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March 24, 2008

The Honorable Joseph C. Perry, Senate Chair
The Honorable John F. Piotti, House Chair
Members of the Joint Standing Committee on Taxation
123rd Maine Legislature
10 State House Station
Augusta, ME 043330-0100

Re: L.D. 2229, *An Act to Expand the Economic Development Benefit of Tax Increment Financing in Counties that Include Unorganized Territories*

Dear Senator Perry, Representative Piotti, and Members of the Joint Standing Committee on Taxation:

In your letter of March 13, 2008, you asked for an opinion concerning the constitutionality of L.D. 2229, *An Act to Expand the Economic Development Benefit of Tax Increment Financing in Counties that Include Unorganized Territories*. This bill would authorize county commissioners to use property taxes generated from tax increment financing ("TIF") districts within the unorganized territory of that county to fund "county economic and community development," as defined in 30-A M.R.S.A. § 125(1)(A).

It was suggested to the Taxation Committee that allowing county commissioners to use property taxes collected from TIF districts within the unorganized territories to support county-wide economic development may violate Article IX, Section 8, of the Maine Constitution when property taxes from taxpayers in the organized areas of the county are not contributing to such expenditures. Your letter asked for our opinion as to whether Article IX, Section 8, presents a barrier to the enactment of L.D. 2229 under these circumstances.

Based on the analysis described below, we believe that a court would likely conclude that the bill satisfies Article IX, Section 8, when the county's expenditure of property taxes from the unorganized territory for "county

economic and community development” results in some special benefit to the unorganized territory within that county. However, we also believe that a court may well conclude that L.D. 2229 violates Article IX, Section 8, to the extent that it permits property taxes from the unorganized territory tax district to be spent without providing a special benefit to the unorganized territory. We believe that the bill would more likely survive a court challenge under Article IX, Section 8, if it expressly required that the authorized spending by the county commissioners for “county economic and community development” must result in a special benefit to the unorganized territory within that county.

Background

As your letter states, TIF districts are ordinarily negotiated by a municipality and a developer to provide an incentive to economic development within that municipality. The specific requirements of TIFs are set out in Maine statutes. *See, e.g.,* 30-A M.R.S.A. §§ 5221-5235. Typically, as your letter also notes, a portion of the property taxes derived from the TIF development district is returned to the developer. 30-A M.R.S.A. § 5227.

Authorized expenditures (“project costs”) under a TIF are set out in 30-A M.R.S.A. § 5225 and include certain costs of improvements made within the TIF district. In addition, certain costs of improvements made outside the TIF district are allowed when they “are directly related to or are made necessary by the establishment or operation of the district.” 30-A M.R.S.A. § 5225(1)(B). Certain costs “related to economic development, environmental improvements or employment training within the municipality” are also allowed. 30-A M.R.S.A. § 5225(1)(C). Generally speaking, allowable project costs do not include the cost of facilities, buildings, or portions of buildings used predominantly for the general conduct of government or for public recreational purposes. 30-A M.R.S.A. § 5225(1). The Commissioner of the Department of Economic and Community Development is charged with reviewing proposed project costs to ensure compliance with 30-A M.R.S.A. § 5225. *See* 30-A M.R.S.A. § 5225(1).

For the purposes of the TIF law, a county may act as a municipality for the unorganized territory within that county and may designate TIF districts within the unorganized territory in that county; when it does so, the county commissioners act as the municipality and as the municipal legislative body. *See* 30-A M.R.S.A. § 5235. As a result, Section 5223(2) requires the county commissioners to consider whether the proposed district or program will contribute to the economic growth or well-being of the unorganized territory or to the betterment of the health, welfare or safety of its inhabitants. L.D. 2229 would expand the range of allowable “project costs” under Section 5225(1) by authorizing county commissioners to use property tax revenues generated from a TIF district within the unorganized territory of that county to fund “county economic and community development,” as defined by 30-A M.R.S.A. §

125(1)(A). "County economic and community development" means "assisting or encouraging the creation or preservation of new or existing employment opportunities for residents of a county, or any of its municipalities, through one or more" designated activities. *Id.*

Analysis and Discussion

Under Article IX, Section 8, of the Maine Constitution, any and all taxes assessed upon real and personal property by the State must be assessed "on all of the property of the State on an equal basis." *McBreairty v. Commissioner*, 663 A.2d 50, 54 (1995), quoting *Opinion of the Justices*, 146 Me. 239, 240, 80 A.2d 421 (1951).¹ Notwithstanding that general principle, the Legislature may create separate tax districts (such as the unorganized territory tax district, see 36 M.R.S.A. §§ 1601-1611) and tax those districts differently as long as "the assessed taxes result in some special benefit to the taxed district." *McBreairty*, 663 A.2d at 54. The Court explained that different tax rates for separate tax districts satisfies Article IX, Section 8, "[a]s long as all property within a given district is assessed at a uniform rate, and the benefit from the tax is for a public purpose within the district." *Id.* (emphasis added). Thus, the Court in *McBreairty* and other cases has suggested that, to satisfy Article IX, Section 8, property tax revenues from a separate taxing district must be expended for undertakings that result in a "special benefit" to that taxing district. See also *Opinion of the Justices*, 383 A.2d 648, 652 (1978).

In *McBreairty*, the Law Court considered several claims that statutes involving the taxation of property within the unorganized territory violated Article IX, Section 8. One of the issues involved the funding for the Land Use Regulation Commission ("LURC"). At that time, 10% of LURC's funding came from the unorganized territory tax district, and 90% came from the State's General Fund. According to the Court, LURC provided roughly 9% of its services to organized areas, and no property tax revenues from those organized areas were being assessed to fund LURC. *Id.* at 53-54.

The Plaintiffs in *McBreairty* (property owners from the unorganized territory) contended that such an arrangement violated Article IX, Section 8, because property tax revenues from the unorganized territory were being used to fund an agency (LURC) that provided services to both the unorganized territory and the organized areas. In other words, the Plaintiffs claimed that the statute imposing property taxes on them violated Article IX, Section 8, because a portion of their property taxes was being used to pay for services in the organized areas, while property owners in the organized areas were not similarly taxed.

¹ Art. IX, § 8, provides in pertinent part as follows: "All taxes upon real and personal estate, assessed by authority of this State, shall be apportioned and assessed equally according to the just value thereof."

The Court rejected this argument, pointing out that 91% of the work done by LURC took place in the unorganized territory, and only 10% of LURC's budget came from property taxes from the unorganized territory. *McBreairty*, 663 A.2d 53-54. "As long as the tax revenues LURC receives from the [unorganized territory tax district] are used to fund its services in the unorganized areas, no constitutional violation occurs."² *Id.* at 54.

The Plaintiffs in *McBreairty* also contended that a provision in the Tree Growth Tax Law violated Article IX, Section 8. To encourage forest landowners to continue the forest use of their land, that law allowed all landowners to obtain reduced valuation rates, set by the State Tax Assessor, on their forest property. This reduced the owners' real estate taxes and resulted in the local taxing authority receiving less revenue than if the reduced valuation rates were not imposed. The State reimbursed a "municipality actually levying and collecting municipal property taxes . . . [for] 90% of the per acre tax revenue lost as a result [of the lower valuation rates]." 36 M.R.S.A. § 578(1) (1990 & Supp. 1994). However, the unorganized territory did not receive any reimbursement from the State under this law.

The Court rejected the Plaintiffs' contention that the Tree Growth Tax Law violated Article IX, Section 8. According to the Court, the plaintiffs' argument concerned only the distribution of tax revenues, not the apportionment or assessment of taxes. *Id.* at 54-55. The Court explained that:

[a]lthough Article IX, Section 8, requires equal assessment of property taxes, it does not apply to the manner in which the government chooses to spend tax revenues. There is no requirement that the Legislature distribute tax revenues equally, *see Opinion of the Justices*, 339 A.2d 492, 510 (Me. 1975) (legislative scheme for distribution of revenues lies outside scope of Me. Const. art. IX, § 8), and the method of distribution is not a factor for us to scrutinize when we consider a tax statute's constitutionality. *Sawyer*, 109 Me. at 174-76.

Id. at 55. The failure of the State to provide forest land reimbursements to the unorganized territory did not violate Article IX, Section 8, the Court held. *Id.*

Thus, the Law Court has held that certain spending decisions of the State and municipalities are immune from Article IX, Section 8, inquiry. *See McBreairty* 663 A.2d at 55. *See also Delogu v. State of Maine*, 1998 ME 246, ¶¶

² Although the Court did not elaborate further on its rationale, it is worth noting that money is fungible, and one might argue that the 10% of LURC's budget that came from property taxes from the unorganized territories was spent entirely on the 91% of LURC's services that were directed to the unorganized territories.

17-18, 720 A.2d 1153, 1156 (City of Bath's decision to reimburse Bath Iron Works ("BIW") all the property taxes directly attributable to TIF project in Bath involving BIW did not violate Article IX, § 8); *Sawyer v. Gilmore*, 109 Me. 169, 174-76 (1912) (fact that tax was assessed equally on unorganized townships, cities, towns, and plantations, but distributed only to cities, towns, and plantations to fund education was "not in itself fatal"). Nonetheless, the spending decisions at issue in those cases were not identical to those presented by L.D. 2229, which could result in the expenditure of a taxing district's funds totally outside that taxing district (*i.e.*, in organized areas of a county) on development as to which property taxpayers in the county's organized areas would not be contributing. In addition to that factual distinction, the Law Court more recently struck down the City of Portland's "Property Tax Relief Program" as violating Article IX, Section 8, even though the City presented it as a tax spending measure. *Delogu v. City of Portland*, 2004 ME 18, ¶¶ 21-23, 30, 848 A.2d 33, 39, 40.

We are not aware of any Maine case that addresses the precise issue raised by L.D. 2229. Applying the general principles discussed above, property tax revenues from a separate taxing district like the unorganized territory need to be expended for undertakings that result in a "special benefit" to that taxing district. Therefore, we believe that a court would likely conclude that the bill satisfies Article IX, Section 8, when the county's expenditure of property taxes from a TIF project in the unorganized territory results in a special benefit to the unorganized territory within that county. Although a court might conclude that the spending decisions like those raised by L.D. 2229 are totally outside the purview of Article IX, Section 8 (*see, e.g., McBreairty* 663 A.2d at 55), we believe that a court may well conclude that L.D. 2229 violates Article IX, Section 8, to the extent that it permits property taxes from the unorganized territory tax district to be spent without providing a special benefit to the unorganized territory.

As noted above, we believe that L.D. 2229 would more likely survive a legal challenge brought under Article IX, Section 8, if it were amended to expressly require that the authorized spending by the county for "county economic and community development" must result in a special benefit to the unorganized territory within that county.

We hope that this letter is of assistance to you.

Sincerely,



G. Steven Rowe
Attorney General