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July 3, 1996

Honorable Angus S. King, Jr.
Governor, State of Maine
1 State House Station
Augusta, Maine 04333

Dear Governor King:

I am writing in response to your inquiry of June 27, 1996, asking two questions concerning the constitutional ability of the 117th Legislature to enact legislation concerning forest practices in Maine, in view of the pendency of initiated legislation on the subject. In particular, you ask, whether the Legislature has the constitutional authority to enact a competing measure to the initiative at a special session, or whether a competing measure may only be enacted at the regular session of the Legislature to which the initiated legislation was presented; and whether the Legislature may enact legislation which enters into force only if the initiated legislation is not approved by the electorate, without such legislation being considered a "competing measure." For the reasons which follow, it is the Opinion of this Department that the Legislature is not prohibited by the Constitution from enacting a competing measure at a special session; and that the Legislature is also not prohibited from enacting legislation contingent upon the failure of the electorate to approve an initiated bill. In addition, the Legislature may also enact legislation on the same subject as an initiated bill and not have that legislation treated as a competing measure, if it enacts the legislation as emergency legislation.

Both of the questions which you pose require interpretation of Article IV, Part 3, Section 18 of the Maine Constitution, which provides for the direct initiative of legislation. Pursuant to the provisions of this section, initiators placed before the Second Regular Session of the 117th Maine Legislature Legislative Document 1819,

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"An Act to Promote Forest Rehabilitation and Eliminate Clearcutting." Since the Legislature did not enact this bill during that session, the measure will be submitted to the voters for their approval at the November, 1996 general election, pursuant to the provisions of the third sentence of Subsection 2 of Section 18:

> The measure thus proposed, unless enacted without change by the Legislature at the session at which it is presented, shall be submitted to the electors together with any amended form, substitute, or recommendation of the Legislature, and in such manner that the people can choose between the competing measures or reject both.

In interpreting this provision, it is first important to determine whether it is possible for the Legislature to enact legislation on the same subject matter as the initiated bill without such legislation having to be treated as a "competing measure," within the meaning of the constitutional provision, thus requiring it to be submitted to the electorate as an alternative to the initiated bill. This question appears to have been resolved by the Maine Supreme Judicial Court in Farris ex rel. Dorsky v. Goss, 143 Me. 227 (1948). Prior to that time, it was not clear whether the provision of the Maine Constitution quoted above exercised any restraint on the ability of the Legislature to enact legislation on the same subject as a proposed initiative which would be effective prior to the decision of the electorate on the initiative, or whether the provision in question simply authorized the Legislature, at its own option, to send out proposed legislation as a "competing measure" for consideration by the electorate as an alternative to an initiated bill. In Dorsky, however, the Law Court, over the vigorous dissent of Justice Murchie, held that if the Legislature enacts "[a] bill which deals broadly with the same general subject matter [as an initiated measure], particularly if it deals with it in a manner inconsistent with the initiated measure so that the two cannot stand together," the legislative enactment must be considered a "competing measure" and sent to the electorate as an alternative to the initiated bill. Id. at 232.

This Department does not have before it any proposed legislation that might be enacted by the Legislature at an upcoming special session, so it is unable to determine whether such proposed legislation would be inconsistent with Legislative Document 1819. However, considering that L.D. 1819 proposes to establish a ban on the clearcutting of trees in the unorganized territory of the State, it is difficult to conceive of alternative legislation which would permit some degree of timber harvesting that would not be inconsistent with the proposed initiative. Consequently, it is likely that any proposal contemplated by the Legislature would be inconsistent with the initiated bill and therefore required to be treated as a "competing measure."

However, having established the rule that legislation inconsistent with initiated legislation must be considered a "competing measure," the Law Court appears to have established a significant qualification in the subsequent case of McCaffrey v. Gartley, 337 A.2d 1367 (Me. 1977). In that case, the Court held that, although Dorsky prevented the Legislature from enacting legislation inconsistent

with an initiated bill without treating it as a "competing measure," the Legislature retained the authority, under Article IV, Part 3, Section 16 of the Maine Constitution to enact emergency legislation, effective immediately upon approval by the Governor, without such legislation being considered an "amended form, substitute or recommendation" within the meaning of Section 18(2). Thus, it would appear that the Legislature does have the constitutional authority to enact emergency legislation which is inconsistent with an initiated bill. The Court held:

> . . . the constitution should not be interpreted as burdening the important emergency legislative process with a rule that designates emergency legislation as a measure competing with an initiative bill.

Id. at 1371. Thus, even if the forest practices proposal being considered by the Legislature is inconsistent with L.D. 1819, it appears that the Legislature could avoid the effect of the Dorsky rule by enacting the proposal as emergency legislation.[1]

I. Legislative Power to Enact Competing Measure at Special Session.

Turning to your first question, you ask whether, if the Legislature chooses to enact a "competing measure" with regard to L.D. 1819, it may do so at a special session. This question involves an interpretation of the sentence of Article IV, Part 3, Section 18 of the Maine Constitution quoted above which provides that unless the Legislature enacts an initiated bill without change "at the session at which it is presented," the bill "shall be submitted to the electors together with any amended form, substitute or recommendation of the Legislature, . . ." The question is whether it was the intention of the framers of this provision that the phrase "at the session at which it is presented" apply not only to the time at which the Legislature may enact an initiated bill without change, but also to the time in which it may enact a "competing measure."

To the knowledge of this Department, this question has not been the subject of any determination of the Supreme Judicial Court, either in a decided case or an advisory opinion, nor has it been the subject of a prior opinion of this Department. In the absence of such authority, this Department is reluctant to advise that a court would read this provision to require that the Legislature must enact a competing measure only at the session at which an initiated bill is presented to it. It is clear that, once the session at which an initiated bill is presented to the Legislature ends, the initiated bill must be presented to the electorate if it has not been enacted by the Legislature. It is not so clear, however, that the Legislature also loses at the same

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[1]The Law Court has manifested considerable deference to the Legislature as to whether a sufficient emergency exists in order to support emergency legislation enacted under Article IV, Part 3, Section 16 of the Maine Constitution. Thus, for example, in Morris v. Goss, 147 Me. 89 (1951), the Law Court indicated that so long as the Legislature expresses in the preamble to emergency legislation sufficient facts that can constitute an emergency, it will not inquire into whether those expressed facts do constitute an emergency. Id. at 98-99. See generally Op. Me. Att'y Gen. 81-56 at 2-3.

time its power to enact a competing measure. There does not appear to be any policy reason, however, why the Legislature should be so restricted, so long as its competing measure is enacted in sufficient time for it to appear on the ballot with the initiated bill. Indeed, it would appear that policy considerations should dictate allowing the Legislature to act in this fashion. If the rule were otherwise, a Legislature (such as the current Legislature) which seeks to study a complex matter raised by an initiative, could accord itself adequate time to do so simply by not adjourning the session at which the initiated bill was presented until it had completed its inquiries. Such action, however, would have the effect of delaying the effectiveness of all of the legislation passed at that session until 90 days after the Legislature came back into session, completed its business and adjourned, pursuant to the provisions of Article IV, Part 3, Section 16 of the Maine Constitution. This Department does not believe that the framers of the direct democracy provisions of the Constitution intended to place the Legislature in such a bind. Therefore, this Department is inclined to read those provisions in such a way as to allow the Legislature to enact a competing measure at any time, whether at the session at which the initiated bill is presented or at a later special session, so long as such enactment occurs in time for the competing measure to appear on the ballot.

II. Legislative Power to Enact Statute Contingent Upon Failure of Initiative.

Your second question is whether it is constitutionally possible for the Legislature to enact, as a noncompeting measure, legislation which, while inconsistent in substance with the proposed initiative, would only take effect if that initiative were not approved by the voters at the general election in November.

This proposal requires an interpretation of the rule in Dorsky. As described above, that rule prohibits the Legislature from enacting a measure which is inconsistent with an initiated measure, in the sense that the two cannot stand together, without treating the measure as a "competing measure" and sending it to the electorate for consideration as an alternative to the initiative. The question raised by the present inquiry is whether a measure that takes effect only on the failure of the voters to approve an initiative could be considered as "inconsistent" with that initiative.

In the Opinion of this Department, such a measure should not be considered "inconsistent," since it is expressly intended not to take effect unless the initiated measure fails. While there does not appear to be any determination of the Supreme Judicial Court on the point, this view is consistent with at least two prior Opinions of this office. In 1981, this Department advised that it would not violate the Constitution if the Legislature were to enact a bill establishing the Office of the Public Advocate, but to provide that such a bill would not become effective if an initiated proposal for a directly elected Public Utilities Commission, then pending before the Legislature, were to be approved. Op. Me. Att'y. Gen. 81-56 at 3-4. Similarly, in 1977, this Department advised that legislation enacted dealing with the implementation of the Uniform Property Tax would not have to be treated as a competing measure with an initiative then pending before the Legislature to repeal that tax, since the legislation only dealt with the administration of the tax during a period prior to when the initiated bill would repeal it. The Department concluded

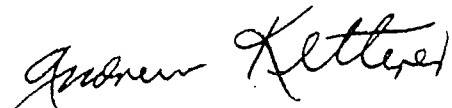
that since the two bills addressed to different time periods, they were not inconsistent. Op. Me. Att'y Gen. (May 20, 1977) at 2. It is possible, of course, that the Court, acting out of a concern to safeguard the interests of the initiators, might take the view that so long as the substance of the legislative enactment is inconsistent with that of the initiated bill, the legislative enactment must be treated as a "competing measure" even if it is directed at a different time period. This Department believes, however, that the better view is that only if the two enactments cannot stand together at the same time should the legislative enactment be so regarded.

* * *

In summary, therefore, if the Legislature wished to enact legislation relating to forest practices which is inconsistent with Legislative Document 1819, it appears that it could do so at a special session called for that purpose and not have its enactment treated as a "competing measure" to the initiated bill if it enacts the measure either as emergency legislation or as legislation contingent upon the failure of the electorate to approve the initiated bill at the November general election. In addition, it also appears that the Legislature could enact at a special session legislation that is inconsistent with the initiated bill, so long as that legislation is treated as a "competing measure" and presented to the electorate as an alternative to the initiated bill at the November general election. We do suggest, however, that, in view of the absence of authority on the questions of the power of the Legislature to enact a competing measure at a special session, and the power of the Legislature to enact legislation contingent on the failure of the initiative, it might be prudent to seek the advice of the Justices of the Supreme Judicial Court through a request for an advisory opinion, pursuant to Article VI, Section 3 of the Maine Constitution, in advance of convening the Legislature into special session.

I hope the foregoing answers your questions. Please feel free to reinquire if further clarification is necessary.

Sincerely,



ANDREW KETTERER
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AK:sw

cc: Hon. Angus S. King
Governor

Hon. Dan A. Gwadosky
Speaker, Maine House of Representatives