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January 24, 2017

The Honorable Roger Katz
Maine State Senate
3 State House Station
Augusta, ME 04333-0003

The Honorable Aaron Frey
Maine State House of Representatives
2 State House Station
Augusta, ME 04333-0002

RE: Riverview – Proposed Secure Forensic Facility

Dear Senator Katz and Representative Frey:

We cannot comment on the specifics of a proposal that is not clearly defined in writing, but we offer these general comments, not an official opinion, in response to your questions.

We were made aware of a proposal to build a secure forensic facility (more recently referred to as a “step-down” facility) on the grounds of the Riverview campus. We counseled the Administration that Title 5, section 304 expressly requires Legislative Council approval for the construction of a new building at that location since it is within the “Capitol Area” as defined by statute. *See* 1 M.R.S. § 814 and 5 M.R.S. § 304.

Now we are informed that the Administration is proposing to build this facility in another location, perhaps on state-owned property in Bangor.

Under the Maine Constitution, executive agencies have only that authority which is given to them by the Legislature. *See, e.g., Sawyer v. Gilmore*, 109 Me. 169, 180 (1912):

The authority of the executive and judicial departments is a grant. These departments can exercise only the powers enumerated in and conferred upon them by the Constitution and such as are necessarily implied therefrom. The powers of the Legislature in matters of legislation, broadly speaking, are absolute, except as restricted and limited by the Constitution. As to the executive and judiciary, the Constitution measures the extent of their authority, as to the Legislature it measures the limitations upon its authority.

See also Valente v. Board of Environmental Protection, 461 A.2d 716, 718 (Me. 1983) (“Administrative agencies are creatures of statute, and can only have such powers as those expressly conferred upon them by the Legislature, or such as arise therefrom by necessary implication to allow carrying out the powers accorded to them.”).

We are unaware of any statute giving the Commissioner of Health and Human Services or the Bureau of General Services authority to build a secure forensic facility on state owned property in Augusta or Bangor.¹

Legislative authorization for new construction is typically granted in the form of a budget appropriation, bond issue or legislation approving a Maine Governmental Facilities Authority project. Examples include: P.L. 1999, ch. 731, part NNN (authorizing construction of the Riverview Psychiatric Center); P.L. 1997, ch. 788, § 4 (authorizing construction of the State House connector tunnel and significant renovations to other state buildings); and P.L. 1985, ch. 122, §§ 1 & 6 (bond issue for construction of activity building on AMHI campus). In these instances, the Legislature authorized construction and funding in the same act.

DHHS has indicated that it already has the funds necessary to construct this forensic facility, apparently from carry over funds in SAMHS and/or consent decree appropriations. We do not know the details and cannot comment on funding sources, except to say that even if DHHS has sufficient funds within existing appropriations, the agency is not exempt from obtaining legislative authority to construct a new building.

The statutes governing the budget and appropriations process require capital expenditures to be specifically identified in agencies’ budget submissions and in legislative appropriations. *See* 5 M.R.S. § 1581 (“appropriations for the acquisition of property” are to be detailed in appropriations bill) and § 1663 (budget “shall set forth all expenditures for capital projects to be undertaken and executed during each fiscal year of the biennium”). Title 5, section 1587 expressly prohibits agencies from entering into “a lease-purchase or similar agreement whereby the State would become the ultimate owner of buildings ... without specific prior approval of the Legislature through the usual budget procedure.” For an example of such approval, see P.L. 1989, ch. 921, § E-2 (authorizing lease-purchase agreement for new Division of Motor Vehicles building). These provisions underscore the Legislature’s role in approving the construction or

¹ Certain other agencies do have statutory authority to acquire and/or construct facilities. *E.g.*, 12 M.R.S. §§ 1818, 1825, 1832, 1846 & 1894 (Bureau of Parks and Lands authorized to construct public campsites, recreation facilities and boat launches); 12 M.R.S. § 8003(3)(M-1) (Bureau of Forestry authorized to purchase or construct structures or purchase land on which to build structures); 12 M.R.S. § 10109 (Commissioner of Inland Fisheries and Wildlife may purchase land and erect buildings for operation of state game farms); 23 M.R.S. § 4210(3) (Department of Transportation may use Transportation Facilities Fund monies for construction of buildings, including permanent storage facilities, garages and field office buildings); 37-B M.R.S. § 302 (“Adjutant General may, with the approval of the Governor, erect armories and other necessary buildings”).

acquisition of any capital asset that is going to be built or purchased and maintained with state funds.

In response to your first question, therefore, we believe that legislative authorization to construct the forensic facility is required, regardless of where it is built. If it is located next to the Riverview Psychiatric Center in the Capitol Area, Title 5, section 304 requires approval by the Legislative Council acting on behalf of the Legislature; outside that geographic area, approval of the full Legislature would appear to be required.

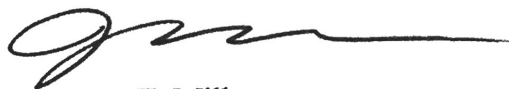
In response to your second question relating to programming at the facility, the Commissioner of DHHS has broad authority under existing statutes to care for the mentally ill who have been committed to her custody pursuant to a court order after being adjudicated as not criminally responsible by reason of insanity ("NCR"). See 15 M.R.S. § 103. See also 22-A M.R.S. §§ 203(4) & 207(1) (authority to contract with private agencies to deliver programs and services). The proposed "step-down" or secure forensic facility is apparently designed to provide an intermediate level of care to NCR patients – less intensive than hospital-level care but more restrictive than a community residence – but providing such a "program" does not appear to be outside the scope of DHHS's existing statutory authority under the legal principles outlined above.

In response to your third question, the answer is that there are no legal impediments to the Legislature passing a bill to require additional oversight over the operation of this forensic facility before the building is occupied. See Me. Const. art. IV, pt. 3, § 1; *League of Women Voters v. Secretary of State*, 683 A.2d 769, 771 (Me. 1996) (Legislature has plenary authority to enact laws unless expressly, or by necessary implication, prohibited by the Constitution of Maine or the United States).

We trust this letter adequately responds to your inquiry.

Please let us know if we can be of any further assistance in this matter.

Yours Very Truly,



Janet T. Mills
Attorney General