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*Referendums: Local Government Taking Positions
Municipalities' Advocacy in Referendum Campaigns
Me. Const. Art. 8 Pt. 2*

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September 12, 1977

Honorable Bennett Katz
27 Westwood Road
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Honorable Mary Najarian
173 Pleasant Avenue
Portland, Maine 04103

Dear Senator Katz and Representative Najarian:

This responds to your recent requests for advice regarding whether a municipality may appropriate local funds to engage in activities supporting the position of that municipality, at least the governing body thereof, in state-wide initiative and referendum campaigns.

Our response is that based on the research we have done, and recognizing that you desire a prompt response, we cannot say that a municipality is barred by state law from expending funds to advocate a position regarding a state-wide referendum campaign where such expenditures are made pursuant to a specific authorization in a local charter or ordinance and where state law does not control the use of the particular local funds in question.

Generally it is the law that public funds may only be expended for public purposes, Me. Const. Art. I, Sec. 21, and where properly authorized by statute or ordinance. Prior to adoption of the home rule amendment (Maine Const. Art. 8, Pt. Second, Sec. 1), Maine municipalities were also limited by the requirement that they could only undertake expenditures which were authorized or followed by necessary implication from provisions of state law, cf., Squires v. City of Augusta, 155 Me. 151 (1959).

However, adoption of the home rule provision of the Maine Constitution changed that. Section 1 of the home rule amendment, adopted in 1969, provides:

"The inhabitants of any municipality shall have the power to alter and amend their charters on all matters, not prohibited by Constitution or general law, which are local and municipal in character. The Legislature shall prescribe the procedure by which the municipality may so act."

Thus, municipalities may adopt charter provisions, including charter provisions specifically authorizing expenditures, except where expressly prohibited by state law or by the constitutional public purpose doctrine cited above.

A review of the state law indicates neither an express authorization nor an express prohibition of municipal expenditures to advocate municipal positions in a state-wide referendum campaign.* There is no Maine precedent on the issue. In some other states such expenditures have been authorized in other cases involving state-wide issues, see City Affairs Committee v. Board of Commissioners, 46 A.2d 425 (M.J. 1946). However, the matter is not entirely free from doubt, see Stanson v. Mort, 551 P.2d 1 (Cal., 1976). The cases holding that use of public funds for referendum advocacy cases may not be allowed, however, may be distinguishable from the present Maine situation.

First, the cases tend to involve general grants of authority to undertake expenditures which are less broad than the municipal home rule provision of the Maine Constitution. Thus, states, and including the State of Maine, are generally barred from making expenditures except where specifically authorized by law, whereas the Maine home rule provision grants municipalities rights to adopt charter provisions unless they are specifically prohibited by state law.

Second, the cases disapproving expenditures of funds in referendum campaigns tend to involve questions of statutory or charter interpretation, holding that the expenditure in question was not so authorized. That view is the law in Maine. In order for a municipality to undertake an expenditure it must be explicitly authorized by a local charter or ordinance provision. For that reason, we will not be able to comment on whether any specific

* C.f. 30 M.R.S.A. §§ 5101-5108. Note that 30 M.R.S.A. § 5102-8 does expressly authorize contributions to municipal advisory organizations, naming therein the Maine Municipal Association. Contributions to such organizations could, of course, be used for legitimate organization-related purposes, including advocacy.

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municipality may expend funds in the manner questioned; we can only advise that it may be possible for a municipality to adopt a charter provision authorizing such expenditures.

Third, some cases disapproving expenditures also involve advocacy expenditures by the level of government conducting the election. (e.g., expenditures by a state in a state election or expenditures by a municipality in a municipal election.) In such cases, basic questions of fairness and interference with the electoral process by the government conducting the election are raised. Here we do not have that question as the matter involves expenditures by a municipality in a state-wide election.

Thus, it is our view that municipalities are not barred by state law from expending funds to advocate positions regarding a state-wide referendum. Municipalities may only take such actions, however, if the expenditures are made pursuant to a local charter or ordinance provision specifically authorizing the expenditure. Further, municipalities would be limited to using locally raised and locally controlled funds. This opinion does not address the question of use of state raised or state controlled funds or Federal funds.

In closing, we would note again that this matter involves many complicated issues and our brief research has disclosed some disagreement among precedent in various states. Based on the limited research we have been able to do, and our general understanding of the law, including the Maine home rule provision which has not yet been subject to judicial interpretation, we have given this advice recognizing that you need the advice in a fairly short period of time. Municipalities, in deciding to take action should seek the advice of their own counsel regarding both the status of the municipal charter and the question of whether advocacy expenditures, if any, may be appropriated by the particular municipality.

I hope this information is helpful to you.

Sincerely,

JOSEPH E. BRENNAN
Attorney General

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