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December 29, 2005

The Honorable John Richardson, Speaker of the House
122nd Maine Legislature
2 State House Station
Augusta, ME 04333-0100

Re: Your request for an opinion concerning Art. IV, Part 3, § 23, of the Maine
Constitution

Dear Speaker Richardson:

This letter responds to your request for a written opinion concerning the interpretation of Article IV, Part 3, § 23 of the Maine Constitution as it applies to personal property tax revenues. You have asked the following specific questions:

1. Does the 50% reimbursement requirement for "lost" property tax revenues in this provision apply to personal property tax revenues as well as real property tax revenues?
2. The Constitution applies the 50% reimbursement to "property tax revenue loss suffered . . . because of property tax exemptions or credits." If the Legislature completely repeals the personal property tax [no exemptions or credits involved], does the 50% reimbursement still apply?
3. If this provision does apply to "lost" personal property tax revenues, and the Legislature repealed the personal property tax, to what benchmark does the 50% reimbursement apply in future years? For example,

- A. If a municipality currently collects a certain amount of personal property tax revenues in year 1 of the life of machinery and equipment (at its highest value), when the personal property tax is repealed, at what value in future years is the State's 50% reimbursement requirement applied?
- B. If the State retains the personal property tax, but reduces the type of property subject to this tax [exemptions and credits not involved], is the State subject to the 50% reimbursement requirement for personal property no longer subject to the tax?

SUMMARY OF CONCLUSIONS

The questions you raise have not been addressed by any Maine court. Accordingly, our answers reflect the analysis that we believe the courts would apply without the benefit of the greater certainty that clear precedents provide. Moreover, without the specific language of proposed legislation before us, our answers are of necessity quite general and may not have clear application to any particular legislative proposal. With these caveats in mind, we summarize our conclusions as follows.

We believe that a court would very likely conclude that Article IV, Part 3, § 23 applies to both personal property taxes and real property taxes, as there is no language in § 23 or other rationale that would provide a basis for excluding personal property taxes from the scope of § 23. The question of whether a repeal of all personal property taxes would trigger the 50% reimbursement required when statutory property tax exemptions and credits are enacted is less clear. However, on balance we believe that the reimbursement requirement of § 23 would not apply to the total repeal of the personal property tax since such a repeal would be a different type of legislative action than the enactment of a particular exemption or credit. In addition, the legislative history of § 23 indicates that its purpose was to require careful legislative consideration of the financial impact on municipalities of new exemptions and credits. A total repeal of the personal property tax would be an action of such a different dimension that its fiscal consequences for municipalities would likely receive careful consideration even if § 23 did not exist. Finally, if a court were to conclude that the repeal of the personal property tax did come within the ambit of the reimbursement requirement in § 23, it would likely also conclude that the dollar amount of reimbursement owed should be calculated using the methodology set out in Title 36, § 661(1)-(3).

THE RELEVANT CONSTITUTIONAL PROVISION

To begin our analysis, we first set out in full the Maine constitutional provision at issue, Article IV, Part 3, § 23:

“Section 23. The Legislature shall annually reimburse each municipality from state tax sources for not less than 50% of the property tax revenue loss suffered by that municipality during the previous calendar year because of the statutory

property tax exemptions or credits enacted after April 1, 1978. The Legislature shall enact appropriate legislation to carry out the intent of this section.

"This section shall allow, but not require, reimbursement for statutory property tax exemptions or credits for unextracted minerals."

The history of section 23, which was added to the Maine Constitution by amendment in 1978, suggests that it was intended to require the Legislature to carefully consider enacting new property tax exemptions and the concomitant loss of revenue to municipalities. As noted by one proponent of the amendment, "[t]he purpose of this bill was, in fact, to make the people up here think twice about granting new exemptions and credits." Legis. Record 2216 (June 30, 1977) (statement of Rep. Bachrach). There was a concern that the number of property tax exemptions and credits was eroding the tax base relied upon by municipalities. As another proponent of the amendment observed, in many Maine cities and towns, more than 25% of the tax base had been eliminated by "legislative generosity." Legis. Record 1736 (June 16, 1977) (statement of Sen. Merrill). See also M.J. Tinkle, *The Maine Constitution, A Reference Guide* 97 (1992). The provision seems to have accomplished what it set out to do; since 1978, few property tax exemptions have been enacted. Prior to that date, numerous exemptions were enacted. See, e.g., 36 M.R.S.A. §§ 651, 652.

DISCUSSION

We turn now to the questions you posed.

1. Does the 50% reimbursement requirement for "lost" property tax revenues in this provision apply to personal property tax revenues as well as real property tax revenues?

We believe that this constitutional provision applies to both personal property tax revenues and real property tax revenues. Section 23 on its face applies to "property tax" revenues lost by municipalities, and there are two classes of property tax revenues flowing to municipalities: personal property tax revenues and real property tax revenues. We have searched the history of the constitutional amendment and can find no support for the proposition that the Legislature or the voters intended the amendment to apply only to real property taxes. Such limiting language would have been easy to craft, if that had been the intent.

Although we are not aware of any Maine precedent addressing this question, we believe that the Maine courts would conclude that the provision applies to both personal property tax revenues and real property tax revenues.

2. If the Legislature completely repeals the personal property tax [no exemptions or credits involved], does the 50% reimbursement still apply?

While there is no judicial precedent on point, we believe that a court might well conclude that a clear and complete repeal of the personal property tax is not an exemption or credit that triggers the 50% reimbursement requirement of § 23. There are several points that support this conclusion.

A legislative repeal of the personal property tax would not be, by its own terms, an "exemption" or a "credit." (See list of exemptions codified in 36 M.R.S.A. §§ 651-661, a subchapter of the Maine tax law entitled "Exemptions"). A repeal of a tax is an entirely distinct legislative act from the enactment of an exemption or a credit. That this distinction is material in this instance is further supported by the fact that the Legislature would be unlikely to overlook the financial impact of an outright repeal of the personal property tax in its entirety. Further, Article IV, Part 3, § 23, does not state explicitly that the repeal of the property tax would trigger the 50% reimbursement requirement; by its terms it applies only to the enactment of "exemptions" or "credits." Put another way, the repeal of existing property taxes could easily have been included in § 23, but was not.

Additional support for this conclusion can be found in common usage of the term "exemption." In our opinion letter dated March 23, 2004, analyzing certain aspects of Initiated Bill 4, L.D. 1893 (121st Legis. 2004), "An Act to Impose Limits on Real and Personal Property Taxes," we relied on analysis of the Washington Supreme Court in *Belas v. Kiga*, 135 Wn.2d 913, 959 P.2d 1037 (Wash. 1998), the challenge to a similar proposal in Washington State.¹ In rejecting the argument that a value averaging valuation method should escape application of the tax uniformity requirement of that state's Constitution because it functioned as an "exemption," the Court described property tax exemptions as follows.

Property tax exemptions are subsidies to certain owners or for certain uses or property, to encourage publicly desired objectives. A key principle of property tax systems is that all property is taxable unless it is specifically exempted, and exemptions are to be narrowly construed.

....

These exemptions [provided by state constitution and statutes] fall in basically three categories: where the exemption is defined by some characteristic of the property owner, (*i.e.*, low-income, retired or disabled); use of the property creates the exemption (*i.e.*, homes for the sick, aging or homeless); or the use to which the property is put meets some public need or encourages a publicly desired use (*i.e.*, historical landmark or timber preservation).

¹ In our March 23, 2004 opinion, we concluded that the Washington Supreme Court's analysis was applicable to L.D. 1893, *i.e.*, that L.D. 1893's valuation system was not an "exemption," because, among other reasons, exemptions cannot be extended by ambiguous language or by language that does not clearly create an exemption. Because that issue had not been directly addressed by any Maine precedent that we found, however, we cautioned that the conclusion we reached was not free from doubt. The Supreme Judicial Court did not explicitly deal with this argument in its *Opinion of the Justices* concerning L.D. 1893, 2004 ME 54, 850 A.2d 1145.

Id. at 931-32, 959 P.2d at 1045-1046.

Like Washington's Supreme Court, the Maine Supreme Court has ruled that property tax exemptions are to be strictly construed. *Silverman v. Town of Alton*, 451 A.2d 103, 105 (Me. 1982). The *Silverman* decision, and other Maine Law Court decisions with similar language, set out rules of construction to assist in the determination of whether a particular piece of property or a particular activity falls within the language of a specific exemption. It is not clear, therefore, to what extent those rulings would be applicable to the legal issue of whether an outright repeal of the personal property tax should be treated as an "exemption" for purposes of Article IV, Part 3, § 23.

It should be noted that the outcome of litigation on this issue cannot be predicted with certainty, given the absence of direct precedents and the existence of meaningful arguments that can be advanced by the proponents of reimbursement. Outright repeal of the personal property tax could be viewed as the ultimate "exemption." In support of this conclusion, a court might look to the fact that the clear purpose of this constitutional provision is to protect municipalities from further erosion of the property tax revenues by legislative act. Drawing the technical distinction between a repeal of the tax and an exemption of all property subject to the tax could be seen as elevating form over substance under some circumstances, for instance, where the cumulative effect of a number of specific exemptions is tantamount to repeal of the tax. The particular terms of the legislative proposal at issue could influence the outcome on this issue. For example, if the Legislature crafted legislation that effectively exempted all categories of personal property that contribute personal property tax revenues, but did not explicitly repeal the personal property tax, then it would be more likely that a court would conclude that the 50% reimbursement would apply.

In sum, while there are arguments to be made in support of both sides of this issue, we believe it is more likely than not that a court would find that the weight of the arguments favor non-application of section 23, although the lack of precedents means that we cannot predict this outcome with any degree of certainty. A court's conclusion might be influenced by how the repeal is worded, legislative findings supporting the repeal, and what, if any, additional revenue is given to municipalities at the time of repeal.

3. If this provision does apply to "lost" personal property tax revenues, and the Legislature repealed the personal property tax, to what benchmark does the 50% reimbursement apply in future years? For example,
 - A. If a municipality currently collects a certain amount of personal property tax revenues in year 1 of the life of machinery and equipment (at its highest value), when the personal property tax is repealed, at what value in future years is the State's 50% reimbursement requirement applied?

- B. If the State retains the personal property tax, but reduces the type of property subject to this tax [exemptions and credits not involved], is the State subject to the 50% reimbursement requirement for personal property no longer subject to the tax?

In answering Question 3(A), we note first that the question assumes that the repeal of the personal property tax would trigger the 50% reimbursement requirement.

The Legislature enacted legislation in 1981 to carry out the intent of Article IV, Part 3, § 23. See 36 M.R.S.A. § 661. That legislation sets out a method by which municipalities may file a claim and describes how a municipality is to calculate the amount of tax revenue loss that results from a statutory property exemption or credit enacted after April 1, 1978. See 36 M.R.S.A. §§ 661(1)–(3). That calculation works as follows. The amount of property tax revenue lost by a municipality is determined by first computing a hypothetical tax rate and then multiplying that tax rate against the municipal valuation of exempt property. The hypothetical tax rate is based on the municipality's calculation of three values: (A) the total amount of property taxes levied by that municipality in the previous calendar year, (B) the valuation of the property taxed by that municipality during the previous year, and (C) the valuation of the property that is exempt as a result of exemptions and credits enacted after April 1, 1978. The State Tax Assessor then adds (B) and (C) together. That sum is then divided into (A) to come up with a new tax rate, which the Assessor then multiplies by the valuation of exempt property to determine the amount of lost tax revenues. Fifty per cent of that amount is to be reimbursed to the municipality. We see no reason why a court would not follow this methodology if the Legislature were to repeal the personal property tax.

Thus, in response to part A of this question, we believe that a court would likely decide to follow the methodology set out in section 661(1)–(3).

In response to Part B of this question, which assumes that the personal property tax is not repealed, we have been unable to come up with hypothetical examples of legislative enactments that reduce the types of property subject to the personal property tax, but do not amount to an exemption or a credit. As a general matter, an enactment that protects from tax a type or class of property that is currently subject to property tax would likely be found to be an exemption requiring 50% reimbursement. However, the precise answer will of course depend on the specific facts, so we are unable to give you a definitive answer.

CONCLUSION

As discussed above, we believe that a court would conclude that Article IV, Part 3, § 23, applies to both personal property taxes and real property taxes. While we think it likely that a court would determine that the constitutional provision does not apply if the Legislature were to completely repeal the personal property tax, we cannot predict the outcome of litigation on this issue with any certainty. A court's conclusion may be influenced by how the repeal is worded, legislative findings supporting the repeal, and

what, if any, additional revenue is given to municipalities at the time of repeal. Finally, if a court ruled that such a repeal triggered the constitutional 50% reimbursement requirement, we believe that the court would likely determine that the methodology set out in section 661(1)-(3) should be followed to calculate the 50% reimbursement.

I hope this information is helpful to you. Please feel free to call upon this office if we can be of further assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "G. Rowe", written in a cursive style.

G. Steven Rowe
Attorney General