

# MAINE STATE LEGISLATURE

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ATTORNEY GENERAL



STATE OF MAINE  
DEPARTMENT OF THE ATTORNEY GENERAL  
STATE HOUSE STATION 6  
AUGUSTA, MAINE 04333

August 9, 1982

The Honorable Joseph E. Brennan  
Governor, State of Maine  
State House Station #1  
Augusta, Maine 04333

Dear Governor Brennan:

This responds in part to your request for advice concerning P.L. 1981, c. 711 (hereinafter referred to as the Mining Excise Tax Act). You have asked two questions about a proposed constitutional amendment which would exclude the value of minerals from the constitutional penalty for withdrawal of land from tree growth classification:

1. May a constitutional amendment be made retroactive to exclude penalties assessed on changes of use occurring prior to the adoption of the Amendment?
2. If the answer to the above question is affirmative, must the effective date of the exclusion be specified? Is there a limit on the period to which retroactivity may apply?

For the reasons which follow, we conclude that a constitutional amendment such as you describe would not be unconstitutional, and that there is no constitutional requirement that an effective date for such an amendment be specified.

As you know, Article IX, § 8 of the Maine Constitution authorizes the Legislature to provide for an assessment of certain kinds of real estate at their current use value, but further requires the imposition of a penalty whenever such use changes to a higher level. Acting pursuant to this authority, the Legislature has enacted the Tree Growth Tax Law, 36 M.R.S.A. § 571, et seq., providing for the assessment of

timberlands and woodlands, among other kinds of land, at current use value. However, earlier this year the Legislature enacted the Mining Excise Tax Act, which contains an provision exempting "naturally occurring metallic minerals," 36 M.R.S.A. § 656(1)(B), prospectively from the payment of the penalty required by Article IX, § 8. See Opinion of the Attorney General, May 11, 1982 (Letter to Governor Brennan). However, it appears that some extensive mineral explorations may have already occurred on certain forest land prior to the effective date of the Mining Excise Tax Act, thus changing the use of the land to a higher level and requiring the imposition of the constitutional penalty. The Legislature now proposes to enact a constitutional amendment applicable to changes of use that occurred before the effective date of the Mining Excise Tax Act, to insure that such changes, will be exempted from paying the penalty.

If this provision is enacted, it will constitute retroactive constitutional legislation. The Law Court has said that a statute is retroactive when it determines the legal significance of acts or events that occurred prior to its enactment. Dobson v. Quinn Freight Lines, Inc., 415 A.2d 814, 816 (Me. 1980). The proposed constitutional provision could alter the legal significance of an event that has already occurred, namely, the change of use of land held to forest production for mineral exploration.

The principal question presented, then, is whether the proposed constitutional amendment would itself be constitutional. Although retroactive laws may be generally disfavored, they are not per se unconstitutional, but are unconstitutional only if they contravene a specific provision of the State or Federal Constitutions. See Sabasteanski v. Pagurko, 232 A.2d 524, 525 (Me. 1967). Further, because the retroactive provision in this instance is a proposed amendment to the Maine Constitution, only the Federal Constitution could be violated by its enactment.

The provisions of the Federal Constitution most frequently used to invalidate retroactive legislation are the Due Process

Clauses of the Fifth and Fourteenth Amendments.<sup>1/</sup> See cases cited in C. Hochner, The Supreme Court and the Constitutionality of Retroactive Legislation, 73 Harv.L.Rev., 692, 693-94 (1960). Because of the indefinite language of these clauses, there are no precise guidelines for determining when retroactive laws are violative of due process. Generally, however, it has been determined that the reasonableness of notice, expectation or reliance are important factors when the United States Supreme Court considers whether the retroactive legislation complies with due process. See Hochman, supra, W. Slawson, Constitutional and Legislative Considerations in Retroactive Lawmaking, 48 Cal.L.Rev. 216 (1960). In short, when the Court, using such analysis, determines that the retroactive legislation adversely affects some recognizable right (often referred to as a "vested" right), the law may be found to be unconstitutional.<sup>2/</sup>

In this case, it is quite clear that no recognizable property rights are affected by the proposed constitutional

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<sup>1/</sup> Two other provisions of the United States Constitution explicitly prohibit some types of retroactive laws: both the Congress and states are prohibited from enacting ex post facto laws, U.S. Const., art. I, § 9, cl. 3, and § 10, cl. 1, and the Contract Clause prevents the state from passing any legislation that impairs the obligations of contracts. U.S. Const., art. I, § 10. However, the prohibition against ex post facto laws applies only to criminal or penal measures, Calder v. Bull, 3 U.S. (3 Dall.) 386, 390 (1798), and thus has no application to the proposed amendment here. In addition, the amendment would not appear to effect any existing contractual right.

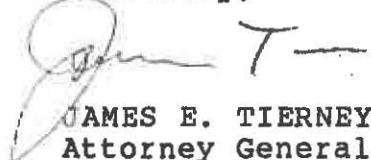
<sup>2/</sup> This is not to say that the Court's analysis stops with the identification of a vested right which has been affected by retroactive legislation. In a recent Supreme Court case, the Court held that a retrospective law complied with due process even though under traditional expectation and reliance analysis the law affected some recognizable property rights. Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976). The Court said, that legislation with a retroactive effect is not unconstitutional merely "because it upset otherwise settled expectations," Id. at 16, so long as it is rationally related to a legitimate governmental purpose. It is our opinion here that, even if the proposed amendment were found to affect some "vested" right, the retroactive exclusion of mineral value from the tree growth penalty is clearly related to many legitimate governmental functions, including the standardization of the excise, rather than property, tax approach to mineral taxation and the encouragement of mining activities for purposes of economic development.

provision. The concerned taxpayers actually benefit from the provision, and there is no other group that might have a due process right in the affected taxpayers' avoidance of the constitutional penalty. Non-tree growth taxpayers are the ones who "pay for" tree growth valuation, but they have no vested right that tree growth taxpayers be penalized for changes of use. Indeed, the taxpayers who "paid for" tree growth might not be the same as those who might benefit years later if a penalty is imposed. Thus, since the proposed amendment affects no "vested" rights, it would not be repugnant to the Federal constitution.

In response to your second question, there is no constitutional limit on the period to which retroactivity may apply. However, because of the rule of statutory construction that legislation will be deemed to be prospective only absent provision to the contrary, it is imperative that the drafters of the constitutional provision make clear that the provision is intended to be retroactive, as well as the extent of that retroactivity.

I hope this answers your questions. Please feel free to reinquire if further clarification is required. As it is our understanding that the Joint Legislative Committee on Taxation did not desire the answers to your questions concerning municipal reimbursement by its August 9th work session, we have decided to answer those questions separately and will do so shortly.

Sincerely,



JAMES E. TIERNEY  
Attorney General

JET/dab

cc: Honorable Thomas M. Teague  
Honorable Bonnie Post