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The Honorable David H. Brenerman
State House of Representatives
State House
Augusta, Maine 04333

Dear Representative Brenerman:

This responds to your request for advice on the following three sets of questions:

"1. Presently 36 MRSA § 652 (1) (L) allows for municipal service charges, in a very limited case for any communities that so select. Is a service charge, as used in this paragraph, defined as a tax? If it is, would sewer user fees, as used in many municipalities, be defined as a tax? If the answer to my first question is affirmative, does paragraph L violate the equal taxation provision of the Maine Constitution?"

"2. Would legislation expanding paragraph L to allow municipalities (either through local referendum, town meeting or governing body vote) the local option to levy service charges to owners of tax exempt property cause any constitutional problems if one municipality levies charges while another does not?"

"3. Would a law permitting municipalities to determine which properties (i.e. those described in 36 MRSA §§ 652, 656) could be tax exempt violate the equal taxation provision of the constitution and/or the legislative power of taxation provision?"

It is our opinion that the service charges authorized by 36 M.R.S.A. § 652(L) are not taxes and accordingly are not subject to the restrictions of Article IX, Section 8 of the Maine Constitution, provided that such charges are calculated and imposed in strict conformity with the statute and the guidelines presented in this opinion.

While the concept of service charges is sound, its application, in certain situations, might lead a court to conclude that it was a property tax in disguise. This conclusion might be reached if the charge imposed exceeded the value of services actually received or if the purpose, scope and administration of the service charge too closely approximated the local property tax. These determinations would have to be made on a case by case basis. While the statute, as written, is sound, we must emphasize that its improper application might transform the concept into a tax subject to Article IX, Section 8.

We are of the opinion that the imposition of service charges need not be mandatory. Accordingly, the Legislature may permit municipalities to decide whether service charges ought to be imposed.

Finally, we are of the opinion that the Legislature cannot delegate to municipalities the power to establish local property tax exemptions.

Our discussion is presented in three distinct parts corresponding to the three sets of questions you presented. In the first part, we have found it useful to discuss the general concepts of taxation, special assessments, and service charges since Maine's service charge statute bears some resemblance to each of them.

I. SERVICE CHARGES, IMPOSED IN ACCORDANCE WITH 36 M.R.S.A. § 652(L), ARE NOT TAXES AND ARE NOT SUBJECT TO THE RESTRICTIONS OF ARTICLE IX, SECTION 8.

Traditionally taxes are defined as the "proportional contribution from persons and property, levied by the state by virtue of its sovereignty for the support of government and for all public needs." Cooley, The Law of Taxation, § 1 at 61 (4th ed., 1924); Opinion of the Justices, 58 Me. 590, 591 (1871). As the definition implies, taxes can be imposed only for the support of public, not private, purposes. Laughlin v. City of Portland, 111 Me. 486 (1914); Brewer Brick Co. v. Brewer, 62 Me. 62 (1873). Another characteristic of taxation is that it is not a payment for benefits directly received by the taxpayer but rather his contribution for the support of all public needs.

> "A tax is not an assessment of benefits. It is, as we have said, a means of distributing the burden of the cost of government. The only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society established and safeguarded by the devotion of taxes to public purposes . . . This Court has repudiated the suggestion, wherever made, that the Constitution requires the benefits derived from the expenditure of public

> moneys to be appropriated to the burdens of the taxpayer or that he can resist the payment of the tax because it was not expended for purposes which are peculiarly beneficial to him." Carmichael v. Southern Coke & Co., 301 U.S. 495, 552, 57 S.Ct. 868, 878 (1937). See also, Sawyer v. Gilmore, 109 Me. 169 (1912).

While an individual taxpayer cannot complain that his tax burden exceeds the benefits he receives, the courts have recognized that the Legislature has power to require those who receive the greatest benefit from public services or works to bear the greatest tax burden therefor. Thus in Sandy River Plantation v. Lewis & Marcy, 109 Me. 472 (1912) the Court upheld a property tax on forest land located within the Maine Forestry District. The purpose of the Act creating the district was to provide fire protection for the forest land located within the district. The Court sustained the tax, which was assessed only in the district, saying:

> "Land within this district had special benefits that no other forest land in the State had, and it ought to bear the burdens caused by the receipt of those special benefits." Id., at 477.

Nine years later the Court reached a similar conclusion in Hamilton v. Portland Pier Site District, 120 Me. 14 (1921). There the Legislature had created a pier district composed of Portland and South Portland. It authorized the directors of the district to purchase land and build a pier within the district. The land and facilities were State property but were paid by Portland and South Portland through taxation. The Law Court upheld the Legislature's power to tax the district in this fashion.

> "But charging upon a city, town, or district enjoying special benefits from a public improvement a percentage of the tax burden caused thereby greater than that borne by the State at large but yet proportionate to such special benefits does not produce, but on the other hand, prevents inequality. When benefit and burden are reasonably proportionate, the constitutional requirement is met." Id., at 21.

The Law Court has struck down the Legislature's attempt to impose taxes on legislatively created districts when the burden clearly outweighed the benefits. In Dyar v. Farmington Village Corporation, 70 Me. 515 (1878), the Legislature permitted the creation of the Farmington Village Corporation, a district composed of five parcels of real estate within the town of Farmington. The district was authorized to raise, by loan or taxation, $35,000 to aid in building a railroad. The Court invalidated the scheme.

> "What we mean to say is that one public district cannot be created within another, nor be allowed to overlap another, so that for the same public purpose, or for any other public purpose, one portion of the real estate is taxed twice, while the remainder is taxed only once; that local assessments for local improvements cannot be laid on the basis of valuation alone, without regard to benefits. This tax, if viewed as an assessment for a public purpose (as it undoubtedly is) violates the first rule; if viewed as an assessment for a local improvement, it violates the second." Id., at 528-529.

The Law Court has approved another method, devised by the Legislature, that ensures that taxpayers pay an amount equal to the benefits that their class or district receives. This is known as a special assessment. It is designed to recover the measurable value conferred on property by a public improvement. The Court described it as follows:

> "Some objects of taxation, however, that are of public utility, also operate to bestow some peculiar and special benefit upon particular interests; and, so far as this benefit is special and beyond and apart from that enjoyed by the community in general, and by the recipient as a member thereof, it is not a public work or purpose that must be provided for from the public revenues or taxes . . . . It is neither unjust nor inequitable, to require that a land-owner shall contribute towards the cost of a public work a sum equal to the increased value of his property by reason of peculiar and special benefits thereby given, in addition to those bestowed upon him in common with the general public. A work that is of public utility should, so far, be paid from public funds; but it may also afford some private advantage which the public have no concern, and assessments or taxes, to that extent, are not unjust; neither are they levied without authority of law, inasmuch as the legislature is supreme, and in authorizing such levy or tax, does not violate any provision of the constitution. No more is taken from the taxpayer than has already been bestowed upon him. He is made to suffer no pecuniary loss." City of Auburn v. Paul, 84 Me. 212, 215-217 (1878).

Special assessments, if imposed, must be assessed on all similarly situated property. The amount assessed cannot exceed the private benefits received; to do otherwise would be a denial of the guarantees

of due process and equal protection.

There is another method, resembling special assessments, that is used by government as a means of defraying the cost of public services. We shall call this method a "true" service charge. It is generally used by government, acting in a proprietary role, as a means of defraying the costs of certain conveniences or services it furnishes. Examples of such services or conveniences are water, sewer service, and utilities. These charges are not taxes:

> "There are impositions which, though having some of the characteristics of taxes, are, nevertheless, distinguishable from those burdens laid for different purposes and not necessarily governed by the same rules. Charges for services rendered, or for conveniences furnished, are in no sense taxes." Cooley, supra, § 36, p. 115.

Unlike a tax, a service charge is an assessment of benefits since the charge reasonably reflects the value of the service or convenience furnished. The Courts have approved such service charges.

The United States Supreme Court upheld a Massachusetts law imposing service charges for sewer service. The Court stated in its opinion:

> "The act of the legislature (chap. 245, act of 1892) merely provides that the city council 'may by vote establish just and equitable annual charges or rents for the use of such sewers, to be paid by every person who enters his particular sewer into the common sewer, and may change the same from time to time.' The municipal ordinance fixes the annual rentals, determinable upon a certain basis of water service, with a provision that the commissioners may make an equitable discount from such rates at their discretion. This was all there was to it. The lot owner could use the sewer or not, as he chose. If he used it, he paid the rental fixed by the ordinance. If he made no use of it, he paid nothing. There is no element of deprivation here or even of taxation, but one of contract, into which the lot owner might or might not enter." Carson v. Brockton Sewerage Commission, 182 U.S. 398, 402-403 (1901).

The Supreme Court of New Hampshire has also upheld the concept of service charges. There the Court reviewed a legislative enactment that authorized three municipalities to impose service charges upon all users, including the State of New Hampshire, of their municipal sewers. The Court found such a charge to be reasonable. It was

declared not to be a tax since the user's charge reflected the value of the convenience furnished and also because the charge could be avoided by not accepting the service. The Court reasoned that the charge was like a contractual obligation requiring the party receiving the services to pay for them. Opinion of the Justices, 39 A.2d 765 (N.H., 1944). At least one commentator has questioned how the Court would have ruled had the service not been one that the user could reject. "They are sometimes said to be based upon implied contract, but such a theory seems ill suited to that class of cases where there is compulsion to use and to pay for sewer services with no available alternative except a violation of the laws." 11 McQuillan, Municipal Corporations, § 31.30a at 230 (3rd ed., 1977 revised volume).

A review of these and other authorities reveals that service charges will be upheld provided that certain guidelines are followed. First, there must be a benefit received by the person paying the charge. Second, the charge must reasonably reflect the value of that benefit. Third, the charge must be imposed on all similarly situated users. Fourth, it is desirable, although arguably not required, that the service, for which a charge is imposed, be one which can be refused by a person liable for the charge. We shall now review Maine's service charge statute, 36 M.R.S.A. § 652(L), in light of these guidelines.

The statute is of limited scope. It authorizes municipalities to impose service charges on the owners of "certain institutional and organizational real property, which is otherwise exempt from state or municipal taxation." However, the charge may be imposed to recover only the actual cost of providing general municipal services to residential property, held by such owners, which is currently totally exempt from property taxation yet used to provide rental income. The statute exempts student housing and parsonages from such charges. Charges may be imposed for all municipal services other than education and welfare. The charge may not exceed 2% of the gross annual revenues of an institution or organization paying the charge. If a service charge is imposed by a municipality, all liable organizations and institutions located therein must be assessed.

Reviewing Maine's service charge statute in terms of the traditional service charge guidelines, we would conclude that § 652(L) facially complies with all of the requirements described in this opinion. First, the statute permits charges to be imposed only for services received by the owners of certain property. Second, § 652(L) requires that the service charge be calculated according to the actual cost to the municipality of providing the service to the individual or group paying the charge. Third, the service charge is to be imposed upon all organizations owning rental residential property, except for parsonages and student housing.

Given the latitude accorded the Legislature in drawing lines for purposes of "taxation," see, Statler Industries, Inc. v. Board of Environmental Protection, 333 A.2d 703 (Me., 1975); Kahn v. Shevin, 416 U.S. 351 (1974); Lahnhausan v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973), we believe that this classification would satisfy the requirement that the charge be imposed upon all similarly situated users. Fourth, some of the services for which a charge is imposed are services which an individual or organization might avoid. In any event, while the criterion of voluntariness has been noted as being desirable, not all courts have found it to be essential. See Waterworks and Sanitary Sewer Board et al v. Dean, 69 So.2d 204 (Ala. 1953).

Given certain similarities between the charges authorized by § 652 (L) and property taxes, we must acknowledge the possibility that a court could construe those charges as property taxes. In light of the statute's substantial compliance with the requirements discussed above, however, we would conclude, with confidence, if not with certainty, that a court would not place such a construction on the statute.

Having expressed our view on the statute in the abstract, we must note some reservations about its implementation. We believe that it may prove extremely difficult to develop a reasonable formula for measuring the benefit to particular individuals of services such as traffic control, snow removal from public roads, and police protection. Absent such a formula, the courts might be inclined, especially where the cost of the service was related to the value of the property, to view the charges as partial property tax exemptions. In that case, the charges, although not the statute, could be attacked as violating Article IX, Section 8 which requires that:

> "All taxes upon real and personal estate, assessed by authority of this State shall be apportioned and assessed equally according to the just value thereof."

Our ultimate conclusion then is that while the law on this subject is unsettled, reasonable arguments can be made to support the general concept of imposing charges on tax exempt property owners in return for the provision of specific municipal services. This conclusion, however, is subject to two important qualifications. First, we do not mean to say that all such fees established by municipalities would automatically be viewed as service charges rather than taxes; whether they would be so viewed would depend upon their conformity to the criteria recited in this opinion. Second, the more comprehensive the service charge, in terms of the municipal services included in the assessment, the more likely it is that a court would construe the charge as a disguised property tax. Such a construction would raise an entirely different set of legal problems.

Based upon the above analysis, we would offer the following advice. In imposing service charges on the owners of tax exempt property, the legally safest course would be to limit such charges to those services which result in benefits to which a pecuniary value may be assigned with reasonable accuracy. Furthermore, the Legislature may wish to move slowly in this area in order to gain more experience as to which types of municipal services truly lend themselves to fees capable of satisfying the criteria set forth in this opinion. Regrettably, we cannot predict with precision where the courts will draw the line between true service charges and disguised property taxes. Our advice is offered solely to minimize the possibility that this line will be transgressed.

II. THE LEGISLATURE NEED NOT REQUIRE THAT THE IMPOSITION OF SERVICE CHARGES BE MANDATORY.

Subject to the qualifications we expressed above, we are of the opinion that the imposition of service charges need not be mandatory. Service charges are an alternative to taxation. The services for which they are imposed are public in nature and may be paid entirely through taxation. The Legislature has power to permit municipalities to divide the payment of these costs between taxation and service charges. Such schemes have been approved by the Law Court. In Bangor v. Pierce, 106 Me. 527 (1910), a special assessment case, the Court upheld a statute permitting, but not requiring, municipalities to distribute the cost of a street widening project between general taxation and a special assessment. The Law Court has also upheld statutes requiring municipalities to distribute the costs of public improvements between general taxation and special assessments. We believe that the Law Court would apply the same principles to service charges and thus allow municipalities to decide for themselves whether to impose service charges for any given year.

III. THE LEGISLATURE MAY NOT DELEGATE THE POWER TO DECIDE WHICH CLASSES OF PROPERTY TO EXEMPT FROM LOCAL PROPERTY TAXATION.

Finally, you have asked whether the Legislature may delegate to municipalities the power to determine which classes of property may be exempted from local property taxation. The leading case dealing with this subject is Brewer Brick Co. v. Brewer, 62 Me. 62 (1873). There the Town of Brewer voted to exempt a brick manufacturing company from property taxation for a period of ten years. This exemption was authorized by a statute which permitted towns to exempt such industries. The year after the exemption was granted the town assessed a property tax on the brick company. The company sued to recover the tax paid claiming it was entitled to the exemption.

The Court held that the exemption statute was unconstitutional because it (1) approved taxation for private purposes, and (2) it destroyed "all uniformity as to the property upon which taxes are to be imposed, and all equality as to the ratio, so far as regards valuation." Id., 76. The Court stated:

> "To have uniformity of taxation, the imposition of, and exemption from taxation, must be by one and the same authority - that of the legislature. It is for the legislature to determine upon what subject matter taxation shall be imposed; upon land, upon loans, upon stock, etc., etc.; but the subject matter once fixed, the rule is general, and applies to all property within its provisions. So it may relieve certain species of property from taxation, as the tools of the laborer, the churches of religious societies, etc.; but upon the non-exempted estate the taxation must be uniform as the exemptions are uniform." Id., 74.

The Court has consistently followed its holding that the Legislature may not delegate to municipalities the power to determine property tax exemptions. Farnsworth Co. v. Lisbon, 62 Me. 451 (1873); Portland v. Water Co., 67 Me. 135 (1877); Thorndike v. Camden, 82 Me. 39 (1889); Water Co. v. Waterville, 93 Me. 586 (1900); Brownville v. Shank Co., 123 Me. 379 (1924); Town of Milo v. Water Co., 131 Me. 372 (1932); Milo Water Co. v. Milo Inhabitants, 133 Me. 4 (1934); Dolloff v. Gardiner, 148 Me. 176 (1952). The Court's holding in these cases rests principally on the uniformity clause of Article IX, Section 8, which we discussed earlier. The cases, taken together, suggest that the Court has interpreted the uniformity clause to require not only that property taxes be apportioned and assessed equally according to the just value of property but also that the classes of property taxed be uniform throughout the State whether the property tax imposed is a state, county, or local property tax. Therefore, an act delegating the power of exemption to municipalities would result in the lack of uniformity which the Court has indicated is prohibited by the uniformity clause of Article IX, Section 8.

We would note that the interpretation adopted by the Law Court is the minority view. Until such time as the Law Court overturns these precedents, however, we must treat them as the law of Maine.

Please do not hesitate to call upon us if we can be of further assistance.

Sincerely,

STEPHEN L. DIAMOND
Deputy Attorney General

SLD:mfe
cc: Hon. John L. Martin
Hon. Thomas M. Teague
Hon. Bonnie Post