March 24, 2005

Senator Richard Nass
Maine State Senate
3 State House Station
Augusta, ME 04330

Representative Joshua Tardy
Maine House of Representatives
2 State House Station
Augusta, ME 04330

Dear Senator Nass and Representative Tardy:

You have asked several questions about the retroactivity provision of the new homestead exemption in P.L. 2005, ch. 2, Part F ("Chapter 2").[1] These questions arise from the fact that Chapter 2 will not take effect until ninety days after the end of the current legislative session, and that some municipalities may wish to make their property tax commitments before that date. Your questions can be summarized as follows:

1. Will a commitment based on the new homestead exemption that is made before the effective date of Chapter 2 be valid?

2. Will a commitment based on the new homestead exemption and made after the effective date of Chapter 2 be valid?

3. Will a commitment based on the existing homestead exemption made before the effective date of Chapter 2 become invalid when the retroactivity provision takes effect?

4. What rights or liabilities are fixed on April 1, 2005 that cannot be changed by the retroactivity provision of the new homestead exemption?

5. Can municipal assessments be validated by legislation that deems them to be legal?

It is important to note at the outset that because this Office does not advise municipalities, we are not familiar with the practical issues that may arise in the implementation and administration of the property tax program, and the effect of Chapter 2 thereon. We offer our views on the statutory construction and constitutional issues

[1] To avoid confusion, we will refer to the newly enacted homestead exemption as "the new" and the currently effective exemption as "the existing" exemption or homestead exemption.

from this perspective, understanding that there may well be facts unknown to us that could influence the way that a court views these issues. For clarity, we set out our understanding of the legal framework under which property tax commitments are made by municipalities before addressing your questions.

**Background**[2]

The process of establishing the property tax begins with the determination of the taxable status of all property within the State. The pertinent part of 36 M.R.S.A. § 502 states:

> All real estate within the State, all personal property of residents of the State and all personal property within the State of persons not residents of the State is subject to taxation on the first day of each April as provided; and the status of all taxpayers and of such taxable property shall be fixed as of that date.

Section 502[3] fixes the taxable status and ownership of property as of April 1st of each year. The amount to be assessed must be established at a meeting of the voters (§ 503), at which time the voters may also determine the date when the tax assessment lists are to be committed, the date or dates when property taxes are to be due, and when interest will begin to accrue (§ 505). Tax assessors also determine "the nature, amount and value as of the first day of each April of the real estate and personal property to be taxed." § 708.

Once the value, status and ownership of all taxable real and personal property is determined and the voters have approved the amount of taxes to be assessed, the assessors are responsible for preparing the tax lists. The tax lists identify the amount of tax to be paid by each owner of taxable real and personal property, and the delivery of the tax lists by the assessors to the tax collector constitutes the "commitment" of these taxes. § 709. There is no date specified by statute for the commitment of taxes, and while the voters may establish a date, they are not required to do so. As a practical matter, the commitment is likely to be made before taxes are due. Moreover, each municipality is required to file annually with the State Tax Assessor a Municipal Valuation return by the later of November 1st or thirty days from the date of commitment. § 383. Thus, municipalities have considerable latitude in establishing the commitment date. Further, the number and timing of bills issued to collect property taxes are not governed by any statutory requirements, and if two bills are issued the total amount due does not have to be divided evenly between them.

The existing property tax exemption, available to permanent residents who have owned a homestead in Maine for the preceding twelve months, is set forth in § 683.

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[2] This portion of our opinion identifies the key provisions that are relevant to analysis of the questions raised, and is not intended to be comprehensive. For simplicity, we focus on the process for determining and committing property taxes in municipalities; parallel procedures exist, but are not cited here, for the unorganized areas.

[3] Section references are to Title 36 unless otherwise identified.

Section 683(1) exempts from taxation a portion of the just value of the estate on a sliding scale based on the value of the homestead: up to the just value of $7,000 for homesteads with a just value of less than $125,000; up to $5,000 for homesteads valued at more than $125,000 but less than $250,000; and up to $2,500 for homesteads valued at more than $250,000. Section 685 authorizes municipalities to recover from the State 100% of the taxes lost by reason of these homestead exemptions (subsection 2), with 80% of the estimated amount payable by August 15th, and the balance to be paid by December 15th for those municipalities that file their reimbursement claims by November 1st.

The new exemption as enacted by Chapter 2, Part F, repeals and replaces § 683(1) to create an exemption of the just value of $13,000 for all permanent residents who have owned a homestead for the preceding twelve months. Sec. F-1. Part F also amends § 685(2) to provide that the State will reimburse municipalities for 50% of the taxes lost by reason of the exemption. Sec. F-4. Part F applies retroactively to property tax valuations determined on or after April 1, 2005. Sec. F-5.

**Analysis and Discussion**

1. Will a commitment based on the new homestead exemption that is made before the effective date of Chapter 2 be valid?

The answer to this question depends on what is meant by "basing" a commitment made before the effective date of Chapter 2 on the new homestead exemption. We do not believe that a commitment that applies the new exemption in fixing individuals' property tax liability would be valid for the simple reason that such a commitment would be applying a law before it becomes effective.[4]

On the other hand, we see no reason why a town would be precluded from taking the financial effects of Chapter 2 into account when determining the total amount of taxes that will need to be raised for the year, and making a commitment on that basis. For example, assume that a town needs to make its commitment before the Chapter 2 effective date, and therefore must use the existing homestead exemption in determining individual assessments. In setting the amount of taxes to be raised and the resulting mill rate that is approved by the voters, the town may choose to take into account the financial impact of implementing the new exemption after the Chapter 2 effective date. We do not see any reason why this procedure would be unlawful.

[4] Article IV, pt. 3, § 16 of the Maine Constitution provides that no act of the Legislature "shall take effect until 90 days after the recess of the session of the Legislature in which it was passed," except for emergency legislation or orders or resolutions that pertain solely to facilitating the performance of the business of the Legislature. The retroactive application provision governing the new exemption (Chapter 2, sec. F-5) does not alter its effective date; put another way, the retroactivity provision itself will not become effective until 90 days after the end of the current legislative session.

2. Will a commitment based on the new homestead exemption and made after the effective date of Chapter 2 be valid?

After the effective date of Chapter 2, the new homestead exemption becomes effective, and has retroactive application to April 1, 2005. Basing a commitment made after that effective date on the new exemption does not appear to raise any issue of statutory authority, as this is precisely what is contemplated by the retroactivity provision attached to the new exemption.

3. Will a commitment based on the existing homestead exemption made before the effective date of Chapter 2 become invalid when the retroactivity provision takes effect?

A commitment made before the effective date of Chapter 2 and based on the existing exemption would be lawful when made. Thus, this question essentially asks whether, once Chapter 2 takes effect and the new exemption becomes retroactively effective, municipalities are required to take whatever steps may be necessary to give qualifying taxpayers the benefit of the increased exemption.

The retroactivity provision in Sec. F-5 reflects the intent of the Legislature that qualifying homeowners are to realize the benefit of the increased homestead exemption this year. For towns that make their commitment before the effective date of Chapter 2, this can be accomplished in one of two ways. First, if the commitment takes into account the financial effects of adjusting the taxes of qualifying homeowners, thus making provision for this contingent liability, the abatement procedure established by 36 M.R.S.A. § 841 can be used to adjust their property tax. Second, taxes can be recommitted based on the new exemption.[5] For reasons we will discuss in the next part of this opinion, the first approach would create less risk of a successful legal challenge.

4. What rights or liabilities are fixed on April 1, 2005 that cannot be changed by the retroactivity provision of the new homestead exemption?

The short answer to this question is that even if any rights or liabilities are fixed on April 1, 2005, they would not be affected by Chapter 2. Under existing law, April 1 is the date upon which the status of taxpayers and taxable property is fixed. 36 M.R.S.A. § 502. It is also the date upon which the value of taxable property is fixed. 36 M.R.S.A. § 708. None of these determinations is affected by Chapter 2. Thus, even if any rights and liabilities are fixed on April 1, Chapter 2 does not purport to change these rights and liabilities and there are thus no retroactivity concerns with respect to the April 1 deadline.

[5] Since, as noted above, we lack expertise in the administration of the property tax, we offer no comment on the procedures whereby a new commitment would be effected (*e.g.*, voiding the initial commitment and making a new one).

Retroactivity might be a concern, though, if a municipality were to commit its taxes before Chapter 2 takes effect, and then changed the commitment after Chapter 2 takes effect (whether by amendment or recommitment). Specifically, taxpayers who owe more under the amended or subsequent commitment might argue that their tax obligations became permanently fixed at the time of the initial commitment, and that Chapter 2 cannot be applied retroactively to increase their tax liability.[6] While we set forth below the issues that a court would likely consider in addressing such an argument, the outcome of such a challenge is difficult to predict. This is because the case law on retroactive application of law changes is complex, and while the broad legal standards are clear, their application is somewhat subjective.

In the end, though, municipalities can best minimize the risk of retroactivity challenges in one of two ways. First, the commitment can be made after Chapter 2 takes effect. Second, if the first alternative is impractical and the commitment must be made before the effective date of Chapter 2, the commitment could be based on a mill rate that is sufficient to absorb the financial impact of implementing the new exemption, using the abatement process – rather than amending the commitment – to make adjustments after Chapter 2 takes effect. With that in mind, what follows is a summary of the legal principles governing retroactivity as they might apply to a challenge here.

As a general matter, the Legislature can lawfully enact a statute with retroactive effect. *See State of Maine v. L.V.I. Group*, 1997 ME 25, 690 A.2d 960; *Norton v. C.P. Blouin, Inc*., 511 A.2d 1056 (Me. 1986); *Coates v. Maine Employment Security Commission*, 406 A.2d 94 (Me. 1979). To do so, the Legislature must clearly express its intent that the statute operate retroactively; in the absence of such an expression, a court will presume that the Legislature intended only prospective operation. *Commissioner of Department of Human Services v. Massey*, 537 A.2d 1158, 1159 (Me. 1988). Here, the Legislature has clearly and unequivocally expressed its intent that the amendments to the homestead exemption be applied retroactively to April 1, 2005. *See* Chapter 2, sec. F-5.

Once the Legislature has expressed a clear intent of retroactive application, the principal limitation is that a statute cannot be applied retroactively if it would violate the due process clauses of the state and federal constitutions. *L.V.I. Group*, 1997 ME 25, ¶ 15, 690 A.2d at 965; *Norton*, 511 A.2d at 1061 n.5. However, there are no definite criteria for determining whether retroactive application of a statute violates due process, and the analysis depends on the specific facts of each situation:

> In dealing with the problem of retroactivity, it is extremely difficult to establish definite criteria upon which court decisions can be foretold. A statute must not act unreasonably upon the rights of those to whom it applies. What is reasonable and what is unreasonable is difficult to state in advance of actual decisions.

Norman J. Singer, *Sutherland Statutory Construction* § 41.5, at 411 (6th ed. 2001). The Law Court has itself recognized that over the years, it has taken "divergent analytic

[6] We do not assume that property taxes would necessarily increase after the effective date of Chapter 2. Rather, the analysis in this section concerns a scenario where that occurs.

approaches on the question of retroactive application of statutes." *Norton,* 511 A.2d at 1056.

There are some general principles that courts often apply. First, when a statute is purely economic, as is the relevant section of Chapter 2, the Legislature has wide latitude in applying it retroactively. *See Tompkins v. Wade & Searway Constr. Corp.*, 612 A.2d 874, 877 (Me. 1992) ("the retroactive aspects of economic legislation meet the requirements of the due process clause if enacted to further a legitimate legislative purpose by rational means"). In justifying retroactive application, "the requirements of due process are met . . . 'simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose.'" *Id*. (quoting *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730 (1984)). A three-part test governs due process challenges to retroactive aspects of economic legislation:

1. The object of the exercise must be to provide for the public welfare.
2. The legislative means employed must be appropriate to the achievement of the ends sought.
3. The manner of exercising the power must not be unduly arbitrary or capricious.

*L.V.I. Group*, 1997 ME 25, ¶ 9, 690 A.2d at 964.

A second general principle is that a statute may not be applied retroactively if it would impair a person's "vested rights." *Merrill v. Eastland Woolen Mills, Inc.*, 430 A.2d 557, 560 (Me. 1981); *Fournier v. Fournier*, 376 A.2d 100, 101-102 (Me. 1977). The Law Court has never fully defined what kinds of rights are considered "vested" rights, and it has been stated that a vested right is simply one that is protected from retroactive impairment. Norman J. Singer, *Sutherland Statutory Construction* § 41.6, at 426-27 (6th ed. 2001). Generally, the determination of whether a vested right exists depends mainly on considerations of fairness and justice. *Id*. at 427; *Danforth v. Groton Water Co.*, 178 Mass. 472, 59 N.E. 1033 (1901) (Holmes, J.). The Law Court has stated:

> Courts must examine the state of affairs which has been determined by past events to consider the character of previously established rights, expectations and prospects which will be displaced. They must, at the same time, consider the manner in which the Legislature intended the enactment to apply with a realization that legislation which readjusts "rights and burdens is not unlawful merely because it upsets otherwise settled expectations. This is true even though the effect of the legislation is to impose a new duty or liability based on past acts."

*Adams v. Buffalo Forge Co.*, 443 A.2d 932, 943 (Me. 1982) (quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16 (1976)).

One factor that courts commonly address in a vested rights analysis is the expectations of the people who would be affected by the retroactive application. *See*

*General Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992); *Adams*, 443 A.2d at 943. Part of this inquiry involves considering whether people would have altered their conduct if they could have anticipated the change in law. *Usery*, 428 U.S. at 17 n.16; *Farwell v. Rockland*, 62 Me. 296, 301 (1872); *see also Alexander v. Robinson*, 756 F.2d 1153, 1156 (5th Cir. 1985) ("Retroactive application of laws is undesirable where advance notice of the change in the law would motivate a change in an individual's behavior or conduct."). Thus, in deciding whether Chapter 2 can be applied retroactively to permit municipalities to amend a previous commitment, a court would likely examine whether taxpayers were aware at the time of the original commitment that the commitment would change, and the extent to which taxpayers would have changed their conduct had they known that the commitment would change.

Also, it should be noted that Maine law imposes no deadline by which municipalities must make their commitments. Thus, a municipality may make its commitment before or after Chapter 2 takes effect. The fact that taxpayers have no statutory right to have their commitments made by a certain date would weigh against the finding that they have a vested right in the amount of the commitment simply because a municipality chose to make it before Chapter 2 takes effect.

Additionally, courts generally give broad deference to statutes that retroactively adjust tax liabilities. The Supreme Court has stated that the federal tax code does not constitute a promise to taxpayers, and taxpayers have no vested right in the provisions of the tax code. *United States v. Carlton*, 512 U.S. 26, 33 (1994). While due process may prevent a statute creating a brand new form of tax from being applied retroactively, it does not prevent a statute which simply increases the burden of an existing tax from being applied retroactively. *Milliken v. United States*, 283 U.S. 15 (1931). As the Supreme Court has stated, taxpayers always bear the risk that the government will retroactively increase an existing tax. *Id*. at 23; *see also Cohan v. Commissioner*, 39 F.2d 540, 545 (2d Cir. 1930) (Learned Hand, J.) ("Nobody has a vested right in the rate of taxation, which may be retroactively changed at the will of Congress at least for periods of less than twelve months. . . ."). Thus, the Supreme Court has repeatedly upheld retroactive tax statutes, at least when the retroactivity period is relatively short. *See United States v. Hudson*, 299 U.S. 498, 500 (1937); *see also United States v. Hemme*, 476 U.S. 558 (1986); *United States v. Darusmont*, 449 U.S. 292 (1981); *Welch v. Henry*, 305 U.S. 134 (1938); *Cooper v. United States*, 280 U.S. 409 (1930).

In *Carlton*, the Supreme Court stated a test for determining whether a tax statute can be applied retroactively:

> The due process standard to be applied to tax statutes with retroactive effect, therefore, is the same as that generally applicable to retroactive economic legislation: "Provided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches."

*Carlton*, 512 U.S. at 30-31. This is a relatively undemanding test and, unless a statute creates a new type of tax or is retroactive for a long period of time, the test will be easily met in most challenges to retroactive tax statutes.

Finally, the Law Court has stated that "the legislature possesse[s] the power to take away by statute, what was given by statute, except vested rights." *Oriental Bank v. Freeze*, 18 Me. 109, 112 (1841); *see also Hayes v. Briggs*, 106 Me. 423, 427 (Me. 1910); *Coffin v. Rich*, 45 Me. 507, 511 (1858). Thus, a court adjudicating a retroactivity challenge to Chapter 2 would find it relevant that the homestead exemption is created solely by statute and apparently has no basis in the constitution or the common law.

In sum, we believe that many of the relevant factors support a finding that Section 2 can be retroactively applied. However, because the case law does not provide a firm basis for predicting the outcome of such a challenge, there is certainly a reasonable possibility that a court could hold otherwise. As we noted at the outset of this discussion, the safest course for municipalities is to delay making commitments until after Chapter 2 becomes effective. Alternatively, if a commitment of taxes must be made before then, the risk of a successful legal challenge can be reduced by setting the mil rate at a level that can accommodate abatements sufficient to give qualifying homeowners the benefit of the new exemption once Chapter 2 takes effect.

5. Can municipal assessments be validated by legislation that deems them to be legal?

This question is difficult to answer in the abstract, as the answer depends on the nature of the defect the legislation is intended to correct. In asking this question, you refer to *Inhabitants of the Town of Otisfield v. Bourdon Scribner*, 129 Me. 311, 151 A. 670 (1930). In that case, which has been cited by the Law Court only once, one member of a board of assessors was disqualified by statute from so serving because he had not settled with the town for taxes collected during a prior period. The Law Court held that this defect was jurisdictional, and that the assessments made by the board of assessors were therefore void and unenforceable. This case has been cited by one legal commentator as simply supporting the proposition that jurisdictional defects cannot be cured by subsequent acts. Norman J. Singer, *Sutherland Statutory Construction* § 41.14, at 475-76 (6th ed. 2001).

In contrast, the Law Court has also held that procedural irregularities in a town's selection of a tax collector do not affect the validity of the assessment of taxes by the board of assessors, nor the obligation of the property owner to pay the taxes because the defect did not go to the jurisdiction of the assessors, deprive the defendant of some substantial right, or constitute the omission of an essential prerequisite to the action to collect taxes. *Inhabitants of Greenville v. Blair*, 104 Me. 444, 445-6, 72 A. 177, 178 (1908). In short, this case points us to the retroactivity analysis outlined above.

**Conclusion.**

The Legislature has clearly expressed the intent that qualifying homeowners are to receive the benefit of the new homestead exemption this year. It is equally clear under Maine's Constitution that the terms of Chapter 2, including the provision making the new homestead exemption retroactively effective as of April 1, cannot become effective until 90 days after the end of the current legislative session. As municipalities weigh the options available to them for implementing the new exemption, these options can be viewed as falling along a continuum of litigation risk with respect to retroactive application. Awaiting the effective date of Chapter 2 is clearly the least risky option, but it may not be financially feasible. If a commitment must be made before the effective date of Chapter 2, a commitment that takes into account the cost of abatements necessary to implement the new exemption eliminates the need to recommit taxes for that purpose, with the result that no one's taxes go up. While we believe that even a recommitment of property taxes after the effective date of Chapter 2 is certainly defensible, it generates potential retroactivity issues that can be avoided if one of the other options is used.

Sincerely,

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GSR/djp