STEVEN ROWE
ATTORNEY GENERAL

Telephone: (207) 626-8800
TDD: (207) 626-8865

STATE OF MAINE
OFFICE OF THE ATTORNEY GENERAL
6 STATE HOUSE STATION
AUGUSTA, MAINE 04333-0006

REGIONAL OFFICES:

84 HARLOW ST., 2ND FLOOR
BANGOR, MAINE 04401
TEL: (207) 941-3070
FAX: (207) 941-3075

44 OAK STREET, 4TH FLOOR
PORTLAND, MAINE 04101-3014
TEL: (207) 822-0260
FAX: (207) 822-0259
TDD: (877) 428-8800

128 SWEDEN ST., STE. 2
CARIBOU, MAINE 04736
TEL: (207) 496-3792
FAX: (207) 496-3291

June 10, 2005

Senator Peggy Rotundo
Maine State Senate
3 State House Station
Augusta, Maine 04333-1515

RE: L.D. 1481

Dear Senator Rotundo:

By letter dated June 1, 2005, you have asked for an opinion concerning the constitutionality of L.D. 1481, *An Act to Amend the Laws Governing the Enactment Procedures for Ordinances*, and the proposed committee amendment to the bill. Both the bill in its original form and as amended by Committee Amendment "A" (S-242) set forth requirements for citizen initiated ordinances or bylaws, and both limit the application of such initiatives to certain projects: those that have received municipal land use permits or approvals prior to the date on which the initiative petition is filed.[1]

While we understand the forceful arguments favoring and opposing limitations of this kind, we express no opinion on those policy arguments. Rather, our purpose is simply to offer an opinion as to how the Maine Law Court would likely decide the legal issues presented. As a legal matter, we believe that the Maine Constitution reserves for municipalities the power to enact such limitations or to forgo altogether the municipal citizen initiative. The Legislature may provide a "uniform method" for the exercise of municipal initiatives, but we believe that the Court would likely find that the portion of

[1] For simplicity, we have focused in this opinion on the text of the Committee Amendment "A" to L.D. 1481. The original bill presents the same issues, but in a slightly different form.

L.D. 1481 that limits the content or applicability of municipal ordinances adopted by citizen initiative or referendum violates Article IV, Part 3, § 21 of the Maine Constitution.

Article IV, Part 3, §21 of the Maine Constitution authorizes city councils to "establish the direct initiative and people's veto for the electors of such city in regard to its municipal affairs," provided that any ordinance establishing direct initiative and people's veto "shall not take effect until ratified by vote of a majority of the electors of said city, voting thereon at a municipal election," and further provided that "*the Legislature may at any time provide a uniform method for the exercise of the initiative and referendum* in municipal affairs." (Emphasis supplied.) As described by the Law Court in *LaFleur v. Frost,* 80 A. 2d 407, 412 (Me. 1951), section 21 constitutes a direct grant of authority to municipalities that may not be limited by the Legislature except as provided in the Constitution. *See also, Albert v. Town of Fairfield,* 597 A.2d 1353, 1354, fn. 1("This power is subject only to the Legislature's authority to 'at any time provide a uniform method for the exercise of the initiative and referendum in municipal affairs.'") Accordingly, our analysis must focus on the scope of the Legislature's authority to establish a "uniform method" for municipal initiatives and referenda.

As your letter notes, this Office addressed the same questions regarding the constitutionality of L.D. 389, which was pending before the last Legislature, by letter dated June 3, 2003. L.D. 389, *An Act to Amend the Laws Governing Municipal Citizen Initiatives and Referenda*, as amended in committee, would have enacted a new subsection 5 of title 30-A §3001. Section 3001 is the statute that defines the general scope of a municipality's ordinance power. The key provision in §3001(5), as proposed by L.D. 389, stated that any ordinance or bylaw enacted by citizen initiative or referendum "may not invalidate, repeal, revoke or modify any building permit, zoning permit, land use approval, subdivision approval or site plan approval if the final municipal approval or issuance of the permit was taken prior to the enactment of that ordinance or bylaw." In effect, L.D. 389 would have prohibited the retroactive, or retrospective, application of citizen-initiated ordinances or bylaws to projects that had already obtained permits or other land use approvals. Our office concluded in 2003 that this proposed statutory change constituted a substantive limitation on the municipal initiative and referendum process and, therefore, would have violated Article IV, Part 3, §21 of the Maine Constitution.

L.D. 1481, as amended, differs from L.D. 389 in certain respects. It creates a new section 3002-A of Title 30-A, entitled "Procedures for enactment and amendment of local ordinances by direct initiative." Subsections 1 and 2(A) of the proposed new section 3002-A address the process by which municipal voters may file petitions, the certification of signatures by the municipal clerk, and the date on which an initiated ordinance or ordinance amendment may become effective.[2] Our analysis focuses on subsection 2(B), which provides that ordinances or amendments enacted by direct initiative:

---

[2] The new sub-section 1 of §3002-A simply provides that any municipality choosing to establish direct initiative must follow the procedures set forth in this section. Subsection 2 and paragraph 2(A) of §3002-A provide that the registered voters of any municipality may propose a new ordinance or bylaw or

B. May not apply to structures and uses of structures in construction or proposed for construction for which a municipal building permit, zoning permit, subdivision approval, site plan approval or any other municipal land use approval was received prior to the date that the municipal clerk certifies that the direct initiative petition meets the applicable filing requirements, including the requisite number of registered municipal voters' signatures.

The question presented is whether LD 1481 -- in particular the language of subsection 2(B) – merely prescribes a "uniform method for the exercise of the initiative and referendum in municipal affairs," or whether it circumscribes the substance of what may be done by municipal initiative and referenda. The former is clearly permissible under the Constitution; however, we believe that the Law Court would likely conclude that the latter would exceed the scope of the Legislature's authority, as outlined in our previous opinion.

The Law Court has never construed the meaning of "uniform method" in Article IV, Part 3, §21 of Maine's Constitution. In interpreting the Constitution, however, courts look to the plain, ordinary meaning of the language used. *In re 1983 Legislative Apportionment of House, Senate and Congressional Districts*, 469 A.2d 819, 825 (Me. 1983); *see also Rockland Plaza Realty Corp. v. City of Rockland*, 2001 ME 81, ¶12, 772 A.2d 256, 260 (Me. 2001). "Method" is defined in standard dictionaries to mean "a procedure or process for attaining an object;" "a means or manner of procedure, especially a regular and systematic way of accomplishing something;"[3] or "the mode of operating, or the means of attaining an object."[4] Thus, a "uniform method" might include provisions that define how an initiative petition may be filed and processed at the municipal level. Statutory provisions relating to the number of signatures required to get a measure on the ballot would seem to fit easily within the plain meaning of "method," as would setting forth a procedure for certification of signatures on petitions by the municipal clerk. The provisions of L.D. 1481 enacting subsections 3002-A(1), (2) and 2(A), all appear to describe a method or "means of attaining an object" of direct initiatives at the local level, and, for this reason, do not raise constitutional concerns.

A time frame for filing citizen initiative petitions also could be considered part of a "method" using the plain meaning of that term, but L.D. 1481 does not set forth a generally applicable time period for filing petitions. Instead, proposed subsection 3002-

---

amendment by written petition, pursuant to 30-A M.R.S.A. §§2522 and 2528 or the municipal charter; that the municipal clerk shall certify that the required number of signatures of registered voters in the municipality were obtained; and that any citizen-initiated municipal ordinance or amendment must become effective upon majority vote of the voters on the date the vote was taken or as otherwise provided by state law or municipal charter. L.D. 1481, as amended by Committee Amend. "A" (S-242).

[3] *The American Heritage Dictionary of the English Language* (4th Ed. 2000).

[4] *Black's Law Dictionary* (6th Ed. 1990). *Compare VonTiling v. City of Portland,* 268 A.2d 888, 891 (Me. 1970)(referring to initiative procedure under Art. IV, Pt. 3, § 21 as "machinery").

A (2)(B) limits the *applicability* of ordinances enacted by direct initiative to certain projects. In this respect, L.D. 1481 is not fundamentally different from L.D. 389.[5]

Subsection 3002-A(2)(B) may be construed as a timing provision only in the sense that in order to have a new or amended ordinance apply to structures or proposed uses, the citizens must file the initiative petition *before* any permits or municipal land use approvals are issued for those projects. To the extent that it establishes time limitations, however, this provision of L.D. 1481 does so only for petitions seeking to enact certain types of ordinances, namely land use ordinances relating to construction of structures. Moreover, the Law Court has upheld the authority of municipalities, under some circumstances, to enact ordinances that apply retrospectively to projects that have already received municipal permits. *E.g., Kittery Retail Ventures, LLC v. Town of Kittery*, 2004 ME 65, 856 A.2d 1183; *City of Portland v. Fisherman's Wharf Associates II*, 541 A.2d 160,164 (Me. 1988). Proposed section 3002-A(2)(B) thus imposes restrictions on citizen-initiated ordinances that do not apply to ordinances enacted by municipal officials.[6]

Maine's Constitution does not draw the lines of legislative authority in this area based on what is "procedural" versus "substantive," but rather on what constitutes a "uniform method."[7] Even though subsection 3002-A(2)(B) may be characterized as procedural, in this context it actually restricts the substance of citizen initiatives at the local level by prohibiting the application of any citizen initiated ordinance or bylaw to projects that have already received a permit or local land use approval.

The Law Court has held that under Article IV, Part 3, §21, municipalities may choose to restrict the scope of direct initiative and referendum so that it applies to some, but not all, of their municipal affairs. *LaFleur v. Frost*, 80 A.2d 407, 414 (Me. 1951)(upholding city ordinance establishing initiative and referendum only for ordinances dealing with legislative matters in municipal affairs). Pursuant to that authority, we presume that individual municipalities could choose to prohibit local initiatives from applying to land use projects that had already been issued permits.

---

[5] L.D. 389 stated that citizen-initiated ordinances "may not invalidate, repeal, revoke or modify" any permit or land use approval that had been issued prior to their enactment. L.D. 1481 states that citizen-initiated ordinances "may not apply to" certain structures or uses of structures that have received a permit or municipal land use approval prior the filing of the initiative petition. The only real substantive difference is that in L.D. 389 the limitation on applicability relates to the date of enactment of an initiated ordinance, whereas in L.D. 1481 it is the date the initiative petition is filed.

[6] As noted in our previous opinion, we believe the Legislature's authority to modify the powers of municipalities would include the power to prohibit municipalities from enacting retroactive ordinances. It is only the Legislature's attempt to restrict the citizens' power to enact such ordinances that implicates Article IV, Part 3, §21.

[7] It is for this reason that we do not find particularly helpful the case law regarding distinctions between procedural and substantive statutes made in the context of determining what constitutes retroactive application of a new or amended statute. *E.g., Michaud v. Northern Maine Medical Center*, 436 A.2d 398 (Me. 1981)(tort claim notice provision held procedural and therefore could be applied to lawsuit for an injury that predated its enactment).

However, we believe that the Law Court would most likely conclude that decisions to limit the scope of direct initiative and referendum at the municipal level are ones that only individual municipalities, and not the Legislature, are empowered to make under Maine's Constitution.

Sincerely,

G. Steven Rowe
Attorney General