# STATE OF MAINE

Inter-Departmental Memorandum Date May 20, 1977

To Markham L. Gartley, Sec. of State Dept. State

From Joseph E. Brennan, Attorney General Dept. Attorney General

Subject Uniform Property Tax: Competing Legislation

This responds to your opinion request concerning the initiated measure to repeal the uniform property tax.

BACKGROUND:

Me. Const. Art. IV, Part 3, Section 18 establishes the procedure for "direct initiative of legislation." Section 18 provides that unless the Legislature enacts the initiated measure without change, the measure shall "be submitted to the electors together with any amended form, substitute or recommendation of the Legislature, and in such a manner that the people can choose between the competing measures or reject both."

An initiated bill to repeal the uniform property tax has been presented to the current session of the Legislature. See Opinion of the Justices, 370 A.2d 654 (Me., 1977). Section 3 of the initiated bill seeks repeal of 36 M.R.S.A. § 451-2 (Supp., 1976). Section 451-2 establishes the mill rate of the uniform property tax at 13 mills for the year ending June 30, 1977 and at "12.5 mills thereafter."

P.L. 1977, c. 98, establishes the school funding level for the year beginning July 1, 1977, and terminating June 30, 1978; sets the mill rate for the uniform property tax for that same period; and provides for inventory tax reimbursements. Section 8 of c. 98 enacts a new section, 36 M.R.S.A. § 451-A, which sets the mill rate of the uniform property tax at "11.50 mills for the period beginning July 1, 1977 and ending June 30, 1978." None of the other provisions of c. 98 even arguably compete with any of the provisions of the initiated bill.

P.L. 1977, c. 109, repeals the language in 36 M.R.S.A. § 451-2 which establishes the mill rate of the uniform property tax at 12.5 mills for the years after June 30, 1977, and requires the Legislature to set the rate in accordance with 20 M.R.S.A. § 3747. Section 3747 requires the Legislature to annually establish the uniform property tax rate at a level such that revenues will not "exceed 50% of the basic education allocation."

The Senate, in its request for an advisory opinion concerning the initiated bill, noted that "a popular vote on [the] initiated legislation. . . . will not occur until after July 1, 1977." 370 A.2d 654, 656 (Me., 1977). It will be assumed in this opinion that the initiated bill will not be enacted by the Legislature or passed by the electorate so that the bill could be effective prior to July 1, 1977.

QUESTION I:

Is P.L. 1977, c. 98 [hereinafter cited as c. 98] a competing measure with the initiated bill to repeal the uniform property tax, such that c. 98 will have to be submitted to the electorate at the referendum on the initiated bill?

ANSWER I:

C. 98 is not a competing measure with the initiated bill to repeal the uniform property tax because the two measure will operate in different time periods.

REASONING I:

Section 8 of c. 98 is not in competition with the initiated bill, because the force and impact of § 8 will terminate before the initiated bill becomes effective. In a recent Opinion of the Justices, the Supreme Judicial Court concluded that, if the initiated bill is either enacted by the Legislature or passed by the electorate so that the bill is effective after July 1, 1977, then the repeal of the uniform property tax will not be effective until after July 1, 1978. Opinion of the Justices, 370 A.2d 654, 668 (Me., 1977). See also Opinion of the Attorney General dated September 21, 1976 [attached as Appendix A]. In our September 21, 1976 opinion, this office also concluded that a change in the mill rate of the uniform property tax for the period beginning July 1, 1977, and ending June 30, 1978, would not constitute a competing measure with an initiated bill that would not repeal the uniform property tax until July 1, 1978. "[S]ince the full impact of the change [in the mill rate] would occur prior to the date on which the initiative measure would take effect," the provisions of the two bills would not be in competition.

Section 451-A is drafted so as to be effective only for the one-year period beginning July 1, 1977, and ending June 30, 1978. The initiated bill, however, if enacted or passed so it is effective after July 1, 1977, will not repeal the uniform property tax until July 1, 1978, at which time § 451-2, and not § 451-A, will govern the mill rate of the uniform property tax. Section 451-A and the initiated bill thus will operate within different time periods. Therefore, c. 98 will not be in competition with the initiated bill, and thus will not have to be submitted to the electorate at the referendum on the initiated bill.

QUESTION II:

Is P.L. 1977, c. 109 [hereinafter cited as c. 109] a competing measure with the initiated bill to repeal the uniform property tax, such that c. 109 will have to be submitted to the electorate at the referendum on the initiated bill?

ANSWER II:

C. 109 is a competing measure with the initiated bill such that c. 109 will have to be submitted to the electorate at the referendum on the initiated bill.

REASONING II:

Me. Const. Art. IV, Part 3, Section 18 provides that initiated measures, unless enacted without change by the Legislature, must be submitted to the electorate along with any competing bill: amended form, substitute or recommendation. In an Opinion dated September 21, 1976 [attached as Appendix A], this office concluded that legislation changing the mill rate of the uniform property tax would constitute an amended form of the initiated bill seeking repeal of the uniform property tax. Although c. 109 does not establish a tax rate, it repeals the 12.5 rate applicable after June 30, 1977, and provides guidelines for legislative determination of future rates. C. 109 alters the mill rate of the uniform property tax, and, as was concluded in the Attorney General Opinion referred to above, constitutes an amended form of the initiated bill. C. 109, thus, must be submitted to the electorate as a competing measure with the initiated bill.

In a recent Opinion of the Justices, the Supreme Judicial Court dealt with the impact on the pending initiative measure of certain legislative documents amending the mill rate of the uniform property tax.[1/] 370 A.2d 654 (Me., 1977). The Court concluded that the pendency of an initiative petition does not stay the immediate effectiveness of emergency legislation. Emergency legislation amending the mill rate of the uniform property tax, such as c. 109, will "become effective, as written, when enacted." 370 A.2d 654 at 669.[2/] Although the

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1/ The legislative documents included the bill (L.D. 91) which was subsequently enacted as c. 109.

2/ As was discussed in an Opinion of the Attorney General dated March 24, 1977, the court's conclusion on the effective date of the legislative documents "apparently significantly qualified its decision in [Farris ex rel Dorsky v. Goss, 143 Me. 227 (1948),] without, however, mentioning that earlier decision."

court did not discuss whether any of the legislative documents in controversy were competing measures, the court's conclusion on the effective date of emergency legislation does not conflict with the constitutional provision concerning competing measures. Me. Const. Article IV, Part 3, Section 18. Thus emergency legislation which competes with an initiated measure must be submitted to the electorate at the referendum on the initiated measure. At the referendum, the electorate will vote whether to approve or repeal the competing legislation (c. 109) and whether to affirm or reject the initiated measure (the uniform property tax repeal).3/

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3/ The court's recent Opinion could be interpreted to mean that emergency legislation can never compete with an initiated bill. However, such an interpretation would conflict with the language of Me. Const. Article IV, Part 3, Section 18, and interfere with the electorate's right to enact legislation. If the Legislature can alter initiated legislation prior to referendum, then the Legislature, and not the electorate, will control the content of initiated legislation.

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STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
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September 21, 1976

Honorable Bonnie D. Post
Owls Head
Maine 04841

Re: Initiative Petition - Repeal of Uniform Property Tax.

Dear Representative Post:

This responds to your opinion request of September 2, 1976.

FACTS:

A direct initiative petition containing a bill entitled "An Act to Repeal the State Property Tax" is presently being circulated under the provisions of Article IV, Part 3, § 18 of the Maine Constitution. Section 3 of this bill would repeal § 451(2) as enacted by P.L. 1975, c. 660, § 5. Section 451(2) establishes the uniform property tax rate at "13 mills for the period beginning July 1, 1976, and ending June 30, 1977, and 12.5 mills thereafter." Three questions are asked concerning the effect of the petition.

QUESTION ONE:

If the bill contained in the petition is presented to the Regular Session of the 108th Legislature as the result of this initiative, is the Legislature in that session prohibited by the Constitution from changing the mill rate of the uniform property tax in a separate law to be effective prior to a referendum on the initiated bill?

ANSWER ONE:

If the bill contained in the petition is presented to the Regular Session of the 108th Legislature as the result of this initiative, the Legislature will be prohibited by Article IV, Part 3, § 18 of the Maine Constitution from changing the mill rate of the uniform property tax in a separate law to be effective prior to a referendum on the initiated bill.

REASONING ONE:

Article IV, Part 3, § 18 of the Maine Constitution sets forth the procedure for "direct initiative of legislation." Section 18 provides that unless the Legislature enacts the initiated measure without change, the measure "shall be submitted to the electors together with any amended form, substitute, or recommendation of the Legislature, and in such a manner that the people can choose between competing measures or reject both." (emphasis added) The critical inquiry for purposes of Question One is whether a change in the mill rate of the uniform property tax would constitute an "amended form, substitute or recommendation of the Legislature," and, if so, what consequences would follow.

Determination Whether a Rate Change Constitutes an Amended Form, Substitute or Recommendation

In Farris ex rel Dorsky v. Goss, 143 Me. 227 (1948), the Supreme Judicial Court delineated the confines of the term "substitute" as used in § 18. The Court held that

> "[a] bill which deals broadly with the same general subject matter, particularly if it deals with it in a manner inconsistent with the initiated measure so that the two cannot stand together, is such a substitute as was referred to in [§18]." 143 Me. 227 at 232.

Although a change in the mill rate of the uniform property tax is "inconsistent" with a repeal of the tax, it is questionable whether a rate change "deals broadly with the same general subject matter" as the repeal. The term "broadly" could refer either to the impact of the legislative action or to the extensiveness of that action. A change in mill rate, although a change of potentially great impact, only amends on portion of a lengthy and complex act. Thus, if the term "broadly" refers to the extensiveness of treatment, the determination whether a change in mill rates constitutes a substitute becomes a close one. In Dorsky, the Court declared that legislation which dealt only with two of eight subjects contained in the initiated measure constituted a substitute within the meaning of § 18. The Dorsky decision thus suggests using a liberal interpretation of the term "broadly." This issue, however, need not be resolved, because it is concluded in this Opinion that a change in mill rates constitutes an "amended form" under § 18. This conclusion abrogates the need to determine whether such a change also constitutes a substitute or a recommendation.

Although a change in the mill rates does not alter any language in the initiative measure, it clearly alters the effect of that measure. If the mill rates are changed prior to the referendum on the initiated measure, the passage of the initiated measure will repeal the amended version of the uniform property tax and not the version existing at the time the initiative petition was filed. Thus in practical terms a change in the mill rates amends the initiative measure.

It should be noted that the Court in Dorsky derived its test for a substitute measure from the judicial standard used to determine when one statute impliedly repealed another. 143 Me. 227, at 232-33. Although the Supreme Judicial Court has yet to define "amended form," it is likely that the Court would adopt a similar practical and common sense approach to that used in defining "substitute."

The above conclusion - that a legislative alteration of an act constitutes an amendment of an initiative measure seeking to repeal that act - is also supported by the policies behind § 18. The Supreme Judicial Court in Dorsky commented that

> "[§18] made a fundamental change in the existing form of government in so far as legislative power was involved. . . . By the amendment the people. . . reserved power at their own option to approve or reject at the polls any act, bill, resolve or resolution passed by the joint action of both branches of the Legislature. . . . The significance of this change must not be overlooked, particularly by this court whose duty it is to so construe legislative action that the power of the people to enact their laws shall be given the scope which their action in adopting this amendment intended them to have." 143 Me. 227, at 230-31.

If a change in the mill rates is not construed as an amendment of the initiative measure, then the policy supporting § 18 may be frustrated. The purpose of this initiative measure is to repeal the uniform property tax as it presently stands. If the Legislature can amend its act at will after the initiative petition is filed, then the referendum may result in the repeal of a substantially altered act. The Supreme Judicial Court has clearly stated that the Legislature cannot directly or indirectly abridge the people's right to disapprove of legislation. 143 Me. 227, at 231. A legislative change in the mill rate would, at the least, constitute an indirect abridgment of this initiative petition.

Effect of § 18

The Supreme Judicial Court in Dorsky unequivocally set forth the consequences of a finding that an act was an amended form, substitute or recommendation.

> ". . . Sec. 18 places no curb on the enactment of legislation; but a bill enacted which is a substitute for the initiated measure must go to the electors with the initiated measure, and does not become a law until they approve it under the provisions of Sec. 18." (emphasis added) 143 Me. 227, at 232.

Thus, although the Legislature can change the mill rate of the uniform property tax, the change will not be effective prior to the referendum on the initiated bill.

QUESTION TWO:

If a petition identical to the one being circulated, except for the addition of a July 1, 1978, effective date on the contained bill, is presented to the Regular Session of the 108th Legislature as the result of an initiative, would the Legislature, whether it enacted or failed to enact this bill, be prohibited in that session from changing the mill rate of the uniform property tax in a separate law to be effective July 1, 1977?

ANSWER TWO:

If a petition identical to the one being circulated, except for the addition of a July 1, 1978, effective date on the contained bill, is presented to the Regular Session of the 108th Legislature as the result of an initiative, the Legislature, whether it enacted or failed to enact the bill, would not be prohibited from changing the mill rate of the uniform property tax for the single fiscal year beginning July 1, 1977, and ending June 30, 1978; however, the Legislature would be prohibited from changing the mill rate with the change to be effective July 1, 1978, or any time thereafter.

REASONING TWO:

As was discussed in the Answer and Reasoning to Question One, a change in the mill rate of the uniform property tax would constitute an amended form of the initiative measure. Therefore, such a change could not become a law until approved by the people under the provisions of § 18. However, if the initiative measure

contained a July 1, 1978, effective date, a change in the tax rate only for the fiscal year beginning July 1, 1977, would not be prohibited. Such a change would not be an amended form of the initiative measure, since the full impact of the change would occur prior to the date on which the initiative measure would take effect. The Legislature, however, would be prohibited from changing the mill rate for the year beginning July 1, 1978, or any year thereafter.

QUESTION THREE:

If the bill contained in the existing petition is either enacted by the Legislature so that it is effective after July 1, 1977, or passed by the electors and proclaimed by the Governor after July 1, 1977, what is the effect of the repeal on the levying and collections of the uniform property tax between July 1, 1977, and June 30, 1978? Would the repeal of the tax be considered prospective or retrospective?

ANSWER THREE:

If the bill contained in the initiative petition is either enacted by the Legislature so that it is effective after July 1, 1977, or passed by the electors and proclaimed by the Governor after July 1, 1977, the repeal of the levying and collections of the uniform property tax will not be effective until the fiscal year beginning July 1, 1978. The initiative measure would have a prospective application.

REASONING THREE:

Generally, repealing acts are construed retrospectively. 82 C.J.S. § 434 at 1008-09 (1953), citing City of Rockland v. Lincolnville, 135 Me. 420 (1938). However, this rule of construction is limited both by the "saving" provisions of M.R.S.A. Title 1, § 302 (Supp. 1973) and by case law. Section 302 states that the repeal of an act does not affect any punishment, penalty, or forfeiture incurred, or action or proceeding pending before the repeal takes effect. More importantly for purposes of this Question, the Supreme Judicial Court has held that the language of § 302 is not exclusive. In Maine v. Waterville Savings Bank, 68 Me. 515 (1878), the Court determined that the repeal of a tax law after an assessment was made, but before any legal action was instituted, did not bar recovery of the tax by the State. Although the Court stressed the fact that the repeal was occasioned only by a consolidation of tax law, the language of the opinion is broad enough to cover the total repeal of the uniform property tax: "[a] right acquired under a statute while in force. . . does not cease by a repeal of the statute." 68 Me. 515, at 519. See: Main v. Bean, 159 Me. 455, 460-61 (1963).

Although no Maine case has held that the outright and total repeal of a tax will operate only prospectively, the policy evidenced by § 302 as well as precedent like Maine v. Waterville Savings Bank, supra, indicates that obligations which are vested or complete prior to repeal should be enforceable after repeal. Since the assessment of the uniform property tax is made as of July 1st, 36 M.R.S.A. § 452 (1976), the obligation of a taxpayer to pay the tax is vested and complete as of that date. 68 Me. 515, at 519. Thus, if the repeal of the uniform property tax is effective after July 1, 1977, the tax assessed for the fiscal year beginning on that same date would be collectible after the repeal. The initiative petition, therefore, would have a prospective application, unless, of course, the initiative included specific language to the contrary.

If you have any further questions on this matter, please do not hesitate to call on us.

Very truly yours,

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