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ATTORNEY GENERAL

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

January 22, 1990

Representative Glenith Gray
P.O. Box 254
Sargentville, ME 04673

Dear Representative Gray:

You have inquired whether it is legally possible for the Hancock County Commissioners to authorize a county-wide referendum on the question of whether the proposed cogeneration power project of the AES-Harriman Cove, Inc., Co. in Bucksport, Maine should be built. For the reasons which follow, it is the Opinion of this Department that, absent specific legislative authorization, the counties of Maine cannot conduct county-wide referenda.

The concept of a referendum appears in three places in the Maine Constitution. Article IV, Part 3, Section 17 contemplates that within 90 days after the recess of the Legislature the voters of the State may compel a state-wide referendum (known as the "people's veto") on any act passed by that Legislature, upon the submission of a petition containing a certain number of signatures. Article IV, Part 3, Section 18 provides that the voters of the State may directly initiate legislation by submitting a similar petition to the Legislature, which must then either enact the proposed legislation as written or send it to state-wide referendum. Finally, Article IV, Part 3, Section 21 provides that the city council of any city may provide by ordinance for the direct initiative or people's veto of legislation. The Constitution, therefore, does not contemplate the conduct of referenda by the counties of the State.

Notwithstanding the absence of any constitutional provision relating to counties, however, the Legislature has, from time to time, authorized the conduct of county referenda.

See, e.g., 30-A M.R.S.A. § 122 (prohibiting the erection of a county building outside of the county seat without the approval of a majority of county voters voting at municipal elections); P.& S.L. 1989, ch. 63 (authorizing county-wide referendum for bonds for construction of Cumberland County jail). The Legislature has not, however, enacted any statute giving specific authority to counties to conduct referenda generally, nor has it passed legislation authorizing Hancock County to conduct a referendum on the specific matter which gives rise to your inquiry. The question which that inquiry raises, therefore, is whether such specific authorizing legislation is necessary.

While no cases can be found addressing the legality of the unilateral action by the legislative body of a political subdivision of a state to hold a referendum on any particular question, the issue of the authority of such bodies to conduct referenda has arisen frequently in the context of proposed initiated local legislation. In these circumstances, the typical scenario is that a group of voters, utilizing a local initiative provision, present to the legislative body of a political subdivision a proposal for a referendum on a subject over which the body in question has no legal authority to take action. The legislative body then refuses to authorize the referendum, whereupon the intiators institute legal action seeking to have the courts compel the conduct of the referendum. Generally speaking, the courts have not been sympathetic to such cases.

In Maine, two such efforts have been rebuffed by the Supreme Judicial Court. In 1938, voters in the City of Bangor sought to compel the City Council to send the city budget out to referendum. The Law Court, noting that the power to hold a municipal referendum under Article IV, Part 3, Section 21 of the Maine Constitution was limited to "municipal affairs", refused to order the referendum on the ground that many of the items of the city's budget were controlled by state law and therefore were not purely "municipal" in nature. Burkett v. Youngs, 135 Me. 459 (1938). In 1950, the Court similarly refused to order a referendum sought by voters of the City of Portland concerning the salaries to be paid to patrolmen, because the matter had already been addressed by the city's charter, which had been enacted by the State Legislature, and was therefore beyond the City Council's power to amend by ordinance. Farris ex rel. Anderson v. Colley, 145 Me. 95 (1950). In so ruling, the Court concluded: "The proposed ordinance, if adopted, would be void. It is not a proper matter for submission to the voters." Id. at 102.

Similar results have obtained elsewhere in the country. Most notably, in two of these cases, the courts noted that were

they to order the proposed referendum, in the absence of any legislative authority on the part of the political subdivision in question to take action, they would be countenancing an unauthorized use of public funds. In Fossella v. Dinkins, 494 N.Y.S.2d 1012, 1017-20 (N.Y. App. Div. 1985), the Appellate Division of the New York Supreme Court summarized prior New York case law as establishing the principle that "[i]n the absence of an express statutory authority, an advisory referendum by a city is not authorized," id., at 1018, and observed that these cases "strongly suggest that the use of a referendum to obtain advisory opinion polls is impermissible." id., at 1020. Likewise, the Supreme Court of Idaho held that to authorize an election where the political subdivision in question had no authority to take the action required would "involve the taxpayers . . . in a useless expense." Gumprecht v. City of Coeur d'Alene, 661 P.2d 1214, 1215-16 (Idaho 1983) citing Perrault v. Robinson, 159 P. 1074, 1075 (Idaho 1916). See also Alaska Conservative Political Action Committee v. Municipality of Anchorage, 745 P.2d 936 (Alaska 1987); State ex rel. Rhodes v. Board of Elections of Lake County, 230 N.E.2d 347 (Ohio 1967) (Ohio law found not to authorize referendum on Viet Nam war); Atlantic City Housing Action Coalition v. Deane, 437 A.2d 918 (N.J. Super. 1981).

The only case arguably to the contrary of this authority is the divided opinion of the Supreme Court of California in Farley v. Healey, 431 P.2d 650 (Cal. 1967), in which that Court directed the City of San Francisco to hold a public referendum, at the request of initiators, on the advisability of the Viet Nam war. As the New York Supreme Court noted, however, in refusing the direct the City of New York to hold a similar referendum, the charter of the City of San Francisco provided that "Any declaration of policy may be submitted to the electors." Silberman v. Katz, 283 N.Y.S.2d 895, 900 (N.Y. Sup. Ct. 1967). Thus, the California case can be viewed as simply holding that the referendum in question was statutorily authorized. In any event, it is clear that, as a general rule in California law, such authorization is required. Simpson v. Hite, 222 P.2d 225 (Cal. 1950).

In view of the foregoing authority, both within and without Maine, it is the Opinion of this Department that, were it to be faced with the question, the Supreme Judicial Court of Maine would not permit the legislative body of a political subdivision of the State, such as a board of commissioners of a county, to authorize a referendum on a subject over which the county had no legal authority, in the absence of specific authorization from the State Legislature. With regard to the specific project which prompted your inquiry, Hancock County has no legal authority, the Legislature having entrusted such authority exclusively to various state and municipal regulatory

bodies. In the absence of such authority, and in the absence of any constitutional or legislative provisions authorizing the conduct of a referendum, the county would have no legal ability to conduct the referendum.

I hope the foregoing answers your question. Please feel free to reinquire if further clarification is necessary.

Sincerely,

MICHAEL E. CARPENTER
Attorney General

MEC:sw

cc: District Attorney Michael Povich