

MAINE STATE LEGISLATURE

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STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
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AUGUSTA, MAINE 04333-0006

January 3, 1996

Brian H. Mahaney, Esq.
State Tax Assessor
Bureau of Taxation
24 State House Station
Augusta, ME 04333-0024

Dear Mr. Mahany:

I am responding to your request for an opinion relating to Tax Increment Financing (TIF) under Maine law. Your request is made in behalf of the TIF Task Force of which you are a designated member as well as in your capacity as State Tax Assessor. First, you have asked whether, pursuant to a TIF development plan or otherwise, a municipality may constitutionally pay public money directly or indirectly to a private taxpayer where the payments are not in exchange for services rendered. Your second inquiry is whether payments of public moneys by a municipality to a private taxpayer where those payments may offset the amount of incremental property taxes on property which is the subject of TIF financing violate the provisions of the Maine Constitution relating to equal apportionment and assessment of such taxes. For reasons set forth below, it is the opinion of this Department that a municipality may constitutionally pay public moneys to a private party without regard to whether the payments are in consideration of services rendered by that private party providing that the benefit to the municipality can reasonably be characterized as serving a public purpose, and that payments of revenues derived from property tax increments to private parties as described in your second inquiry do not result in an unconstitutional apportionment and assessment of property tax.

A brief description of tax increment financing is provided to assist an understanding of this opinion. In Maine, the authority for TIF financings is found at 30-A M.R.S.A. § 5251 et seq., the Municipal Development Districts statute. In a typical project utilizing TIF, a municipality adopts a plan for new development in an area of the municipality to provide new employment opportunities and broaden

the tax base of the municipality. After adopting the plan, the municipality may then issue bonds to finance the costs of such things as property acquisition and the construction of new infrastructure. The bonds are repaid from future tax increments on the property of private persons making use of the new public improvements in the development area. This tax increment is calculated as the difference between the amount of tax at the new, improved value of property in the development area, or TIF district, and the original assessed value of the property prior to development.

In recent years, however, it has been common for a municipality and private enterprise to create jointly a development program under which the private enterprise will agree to construct a new building or expand production capacity through acquisition of new production equipment if the municipality will assist in the financing of the new property through a TIF financing. Pursuant to this type of plan, the private enterprise acquires TIF property, and the municipality, through its governing body, appropriates and pays to the private enterprise a portion of the cost of the new property with the tax increment generated by the new property.

I. Public Purpose

Your first inquiry addresses the question of whether it is constitutional for a municipality, in the second of the situations just described, to expend public moneys without obtaining the benefit of direct services to the municipality. This issue was specifically addressed by the Law Court in Common Cause et al. v. State of Maine et al., 455 A.2d 1 (Me. 1983). In that case the Law Court held that indirect economic benefits, such as enhancing opportunities for employment, may be taken into consideration in deciding whether the expenditure of public funds is for a public purpose as required by Maine Constitution, Art. 4, Pt. 3, § 1. Further, the court determined that appropriate authorization of public spending will be treated as constitutional unless it is determined that the legislative decision authorizing the spending has no rational basis. Id. at 25. Thus, appropriately authorized public spending for the purpose of encouraging economic activity is presumptively permissible.

II. Unequal Taxation

Your letter also inquires about the propriety of a municipality creating a TIF district and using all or part of the captured tax increment from the district to defray the expense of acquiring taxable property for the benefit of a private party. Your question appears to be whether it is appropriate for the "project costs" of a TIF district, as defined in 30-A M.R.S.A. § 5252(8) and borne by the municipality, to include the cost of acquisition of real or personal property to be owned by a private party which is also a taxpayer in the municipality. You suggest that such a practice may, as you characterize it, constitute a "de facto tax exemption," and, therefore, may

violate the provisions of the Maine Constitution, Art. 9, § 8, which requires that all property taxes be apportioned and assessed equally according to the just value of that property.

Although the acquisition of property for the benefit of private parties is not a traditional implementation of the TIF concept, see e.g., Davidson, Tax Increment Financing as a Tool for Community Redevelopment, 56 Journal of Urban Law 405 (1979), such a utilization of public moneys, as noted above, does not violate the principles established in the Common Cause case. Further, this Department does not believe it can be said to violate the provisions of the Maine Constitution relating to equal apportionment and assessment of property taxes. Me. Const. art. IX, § 8.¹ Under such TIF financings, the property acquired by a private party is the subject of annual municipal property taxes levied in accordance with the provisions of Article IX, Section 8. By agreement of the municipality and the owner of such property, the municipality, in effect, chooses to appropriate to the property owner an amount of money equal to the tax increment revenues received by the municipality to pay for all or a portion of the costs of the property. This practice cannot be said to violate the provisions of the Maine Constitution relating to property taxation since there has been no change in the valuation of the property. In a recent decision interpreting Article IX, Section 8, the Law Court confirmed that the provision applies only to the apportionment and assessment of taxes, and not to the manner in which the government chooses to spend tax revenues. McBrierty v. Commissioner of Administrative and Financial Services, 663 A.2d 50, 54-55 (Me. 1995). See Sawyer v. Gilmore, 109 Me. 169, 174-178 (1912).² This is not to say, of course, that the matter is beyond legislative control; if the legislature feels that the financings of this kind are inappropriate, it can certainly choose to amend the existing statute to curtail the practice.

Please note that the conclusions reached in the present matter are limited to the factual circumstances described above. The particular facts and circumstances of

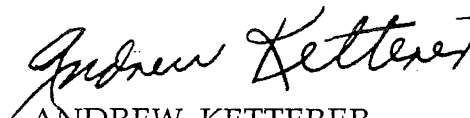
¹Expenditures of this kind are contemplated by the Municipal Development Districts law. This conclusion finds support both in the broad language of the statute generally and in the specific language employed to define authorized "project costs," 30-A M.R.S.A. § 5252(8). It is also of significance that the Department of Economic and Community Development (DECD), the state department charged with the administrative approval of each TIF district has, we are informed, approved numerous, similar TIF financings in the past.

²The situation is thus distinguishable from the case of Brewer Brick Co. v. Bourez, 62 Me. 62 (1873), in which the Law Court invalidated an effort by a municipality to exempt outright the payment of property taxes by all manufacturing companies for a period of ten years.

a given TIF financing might lead to a different conclusion. As a general matter, however, the acquisition of private property through the use of a TIF is not unconstitutional under existing law.

I hope that I have addressed your inquiries in a satisfactory manner. Should you have further questions, please feel free to inquire further.

Very truly yours,

A handwritten signature in cursive script that reads "Andrew Ketterer". The signature is written in dark ink and is positioned above the printed name.

ANDREW KETTERER
Attorney General

AK:sw