Initiatives: Competing Legislation
Uniform Property Tax Repeal Initiative
36 MRSA 451-2
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To: Markham L. Gartley, Secretary of State

From: Joseph E. Brennan, Attorney General

Re: Legislation Competing with Uniform Property Tax Initiative.

This responds to your request for advice as to whether certain recently enacted laws, specifically, P.L. 1977, c. 530, Sec. 2, and P.L. 1977, c. 564, Sec. 131-A, are competing legislation with the initiated bill to repeal the uniform property tax.

BACKGROUND:

The pendency of the uniform property tax repeal initiative and the fact that the initiative petitions were likely to be presented early in the first session of the 108th Legislature was well known and subject to discussion prior to commencement of the legislative session. A key feature of the initiative is the repeal of 36 M.R.S.A. Sec. 451(2) which sets the mill rate for the uniform property tax.

Because of the provisions of Article IV, Part Third, Section 18, of the Maine Constitution, which had been interpreted in Farris ex rel. Dorsky v. Goss, 143 Me. 227 (1948) to suspend competing legislation pending a referendum on both the initiative legislation and the competing legislation, concern was expressed that it might be difficult to enact amendments to the mill rate or other elements of the uniform property tax during the 1977 legislative session. Several Legislators believed such amendments were necessary in 1977 to adopt certain revisions of the uniform property tax which they deemed necessary to improve the system.

As a result, this office received several requests for opinions regarding the uniform property tax repeal initiative and its relationship to amending legislation which might be adopted during the first regular session of the 108th Legislature. In an opinion issued September 21, 1976, a copy of which is attached, this office advised

that the Legislature could not generally amend the mill rate established by the uniform property tax at 36 M.R.S.A. Sec. 451(2) and have that amendment take effect prior to the referendum on the uniform property tax. We gave this advice because of our view that such amending legislation would be competing legislation which would be suspended, by operation of the Constitution, until the referendum on the uniform property tax repeal. *

That opinion also advised that if the uniform property tax repeal was enacted after July 1, 1977, the repeal of the levying and collection of the uniform property tax would not be effective until the fiscal year beginning July 1, 1978.

In a subsequent opinion, dated October 22, 1976, this office advised that it would be possible to amend the uniform property tax, without raising the threat of having such amendments suspended by operation of the constitutional provisions, if those amendments to the uniform property tax were limited in their effectiveness to the fiscal year beginning July 1, 1977, and terminating June 30, 1978. A copy of that opinion is also attached hereto. The opinions of September 21 and October 22 apparently received wide distribution and discussion among incoming Legislators.

The office also issued two other relevant opinions on the uniform property tax in late 1976, one dated December 2, 1976, advising that the 12.5 mill rate then specified in 36 M.R.S.A. Sec. 451(2) would apply to fiscal year 1977 and thereafter unless revised by legislation, and the other, dated December 22, 1976, holding that the initiated measure to repeal the uniform property tax would not violate Article IX, Section 9, of the Maine Constitution.

With the background of the advice given by the office, three pieces of legislation amending 36 M.R.S.A. Sec. 451(2) were introduced in the 108th Legislature. L.D. 16 and L.D. 91 both amended the uniform property tax to strike the 12.5 mill rate and substitute a provision directing the Legislature to annually establish the uniform property tax rate in accordance with the provisions of 20 M.R.S.A. Sec. 3747 (the education funding legislation). Both L.D. 16 and L.D. 91 were proposed as emergency measures and both were proposed to be general amending legislation, not limited in effect to fiscal year 1978 or any other time.

In addition, L.D. 193 was introduced. This legislation reduced the uniform property tax from 12.5 mills to 11.25 mills. L.D. 193 was, however, limited in effect to the fiscal year beginning July 1, 1977, and ending June 30, 1978. Thus, if enacted, it would not have been competing legislation.

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* That opinion did not address the question of what might happen if the amending legislation were adopted as emergency legislation.

Because of the importance of the pending L.D.'s in making budget calculations, and concern that legislation amending the mill rate would compete with the initiative and thus might not take effect until the vote on the uniform property tax, the Senate submitted to the Supreme Judicial Court, by Order dated February 1, 1977, several questions relating to the impact of L.D. 16, L.D. 91 and L.D. 193.* The Court presented its answer to the Senate on March 8, 1977, Opinion of the Justices, 370 A.2d 654 (Me., 1977).

The Court held that the initiated bill to repeal the uniform property tax, if enacted and effective after July 1, 1977, would take effect to terminate the uniform property tax and cease collections thereunder on July 1, 1978, and not before.

The Court also held that L.D. 16 and L.D. 91, if they were enacted, could take effect immediately because they were emergency legislation. In so doing, the Court apparently modified its holding in Farris ex rel. Dorsky v. Goss, 143 Me. 227 (1948) by holding that emergency legislation, unlike the regularly enacted legislation addressed in the 1948 decision, could take immediate effect even if it were competing legislation with initiative legislation.

In reaching the constitutional question of the effective date, the Court apparently accepted the fact that the provisions of L.D. 16 and L.D. 91 would be construed as competing legislation. If the Court had not accepted that premise, it would have simply held that the legislation could take effect immediately because it was not competing legislation. The Court would not have reached the constitutional issue of when the competing legislation, enacted as emergency legislation, could take effect. By well accepted doctrines of statutory interpretation and judicial restraint, courts will not reach and address constitutional issues where non-constitutional approaches in interpretation may be relied on to resolve a problem. Cf. Portland Pipeline Co., Inc. v. Environmental Improvement Commission, 307 A.2d 1 (Me., 1973). Thus, the submission to the Court by the Senate**and the Court's subsequent opinion indicate the apparent belief of both the Senate and the Court that the provisions of L.D. 16 and L.D. 91 were competing measures, notwithstanding that the measures, which were enacted as emergency legislation, would take effect immediately.

Subsequently, the Legislature enacted and the Governor approved L.D. 91 in a form virtually identical to the form in which L.D. 91 was originally proposed and submitted to the Court. The only change in P.L. 1977, c. 109, the enacted version of L.D. 91, was to shift the date of January 1, 1977, in L.D. 91, to June 30, 1977, in c. 109. Thus, the Legislature adopted the legislation which it had presumed to be competing. The alternative of non-competing legislation, which would only be effective for one year, was available but apparently rejected.

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* See Legislative Record, Senate, January 27, 1977, pp. 74 and 75 and February 1, 1977, pp. 81 and 82 where the prior opinions of this office which addressed the competing nature of mill rate amendments are referenced in the legislative discussion.

** See Legislative Record, Senate, January 27, 1977, p. 75.

By opinion dated May 20, 1977, a copy of which is attached, this office advised that Chapter 109, the enacted version of L.D. 91, was indeed competing legislation and would have to be placed on the ballot as an alternative to the uniform property tax repeal question.*

L.D. 91 (Chapter 109) only amended Section 451(2) by striking four words and adding a sentence. Subsequently, however, the Legislature enacted P.L. 1977, c. 564, Sec. 131-A, which entirely repealed and replaced Sec. 451(2). By repealing and replacing the section, Chapter 564 worked a more substantial change to Sec. 451(2) than the bills considered by the Legislature and submitted to the Court. Its net effect was to combine the provisions of Chapter 109 and Chapter 48 (which was not considered by the Court in its Opinion of the Justices) into one amendment and to repeal those two chapters.

QUESTION #1:

Is P.L. 1977, c. 564, Sec. 131-A, a competing measure with the initiated bill to repeal the uniform property tax, such that Chapter 564, Section 131-A will have to be submitted to the electorate at the December 5, 1977, referendum on the initiated bill?

ANSWER # 1:

P.L. 1977, c. 564, Sec. 131-A, is a competing measure with the initiated bill to repeal the uniform property tax, such that Chapter 564, Section 131-A, will have to be submitted to the electorate at the December 5, 1977, referendum on the initiated bill.

REASONING:

Chapter 564, Sec. 131-A, repeals 36 M.R.S.A. Sec. 451(2) and enacts in its place a version of Sec. 451(2) containing the two amendments to Sec. 451(2) enacted in the 108th Legislative Session. Section 131-A comprises a more substantial change in the uniform property tax than does L.D. 91 because Sec. 131-A includes the changes accomplished by C. 48 as well as by C. 109 (the enacted version of L.D. 91). Since, as was discussed earlier, the Supreme Judicial Court in its Opinion of the Justices, supra, apparently reasoned that L.D. 91 was a competing measure, the Court would likely conclude that the more extensive change contained in Sec. 131-A was also competing. Moreover, this office concluded in prior opinions (attached to this opinion) that the changes accomplished by Sec. 131-A comprise competing measures. See Opinions of the Attorney General, dated May 20, 1977 (C. 109) and July 8, 1977 (C. 48).

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* By opinion dated July 8, 1977, this office advised that the provisions of P.L. 1977, c. 48, were also competing legislation and would have to be combined with the provisions of C. 109 as an alternative question posed on the ballot. Chapter 48 also amended the provisions of 36 M.R.S.A. Sec. 451(2).

Section 131-A alters the subject matter of the uniform property tax in a manner which is inconsistent with the version of the tax referred to in the initiated bill. Farris ex rel. Dorsky v. Goss, 143 Me. 227 (1948) held that an amended version of an initiated measure which could not be in effect at the same time as the provisions of an initiated measure must be regarded as a substitute measure and must be submitted to the voters as a competing measure. 143 Me. at 232-233. Section 131-A constitutes a competing measure with the initiated bill. Pursuant to the provisions of Me. Const. Article IV, Part 3, Section 18, all competing measures must be submitted to the voters so that the electorate can choose between the competing measure and the initiated bill or reject both. Section 131-A, because it constitutes a competing measure, must be submitted to the voters at the December 5, 1977, referendum as an alternative to the initiated bill.

In issuing this advice, we recognize the concerns of those who believe that the presence of a competing measure may complicate the choice of the voters on the repeal initiative. However, the Department of the Attorney General must base its opinions on the law as stated in the Constitution and as interpreted by the Courts. We must try to reach a result based on our belief of what a court would decide if the issue were litigated.

The Constitution in Article IV, Part Third, Section 18, contemplated that the Legislature might adopt competing measures to try to address, in a different manner, concerns of persons supporting an initiative petition, and that such competing measures would go on the ballot as an alternative to the initiative petition. Here we cannot say that the Legislature did not elect to present the voters with such an alternative. The history of interpretation of the mill rate amendments (L.D. 91) and the fact that the Legislature had before it and rejected the alternative of a single year mill rate amendment,which would have avoided the competing legislation issue, weigh strongly against any conclusion that Section 131-A is not competing legislation.

QUESTION # 2:

Is P.L. 1977, c. 530, a competing measure with the initiated bill to repeal the uniform property tax, such that Chapter 48 will have to be submitted to the electorate at the December 5, 1977, referendum on the initiated bill?

ANSWER # 2:

P.L. 1977, c. 530, is not a competing measure with the initiated bill to repeal the uniform property tax and thus need not be submitted to the electorate at the December 5, 1977, referendum on the initiated bill.

REASONING:

P.L. 1977, c. 530, contains two provisions. Section 1 amends 20 M.R.S.A. Sec. 4738-A by adding a sentence directing the Commissioner of Educational and Cultural Services to pay the principal and interest on school construction projects approved prior to July 1, 1977, to administrative units whose debt service costs exceed their state school subsidy. The administrative units are required to pay the Treasurer of State in 12 equal installments a sum equal to their debt service costs. Section 2 of Chapter 530 amends 36 M.R.S.A. Sec. 453 by adding a sentence directing administrative units whose annual debt service payments exceed their school subsidy payment to pay the Treasurer of State in 12 equal installments a sum equal to their debt service costs. Section 5 of the initiated bill would repeal Section 453.

Me. Const. Article IV, Part Third, Section 18, provides that unless the Legislature adopts an initiated bill without change, the initiated bill must be submitted to the electorate along with any substitute, amended form or recommendation of the Legislature. In the only Supreme Judicial Court decision interpreting this provision of Section 18, the Court defined the term "substitute" as:

> "(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. . . . " Farris ex rel. Dorsky v. Goss, 143 Me. 227, 232 (1948).

Although the Supreme Judicial Court has yet to define the term "amended form", it is reasonable to conclude that the Court will take a similar approach to defining "amended form" as it adopted in defining "substitute."

The term "amended form" suggests a measure which alters the initiated bill to a lesser degree than does a substitute. Whereas a substitute is a complete replacement of a thing, an amended form (which must be defined as having some of the characteristics of an amendment) only alters some part of the initiated bill. Applying the general approach adopted in Dorsky, an amended form must both address or alter the same subject matter as a provision contained in the initiated bill and deal with that subject matter in a manner that is inconsistent with its treatment in the initiated bill. However, while a substitute must be so inconsistent with the initiated bill "that the two cannot stand together," an amended form need only be inconsistent with the specific provision or provisions of the initiated bill which the amended form addresses or alters.

Chapter 530, Sec. 2, although not altering any language in the initiated bill itself, does amend a provision of Title 36 which will be repealed if the initiated bill is approved by the electorate. As was concluded in a prior opinion of this office, an amendment of the uniform property tax can constitute an amended form of the initiated measure. See Opinion of the Attorney General, dated September 21, 1976. If the Legislature is free to alter the uniform property tax prior to the referendum on the initiated bill without invoking the constitutional provision on competing measures, then the Legislature and not the people will control the content of initiated legislation. For example, the Legislature could amend the uniform property tax by drastically lowering the mill rate of the tax. If this amendment was incorporated into the version of the uniform property tax which the initiated bill would repeal and furthermore was not submitted to the electorate as a competing measure, then the electorate would vote whether to repeal a significantly different bill than was described in the initiative petition. The Supreme Judicial Court concluded in Dorsky, supra, at 231, that the right of the electorate to initiate legislation cannot "be abridged directly or indirectly by any action of the Legislature." An amendment of the law which the initiated bill seeks to repeal must be capable of constituting an amended form, or the Legislature will have the power to abridge the electorate's right to adopt initiated legislation. Moreover, the initiated bill seeks to repeal the uniform property tax as last amended by the 107th Legislature, and not as amended by the 108th Legislature. See text of initiated bill in Opinion of the Justices, 370 A.2d 654, 663 (Me., 1977).

Notwithstanding that C. 530, Sec. 2 amends a provision which the initiated bill would repeal, it is concluded that Section 2 does not constitute an amended form because Section 2 neither deals with the same subject matter nor alters any provision of the uniform property tax. Section 2 amends 36 M.R.S.A. Sec. 453 to require school administrative units whose annual debt service payments exceed their school subsidy to pay the Treasurer of State in 12 equal installments a sum equal to the unit's debt service cost. Section 453, as it existed prior to amendment by C. 530, set forth the method for payment of the uniform property tax by municipalities. The requirement imposed on certain municipalities by C. 530, Sec. 2, does not affect a municipality's obligation with respect to payment of the uniform property tax. Chapter 530, Sec. 2 neither alters nor deals with the subject matter previously addressed by Sec. 453. Rather, c. 530, Sec. 2 amends Sec. 453 by imposing upon municipalities a new obligation unrelated to the prior subject matter of Sec. 453. Chapter 530, Sec. 2 fails to meet the first part of the definition of amended form: that the measure deal with or alter a provision of the initiated bill. Thus, the second part of the definition -- that the amended form must deal with the initiated bill in an inconsistent manner -- need not be reached.

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