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Senator Thomas M. Teague, Senate Chairman
Representative Bonnie Post, House Chairman
Committee on Taxation
State House
Augusta, Maine 04333

Dear Senator Teague and Representative Post:

This responds to your request for advice on matters relating to the penalty provisions of 36 M.R.S.A. § 581 and Article IX, Section 8 of the Maine Constitution. The questions you have submitted require us to determine whether legislation excluding certain forest land from continued Tree Growth classification would trigger the imposition of the penalties established by Article IX, Section 8 and 36 M.R.S.A. § 581.

The Tree Growth Tax Law, 36 M.R.S.A. § 571 et seq., is a property tax valuation law. It implements a 1970 constitutional amendment (Resolves of 1969, c. 34) permitting forest land to be valued in accordance with its current use value for property tax purposes. At present forest land bordering the State's waters and waterways is eligible for Tree Growth classification, 36 M.R.S.A. § 573(3). L.D. 1775, as amended by the proposed committee amendment, would bar the classification of forest land situated within 250 feet of the normal high water mark of any pond, river or salt water body. The enactment of such legislation would remove some classified forest land from Tree Growth classification.

I. The Penalty Clause of Article IX, Section 8.

The penalty clause of Article IX, Section 8 states:

> In implementing paragraphs A, B and C [paragraphs describing classes of property which can be valued at current use value] the Legislature shall provide that any change of use higher than those set forth in paragraphs A, B and C, except when the change is occasioned by a transfer resulting from the exercise or threatened exercise

> of the power of eminent domain, shall result in the imposition of a minimum penalty equal to the tax which would have been imposed over the 5 years preceding that change of use had that real estate been assessed at its highest and best use, less all taxes paid on that real estate over the preceding 5 years, and interest, upon such reasonable and equitable basis as the Legislature shall determine. (emphasis supplied)

The language indicates clearly that a penalty must be imposed when a landowner changes the use of classified land to a use which is higher than that permitted by the current use classification. An exception is provided when such a change results from the "exercise or the threatened exercise of the power of eminent domain."

L.D. 1775, as amended, would not, if enacted, trigger the Article IX, Section 8 penalty. First, the enactment of such legislation does not effectuate a change of use. It merely narrows the class of property which is eligible for Tree Growth classification. Second, the fact that such legislation would remove classified land from the Tree Growth "program" does not trigger the Article IX, Section 8 penalty. Again, the penalty turns on action by the landowner which is inconsistent with the current use classification of his land. Here the Legislature, not the landowner, is taking the action that removes the land from its Tree Growth classification. Since that situation results from legislative action, not landowner action, the Article IX, Section 8 penalty cannot be imposed. A contrary interpretation would conflict with the intent of the constitutional provision, in that it would result in the imposition of a penalty because of an action beyond the control of the landowner.

II. The Statutory Penalty - 36 M.R.S.A. § 581.

Although Article IX, Section 8 requires the imposition of a minimum penalty in appropriate circumstances, 36 M.R.S.A. § 581 contains more far reaching penalty language. It states in pertinent part:

> If the assessor determines that land subject to this subchapter no longer meets the requirements of this subchapter, the assessor may withdraw the parcel from taxation under this subchapter. The owner of land subject to this subchapter may at any time request withdrawal of any parcel, or portion thereof, from taxation under this subchapter by certifying to the assessor that the land is no longer to be classified under this subchapter.
>
> In the case of withdrawal of a portion of a parcel, the owner, as a condition of withdrawal,

> shall file with the assessor a plan showing the area withdrawn and the area remaining under this subchapter. In the case of withdrawal of a portion of a parcel, the resulting portions shall be treated thereafter as separate parcels under section 708.
>
> In either case, and except when the change is occasioned by a transfer to the State or other entity holding the power of eminent domain, resulting from the exercise or threatened exercise of that power, withdrawal shall impose a penalty upon the owner which shall be the greater of (a) an amount equal to the taxes which would have been equal to the taxes which would have been assessed on the first day of April for the 5 tax years, or any lesser number of tax years starting with the year in which the property was first classified preceding such withdrawal had such real estate been assessed in each of those years at its fair market value on the date of withdrawal less all taxes paid on said real estate over the preceding 5 years, and interest at the legal rate from the date or dates on which said amounts would have been payable or (b) an amount computed by multiplying the amount, if any, by which the fair market value of the real estate on the date of withdrawal exceeds the 100% valuation of the real estate pursuant to this subchapter on the preceding April 1st, by the following rates: 10% from April 1, 1973 to March 31, 1978, 20% from April 1, 1978 to March 31, 1983 and 30% after March 31, 1983. Fair market value at the time of withdrawal is the assessed value of comparable property in the municipality adjusted by the municipality's certified assessment ratio.

Section 581 requires that a penalty be imposed when classified land is withdrawn from the Tree Growth program. The exception to this rule is when the withdrawal is occasioned by a transfer, to the State or other entity holding the power of eminent domain, resulting from the exercise or threatened exercise of that power. Although the term "withdrawal" is ambiguous, as used in section 581, it is clear that it would be deemed to apply when a landowner voluntarily takes action to remove his land from continued Tree Growth classification and also when an assessor removes land from the program because the landowner introduces a "prohibited" use.

Since the Section 581 penalty is keyed to "withdrawal" and it provides that an assessor can impose a penalty whenever he "determines that land subject to this subchapter no longer meets the requirements of this subchapter," it is not clear whether the enactment of L.D. 1775, as amended, would require the imposition of the

statutory penalty on the land removed from Tree Growth classification.

It could be argued that no penalty should be imposed since the land is not withdrawn from its classification by the landowner or by an assessor. Rather the land is excluded from its continued classification by a legislative act which merely changes the definition of eligible land for Tree Growth classification purposes. This legislative action is one which the landowner cannot control nor is it a matter in which the assessor can exercise any measure of discretion or judgment. The argument has merit because it differentiates legislative action from landowner action thus keying the penalty to an act which the landowner can control, which seems to be consistent with the concept of a penalty.

On the other hand it could be argued that the statute allows no distinction between landowner and legislative action. The act which triggers a penalty is withdrawal and the statute does not specifically restrict the scope of withdrawal to acts of landowners. The enactment of L.D. 1775, as amended, could be characterized as withdrawing certain lands from their Tree Growth classifications and hence requiring the imposition of a penalty.

In the final analysis we believe that the proper construction of Section 581 is that legislative removal of land from the Tree Growth program does not constitute withdrawal so as to trigger the penalty. However, we should advise you that a court could reach a contrary result.

In light of the uncertainty surrounding this issue, we believe the best course of action would be for the Legislature to clarify the language of Section 581 if it enacts L.D. 1775, as amended. Such legislative action would eliminate any confusion as to the applicability of the penalty.

If we can be of any further assistance, please do not hesitate to contact this office.

Sincerely,

RICHARD S. COHEN
Attorney General

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