.

> The plan of the "gasoline tax" was to focus on those who derived benefits as users of the highway system as the class subject to the tax. While the entire tax has never been subject to an exemption, that part imposed without exemption was rationalized as a minimum payment by otherwise exempt users for residual benefits derived from good roads. The minimum gasoline tax collected from otherwise exempt users has also been expended for purposes other than specified in Article IX, Section 19. It is apparent to this Court that the gasoline tax statutes are intended to result in taxation of highway users.

Id. at 19 (footnotes omitted).

The Court goes on to note that in 1934 Congress enacted a requirement that federal highway funds be withheld from any state that did not apply gasoline taxes and other taxes on motor vehicle owners and operators to highway purposes.[1] In response, an initiated bill "reserving for highway purposes the taxes derived from the 'tax imposed on internal combustion fuel'" was approved by the people at the general election held in November 1936. *Id.* at 21.

[1] This federal statute, subsequently codified at 23 U.S.C. § 126, was repealed in 1998.

This citizen initiated measure has remained in statute since then in very nearly its original language, and appears now at 23 M.R.S.A. § 1653 ("the Highway Fund statute").[2] A side-by-side comparison of the initiated law and the Highway Fund statute is set forth in Attachment A to this opinion. Since its inception, this statutory language has provided that the General Highway Fund is to be used first to satisfy obligations arising from state highway and bridge construction bonds, with the remainder to be "apportioned and expended solely" for: 1) "the cost of registering motor vehicles and licensing the operators thereof;" 2) "maintenance of the State highway police" (1936) or "State Police" (current version); 3) "administration of the office and duties" of the State Highway Commission (in 1936), and subsequently the Department of Transportation; 4) "administration of the tax on internal combustion engine fuel;" 5) "payment of rebates on said tax;" 6) "improvement, construction and maintenance of highways and bridges;" and 7) "snow guards or removal." 1937 Laws of Maine 737 and the Highway Fund statute.

Thus, since 1936, the statute has specifically authorized the use of the Highway Fund to support the State Police. The statute was not repealed or modified when Article IX, section 19 was adopted in 1943. It should be noted that the language of section 19 (quoted on page 2 above) is different from that of the Highway Fund statute (Attachment A hereto) in two respects. First, some of the permitted uses of the Highway Fund are described in a slightly different manner. For example, instead of the specific reference in the Highway Fund statute to the State Police, section 19 refers to "expense for state enforcement of traffic laws."

The other distinction between the language of section 19 and the Highway Fund statute is that in describing the revenues that are subject to its terms, section 19 does not include fines, forfeitures and costs accruing to the State for motor vehicle violations under 29-A M.R.S.A. § 2602 (Attachment B hereto).[3] As a result, these fines, forfeitures and costs are not subject to the spending restrictions of section 19, and the Legislature is constitutionally free to spend them for other purposes. It is our understanding that fines, forfeitures and penalties that go into the Highway Fund under the Highway Fund statute are treated the same as those revenues whose use is restricted by section 19. However, while these revenues are not treated differently for spending purposes than other revenues to the Highway Fund, fines, forfeitures and penalties are separately accounted for as a source of revenue to the Highway Fund.[4] In other words, the Legislature could identify these funds and choose to spend them differently if it wished.

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[2] In 1937, the Legislature amended the statute to allow these funds to be used temporarily for other than highway purposes pending collection of general revenues. Other than this, and updating the statutory cross-reference and name of the Department of Transportation, the statute remains the same as that approved by the voters in 1936.

[3] While revenues from this source are directed into the Highway Fund under the Highway Fund statute, section 2602 carves out portions of these same revenues and directs that they be deposited in the General Fund.

[4] *See, e.g.*, Highway Fund Revenue, Revenue Forecasting Committee Recommendations—March 2007, http://www.maine.gov/legis/ofpr/2007-Mar-HF.pdf.

II. Case Law and Opinions on Constitutional Uses of the Highway Fund

The principles governing the interpretation of a provision of the Constitution are discussed in the *Portland Pipe Line*[5] case as follows:

> The rules which guide this Court in determining the meaning of constitutional provisions are set forth in *Opinion of the Justices, 142 Me. 409, 60 A.2d 903 (1947).* There we said [,] '[t]he fundamental rule of construction of statutory and 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.' And further, '[i]t is proper in construing constitutional language to give decisive weight to the history of its development.'... The Supreme Judicial Court of Massachusetts, in construing a constitutional amendment, stated that the amendment ... 'was written to be understood by the voters to whom it was submitted for approval. It is to be interpreted in the sense most obvious to the common intelligence.'

Id., 307 A.2d at 18 (*quoting Opinion of the Justices,* 142 Me. 409, 60 A.2d 903 (1947), and *Yont v. Secretary of Commonwealth,* 275 Mass. 365, 366, 176 N.E. 1, 2 (1931).

The Justices of the Supreme Judicial Court have on two occasions offered their views about the constitutional limits on uses of the Highway Fund.[6] In the first of these opinions, the use of Highway Fund money to cover the cost of relocating utility facilities due to interstate construction was challenged. Five of the Justices concluded that although the state had the authority to pay for the cost of relocating such facilities if it chose, it could not constitutionally use Highway Funds for this purpose because the relocation could not be construed as construction or reconstruction of a highway within the meaning of Article IX, section 19. "The language of the Constitution should not, in our view, be extended beyond its plain and ordinary meaning." *Opinion of the Justices,* 152 Me. 449, 456, 132 A.2d 440 (1957). However, one Justice declined to find that section 19 prohibited use of Highway Funds for this purpose, finding that interpretation too narrow.

> I am satisfied that the limitation placed upon the expenditure of highway funds was designed and intended to prevent raids on those funds for purposes entirely unrelated to the highway program. In my view expenditures which may reasonably be considered incidental to the construction or reconstruction of highways may properly be met out of highway funds whenever the Legislature elects.

152 Me. at 456.

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[5] The issues on the merits in this case are not relevant to your question. The Court decided that a license fee on over-the-water transfers of petroleum products was not covered by section 19 and thus not subject to its revenue restrictions.

[6] "Advisory opinions provided by the individual justices pursuant to Article VI, section 3 are not binding decisions of the Supreme Judicial Court sitting as the Law Court. Such opinions are expressed 'without the benefit of full factual development, oral argument, or full briefing by all interested parties.'" *Opinion of the Justices,* 680 A.2d 444, 447 (Me. 1996), quoting *Opinion of the Justices,* 673 A.2d 693, 695 (Me. 1996). However, "such opinions provide guidance on present and future controversies." *Opinion of the Justices,* 2002 ME 169, ¶ 7, 815 A.2d 791,795.

Considering the same issue in the same year, the Justices of the New Hampshire Supreme Court took the position that drew the support of only one Maine Justice, concluding that the cost of relocating utility facilities required because of the relocation of a highway could appropriately be paid out of revenues governed by a constitutional provision worded in a manner very similar to Maine's. *Opinion of the Justices,* 132 A.2d 613 (N.H. 1957). These disparate results highlight the difficulty in construing section 19: in the absence of definitions of the prescribed Highway Fund uses, there is room for reasonable interpretations to differ on issues such as whether reasonably incidental expenses can be included.[7]

We have found no Maine cases that specifically address how to determine the appropriate extent of Highway Fund support for a program that does not fall wholly within the purposes specified in section 19. The Legislature has historically demonstrated its judgment on this issue through appropriations to such programs. With respect to funding the State Police, the OPEGA Report contains data reflecting Highway Fund funding levels of the major appropriation directed to the State Police that are predominantly in the range from 74-90% for the period from 1946 to 1997, with dips to 50% for 1958-1961 and the year 1990. Since 1998, Highway Fund support for this same appropriation has ranged from 60-65%. *See* Table 5, State Police App. Program (0291) Ratio 1946-2006, OPEGA Report at 13.

The Justices of the New Hampshire Supreme Court have addressed the funding the State Police using that state's Highway Trust Fund in this way:

> In our opinion the express language of pt. II, art. 6-a 'including the supervision of traffic thereon' authorizes the expenditure of such funds for the enforcement of traffic laws and the patrolling of the highways. This is consistent with the constitutional convention history of the article. *See* Jour. N.H. Const. Conv. 148-49 (May 25, 1938). We note that a substantial part of the budget of the division of state police for the communication and traffic bureaus is and has been funded from revenues drawn from the highway trust fund. Such funding does not violate pt. II, art. 6-a provided the amount of funding from highway trust funds is in the proportion that the work of a particular bureau relates to the supervision of traffic, including the enforcement of traffic laws.

Opinion of the Justices, 371 A.2d 1189, 1190-1 (N.H. 1977).[8]

As discussed above, since its original approval by the voters, the Highway Fund statute has identified the State Police as an appropriate recipient of Highway Fund money to support its operations. The question of how to properly allocate the State Police budget between the Highway Fund and other funding sources has been addressed by this Office in a prior opinion

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[7] There is one other opinion concerning section 19, but it sheds no light on the issue we address here. In *Opinion of the Justices,* 157 Me. 104, 170 A.2d 647 (1961), the Justices agreed that a resolve to reimburse an auto agency and repair shop for loss of business during bridge and road construction could not be funded by Highway Fund money. This conclusion is based on the fact that the contemplated award would not fall within the language "payment of debts and liabilities incurred in construction" since it would constitute an outright grant.

[8] The Court also commented on a statutory provision similar to Maine's requiring that motor vehicle fines be paid into the Highway Trust Fund, saying: "Because these funds are not revenues from the sources set forth in pt. II, art. 6-a, N.H. Constitution, they do not in our opinion fall within the restrictions of that article." *Id.,* at 1191.

that also considers the question of whether the Legislature is bound by findings of fact made by the State Auditor concerning the portion of State Police activities that are appropriate to support with Highway Funds.[9] The Legislature had provided:

> The Department of Audit shall evaluate and determine the portion of State Police activities related to highway transportation and that portion related to other responsibilities. The purpose is to consider on a factual basis that portion of the State Police budget which should be supported from the Highway Fund and General Fund respectively.

P.L. 1977, c. 423, § 5.

The Auditor provided his conclusions by letter stating that the existing State Police funding ratio of 75% Highway Fund and 25% General Fund should be changed to 65% and 35%, respectively, based on a manpower study of the State Police. The then chairs of the Transportation Committee then asked the Attorney General whether the Legislature was required to make this adjustment.[10]

> The essence of the question posed in your letter, we think, is whether the Committee on Transportation is constitutionally bound by the State Auditor's determination. In our opinion it is not. It is clear that the Legislature (not the State Auditor) has the responsibility of how to allocate revenues from the General Highway Fund. 23 M.R.S.A. § 1651. In our opinion the 108th Legislature did not delegate this responsibility to the State Auditor. Rather, we interpret the 1977 law as directing the State Auditor to assist the Legislature to better enable the Legislature to make a determination.

Op. Me. Att'y Gen. 80-41.

Having concluded that the Legislature would not have been bound by the State Auditor's determinations even if it had intended to delegate this responsibility, the opinion describes the Legislature's responsibility as follows:

> In the final analysis, then, it is the task of the 109th Legislature to determine whether adjustments are needed to the present funding ratios for the State Police in order to comply with Section 19 of Article IX of the Maine Constitution. If the Legislature determines in good faith that the State Auditor's judgment concerning the allocation of the expenses of the State Police is not accurate and that the existing ratio continues to be appropriate, then it is fully within the power of the Legislature to make that determination. If, on the other hand, the Legislature determines that the State Auditor's evaluation of the funding ratios is accurate, then the Legislature, in conformity with Article IX, Section 19, should change the existing funding ratios.

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[9] These opinions, provided to the OPEGA staff, are Appendix A to the OPEGA Report.

[10] These facts are recited in the opinion. We have not been able to locate the Auditor's letter.

Addressing the same question in a subsequent opinion, the Attorney General stated:

> Put most simply, a determination of the percentage of the State Police budget actually utilized for traffic enforcement is a question of fact which cannot be resolved in a legal opinion. In our view, the Constitution contemplates that the Legislature will make a good faith resolution of this question and that the appropriations from the Highway Fund will be in accordance with its factual conclusions. In short, insuring compliance with art. IX, § 19 of the Maine Constitution is in the first instance the responsibility of the Legislature.

Op. Me. Att'y Gen. 81-16.

As with the State Auditor's report described in the 1980 Attorney General's opinion, the OPEGA Report is the result of a study requested by the Legislature's Transportation Committee. It is based on available information, and utilizes a detailed analytical framework that incorporates certain specified assumptions. As we pointed out in our 1980 opinion, assessment of the facts and conclusions reached in such a report is a fact-based matter that is within the province of the Legislature, and cannot be made in a legal opinion. This is also the approach taken by the Justices of the New Hampshire Supreme Court when confronted with a challenge to the proper allocation of costs where funds dedicated to highways were involved.

There are numerous factual issues that could be deemed relevant to the ultimate conclusion of how much Highway Fund support can be given to the programs of the State Police, and how much reliance to place on OPEGA's conclusions. The approach taken by OPEGA was to select three specific appropriation programs that fund portions of the Department of Public Safety, focusing primarily on expenditures and activities in state fiscal year 2005. OPEGA Report at 5-6. With respect to the State Police, the appropriation that OPEGA selected accounts for 79% of total expenditures. *Id.*, at 13. State Police activities supported by federal funds were not evaluated for Highway Fund eligibility. *Id.*, at 10. Other valid approaches that might produce different results for purposes of comparison would include reviewing all State Police expenditures and/or including more years of data.

Perhaps more importantly, OPEGA discovered that it could not carry out its intention of undertaking a traditional, activity-based cost allocation analysis due to the absence of 1) a clear definition of what constitutes Highway Fund eligibility and 2) State Police activity data that either is or can be closely linked with financial data. *Id.*, at 2, 6-10. As a result, OPEGA qualifies its analysis at the outset of its report by explaining that it is unable to reach any definitive conclusion in the absence of these elements. *Id.*, at 2.

Of these two issues, the lack of a specific definition of activities eligible for Highway Fund support may be the less problematic from a legal perspective. As a practical matter, the Legislature's budget enactments reflect its determination (whether explicit or implicit) of what activities are properly supported by the Highway Fund. Moreover, while adopting a definition of eligible activities would be a useful policymaking exercise, any definition that might be provided by the Legislature would not bind its successors to the same interpretation. In contrast, the lack of reliable activity data presents a significant obstacle to any fact-based assessment. *See* OPEGA Report at 8-10.

It is our understanding that the State Police plan to collect more detailed data for the Committee's consideration in the future. As we have previously opined, the Legislature has a responsibility to make a good faith, fact-based determination as to the uses of Highway Fund money that comply with the limitations of Article IX, section 19 of the Maine Constitution. It is the prerogative of the Legislature to decide what information it requires to undertake that analysis, and to make the policy judgments necessary to determine what activities are appropriate to charge against the Highway Fund. In our opinion, the courts will likely defer to the Legislature's judgment on these factual issues as long as there is a reasonable basis for that judgment.

I hope this information is helpful.

Sincerely,

G. STEVEN ROWE
Attorney General

COMPARISON OF 1937 INITIATED LAW AND 2007 STATUTE GOVERNING USE OF HIGHWAY FUND MONEY

Initiative Approved by the Voters, 1937 Laws of Maine 736	23 M.R.S.A. § 1653
All revenues received by the State from the registration of motor vehicles, and the licensing of operators thereof, from the tax imposed on internal combustion engine fuel, from fines, forfeitures and costs accruing to the State under Section 118 of Chapter 29 of the Revised Statutes, as amended, and from permits granted by the State Highway Commission to open highways, shall be segregated, allocated to and become a part of the general highway fund created and existing by Chapter 251 of the Public Laws of 1931 and Chapter 175 of the Public Laws of 1933; and after payment and deduction from such fund of such sums as are necessary to meet all provisions of bond issues for State highway and bridge construction, the remainder of such fund shall be apportioned and expended solely for the cost of registering motor vehicles and licensing the operators thereof, for maintenance of the State highway police, for administration of the office and duties of the State Highway Commission, for administration of the tax on internal combustion engine fuel and payment of rebates on said tax, and for the improvement, construction and maintenance of highways and bridges, and for snow guards or removal as provided by statute. Neither the general highway fund, nor any fund derived from direct taxation imposed for highway construction, bridge construction, or the improvement and maintenance thereof, shall be diverted or expended, either temporarily or permanently, for any other purpose than set forth in this act, except for the establishment f an aeronautical fund as provided by Section 89A of Chapter 12 of the Revised Statutes.	**§1653. Limitation on use of fund** All revenue received by the State from the registration of motor vehicles and the licensing of operators thereof, from the tax imposed on internal combustion engine fuel, from fines, forfeitures and costs accruing to the State under Title 29-A, section 2602, and from permits granted by the department to open highways must be segregated, allocated to and become part of the General Highway Fund created and existing by statute, and after payment and deduction from such fund of such sums as are necessary to meet all provisions of bond issues for state highway and bridge construction, the remainder of such fund must be apportioned and expended solely: 1. **Registration and licensing.** For the cost of registering motor vehicles and licensing the operators thereof; 2. **State police.** For maintenance of the State Police; 3. **Administration of office.** For administration of the office and duties of the department; 4. **Administration of fuel tax.** For administration of the tax on internal combustion engine fuel; 5. **Rebates.** For payment of rebates on said tax; 6. **Highways and bridges.** For the improvement, construction and maintenance of highways and bridges; 7. **Snow guards.** For snow guards or removal as provided by statute. Neither the General Highway Fund, nor any fund derived from direct taxation imposed for highway construction, bridge construction or the improvement and maintenance thereof, shall be diverted or expended, permanently, for any other purpose than set forth in this section, except that funds so segregated may be used for other appropriations but only those for which anticipated income has not been received and for which financial provision has been made by the Legislature and is forthcoming. The Treasurer of State is directed and authorized to reimburse the General Highway Fund by a deposit of the funds received from such aforesaid appropriations, the receipt of which has been anticipated, to the extent of the amounts temporarily diverted therefrom. Such deposits shall be made as soon as such revenues are collected.

Title 29-A, §2602, Jurisdiction

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§2602. Jurisdiction

1. **Traffic infractions.** The District Court has original and exclusive jurisdiction over prosecutions for traffic infractions.

[1993, c. 683, Pt. A, §2 (new); Pt. B, §5 (aff).]

2. **Other violations.** The District Court has original and concurrent jurisdiction with the Superior Court over prosecutions for other violations of this Title.

[1993, c. 683, Pt. A, §2 (new); Pt. B, §5 (aff).]

3. **Class C or greater.** For Class C or greater crimes, the District Court jurisdiction is subject to Title 4, section 165 and Title 17-A, section 9.

[1999, c. 731, Pt. ZZZ, §38 (amd); §42 (aff).]

4. **Fines.** Except as otherwise provided in this Title, fines and forfeitures collected under this Title accrue to the General Fund, except that:

A. Six percent of fines and forfeitures collected for all traffic infractions, including fines and forfeitures collected for traffic infractions under section 561-A, accrues to the Law Enforcement Agency Reimbursement Fund established in Title 4, section 173, subsection 4-B. This paragraph does not apply to sections 525, 1767 and 2363; [2001, c. 565, Pt. F, §3 (amd).]

B. Of the fines and forfeitures collected for traffic infractions under sections 511, 2354, 2356, 2360, 2380, 2387 and 2388, 7% accrues to the General Fund, 6% accrues to the Law Enforcement Agency Reimbursement Fund and the balance accrues to the General Highway Fund; and [2003, c. 498, §6 (amd); §12 (aff).]

C. Of the fines and forfeitures collected for violations other than traffic infractions under sections 511, 2354, 2356, 2360, 2380, 2387 and 2388, only $5 or 13%, whichever is greater, accrues to the General Fund and the balance accrues to the Highway Fund. [2003, c. 498, §6 (amd); §12 (aff).]

[2003, c. 498, §6 (amd); §12 (aff).]

PL 1993, Ch. 683, §A2 (NEW).
PL 1993, Ch. 683, §B5 (AFF).
PL 1997, Ch. 750, §A3 (AMD).
PL 1999, Ch. 731, §ZZZ38 (AMD).
PL 1999, Ch. 731, §ZZZ42 (AFF).
PL 2001, Ch. 565, §F3 (AMD).
PL 2003, Ch. 498, §12 (AFF).
PL 2003, Ch. 498, §6 (AMD).