# MAINE STATE LEGISLATURE

The following document is provided by the

**LAW AND LEGISLATIVE DIGITAL LIBRARY**

at the Maine State Law and Legislative Reference Library

http://legislature.maine.gov/lawlib


Reproduced from scanned originals with text recognition applied

(searchable text may contain some errors and/or omissions)

STATE LAW LIBRARY
AUGUSTA, MAINE



G. STEVEN ROWE
ATTORNEY GENERAL

TEL: (207) 626-8800
TTY: 1-888-577-6690

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

May 13, 2006

Honorable Philip L. Bartlett, II
Maine Senate
3 State House Station
Augusta, ME 04333-0003

Honorable Sean Faircloth
Maine House of Representatives
2 State House Station
Augusta, ME 04333-0002

RE: L.D. 1481

Dear Senator Bartlett and Representative Faircloth:

By correspondence from Representative Faircloth dated April 28, 2006, you have asked two questions concerning L.D. 1481, as amended by Committee Amendment "C" (S-437) as amended by Senate Amendment "C" (S-554), a copy of which is attached (Attachment 1). The bill as amended would prohibit a municipality from nullifying or amending a land use permit by subsequent enactment, amendment or repeal of a local ordinance after a period of 75 days has passed after 1) the permit received its lawful final approval and 2) any required public hearing was held on the permit.

Your questions can be summarized as follows:

1) Does the 75-day limit require a municipality to schedule a special meeting for a vote on a citizen petition to amend or nullify a land use permit and, if so, does that constitute a mandate on the municipality within the meaning of Article IX, section 21, of the Maine Constitution?



PRINTED ON RECYCLED PAPER

2) If L.D. 1481[1] permits a municipality to delay a vote on such a citizen petition beyond the 75-day limit, would that delay deprive citizens of a true right of initiative and referendum under the rule of *LaFleur v. Frost*, 146 Me. 270, 80 A.2d 407 (1951)?

In preparing an opinion, our goal is to provide the most objective analysis possible of how we believe a court would decide the issues presented. In this instance, we are hampered by both a lack of case law addressing the issues, as well as a lack of detailed knowledge of municipal law and its practical application.[2] Within these limitations, we offer the following conclusions.

1) We believe it is likely that a court would conclude that, when considered within the existing statutory framework, the 75-day limit in L.D. 1481 implicitly requires towns to schedule a special meeting to vote on a timely citizen petition for an ordinance change to amend or nullify a land use permit, if a regular meeting is not already set to occur within those 75 days. It is less clear whether a court would find that this requirement results in a modification of town activities necessitating additional spending of local revenues so as to constitute a mandate within the meaning of Article IX, section 21. On balance, however, we believe it is more likely than not that a court would conclude that, because L.D. 1481 would compel municipalities to schedule special meetings in some cases, it results in a mandate.

2) As noted in answer to Question 1, we believe that a court would conclude that L.D. 1481 does not permit a town to delay a vote on a timely citizen petition for an ordinance change to amend or nullify a land use permit beyond 75 days from final permit approval. To allow such a delay and thereby deny a town vote on an ordinance within the scope of L.D. 1481 would be inconsistent with the statutory right to petition for an ordinance change.

## I. Applicable Constitutional and Statutory Provisions

Maine's Constitution was amended effective November 23, 1992 by adding Article IX, section 21 (hereafter "Article IX, section 21"), which provides as follows:

> **Section 21. State mandates.** For the purpose of more fairly apportioning the cost of government and providing local property tax relief, the State may not require a local unit of government to expand or modify that unit's activities so as to necessitate additional expenditures from local revenues unless the State provides annually 90% of the funding for these

[1] References to "L.D. 1481" are to the bill in its amended form, Senate Amendment "C" to Committee Amendment "C," attached hereto as Attachment 1.

[2] We note at the outset that the Office of the Attorney General does not typically advise municipalities. Our analysis is based on a review of the applicable statutes and case law without the practical expertise in application of the law in question that we typically have when issuing an opinion. For this reason, we have given careful consideration to arguments made by those with municipal law expertise both supporting and opposing the conclusion that L.D. 1481 constitutes a mandate.

> expenditures from State funds not previously appropriated to that local unit of government. Legislation implementing this section or requiring a specific expenditure as an exception to this requirement may be enacted upon the vote of 2/3 of all members elected to each House. This section must be liberally construed.

Consistent with the authorization contained in Article 21, section 21, in 1993 the Legislature enacted implementing legislation, 30-A M.R.S.A. § 5685. This statute contains definitions of key terms, and spells out how funding of mandate obligations may be provided to local units of government. In addition, section 5685(4) provides:

> **4. Local units of government not bound.** A local unit of government is not bound by any mandate unless funded or exempted from state funding in accordance with this section and the Constitution of Maine, Article IX, Section 21.

We consider these provisions in light of state laws that allow for citizen petitions. For municipalities with a town meeting form of government, citizens can bring a matter to a vote pursuant to 30-A M.R.S.A. § 2522, which provides:

> **§ 2522. Petition for article in warrant.** On the written petition of a number of voters equal to at least 10% of the number of votes cast in the town at the last gubernatorial election, but in no case less than 10, the municipal officers shall either insert a particular article in the next warrant issued or shall within 60 days call a special town meeting for its consideration.

Under certain circumstances, 30-A M.R.S.A. § 2521(4) permits a notary public to call a town meeting to vote on a matter:

> **4. Petition by voters, if selectmen refuse.** If the selectmen unreasonably refuse to call a town meeting, a notary public may call the meeting on the written petition of a number of voters equal to at least 10% of the number of votes cast in the town at the last gubernatorial election, but in no case less than 10.

In addition, the municipal officers may order that a matter be placed on the next ballot printed or a special meeting called to consider it. 30-A M.R.S.A. § 2528(5).

## II. Whether L.D. 1481 Creates a Mandate Within the Meaning of Section 21

Your first question is whether the 75-day limitation on a town's ability to amend or nullify a land use permit in L.D. 1481 requires the town selectmen to schedule a special town meeting on any citizen petition to amend or nullify such a land use permit, and thus causes the town to expand or modify its activities in a manner that necessitates

the expenditure of local revenue within the meaning of Article IX, section 21. To analyze this question, we must determine: 1) what current law requires with regard to citizen petitions; 2) whether the terms of L.D. 1481 change that process; and 3) whether any change required by L.D. 1481 constitutes a mandate. We begin with a review of current municipal law.

### A. Current law governing town meetings to address citizen petitions

In municipalities with a town meeting form of government, a citizen can put a matter before the voters under section 2522[3] on a written petition signed by voters who number at least 10% of the votes cast in the town at the last gubernatorial election. Section 2522 provides that the municipal officers "shall either" insert the article in the next warrant issued, or call a special town meeting within 60 days for its consideration. This language appears to give the town selectmen the option of waiting for the next regular town meeting to put the matter before the voters, which may be the town's annual meeting, rather than scheduling a special town meeting within 60 days of receiving the petition for purposes of taking the vote.

However, if the town selectmen do not schedule a special meeting for consideration of the matter that is the subject of the petition within 60 days, the petitioners may be able to force the scheduling of a meeting prior to the next regular town meeting, using the procedure established by section 2521(4). Section 2521(4) permits a notary public to call a town meeting on the written petition of a number of voters at least equal to 10% of the votes in the last gubernatorial election, based on a finding that the selectmen have unreasonably refused to schedule a meeting. The minimum number of signatures required for such a petition to a notary public is the same as required under section 2522 to put a matter before a meeting.

The Law Court has commented on the purpose of permitting a notary public (or justice of the peace under the predecessor statute) to call a town meeting:

> In fact, the whole theory of a New England town meeting, has been, that upon all necessary occasions, the inhabitants upon short notice, could come together. Upon this idea is based the provision (R.S., c. 3, § 4) that where the selectmen unreasonably refuse to call a town meeting, a justice of the peace may call one upon the application of any ten or more voters.

*Jones v. Inhabitants of Sanford*, 66 Me. 585, 590 (1877).

We have located only three Maine cases that address what it means for the selectmen to "unreasonably refuse" to schedule a town meeting. Two of these cases held only that there could not be an unreasonable refusal by the selectmen to hold a meeting

---

[3] Section references are to Title 30-A, unless otherwise noted.

where none was requested, and that in the absence of an unreasonable refusal, any meeting called by a justice of the peace (who held this authority under a predecessor statute) was illegal. *Southard v. Inhabitants of Bradford*, 53 Me. 389 (1866); *Allen v. Hackett,* 123 Me. 106, 121 A. 906 (1923). In the third case, *Googins v. Gilpatrick*, 131 Me. 23, 158 A. 699 (1932), the Law Court held that when a vacancy in the office of town treasurer had been filled by appointment of the selectmen prior to the filing of a petition to call a special town meeting to elect a treasurer, the selectmen did not unreasonably refuse to schedule a meeting, and that consequently a special meeting scheduled by a notary was ineffective to elect a treasurer. Because the selectmen had the statutory authority to appoint a treasurer to serve until the next annual town meeting, "[r]eason would not justify the expenditure required to summon the inhabitants to vote when their action would effect nothing." 131 Me. at 27, 158 A. at 701.

The cases construing the "unreasonable refusal" standard for the calling of a special meeting by a notary public shed little light on the question of when, under current law, a notary public can call a special town meeting based on an unreasonable refusal by the town's selectmen to do so. These cases are very fact specific, and do not provide any direct precedent on this point. However, we think it likely that a court would find that current law gives the selectmen considerable discretion in deciding whether to schedule a special meeting.

### B. The terms of L.D. 1481

We turn now to a discussion of the terms of L.D. 1481. L.D. 1481 in its original form proposed certain requirements for citizen initiated ordinances or bylaws, while providing that such citizen initiatives did not apply to structures and uses for which building permits, zoning permits, subdivision approval, site plan approval or any other land use approval had been granted. This Office issued an opinion dated June 10, 2005 (Attachment 2) stating that L.D. 1481 and Committee Amendment "A" (S-242), which contained substantially similar provisions, were likely in violation of the Constitution, Article IV, part 3, section 21. In sum, that opinion concludes that section 21 authorizes the Legislature to provide a "uniform method for the exercise of the initiative and referendum in municipal affairs" but reserves for municipalities the power to enact substantive limitations on the exercise of the initiative or to forego it altogether.

The bill was subsequently reworked and reported out of the Joint Standing Committee on State and Local Government as Committee Amendment "C" (S-437). Committee Amendment "C" addressed the constitutional issue that had been identified with respect to both the bill as printed and Committee Amendment "A."[4] Committee Amendment "C" prohibited municipalities from nullifying or amending a municipal land use permit by subsequent enactment, amendment or repeal of a local ordinance after the permit has received its lawful final approval and a period of 30 days has passed. Senate

[4] A January 17, 2006 opinion of the Attorney General (Attachment 3) concluded that the changes to the bill made by Committee Amendment "C" eliminated the constitutional issue identified in the June 10, 2005 opinion, relating to Article IV, part 3, section 21.

Amendment "C" (S-554) to Committee Amendment "C" made several additional changes, so that the key provision in the bill for purposes of our analysis now reads:

> **6. Restriction on nullification of final permit.** A municipality may not nullify or amend a municipal land use permit by a subsequent enactment, amendment or repeal of a local ordinance after a period of 75 days has passed after:
>
> A. The permit has received its lawful final approval; and
>
> B. If required, a public hearing was held on the permit.
>
> ....

The summary portions of the two pertinent amendments read together clearly capture the legal effect of the bill in its present form. The Summary to Committee Amendment "C" notes that the amendment replaces the bill and further states: "It restricts a municipality's ability to nullify or amend a municipal land use permit by a subsequent enactment, amendment or repeal of a local ordinance." The Summary to Senate Amendment "C" to Committee Amendment "C" states: "This amendment extends the period within which a municipality may nullify or amend a land use permit to 75 days." In short, the bill creates a bright line deadline after which a permit cannot be changed or nullified by an ordinance that is subsequently enacted, amended or repealed. Such a deadline does not now exist; rather, the question of when a municipality may no longer alter or nullify a permit depends currently on a complex analysis of when a permit holder's rights under a permit become vested.

L.D. 1481 does not specify any interim time limits or special procedures for considering ordinance changes affecting municipal land use permits, other than to state that such changes may not be enacted after this 75-day period. Accordingly, existing statutory requirements for giving notice of a public meeting or hearing (§§ 2523 & 2528) and for making absentee ballots available 30 days prior to an election (§ 2529 and 21-A M.R.S.A. § 752) would still apply. The bill also does not contain any provision that would toll the running of the 75-day period based on the taking of some preliminary step such as the filing of a citizens' petition or issuing the warrant for the town meeting. Finally, although not stated clearly in the bill, it appears that if a project requires the issuance of more than one permit, the 75-day limitation period would start anew with respect to each permit that is issued and falls within the meaning of "land use permit" in the bill.[5]

### C. Whether L.D. 1481 Contains a Mandate on Local Government

For purposes of determining whether a mandate on local government would be imposed under Article IX, section 21, the relevant language of the constitutional

[5] The pertinent language in L.D. 1481 states: "For the purposes of this subsection, 'municipal land use permit' includes a municipal building permit, zoning permit, subdivision approval and site plan approval."

provision is: "The State may not require a local unit of government to expand or modify that unit's activities so as to necessitate additional expenditures from local revenues..." This is a two part test: first, the State must require the local unit to expand or modify its activities; secondly, that expansion or modification of activities must require the additional expenditure of local revenue. Before we apply this test, we must first determine whether L.D. 1481 would require towns to hold special meetings in cases in which they are not legally required to do now.

1. Does L.D. 1481 require local government to hold special meetings?

L.D. 1481 does not expressly provide that a town meeting to vote on a proposed ordinance change must be held within 75 days after the land use permit to be affected by the ordinance change has been finally approved. It does, however, state that the municipality "may not nullify or amend a municipal land use permit by a subsequent enactment, amendment or repeal of a local ordinance after a period of 75 days has passed," and the only way that a local ordinance may be enacted, amended or repealed in a municipality with a town meeting form of government is by majority vote of the citizens at a town meeting. For this reason, we believe a court would find that the bill *implicitly requires* that a special town meeting be held within the 75-day period if a valid citizen petition is filed, unless (a) a regular town meeting is already scheduled during that time frame, (b) the ordinance change sought is not within the town's authority to enact or repeal or is outside the scope of L.D. 1481, or (c) the petition is filed so late in the 75-day period as to preclude compliance with other statutory requirements, such as those providing for public notice (§ 2523), public hearing (§ 2528), and absentee balloting (§ 2529, 21-A M.R.S.A. § 752).[6]

Indeed, if all the requirements for a valid petition are met under L.D. 1481, and the selectmen refuse to schedule a special meeting to vote on the proposed ordinance change, we think a court would likely find the selectmen's refusal to be unreasonable and would uphold a decision by a notary public to schedule the town meeting pursuant to §2521(4). Regardless of whether the meeting is ultimately scheduled by the selectmen or by a notary public, it is our view that the requirement for a special town meeting would be triggered by the timely filing of a valid petition for an ordinance change under L.D. 1481, unless the regular town meeting was already scheduled to occur within the 75-day period.[7]

---

[6] Some other circumstances might arise that could support the selectmen's refusal to schedule a town meeting, but these seem to be the most obvious ones that a court would likely find legitimate.

[7] In cities with a city council form of government that have adopted ordinances providing for local initiative and referendum, a similar result could occur, *i.e.*, the council's latitude to schedule a vote to coincide with a general election or primary might be constricted if the vote must take place within the 75-day window. It has also been argued that the 75-day limitation period in L.D. 1481 creates a mandate for a number of municipalities with city councils on an additional ground: that it will require them to amend their ordinances concerning citizen initiative and referenda because the existing time periods for the taking of various actions in that process exceed 75 days, and that there is cost involved in amending ordinances. The logical consequence of such an argument is that the State could be required to bear this cost each time a

2. Does the requirement to hold a special town meeting under these circumstances meet the two-part test for determining whether a mandate exists?

We have found only one case in which the Law Court has construed Article IX, section 21, and it provides little guidance as to what constitutes an expansion or modification of local government activities. In *Town of Wells v. Town of Ogunquit*, 2001 ME 122, 775 A.2d 1174, the Town of Wells challenged a private and special act of the Legislature that changed the funding formula for the Wells-Ogunquit school district from a state property valuation basis to one under which only a portion of the towns' respective school funding obligations was based on property valuation, with the remainder based on the number of students. The result was a substantial shift in the relative funding obligations to the Town of Wells, which challenged the law as an unfunded mandate under section 21.

The Law Court held that the law did not result in an unfunded mandate, reasoning as follows:

> The State has not required Wells to expand or modify its activities. It is not being required to build a new transportation system or provide computers to all of its residents. It is not being required to expand or modify the educational program of the school district. It does not have to hire more teachers or provide new courses. Presumably such requirements would be expansions that would necessitate the town to expend additional revenues. [P9] The harsh reality is that Wells' portion of the funding formula has been increased, and Wells will have to spend more money if the school budget remains as is. The reality also is that Wells controls the votes on the board of the school district. P. & S.L. 1985, ch. 93. Wells, not the State, controls the expenditures of the school district.
>
> [P10] The State has not required Wells to raise taxes, and the State has not required Wells to expand or modify its activities. The revised funding formula for the school district does not violate section 21 of Article IX of the Maine Constitution.

*Id.* ¶8-10, 775 A.2d at 1176-1177.

The Law Court's decision in *Town of Wells v. Town of Ogunquit* can be read as taking a fairly narrow view of what constitutes an expanded or modified activity, and could be relied upon in this instance as supporting a conclusion that L.D. 1481 does not itself require local units to engage in any activities that they are not already carrying out. It can be argued that L.D. 1481 does not expressly require that a special meeting be

---

municipality must amend its ordinances to conform to newly enacted statutes. There is nothing in the legislative history of Article IX, section 21 to suggest that it was intended to be read so broadly that it would encompass this latter argument.

called; that the procedures governing the scheduling of a town meeting by town selectmen or by a notary public are matters of existing law; and that holding special town meetings is not a new activity in itself, nor is dealing with citizen petitions to place proposals on a town meeting warrant. Moreover, the effect of the bill will not always require a special election; whether a special election will be necessary will depend upon the timing of final approval of the land use permit and whether the regularly scheduled town meeting will or will not occur within 75 days thereafter.

In support of the conclusion that L.D. 1481 results in a mandate, it can be argued that while town officials have broad discretion under current law to delay until the next regularly scheduled town meeting a vote on a matter that has been raised by citizen petition,[8] the 75-day limitation period requires them to schedule a special meeting (unless the regular meeting is going to occur within the 75-day period) in response to a timely petition within the scope of L.D. 1481 if the petitioners are to be given an effective opportunity to amend or nullify a land use permit.[9] Moreover, the *Town of Wells v. Town of Ogunquit* decision can readily be distinguished, in that the Court's conclusion in that case was based on its determination that the legislative act under review there did not require the Town of Wells to undertake different activities, but simply to pay more of the cost for its current activities. On balance, we believe that it is more likely than not that a court would conclude that L.D. 1481 would require towns to modify their activities in at least some cases where citizen petitions within its scope are submitted.

If the first part of the mandate test is satisfied, there is little question that the second part is also met. Since special elections cost money, the requirement to hold a special election, even though implicit rather than explicit if L.D. 1481 were enacted, necessitates the expenditure of local revenues that would not otherwise be expended for that purpose. Although circumstances might arise in which a town would be submitting another proposal to a special town meeting within the same time frame as a land use ordinance petition under L.D. 1481, and could thereby avoid incurring any extra costs for that election, such will not necessarily be the case. Given the limited time period allowed for a vote to enact, repeal or amend a land use ordinance under L.D. 1481, it is unlikely that the extra cost of holding a special town meeting could be avoided. Thus, a court would likely find this part of the mandate test is met by L.D. 1481.

If the Legislature should decline to treat the bill as a mandate, a municipality may choose to exercise its rights under § 5685(4), which provides that a municipality is not bound by any mandate unless it is funded or exempted from funding in accordance with section 21 and its implementing legislation, section 5685. Accordingly, a town could refuse to comply, and litigation would likely ensue to determine whether the provisions of the bill are enforceable.

---

[8] Indeed, it has been suggested by some municipal law practitioners who have submitted comments to our Office in response to your request for this opinion, that the "unreasonable refusal" standard in section 2521(4) imposes little if any practical constraint on the exercise of discretion by selectmen in deciding when to hold a town meeting vote on a citizen petition.

[9] As noted above (see discussion on p. 7), the town's selectmen would not be deprived of all discretion with respect to the scheduling of a town meeting if L.D. 1481 is enacted.

Because application of the first part of the mandate test is uncertain, we cannot say that it would be indefensible for the Legislature to treat L.D. 1481 as not containing a mandate and enact it without the mandate preamble or a two-thirds vote. However, as we have stated, we believe that it is more likely than not that a court would conclude that L.D. 1481 creates a mandate within the meaning of Article IX, section 21. Alternatively, the bill could be amended in a way that eliminates the need to hold a special town meeting within the 75 day limitation period, and thus avoids or substantially reduces the risk of the bill being considered a mandate.[10]

## III. Whether L.D. 1481 Impinges on a Citizen's Right to Local Initiative and Referendum

Your second question is whether L.D. 1481 deprives citizens of a true right of initiative and referendum by purporting to grant them the right to petition while allowing the town to delay the vote on their petition until after the 75-day deadline. Maine's Constitution does not guarantee its citizens a right of initiative and referendum at the local level of government. Article IV, part 3, section 21 provides that the city council of any city may establish the direct initiative and people's veto for its electors in regard to municipal affairs, but this section, by its terms, provides an option rather than a guarantee. As discussed above, voters in a town with a town meeting form of government have certain statutory rights to put issues on the ballot for decision at a town meeting, but those rights are not constitutionally guaranteed.

This does not mean that municipalities have unfettered latitude with respect to voter initiatives, as demonstrated by the case you referenced in connection with this question, *LaFleur v. Frost*, 146 Me. 270, 80 A.2d 407 (1951). In that case, the Law Court held that those portions of a city's initiative and referendum ordinance that reserved to a committee of ten original petitioners the right to withdraw a petition after it had been submitted and to place a brief explanatory statement on the ballot were invalid. The Court's reasoning in reaching this conclusion is as follows:

> A system which compels the voter to leave his great rights to legislate, either directly through the initiative or by the people's veto in a referendum, to the mercy of six out of ten individuals may provide a neat and orderly method for the conduct of business, but it cannot be called the initiative and referendum.
>
> There is no justification for saying the first-ten signers are the most interested citizens or that the citizen, who later signs or indeed who does not sign at all, has not exactly the same interest in the proposal as the original ten. Must the 1490 or more signers (let alone the remainder of the voters) rely upon the judgment of six whom they did not select, whom they may or may not know, and in whom they may or may not have confidence?

[10] For example, if the 75-day deadline were made to apply only to the submission of a petition, that would leave municipal officers the latitude they have under current law to schedule consideration of the matter at a regular or special town meeting.

> It may well be that conditions may arise under which no one wishes the measure submitted to a vote. The election expense in such event will be wasted for the outcome is certain. What manner of provision for withdrawal of the proposal may be reasonably made, we need not determine. It is sufficient for our purposes that the initiative and referendum does not contemplate that the citizen be required to accept the judgment of six of the original ten petitioners, as his agents, in the exercise of the right of initiative and referendum.

146 Me. at 286-287, 80 A.2d at 415-416.

In essence, the Court concluded that the term "initiative" as used in the Constitution had a certain basic meaning that the city could not alter by ordinance. At the same time, the Court recognized that the city was not obligated to provide an initiative procedure, or to extend its applicability to all municipal affairs. *See* 146 Me. at 282-283, 80 A.2d at 413-414.

Although *LaFleur* is not directly on point, it is somewhat analogous to the issue presented by L.D. 1481. Title 30-A creates a statutory right for citizens to submit a proposed ordinance to a town meeting vote if they gather the requisite number of voters' signatures on petitions and meet all the relevant statutory requirements. *See* §§ 2522 & 2528. Under current law, an ordinance change proposed by a valid citizen petition is presented to the town for a vote at either a regular or special town meeting. If, as your second question assumes, L.D. 1481 were interpreted to allow the municipal officers to decline to hold a special town meeting to vote on a land use ordinance change proposed by a timely petition, then the citizens' ability to exercise their statutory rights would be subject to the discretion of those municipal officers. Just as the Court in *LaFleur* did not accept that the first ten petition signers should have authority on their own to withdraw a citizens' petition before a vote, so might a court have difficulty concluding that the municipal officers have discretion to decline to hold a special town meeting to vote on a valid and timely citizen-initiated land use ordinance change within the 75-day period called for in L.D. 1481. Allowing municipal officers to exercise such discretion and effectively deny a vote would seem inconsistent with the statutory right to petition for an ordinance change.[11]

Indeed, it is for this reason, in addition to the reasons noted in our answer to your first question, that we believe a court would *not* interpret L.D. 1481 to permit towns to delay a vote on a land use ordinance change beyond 75 days from final permit approval. Instead, we believe a court would most likely conclude that L.D. 1481, when interpreted in light of the existing statutory framework for citizen petitions, implicitly requires towns to hold a special town meeting on any ordinance change affecting a land use permit within the 75-day period – either by action of the selectmen or by a notary public acting upon their refusal to do so.

---

[11] Of course, such a case may not reach the courts because, unlike the situation in *LaFleur*, if the municipal officers act unreasonably to deny such a vote, then a notary public can schedule the town meeting in their stead.

## Conclusion

For the reasons we have discussed, we believe that it is likely that a court would interpret L.D. 1481 to require a town to hold a special meeting within the 75-day period of limitation if it receives a timely citizen petition proposing a change to an ordinance that amends or nullifies a finally approved land use permit. It is less clear whether L.D. 1481 constitutes a mandate under Article IX, section 21, though we believe it more likely than not that a court would so conclude.

Although we regret that the scarcity of relevant case law affects our ability to offer you conclusions on these issues with a higher degree of certainty, we hope this analysis is useful in your deliberations concerning L.D. 1481.

Sincerely,

G. STEVEN ROWE
Attorney General

STATE OF MAINE

IN THE YEAR OF OUR LORD
TWO THOUSAND AND SIX

S.P. 507 - L.D. 1481

An Act To Amend the Laws Governing the Enactment Procedures for Ordinances

Be it enacted by the People of the State of Maine as follows:

Sec. 1. 30-A MRSA §3007, sub-§6 is enacted to read:

6. Restriction on nullification of final permit. A municipality may not nullify or amend a municipal land use permit by a subsequent enactment, amendment or repeal of a local ordinance after a period of 75 days has passed after:

A. The permit has received its lawful final approval; and

B. If required, a public hearing was held on the permit.

For the purposes of this subsection, "municipal land use permit" includes a municipal building permit, zoning permit, subdivision approval and site plan approval. This subsection does not alter or invalidate any provision of a municipal ordinance that provides for the expiration or lapse of a permit or approval granted pursuant to that permit following the expiration of a certain period of time.

Attachment 2

G. 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.

Printed on Recycled Paper

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

Attachment 3

G. STEVEN ROWE
ATTORNEY GENERAL

TEL: (207) 626-8800
TTY: 1-888-577-6690

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

January 17, 2006

Senator Elizabeth Schneider, Senate Chair
Representative Christopher Barstow, House Chair
Joint Standing Committee on State and Local Government
100 State House Station
Augusta, ME 04333-0003

Re: Proposed Committee Amendment to LD 1481

Dear Senator Schneider and Representative Barstow:

During the work session on LD 1481 held on January 11, 2006, you asked for an opinion concerning a proposed Committee Amendment to the bill, a copy of which is attached. Specifically, you have asked whether the constitutional issue identified in our June 10, 2005 opinion has been resolved by the language of the Committee Amendment.

LD 1481 contains provisions that would have prohibited a municipal initiative or referendum from having any retroactive effect on existing land use permits or approvals without imposing such a restriction directly upon municipalities. By doing so, as we stated in our opinion of June 10, 2005, the bill would have limited the subject matter of municipal ordinances that are subject to the municipal initiative and people's veto process in conflict with the requirements of Art. IV, Pt. 3, § 21 of the Maine Constitution. The proposed Committee Amendment removes all the provisions of the bill that would have limited the scope of ordinances enacted by municipal initiative and referendum as distinct from other ordinances. Instead, the amendment imposes the retroactivity limitation directly upon municipalities, which we believe to be within the Legislature's authority. In doing so, the amendment eliminates the constitutional issue we identified in our opinion.

As always, the determination of the policy issues posed by this amendment are for the Legislature to determine, and in providing this information we do not express an opinion on matters of policy.

Sincerely,

G. STEVEN ROWE
Attorney General

GSR/elf
cc: Anna Broome, Legislative Analyst, OPLA

PRINTED ON RECYCLED PAPER