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DEPARTMENT OF THE ATTORNEY GENERAL
AUGUSTA, MAINE 04333

May 2, 1979

Honorable John D. Chapman
Honorable Robert S. Howe
Chairmen, Business Legislation Committee
State House
Augusta, Maine 04333

Dear Senator Chapman and Representative Howe:

You have inquired as to our interpretation of the language in art. IV, pt. 3, § 18 of the Maine Constitution which provides that when an initiated bill is not enacted without change by the Legislature, it "shall be submitted to the electors together with any amended form, substitute, or recommendation of the Legislature, and in such manner that the people can choose between the competing measures or reject both." More specifically, your inquiry concerns the meaning of "amended form" and "substitute," as those terms are used in § 18.

The problem stems from the fact that there is presently pending before the Committee on Business Legislation a measure proposed by the electors which would repeal 32 M.R.S.A. c. 28 (the "bottle law"). The Legislature has also referred to the Committee ten legislative documents which would make various amendments to that law.1/ Assuming the initiated bill is not enacted without change by the Legislature, and thus must be submitted to the electorate, the question arises as to which, if any, of the ten legislative documents would constitute an amended form or substitute so that, if passed by the Legislature, it would have to be placed on the ballot as a competing measure.

1/ The numbers and titles of those legislative documents are set out in Appendix A to this opinion.

Based upon Maine case law, we are compelled to conclude that the passage of any of the ten bills would result in an amended form of, or substitute for, the initiated bill under art. IV, pt. 3, § 18. Accordingly, that amended form or substitute would have to be included on the ballot as a competing measure. We should add that if more than one of the bills were adopted by the Legislature, it is our view that they would collectively constitute a single competing measure. In other words, the alternatives available to the electorate would be: 1) acceptance of the initiated bill; 2) acceptance of the bottle bill as amended (regardless of the number of amendments); or 3) rejection of both (resulting in the preservation of the existing law). We shall proceed to explain the reasons for our conclusion.

The principal case on this question is Farris, ex rel. Dorsky v. Goss, 143 Me. 227 (1948). In Dorsky, the Legislature failed to enact an initiated measure (the "Barlow bill") which would have placed certain restrictions on organized labor. Instead, it passed the "Tabb bill" which treated some, but not all, of the subjects included in the "Barlow bill." The Law Court held that the Legislature's version was a substitute for the measure proposed by the electors, and thus the Secretary of State was required to place both versions on the initiative ballot.

In construing art. IV, pt. 3, § 18, the Court initially observed that it is irrelevant whether the Legislature intends or perceives a particular bill to be a competing measure. Rather, that determination must be made in accordance with the test articulated by the Court.

> "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. . . [art. IV, pt. 3, § 18]."
> Dorsky, supra, at 232.

Close analysis of the Dorsky opinion reveals that the Court's test turns primarily on whether the various bills are inconsistent with each other. In dealing with this issue, the Court expressly analogizes a competing measure to the repeal or amendment of a statute by implication. Invoking the law on repeal by implication,

Dorsky focuses on whether the bill introduced through the customary legislative process would be inconsistent with, or repugnant to, the measure initiated by the electors, so that the two could not coexist.2/

The only modification to Dorsky has been on the subject of emergency legislation. Relying on the Legislature's constitutional power to enact such legislation, art. IV, pt. 3, § 16, the Law Court in McCaffrey v. Gartley, 377 A.2d 1367 (Me., 1977), held that an emergency amendment to the uniform property tax law would not be a competing measure with an initiated bill to repeal that law.3/ The McCaffrey opinion strongly suggests, however, that the Dorsky holding remains the law of Maine with respect to nonemergency measures.

> "We decided in Dorsky that merely enacting inconsistent legislation could be sufficient and, in that case, was sufficient [to create a competing measure]." McCaffrey, supra, at 1371.
>
> "If the Legislature desires that a proposal be offered as an amended form of an initiated bill, it may invoke the Dorsky rule by passing a nonemergency measure, inconsistent with the initiated bill, that will be treated like an amended form of, or substitute for, the initiated bill." Id.

In short, the "inconsistency test" still governs nonemergency legislation.

2/ One commentator has explained the Dorsky standard in the following language:

> "Do the two measures deal with the same subject; and are they measures which cannot stand side-by-side as law consistently and harmoniously? If so, one is a substitute for the other." Steward, The Law of Initiative Referendum in Massachusetts, 12 N. Eng. L. Rev. 455, 495 (1977).

3/ The Court noted "how important it is that the Legislature have the authority to pass an emergency bill amending legislation that falls within the scope of an initiative and thereby make the amending measure effective immediately." 377 A.2d 1371. See also Opinion of the Justices, 370 A.2d 654 (1977).

Applying the above analysis to the ten legislative documents pending before the Committee on Business Legislation, it is our opinion that the passage of any of those bills would create a competing measure. Since the initiated bill seeks to repeal the bottle law, it is clear that it cannot coexist with legislation which would result in an amended version of that law.

We would add that if more than one of the legislative documents were approved by the Legislature, the approved bills would constitute a single competing measure. As indicated in a prior Opinion of the Attorney General (Opinion issued to Secretary of State Gartley on July 8, 1977 - copy enclosed), "the term 'amended form' can encompass the sum of all legislative alterations of the initiated bill."

Having expressed our legal opinion on this subject, we would acknowledge that the result may create certain problems for the Legislature. Although the Court in Dorsky pointed out that § 18 "places no curb on the enactment of legislation," 143 Me. at 232, it can be argued that the prevailing interpretation of that section may operate to deter legislative action. Under that interpretation, the Legislature can make minor amendments to the law only at the cost of complicating the initiative question[4/] put before the voters.[5/]

Given the relative clarity of the case law, we cannot advise you that Dorsky can be interpreted to be inapplicable to the present problem. Such advice would be tantamount to the creation by the Office of the Attorney General of an exception to a judicially-established rule.[6/] We would point

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4/ This is no small cost, as evidenced by the fact that art. IV, pt. 3, § 20 requires that the question be presented "concisely and intelligibly."

5/ The gravity of this problem was significantly mitigated by McCaffrey v. Gartley, supra, which allows the Legislature to enact immediately effective emergency measures.

6/ We might be inclined to advise that the rule does not reach a truly de minimus amendment to a law which the electors are seeking to repeal. In our view, to be truly de minimus, the amendment could in no way alter either the purpose of the law or the means used to effectuate that purpose. Since none of the bills before the Committee satisfies this criterion, we need not consider the wisdom of creating such an exception in an Opinion of the Attorney General.

out, however, that the Dorsky decision arose out of a significantly different factual situation, insofar as it involved two inconsistent pieces of affirmative legislation, one proposed by the electors and the other passed by the Legislature. By contrast, the present situation stems from the Legislature's desire to amend a law which the initiative bill would repeal. In light of these differences, and in light of the problem referenced above, it is possible, although by no means certain,7/ that the Court would interpret § 18 in a manner which would produce a different result under the facts as they exist in this case.8/ If the Legislature deems this possibility to be of sufficient importance, the appropriate course of action would be for the Senate or House to request an advisory opinion of the Supreme Judicial Court pursuant to art. VI, § 3 of the Maine Constitution.

Please feel free to contact me if I can be of any further service.

Sincerely,

RICHARD S. COHEN
Attorney General

RSC/ec
Enclosure

7/ The appellants in McCaffrey v. Gartley, supra, strenuously argued that Dorsky should either be overruled or held inapplicable to repealer initiatives. See Brief of Appellants, pp. 16-24 and Reply Brief of Appellants, pp. 10-16. The Court did not address either of those arguments, preferring instead to hold that the Dorsky rule does not apply to emergency legislation.

8/ The problem with modifying Dorsky, other than by saying that the Legislature has the complete authority to determine what it wishes placed on the ballot as a competing measure, lies in formulating a workable test. While it might be tempting to exclude all bills which are not relevant to the purpose behind the initiated bill, in that they do not offer the electors either an alternative means of accomplishing the same purpose or an alternative approach to the overall problem, such a test would require a determination of the "purpose behind the initiated bill." Clearly, the signatories to the initiative petition might have a myriad of purposes for repealing the law. While some might consider the bills before the Committee as alternative ways of satisfying their purposes, others might not. In short, any test requiring a determination of the underlying purpose of the initiative bill, in order to decide what is truly an "amended form" or "substitute," is fraught with problems.

APPENDIX A

The following list sets out the legislative documents, pending before the Committee on Business Legislation, which would amend various provisions in 32 M.R.S.A. c. 28 (the "bottle law").

L.D. 74 - AN ACT to Permit Store Owners to Limit the Hours During which they will Accept Returnable Beverage Containers and to Permit them to Limit the Number of Containers they will Accept from a Single Person or Group at One Time.

L.D. 75 - AN ACT to Allow Dealers to Restrict the Hours during which they will Accept Returnable Beverage Containers.

L.D. 469 - An ACT to improve the Efficiency and Operation of Redemption Centers for Returnable Containers.

L.D. 699 - AN ACT to Increase the Handling Charge for Returnable Beverage Containers from 1¢ to 3¢ and to Provide for Prompt Reimbursement of this Charge to Dealers and Redemption Centers.

L.D. 765 - AN ACT Relating to Determination of Refund Values on Beverage Containers.

L.D. 793 - AN ACT to Amend Returnable Beverage Container Statutes to Require Distributor Operation of Redemption Centers and to Require Refillable Containers.

L.D. 986 - AN ACT to Encourage the Acceptance by Distributors of Beverage Containers.

L.D. 993 - AN ACT to Provide Recycling and Conservation Use of Unredeemed Refunds on Beverage Containers.

L.D. 1141- AN ACT to Improve the Efficiency and Operation of Redemption Centers for Returnable Containers.

L.D. 1267- AN ACT to Amend the Returnable Beverage Container Statute to Provide for a 2¢ Handling Charge for Returnable Bottles.

Me. Const. Art. IV Pt 3 sec. 18
Uniform Property Tax Initiative

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July 8, 1977

The Honorable Markham L. Gartley
Secretary of State
State House
Augusta, Maine 04333

Dear Mr. Gartley:

The following responds to your opinion request concerning the initiated bill 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 2 of the bill seeks repeal of 20 MRSA § 3747, 1st sentence (through repeal of subsection 8). Section 3 of the bill seeks repeal of 36 MRSA § 451-2 (Supp. 1976). Both § 3747 and § 451-2 require the Legislature to set the mill rate of the uniform property tax by April 1st of each year.

P.L. 1977, c. 48 amends both 20 MRSA § 3747 and 36 MRSA § 451-2 by changing the April 1st deadline for establishing the mill rate of the uniform property tax to April 14th.

QUESTION:

Is P.L. 1977, c. 48 a competing measure with the initiated bill to repeal the uniform property tax, such that c. 48 will

have to be submitted to the electorate at the referendum on the initiated bill?

ANSWER:

P.L. 1977, c. 48 together with P.L. 1977, c. 109 is a competing measure with the initiated bill to repeal the uniform property tax and must be submitted to the electorate at the referendum on the initiated bill.

REASONING:

C. 48 is an Amended Form

In an opinion dated September 21, 1976, this office concluded that a change in the mill rate of the uniform property tax constitutes an amended form of the initiated bill to repeal the uniform property tax. See also Opinion of the Attorney General, May 20, 1977. In reaching this conclusion, this office reasoned that:

> "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."

The reasoning of our September 21, 1976 opinion applies to a change in the date on which the mill rate is established as well as to a change in the mill rate itself. Moreover, if the change accomplished by c. 48 is not construed as a competing measure, the initiative process may be frustrated. The date by which the Legislature must establish the mill rate bears a critical relation to the level of funding for education. Pursuant to the law as it existed prior to the enactment of c. 48, the Legislature was required to set the mill rate of the uniform property tax, and thus the level of funding for education, by April 1st of every year. As a practical matter, this meant that the education budget was established before the State appropriated moneys for all other programs. Thus, when the education budget was established, that budget was not in direct competition with all other state programs. However, when the Legislature changes the date on which the mill rate must be set to later in the year, the determination of the level of education funding comes into closer competition with the budget setting process for all other programs. At each legislative session the Legislature may determine when

it will adopt the budget for the upcoming fiscal year. The importance of a particular change in the deadline for establishing the mill rate of the uniform property tax will depend both upon the length of the change as well as upon the date which the Legislature chooses for adopting the budget.1/ Because the date upon which the budget will be adopted is not set by statute, and thus cannot be predicted, any change in the deadline must be considered as a substantial change. Thus, we do not have to reach the question of whether a de minimis change in an initiated bill constitutes an amended form.

Form and Number of Competing Measures

In an opinion dated May 20, 1977, this office concluded that P.L. 1977, c. 109 constituted an amended form of the initiated bill to repeal the uniform property tax.2/ Because c. 48 is also an amended form of the initiated bill to repeal the uniform property tax, a question arises as to the content and number of competing bills which will be submitted to the electorate.

Me. Const. Art. IV, Pt. 3, § 18 provides that initiated bills "shall be submitted to the electors together with any amended form. . .and in such manner that the people can choose between the competing measures or reject both." The use of the word "both" in the above quoted provision apparently limits the bills which can be sent to referendum to two - the initiated bill and one competing measure. See Farris ex rel Dorsky v. Goss, 143 Me. 227, 240 (1948) (dissenting opinion). Thus, c. 48 and c. 109 apparently cannot both be separate competing measures.

1/ L.D. 1828, AN ACT to Reform the State Budgetary Process, establishes May 1st as the date for setting the mill rate of the uniform property tax. According to the Statement of Fact, "[t]he purpose of the bill is to establish a uniform date for determining the current services expenditures, including education, by moving the existing deadline for setting education expenditures to May 1st. The same deadline for the Part I budget would be established through the Joint Rules."

2/ 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."

Section 18 could be interpreted so that only one alteration of the initiated bill would constitute a competing measure. For example, the first alteration enacted by the Legislature (c. 48) could be the sole competing measure. However, such an interpretation could result in a total frustration of the initiative process. If alterations of the initiated bill enacted subsequent to the first alteration are not subject to the restrictions of § 18, then the Legislature can amend the initiated measure without limitation. Thus, at referendum, the electorate will vote whether to approve or disapprove of an initiated bill which has been substantially altered from its original form.

In Dorsky, the Supreme Judicial Court explained that

> The right of the people, as provided by [§ 18] of the Constitution, to enact legislation and approve or disapprove legislation enacted by the legislature is an absolute one and cannot be abridged directly or indirectly by any action of the Legislature. 143 Me. 227, at 231.

The interpretation of § 18 set forth in the preceding paragraph (that only the first alteration of the initiated bill constitutes an amended form) permits the Legislature to abridge the electorate's right to enact initiated bills. In order to avoid the possibility of this interference with the initiative process, the amended form submitted to the electorate should contain the sum of all amendments of the initiated bill which are construed as constituting competing measures. Thus the competing measure which will be submitted to the electorate at the referendum on the initiated bill to repeal the uniform property tax will include both c. 48 and c. 109. Again, it should be noted that § 18 does not require all amendments of the initiated bill to be submitted to the electorate. Rather, § 18 only requires that any amended form of the initiated bill be sent out to referendum. The literal meaning of the term "amended form" can encompass the sum of all legislative alterations of the initiated bill. Moreover, such an interpretation protects the integrity of the initiative process from legislative frustration.

Very truly yours,

Joseph E. Brennan

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