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Honorable Minnette H. Cummings
Chairman, Committee on Public Utilities
State House
Augusta, Maine 04330

Dear Senator Cummings:

This is in response to your request, on behalf of your Committee, for my opinion as to the constitutionality of L.D. 2132, which seeks, by Legislative Resolve, to authorize the Town of Bingham to remove sand bars and other obstructions at the confluence of Austin Stream and the Kennebec River and "upstream" therefrom. I understand that the reason why this legislation is being sought is the existence of 12 M.R.S.A. § 2205, which prohibits the dredging of such a stream without the permission of the Commissioner of Inland Fisheries and Game. I further understand that the Town of Bingham, on behalf of certain of its residents who seek to protect their property against flooding, applied to the Commissioner for such permission, and was granted a permit but with restrictions unacceptable to it. The purpose of this bill, therefore, is to rectify the situation from the Town's point of view, by creating an exemption for it from the application of 12 M.R.S.A. § 2205, thereby allowing it to accomplish the necessary dredging. In view of these facts, it is my opinion that the bill would present significant constitutional problems because legislation granting such special exemptions from the general law is disfavored under the Constitutions of both the United States and Maine.

LD 2132

1. Federal Constitution

Section 1 of the Fourteenth Amendment to the United States Constitution provides that "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." While it

has been long established that this clause does not invalidate all special legislation per se, it has been equally understood that it does require that "all persons shall be treated alike under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed." Leavitt v. Canadian Pacific Railway Co., 90 Me. 153, 159 (1897), citing Missouri Pacific Railway Co. v. Mackey, 127 U.S. 205 (1888). Consequently, any piece of special legislation which grants an exemption from a piece of general legislation to a specific person or narrow group of persons will be carefully examined by any court in judging its constitutionality. The Supreme Judicial Court has manifested such close scrutiny on several occasions, the most recent being, Look v. State, 267 A. 2d 907 (Me. 1970), in which it invalidated a legislative resolve which sought to exempt a canning company and its proprietor from a general requirement of law that a landowner must file suit for damages to his property caused by the altering of a state highway within six months of the time of the injury. In so holding, the Court quoted the famous words of the State's first Chief Justice, Prentiss Mellen, in the case of Lewis v. Webb, 3 Me. 326, 336 (1825), written before the enactment of the Fourteenth Amendment, but quoted with approval by the Court several times thereafter:

> "On principle, then, it can never be within the bounds of legitimate legislation to enact a special law, or pass a resolve dispensing with the general law, in a particular case, and granting a privilege and indulgence to one man, by way of exemption from the operation and effect of such general law, leaving all other persons under its operation."

Similarly, the Court has invalidated a legislative resolve seeking to exempt a specific person from meeting the qualifications required for taking a pharmacist's examination, Maine Pharmaceutical Ass'n v. Board of Commissioners, 245 A.2d, 271 (Me. 1968), and a municipal ordinance exempting owners of established filling stations from the operation of the ordinance, which required that all storage of explosives in the city be further than a prescribed distance from any school house, Boothby v. City of Westbrook, 138 Me. 117 (1941). In the latter case, the Court, in finding no rational basis for exempting existing but not prospective filling stations, said:

> "The inhibition of the Fourteenth Amendment that no person should be deprived of the equal protection of the law is designed to prevent any person or class of persons being singled out as a special subject for discriminating or favoring legislation." Id. at 123 (citations omitted).

Only in cases when the Legislature has created a statutory exemption for a genuine class of persons, which discrimination has a rational basis reasonably related to the purposes of the statute, has the Court found no violation of the Equal Protection Clause. Thus, in State v. Leavitt, 105 Me. 76 (1909), a Special Law prohibiting anyone from digging clams in the Town of Scarboro during the summer months except a class of persons consisting of the inhabitants, residents and hotel keepers of the town was sustained; and in State v. King, 135 Me. 5 (1936) a statute subjecting the class of contract carriers, but not the class of common carriers, to public regulation was upheld. Even in the latter case, however, the Court took pains to remark, with reference to the Equal Protection Clause,

> "To present law-made favoritism and to supply full measure of evenly apportioned liberty to the people of this nation was the purpose of this amendment." Id. at 19-20.

In the case at hand, the proposed legislation seeks to exempt a town from the operation of a general law. On the surface, this would appear to be rather close to the situation in Leavitt, supra, where the Legislature sought to protect the interest of citizens of a town in the town's clam flats. But there are significant differences. In the first place, no general law existed in Leavitt; the prohibition from which the exemption was granted was not against clam digging in the State of Maine, but merely in the town of Scarboro. In the present case, a general law does exist, however, (12 M.R.S.A. § 2205), and special exemptions from general laws are more constitutionally suspect than pure special legislation. Secondly, the proposed resolve does not create a class; it seeks to exempt only one entity, the Town of Bingham. This again is different from the situation in Leavitt where a class of persons (the inhabitants, residents and hotel keepers of the town) was created. Nor

is it likely that a Court could save the situation by looking past the form of the legislation to its substance. Even if the resolve were read to benefit not the town but a distinct class of persons (the riparian owners of Bingham), it is not clear whether such a class would be considered broad enough to be sustained. In Leavitt, the class consisted of all the inhabitants of Scarboro (it explicitly included the town's hotel keepers, but it is not clear whether the Court would have ruled the same way if only the hotel keepers had been involved). The class here is much narrower than that, and might, therefore, raise substantial problems, not the least of which might be that the Court might never reach the question at all if it refused to go beyond the explicit terms of the resolve.

In the early history of the United States, it was common practice in many states for the legislature to engage in the wholesale enactment of laws for the advancement of personal rather than public interests. To counteract this trend, many state legislatures, in the latter part of the nineteenth century, enacted prohibitions against such special legislation. These prohibitions varied from outright bans to requirements that all such legislation be permitted to be enacted only when there was no general law applicable. Am. Jr., Statutes, §§ 49-50. In Maine, where the abuse of the special legislation device had not been particularly acute, the approach which the legislature adopted in 1875 was that manifested by the language of the amendment; future legislatures were encouraged to do as much by general legislation, and as little by special legislation, as possible. Notwithstanding this somewhat mild approach, the purpose of the amendment was clear. Commenting upon it in his Annual Message of 1876, Governor Selden Connor remarked:

> "The title of 'Special and Private Laws', which includes so large a portion of the laws of former Legislatures, is an obnoxious one, conveying suggestions of privilege, favoritism and monopoly; though happily these evils have not in fact, stained the character of our legislation, they should not be suffered to have, even in the form of our laws, any grounds of suspicion that can be removed. Other weighty objections to special laws for private benefit are, that they are obtained at public expense, and in their passage distract the attention of legislators from matters of public interest. The opportunity is now afforded, and the duty enjoined upon you, by the amendment, to restrict the necessity for such laws to the narrowest possible limits. An analysis and

> classification of the private and special laws upon the statute books, will inform you of the objects for which it is desirable to provide by general laws, if practicable. Annual Message of Governor Connor, Resolves of the State of Maine, 1875-77, 145, 165. (These views have been quoted as authoritative on the question of the intent of the amendment by the Supreme Judicial Court. Opinion of the Justices, 146 Me. 316, 322 [1951]).

Although not widely known today, the amendment is hardly a dead letter, the Supreme Judicial Court having made use of it as an alternative ground for invalidating special legislation in its two most recent forays into the area; Look v. State, supra at 910; Maine Pharmaceutical Ass'n v. Board of Commissioners, supra at 273. Its existence increases the concern with which any legislation which appears special rather than general in outlook must be viewed.

In view of all the foregoing, I must express serious doubt as to the constitutionality of L.D. 2132. Please let me know if I can be of any further assistance on this matter.

Sincerely yours,

JON A. LUND
Attorney General

JAL/jwp

cc: Honorable Elden H. Shute, Jr.