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March 23, 2004

The Honorable Stephen Stanley, Senate Chair
The Honorable David G. Lemoine, House Chair
Members of the Joint Standing Committee on Taxation
121st Maine Legislature
3 State House Station
Augusta, ME 043330-0100

Dear Senator Stanley, Representative Lemoine, and Members of the Joint Standing Committee on Taxation:

This letter responds to your request for a written opinion concerning certain legal issues presented by L.D. 1893, a citizen initiated bill entitled "An Act to Impose Limits on Real and Personal Property Taxes." Given the time pressures on the Legislature, we have focused on the issues of major significance. Thus, this should not be read as an exhaustive analysis of the bill, which presents a number of interpretive as well as substantive problems.

We have concluded that there is a substantial possibility that a court would find that key provisions of L.D. 1893 violate Article IX, § 8 of the Maine Constitution, and that such a finding would require the court to undertake a complex severability analysis. It is difficult to predict whether the remaining provisions could be given effect, and arguments can be made on each side of this issue given the specific severability provision in the bill. However, a court may well conclude that the lawful provisions are not severable because new language would have to be written into several sections of the bill for them to be both valid and effective, and a court would have little basis for determining whether the people would have voted for the initiative without the unconstitutional features. Finally, if the bill were found to create an exemption from property tax for a portion of each property's value, the requirement that the Legislature use state revenues to reimburse municipalities for 50% of the lost revenue would be triggered. Me. Const. Art. IV, Pt. 3, § 23. While, on balance, we do not think the valuation system created by the bill should be characterized as an "exemption," the outcome of a legal challenge on this point is not certain.

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L.D. 1893 is modeled on California's Proposition 13, a tax cap that was added to the California Constitution as Article XIIIA by amendment in 1978. It is important that we emphasize at the outset that Article XIIIA is materially different from L.D. 1893 by virtue of this fact. If the substance of L.D. 1893 were proposed as a constitutional amendment,[1] the conflicts we have identified between the bill and Maine's Constitution would be eliminated.

The constitutionality of Article XIIIA was immediately challenged in the California courts, and upheld against a number of arguments that were largely specific to California's Constitution. *Amador Valley Joint Union High School Dist. v. State Bd. Of Equalization,* 583 P.2d 1281 (Cal. 1978). While that case did not reach the U.S. Supreme Court, the U.S. Supreme Court subsequently sustained Article XIIIA against an equal protection challenge in *Nordlinger v. Hahn*, 505 U.S. 1 (1992).

**Equal Protection**

We begin with this issue because it has been directly addressed by the U.S. Supreme Court in its review of Article XIIIA of the California Constitution in *Nordlinger*, allowing us to reach a clear conclusion that a court would not likely find that L.D. 1893 violates the Equal Protection Clause of the U.S. Constitution or the equivalent provision of the Maine Constitution, Art. I, §6-A. Because the other legal issues had already been adjudicated in *Amador*, the Supreme Court's decision in *Nordlinger* focused solely on the question of whether Article XIIIA violated federal equal protection guarantees. Thus *Nordlinger*'s precedential value is limited to that issue and does not extend to the problems we address below concerning provisions of Maine's Constitution.

Like L.D. 1893, Article XIIIA[2] caps real property taxes at 1% of a property's "full cash value." Section 1(a). "Full cash value" is then defined as the assessed valuation as of the 1975-76 tax year or, thereafter, the appraised value of real property when purchased, newly constructed, or a change in ownership has occurred. Section 2(a). The assessment is subject to an inflation adjustment of not more than 2% per year. Section 2(b). The legislature is authorized to allow homeowners over the age of 55 who sell their principal residences to carry their previous base-year assessments with them to replacement residences of equal or lesser value. Section 2(a). Another provision permits the existing base-year assessment to follow transfers of a principal residence between parents and children. Section 2(h). As the Supreme Court described these provisions:

> Thus, the assessment provisions of Article XIIIA essentially embody an "acquisition value" system of taxation rather than the more commonplace "current value" taxation. Real property is assessed at values related to the

[1] However, a constitutional amendment cannot be proposed by citizen initiative. *See* Maine Constitution, Art. IV, Pt. 3, §18(1).

[2] The full text of Article XIIIA is found in an appendix to the California Supreme Court's decision in *Amador, supra.*

> value of the property at the time it is acquired by the taxpayer rather than to the value it has in the current real estate market.

*Nordlinger*, 505 U.S. at 5. This summary also accurately describes L.D. 1893, which contains all these provisions.

The facts in *Nordlinger* can be briefly summarized as follows: Stephanie Nordlinger bought a house in 1988 in Los Angeles County for $170,000. She then discovered that she was paying about five times more property tax than were neighbors with comparable residences that they had owned since 1975, and brought suit seeking a tax refund and a declaration that the tax was unconstitutional. The Court noted that "[o]ver time, this acquisition-value system has created dramatic disparities in the taxes paid by persons owning similar pieces of property" and that by 1989, the 44% of California homeowners who had owned their homes since the 1978 enactment of Article XIIIA "shouldered only 25% of the more than $4 billion in residential property taxes paid by homeowners statewide." *Id.* at 6. Ms. Nordlinger's property tax bill was only a few dollars less than that paid by a pre-1976 owner of a $2.1 million Malibu beachfront home.

The Court began its equal protection analysis by noting that the Equal Protection Clause of the 14th Amendment to the U.S. Constitution does not forbid all classifications, as "[o]f course, most laws differentiate in some fashion between classes of persons." *Id.* at 10. Legislatures are presumed to have acted within their constitutional power even if their laws result in some inequality. The Equal Protection Clause requires only that the classification rationally further a legitimate state interest, unless heightened review is required because a fundamental right or inherently suspect class is involved.[3]

"The appropriate standard of review is whether the difference in treatment between newer and older owners rationally furthers a legitimate state interest." *Id.* at 11. The Court found two such interests.

> First, the State has a legitimate interest in local neighborhood preservation, continuity, and stability. The State therefore legitimately can decide to structure its tax system to discourage rapid turnover in ownership of homes and businesses, for example, in order to inhibit displacement of lower income families by the forces of gentrification or of established "mom-and-pop" businesses by newer chain operations. By permitting older owners to pay progressively less in taxes than newer owners of comparable property, the Article XIIIA assessment scheme rationally furthers this interest.
>
> Second, the State legitimately can conclude that a new owner at the time of acquiring his property does not have the same reliance interest warranting protection against higher taxes as does an existing owner...A

[3] The Court rejected Nordlinger's argument that the constitutionally protected right to travel was impaired by Article XIIIA; hence the heightened standard of review was not required. *Id.* at 10-11.

> new owner has full information about the scope of future tax liability before acquiring property, and if he thinks the future tax burden is too demanding, he can decide not to complete the purchase at all. By contrast, the existing owner, already saddled with his purchase, does not have the option of deciding not to buy his home if taxes have become prohibitively high. To meet his tax obligations, he might be forced to sell his home or to divert his income away from the purchase of food, clothing, and other necessities. In short, the State may decide that it is worse to have owned and lost than never to have owned at all.

*Id.* at 12-13 (citation omitted). This reasoning is the foundation for the Court's conclusion that Article XIIIA does not violate the Equal Protection Clause of the U.S. Constitution. Inasmuch as the Maine Law Court has held that the equal protection clause of the Maine Constitution, Art. I, §6-A is coextensive with that of the U.S. Constitution (*see School Admin. Dist. No. 1 v. Commissioner, Dep't of Educ.*, 659 A.2d 854, 857 (Me. 1995); *Choroszy v. Tso,* 647 A.2d 803, 808 (Me. 1994)), the Law Court would likely reach the same conclusion in evaluating whether L.D. 1893 violates the equal protection guarantees of the state and federal constitutions. However, unlike *Nordlinger*, the equal protection issue is only the beginning, not the end, of the constitutional analysis of L.D. 1893 because other provisions of the Maine Constitution are relevant.

**Equal apportionment and assessment based on just value**

The central legal problem presented by L.D. 1893 results from the conflict between its property valuation methods and the requirements of Art. IX, § 8 of the Maine Constitution. Section 8 begins with this statement: "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." Exceptions to this rule are incorporated in this section of the Constitution.

The Law Court has described this provision as establishing two requirements for a valid property tax: a valuation requirement and an apportionment requirement. *Eastler v. State Tax Assessor*, 499 A.2d 921, 924 (Me. 1985). It is our view that the property valuation formula that is the central feature of L.D. 1893 would likely be found to violate both requirements of Article IX, § 8. The valuations produced by the formula are based on what the *Nordlinger* court characterized as "acquisition value" with a fixed inflation adjustment rather than on the "just value" of the property. The resulting tax assessments would not be "apportioned and assessed equally" because the formula would produce different assessments for similarly situated properties depending on how long they had been held by the same owner. We discuss these two requirements of Section 8 separately.

Valuation requirement. Under L.D. 1893's definition of "full-cash value" in § 351(4), tax is assessed on one of two alternative bases. Under the first sentence of 351(4), full-cash value is "the governmental entity's total assessed valuation" "as shown on the 1996-97 tax bill under 'total value." This provision effects an immediate roll-back

in property value for owners who have held their property since the date of that valuation. Under the second sentence of §351(4), "for newly constructed or newly purchased" property "that changes in ownership after the 1996-97 assessments, 'full-cash value' means the appraised value." Reading § 353(1), it then becomes apparent that for property in this latter category, the full-cash value is the appraised value *when* property is purchased, newly constructed, or otherwise changes hands, not the appraised value each tax year. In both instances, the so-called full-cash value may then be adjusted for inflation, but only up to 2% each year.

These three features of the valuation formula in L.D. 1893 — the roll-back, the acquisition cost basis for new construction and newly purchased property, and the limitation on annual property value increases to 2% — each appear to violate the requirement that property taxes be based on "just value." "Just value" is the equivalent of "market value." *Shawmut Inn v. Inhabitants of Town of Kennebunkport*, 428 A.2d 384, 389 (Me. 1981). Thus, in *Eastler*, *supra*, the Law Court found that the Forest Fire Suppression Act tax violated Art. IX, § 8 because it was not based on the market value of the land but rather on a per-acre fee that was uniform across the state and applied only to an owner's property to the extent that it exceeded 500 acres. Similarly, in *Opinion of the Justices*, 210 A.2d 683, 698 (1965), the Justices concluded that an assessment "upon a portion of 80% only of 'the initial value of the fee interest at the time of completion of construction'" was not assessment based on "just value" and thus violated Art. IX, § 8.

L.D. 1893 is clearly intended to reduce property taxes for some owners immediately, as well as to slow their increase over time for all owners. By requiring that property be assigned either the value stated on 1996-97 tax bills or, if acquired or newly constructed after that time, the appraised value at the time of construction or acquisition, the bill results in a significant number of properties being valued at less than market value. This effect is compounded by the 2% per year cap on inflation adjustments, which precludes assessed values from rising with the market in any period where the actual rate of increase in the value of the property exceeds 2%. The result is a formula that on its face fails to comply with the mandate of Article IX, § 8 that property taxes be based on "just value."

Equal assessment and apportionment. The Law Court has most recently discussed the equal apportionment requirement of Article IX, § 8 in *Delogu v. City of Portland*, 2004 ME 18.

> Article IX, Section 8 mandates equality, according to "just value," in the manner by which property taxes are both "apportioned and assessed." It prohibits municipalities from engaging in unjust discrimination in the assessment of real estate taxes or the apportionment of real estate tax burdens...The underassessment or overassessment of one set of similarly situated properties supports a finding of unjust discrimination...The same result occurs when selected properties receive an assessment reduction that does not benefit similarly valued properties.

*Id.* at ¶12.[4]

While "just value" and "equal assessment and apportionment" are two separate requirements of Section 8, failure to satisfy the first often leads to an inability to satisfy the second. For example, in *Opinion of the Justices*, 210 A.2d 683, *supra,* the Justices concluded that the "just value" requirement of Section 8 was violated by a tax assessed under the Municipal Industrial and Recreational Obligations Act on certain properties at less than just value (as discussed above). This led them to conclude, in turn, that this formula also produced "discriminating tax treatment and would result in the necessity of other taxpayers, even competitors, paying the deficit" in violation of Art. IX, § 8). *Id.* at 698.

Similarly disparate treatment of like properties results from the valuation method prescribed by L.D. 1893. Under the definition of "full-cash value," two properties that currently have the same market value (and thus the same "just value") will not typically be taxed "equally" unless they have been owned for the same period of time. A property that has not changed ownership since 1996 will likely be taxed at a lower amount (the 1996-97 value) than a property with the same market value that has had "changes in ownership" since 1996 (or is "newly constructed") and thus is taxed at the "appraised value."

It may reasonably be asked whether the lower threshold "rational basis" test applied under the equal protection provisions of both the Maine and U.S. Constitutions could not be utilized here to support a finding that the L.D. 1893 valuation method results in equal apportionment and assessment. Indeed, such an argument was advanced in a challenge to Referendum 74 in the State of Washington. *Belas v. Kiga,* 135 Wn.2d 913, 959 P.2d 1037 (Wash. 1998). Referendum 74 was an initiated measure that established a "value averaging" valuation method that operated to reduce the taxes on appreciating property in a manner similar to the acquisition cost method of L.D. 1893 and California's Article XIIIA.

The Washington Constitution does not require just or market value in assessing property, only "uniformity," a standard that has long been interpreted by the Washington courts to mean both an equal tax rate and equality in valuing the property. *Id.* at 923, 959 P.2d at 1042. Hence, the equality of the rate and its apportionment became the focus of the litigation. The Washington Supreme Court rejected the argument that the rational basis test was an appropriate measure of the state constitutional requirement of equality in taxation, adopting the reasoning of the state attorney general.

> "Although the acquisition method does not violate the Equal Protection Clause of the U.S. Constitution, we are convinced that it would violate the uniformity requirement of Amendment 14 of the State Constitution.

[4] The opinion in *Delogu* emphasizes the lack of legislative authorization in concluding that the Portland Property Tax Relief Program, which afforded a tax relief payment based on $15,000 of value for owner-occupied residential property assessed at less than $400,000, violated Art. IX, § 8, as well as Art. IX, § 9.

> Under equal protection analysis, there is no violation if there is a rational basis for the difference in treatment.
>
> However, there is no rational basis exception to the uniformity requirement of Amendment 14. The only discrepancies in uniformity that will be tolerated are those required by the practical necessities of revaluing property when the program is carried out 'in an orderly manner and pursuant to a regular plan, and if it is not done in an arbitrary, capricious or intentionally discriminatory manner.' [Citation omitted.]"
>
> 5 Op. Att'y Gen. 16 (1995). We agree with this position.
>
> Arguing that all that is required to satisfy this state's Constitution is a rational basis for classification ignores a century of this Court's cases requiring uniformity of taxation under article VII of the state Constitution and ignores our state Constitution's requirement that all real estate be one class of property. We have treated uniformity challenges very differently than equal protection challenges in taxation cases...[citations omitted]. We decline the invitation to ignore our own constitutional uniformity requirement and apply only the protections provided by federal equal protection law. Referendum 74 was not an amendment to the state Constitution and cannot, therefore, abolish or alter the uniformity requirement of article VII, sec. 1.

*Id.* at 941-942, 959 P.2d at 1051.

We find this analysis well reasoned and consistent with the governing principles in Maine case law discussed in this opinion. Accordingly, we do not believe that the Maine courts will likely find that the equality required by Art. IX, § 8 in the apportionment and assessment of property taxes is satisfied by the rational basis test employed in equal protection analysis. Section 8 established a uniformity rule specific to the state's power to tax that operates in addition to equal protection guarantees and serves a different purpose. This is not to suggest that equal protection analysis has no role in protecting citizens against unfair discrimination in the tax area. To the contrary, differential application of valuation procedures has been held to violate the U.S. Constitution's Equal Protection Clause. *Allegheny Pittsburgh Coal Co. v. Webster County,* 488 U.S. 336 (1989). However, the Equal Protection Clause is not the only constitutional constraint on the power of taxation.

In sum, L.D. 1893 will result in assessments of similarly situated properties that vary based on how long the property has been owned and that do not reflect market value. Applying the available Law Court decisions to the valuation method established by the bill, we believe that it violates the requirement that taxes be apportioned and assessed equally based on just value.

## Severability

If a court were to find that the valuation formula in L.D. 1893 is unconstitutional, the court would then have to determine whether any part of the initiative continues to have legal effect. The initiated bill has a severability clause (proposed 36 M.R.S.A. §361) that provides: "If any portion, word, clause or phrase of this initiative for any reason is held to be invalid or unconstitutional by a court of competent jurisdiction, the remaining portions, clauses and phrases may not be affected, but shall remain in full force and effect."

Maine has a statutory severability provision, 1 M.R.S.A. § 71(8), that is worded somewhat differently and provides in pertinent part:

> The provisions of the statutes are severable. The provisions of any session law are severable. If any provision of the statutes or of a session law is invalid, or if the application of either to any person or circumstance is invalid, such invalidity does not affect other provisions or applications *which can be given effect without the invalid provision or application.*

(Emphasis added.) The highlighted language in § 71(8), which does not appear in the L.D. 1893 severability provision, is key to the severability analysis the Law Court has employed. In order to determine whether the absence of that language in the initiated bill is material, we first discuss the case law on severability.

Under the case law, if a provision of a statute is invalid, that provision is severable from the rest of a statute as long as (a) the rest of the statute "can be given effect" without the invalid provision, and (b) the invalid provision is not such an integral part of the statute that the Legislature would only have enacted the statute as a whole. *See Bayside Enterprises, Inc. v. Maine Agricultural Bargaining Board*, 513 A.2d 1355, 1360 (Me. 1986); *Lambert v. Wentworth*, 423 A.2d 527, 535-36 (Me. 1980) (provision is severable if "the unconstitutional and invalid portion of the veterans' tax exemption is separable from and independent of the rest of the statute which is valid"). "On the other hand, when the legislative provisions are so related in substance and object that it is impossible to determine that the legislation would have been enacted except as an entirety, if one portion offends the Constitution, the whole must fall." *Town of Windham v. LaPointe*, 308 A.2d 286, 292 (Me. 1973).

Two cases will serve to illustrate the different results that can occur when these principles are applied. In *Lambert v. Wentworth*, 423 A.2d 527 (Me. 1980), a nonqualifying veteran challenged 36 M.R.S.A. §653, which provided a tax exemption up to the just value of the estates of veterans who had reached the age of 62 or were receiving certain federal veterans' benefits, provided that the veteran was a resident of the State of Maine at the time of entry into the service or a resident of the state for at least ten years. While the Law Court concluded that the 10-year durational residency requirement was unconstitutional, it upheld the requirement of state residency at the time of entrance into the service. Lambert, a Massachusetts resident at the time of his enlistment, argued

that the two requirements were not severable, and thus both had to fall. The Court disagreed, reasoning as follows.

> [W]e hold that the partial unconstitutionality of the instant statute does not necessarily result in tainting the whole legislation, even though the legislation at issue does not carry a severability clause; and where it appears that the valid provisions would have been enacted without the invalid portion, then the valid part may stand and the invalid segment may be rejected. Such may be presumed to be the case, if, as in our present problem, the unconstitutional and invalid portion of the veterans' tax exemption law is separable from and independent of the rest of the statute which is valid.

423 A.2d at 535 (citation omitted).

In contrast, the statute at issue in *Eastler v. State Tax Assessor, supra,* contained an unconstitutional provision that the Law Court found was not severable. The Forest Fire Suppression Act contained a complex formula for funding forest fire protection services in the unorganized territories and adjacent municipalities, using a number of different revenue sources. One source was a per-acre tax on "protected land," defined as "forest land and other undeveloped land such as blueberry barrens, swamps, bogs, undeveloped pastureland or brushland." Each owner of protected land was entitled to a 500 acre exemption, and federal, state or municipal-owned land was excluded. The per-acre tax was uniform across the State, not based on value, and was found to be in violation of Art. IX, § 8 by the *Eastler* Court.

In an effort to preserve the tax, the State argued that this tax was an excise tax imposed on forestry businesses, and not a property tax, as excise taxes are not subject to the equal apportionment and assessment requirements applicable to property tax. As part of this argument, the State suggested that if all but the words "forest land" were stricken from the definition of protected land, a constitutional excise tax would result. The Court rejected this argument, concluding that the tax in question had the qualities of a property tax rather than an excise tax. In considering the severability argument, the Court further stated: "However, if these words were stricken, there would still be no focus on the business of commercial forestry since "forest land" would remain undefined." 499 A.2d at 927. As a result, the Court held that the entire act was invalid.

This case is more like *Eastler* than *Lambert.* It is difficult to imagine how L.D. 1893 could work if the definition of "full-cash value" were held to be unconstitutional since the 1% tax cap would then be imposed on an undefined tax base. If a court reached that conclusion, the entire bill might very well fail.

This brings us to the question of whether the specific severability definition in the bill would produce a different result. Proponents of the initiative might argue that L.D.1893's severability provision is tailored to require that provisions in the bill that are not unconstitutional be given effect regardless of their interconnection with the remaining

provisions, and that the 1% cap with 2% annual inflation is a valuable protection even if applied to the constitutionally required fair market value.

Assuming that a court would find that the specific severability provision in L.D. 1398 controls over the general statutory provision, it would still have to address the effectiveness of the remaining provisions. As an initial matter, the bill does not provide for the cap to be applied to fair market value, so at a minimum the court would have to revise certain language in the bill to conform it to that requirement. Further, unlike the *Lambert* case, where the unconstitutional provision was independent from other parts of the legislation, the valuation formula in L.D. 1893 is integral to the whole bill in that it informs the application of many key provisions. To argue that this concept can be removed and the remaining provisions given effect would require the courts to rewrite the bill, an invitation that the courts would likely decline. Moreover, a court would have little basis for determining whether the voters would have approved the proposal without the unconstitutional features.

Certainly the specific severability provision in L.D. 1893 makes it difficult to predict how the Maine courts would conduct a severability analysis. In the time available to us we have not found any guidance in the case law to aid us in predicting an outcome on this issue. However, in the event the valuation formula were to be held unconstitutional for the reasons we have outlined in this opinion, on balance, we believe the need to rewrite the language of the bill in order to give the remaining provisions effect coupled with the impossible task of determining the intent of the voters as to the remainder of the bill would lead the courts to conclude that the unlawful provisions are not severable.

**Tax exemption issues**

Three significant tax exemption issues arise. First, can L.D. 1893's valuation formula be defended from constitutional attack on the theory that it represents an "exemption" from taxation not subject to the just value and equal assessment/apportionment requirements? Second, would the reduced property tax revenues result in an obligation on the part of the Legislature to reimburse municipalities for at least 50% of those lost revenues on the theory that they are attributable to an "exemption" within the meaning of Article IV, Pt. 3, § 23 of the Maine Constitution? Third, are the exceptions in L.D. 1893 for transfers by homeowners over the age of 55 purchasing a new primary residence and for transfers of a primary residence from parent to child constitutional?

The determination of what property shall be exempt from taxation rests with the Legislature, without limitations except as are imposed by express constitutional provisions. *Greaves v. Houlton Water Co.*, 59 A.2d 207, 211 (1943). In addition, tax exemptions must be strictly construed, and all doubts must be weighed against exemption. *Silverman v. Town of Alton*, 451 A.2d 103, 105 (Me. 1982).

It is our view that L.D. 1893's valuation system is not an "exemption" from tax. The valuation formula embodied in L.D. 1893 is not by its own terms described anywhere in the bill as an exemption from property tax. Nor does it resemble the express exemptions that are codified in 36 M.R.S.A. §§ 651-661, a subchapter of the tax code titled "Exemptions."

In *Belas v. Kiga, supra,* the challenge to Washington's Referendum 74, proponents of the measure argued that it should escape application of the tax uniformity requirement of the state Constitution because it functioned as an exemption. In rejecting this argument, the Washington Supreme Court provided analysis that we find instructive and which we excerpt here.

> 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.

*Belas,* 135 Wn.2d at 930, 959 P.2d at 1045-1046.

> 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).

*Id.* at 931-2, 959 P.2d at 1046.

> [W]e conclude that since an exemption cannot be extended by ambiguous language, it should not be created by language that does not clearly create an exemption....Where one relies on exemption from taxation, both the power to exempt and the intention to exempt must be clear.

*Id.* at 934, 959 P.2d at 1047.

> Exemptions cannot be created by implication. We conclude value averaging is an assessment formula and not a tax exemption....Since the value averaging formula was not enacted a an exemption from taxation, if the formula results in nonuniform taxes within the class of real estate, it

> will violate article VII [the property tax uniformity provision of the Washington Constitution].

*Id.* at 935, 959 P.2d at 1048.

We believe that this analysis is equally applicable to L.D. 1893, *i.e.,* that its valuation system is not an exemption.[5] Because this issue is not directly addressed by any Maine precedent that we have found, however, this conclusion is not free from doubt.

For all the same reasons that we think that the L.D. 1893 assessment formula is not an exemption for Art. IX, § 8 purposes, we believe that a strong argument can be made that it does not operate as an exemption within the meaning of Article IV, Pt.3, § 23. The pertinent part of Section 23 provides:

> **Section 23. Municipalities reimbursed annually.** 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.

The history of § 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. It could be argued that § 23 does not clearly apply to initiated laws, as distinguished from those enacted by the Legislature. Since the voters will not be asked to approve L.D. 1893 as a property tax exemption, we believe that the argument that its approval would result in a "statutory property tax exemption[s]" within the meaning of § 23 would not be a strong one.

However, we have found no cases construing § 23 so our conclusion on this point is less certain than it is with respect to the Art. IX, § 8 analysis. In the event that L.D. 1893 is approved by the voters, found constitutional by the courts, and determined to create an exemption within the meaning of § 23, the demand on state funds would be substantial.[6] Thus, while we think this result unlikely, it is certainly possible, and the magnitude of the impact created by such a conclusion causes us to raise the issue.

Finally, we briefly address the exceptions in L.D. 1893 to the definitions of "change in ownership" and "purchased" (proposed § 353(4)-(8)), which allow the lower acquisition value to follow the property despite sale, change of ownership, or new

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[5] Indeed, even assuming the Court were to conclude that L.D. 1893 were an "exemption," the bill would still violate the express constitutional requirements of Art. IX, § 8.

[6] This, of course, may be true whether Section 23 is triggered or not, in that if L.D. 1893 is approved by the voters, the resulting reduction in municipal tax revenues will put pressure on the State to help make up lost municipal revenues, and may also generate complex legal issues as to the extent of the respective responsibilities of the State and municipalities to fund education under Art. VIII, Pt. 1, § 1 of the Maine Constitution.

construction. Examples include transfers of principal residences between spouses, between parents and children, and sales by owners over 55 who reinvest in a principal residence of equal or lesser value.

These provisions are not identified as exemptions in the bill. By operating to reduce the property value against which assessments are made under certain circumstances, these provisions may be found to create exceptions to just value and equal assessment/apportionment in violation of Art. IX, § 8. We think the fate of these provisions is inextricably linked to that of the valuation formula that is the fundamental provision of L.D. 1893. If the valuation formula is found to be unconstitutional, these exceptions are unworkable and there is nothing left for them to apply to. On the other hand, if the valuation formula is upheld, these exceptions will likely be found valid as well. *See Nordlinger, supra,* 505 U.S. at 16-17 (where acquisition cost valuation formula is found not to violate the Equal Protection Clause, exemptions for persons aged 55 and over who exchange principal residences, and children who acquire them from their parents do no necessarily render the overall scheme invidiously discriminatory).

**Conclusion**

L.D. 1893 presents several complex issues, to which we have applied available case law. However, the absence of directly applicable precedents in Maine law limits the certainty of our conclusions. Courts may disagree with this analysis, in whole or in part, and there will likely be litigation if voters approve this initiative.

We note again that in the interests of time we have not undertaken a detailed analysis of all provisions of L.D. 1893, and that other legal issues may certainly be presented by the bill that we have not addressed here.[7] It is also important to emphasize that the Legislature is free to propose a constitutional amendment to achieve the result that L.D. 1893 proposes. We express no views on the policy choices embodied in the bill. However, in its current form, we conclude that it is likely that a court would strike the valuation method that is the central concept of L.D. 1893, and that such a holding could well lead to the legal failure of the bill in its entirety.

Sincerely,

G. Steven Rowe
Attorney General

[7] We offer a few examples of open issues. For one, it has been suggested that the special tax provisions of the bill may violate Art. IX, § 9 of the Maine Constitution. Second, section 356 purports to prohibit the Legislature from enacting any future property tax increases without a supermajority in a voter referendum, which conflicts with the provisions of Art. IV, Pt. 3, §18 of the Maine Constitution. Another potentially significant set of issues arises from the fact that, by borrowing language from the California Constitution, the bill uses terminology that does not interface well with Maine's tax laws.

DRAFT

jg 3/23/04

Joint Order Propounding Questions
to the Justices of the
Supreme Judicial Court

**WHEREAS,** it appears to the Senate and the House of Representatives of the 121st Legislation that the following are important questions of law and that this is a solemn occasion; and

**WHEREAS**, the Constitution of Maine, Article VI, Section 3, provides for the Justices of the Supreme Judicial Court to render their opinions on these questions; and

**WHEREAS**, there is now before the 121st Legislature for its consideration Initiated Bill 4, Legislative Document Number 1893, "An Act To Impose Limits on Real and Personal Property Taxes; and

**WHEREAS,** the initiated bill proposes broad changes to the laws of this State related to raising revenues to support vital governmental functions; and

**WHEREAS,** the bill may have constitutional infirmities that can not be corrected by revision or amendment; and

**WHEREAS,** the Legislature must decide whether to enact LD 1893, as proposed, or put forth a competing measure to the initiated bill as authorized by Article IV, Part 3, Section 18;

**WHEREAS,** it is vital that the Legislature be informed as to the question propounded in this order; now, therefore, be it

**ORDERED,** that in accordance with the provisions of the Constitution of Maine, the Senate and the House of Representatives respectfully request the Justice of the Supreme Judicial Court to give the Senate and the House of Representatives their opinion on the following questions of law:

Question 1. If Initiated Bill 4 becomes law, would those provisions of the bill that require the calculation of property taxes based on "full cash value" or "appraised value," as adjusted, violate Article IX, Section 8 of the Maine Constitution which requires taxes on real and personal property to be assessed and apportioned equally and according to just value?

Question 2. If Initiated Bill 4 becomes law, do its provisions create a property tax exemption that would require the Legislature to reimburse municipalities for at least 50% of the revenue loss under Article IV, Part 3, Section 23 of the Maine Constitution?

Question 3. Portions of Initiated Bill 4 that propose Sections 354, 359 and 360 of Title 36 of the Maine Revised Statutes appear to authorize political subdivisions of the State of Maine to impose local taxes as long as those taxes are approved by a 2/3 vote and are not ad valorem property taxes or taxes on the transfer of real and personal property. Do these sections violate Article IX, Section 9 or any other provisions of the Maine Constitution?

Question 4. Initiated Bill 4, in the part that proposes Section 361 of Title 36 of the Maine Revised Statutes, proposes a severability clause. If your answers to the above questions indicate that any portions of Initiated Bill are unconstitutional, would any of the Initiated Bill's provisions remain effective by virtue of Section 361 or under Title 1, Section 71, subsection 8 of the Maine Revised Statutes?

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