

Can the Legislature Be Trusted with the Income Tax?

The bill is LD 1367, *RESOLUTION, Proposing an Amendment to the Constitution of Maine To Eliminate the Income Tax*. Proposed by Governor LePage and sponsored by Rep. Ken Fredette of Newport, the title of this bill is not misleading. If the measure gets out of the State House with at least 2/3 support in both the House and Senate, and if it is then ratified by the voters at referendum, the Maine Legislature would be prohibited by the Constitution from ever taxing the income of Maine residents, beginning in 2020.

The fundamental question is whether the Legislature should be entrusted to determine the role the income tax plays in the state's overall tax policy. The proponents of LD 1367 believe that the voters of Maine are well suited in the overall effort to manage state tax policy, at least enough to determine how they should not be taxed. The opponents, on the other hand, believe that the management of the tax code is appropriately entrusted to the Legislature, and lawmakers should have at their disposal a range of revenue-generating tools to ensure Maine residents and guests are taxed in a fair and balanced way for government services provided.

The repeal of the income tax has been a topic of discussion since late January when the Governor released his proposed FY 2016 – 2017 General Fund budget. So much so that the proponents and opponents of LD 1367 could have drafted each other's testimony with ease. As the three hour public hearing progressed, proponents warned the Committee against falling for the opponents' fear tactics that the loss in income tax revenue would naturally result in increased property tax burdens and sharply reduced government services. In turn, the opponents of LD

1367 challenged the proponents to provide the details necessary to guide the Maine Legislature of the near future through the process of implementing the repeal of the income tax in a manner that protects the state's most vulnerable residents.

The proponents of the bill included members of the Governor's staff, Representatives Kevin Battle of South Portland and Richard Pickett of Dixfield, Brian Dench, a Lewiston-area attorney, former state Sen., Carol Weston, representing the organization Americans for Prosperity, and residents and business owners from the communities of Center Lovell, Freeport, Hallowell, Mount Desert, Oxford and Old Orchard Beach.

In addition to the have-faith-in-the-voters argument, proponents believe that the repeal of the income tax is necessary to attract new businesses, promote economic growth, and convince young adults as well as retirees to make Maine their full

time residence. Furthermore, the proponents believe that a tax system based on consumption is a more equitable way for funding government services, rather than relying on an income tax system that from their perspective discourages growth and hard work.

The proponents of LD 1367 were correct in predicting that opponents of the bill would lament the outright repeal of the income tax as being overly burdensome on the state's most vulnerable residents. That said, with \$1.8 billion in annual income tax revenue on the line, it is difficult to fault opponents for raising those concerns.

The bill's opponents included the Maine Center for Economic Policy, Maine Peoples' Alliance, Maine Education Association, Maine Equal Justice Partners, Maine State Employees Association and residents from the communities of Poland and Winthrop. (In several ways, the

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State Agency Rules: Who's Minding the Store?

Last week's Legislative Bulletin described a public hearing on a bill recently submitted by Gov. LePage (LD 1361, *An Act To Promote Minimum Wage Consistency*) that would preempt municipal home rule authority with respect to any minimum wage regulation.

A public hearing was held this week on another bill recently submitted by the Governor, LD 1354, *An Act To Improve the Maine Administrative Procedure Act*. This bill repeals a requirement in the state's Administrative Procedures Act that proposed state agency rules be reviewed and approved for form and legality by the Attorney General's Office before the rule is made effective. The bill raises a question

from the municipal perspective. The rules that are promulgated by state agencies have the force of law. If the law office for state government is not going to perform a legal review of the rules proposed by the state agencies, who will?

The Attorney General's role within the Administrative Procedures Act is to review proposed state agency rules to make sure they are compliant with state and federal law and, as importantly, that the state agency is acting within and not beyond the scope of the authority delegated to it by the Legislature. According to both the bill's sponsor, Rep. Ken Fredette (Newport), as well as the Governor's Chief

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Income Tax (cont'd)

opponents tried to put the \$1.8 billion annual reduction in state revenue into context. According to the data provided, the Legislature could lay off every single state employee (saving \$370 million), eliminate state contributions to higher education (saving \$270 million), and shift 100% of the costs of funding K-12 educational services to the municipalities (saving approximately \$900 million), and the state would still face a funding shortfall of nearly a quarter of a billion dollars.

MMA also provided testimony in opposition to LD 1367 focusing on two municipal concerns.

First, municipal officials undoubtedly believe that the loss of \$1.8 billion in state revenue will have negative impacts on the property taxpayers. One only needs to review the Governor's proposed budget for evidence. As proposed in his FY 2016 – 2017 General Fund budget, the revenue sharing program would be repealed in the second year of the biennium (FY 2017) in order to cover approximately \$160 million in revenue lost under the Governor's income tax reduction plan. Excluding the income tax from the revenue mix will add additional burdens onto the property taxpayers through continued reductions in state aid and a greater demand on local government to provide the vital public services the state will no longer be able

to afford.

In addition, municipal officials believe that a well balanced tax code includes elements of stability, exportability and progressivity. Under the current tax mix policy, it is the property tax that provides stability, the sales tax that provides exportability and the income tax that provides progressivity. Municipal officials are concerned that repealing the progressive element of the tax code will serve only to

underscore and exacerbate the regressive nature of the property and sales taxes. As was the case on Nov. 2, 1971, when Maine voters overwhelmingly rejected an initiative to repeal the newly enacted income tax by a margin of 3:1, the state's tax code should include a component of progressivity.

The work session on LD 1367 is scheduled for the afternoon of Wednesday, May 13.

State Sales and Income Tax Increase, Yet Revenue Sharing Limpes Into the Sunset

During the hearing on LD 1367, *RESOLUTION, Proposing an Amendment to the Constitution of Maine To Eliminate the Income Tax*, a representative of the Department of Administration and Financial Services (DAFS) suggested that the time was right for eliminating the state income tax because state "revenues were on the rise and the state budget was not in crisis."

While the state's budget may not be in "crisis," actions taken by the Legislature in the past decade (FY 2006 – FY 2015) to reduce revenue sharing distributions by \$322 million has placed serious burdens – in some communities to near crisis levels – on the delivery of municipal services and the property taxpayers who fund those services.

The accompanying chart details the income and sales tax growth data that was presented in the Revenue Forecasting Committee's December 2014 and May 2015 forecast report. Copies of those reports are posted on the Office of Fiscal and Program Review's website: <http://goo.gl/yj6dtb>

As shown in that chart, between FY 2009 and FY 2019 the sales tax is projected to raise an additional \$374 million, while the personal and corporate incomes taxes are expected to generate an additional \$450 million.

In contrast to this relatively robust growth in state government resources, actions of the Legislature and proposals of Gov. LePage over that same period of time have reduced and would continue to reduce the municipal revenue sharing distribution from the level required by state law, more or less, to zero.

Sales, Income Tax Revenue and Distribution of Revenue Sharing (FY 2009 - FY 2020)

	Sales*	Income*	Total	% Increase (Decrease)	Revenue Sharing		% Increase (Decrease)
					By Law	Distributed**	
FY 2009	\$ 974,636,315	\$ 1,508,523,695	\$ 2,483,160,010	-	\$ 123,748,797	\$ 102,160,745	-
FY 2010	\$ 954,025,264	\$ 1,473,328,488	\$ 2,427,353,752	-2%	\$ 122,873,014	\$ 97,425,079	-5%
FY 2011	\$ 976,359,279	\$ 1,624,280,132	\$ 2,600,639,411	7%	\$ 130,880,200	\$ 93,156,725	-5%
FY 2012	\$ 1,029,513,306	\$ 1,666,395,184	\$ 2,695,908,490	4%	\$ 137,225,178	\$ 96,876,954	4%
FY 2013	\$ 1,036,887,515	\$ 1,693,849,829	\$ 2,730,737,344	1%	\$ 138,109,890	\$ 95,974,153	-1%
FY 2014	\$ 1,156,331,624	\$ 1,589,045,886	\$ 2,745,377,510	1%	\$ 138,306,246	\$ 66,063,030	-45%
FY 2015	\$ 1,244,308,294	\$ 1,667,907,728	\$ 2,912,216,022	6%	\$ 145,949,391	\$ 63,806,792	-4%
FY 2016	\$ 1,178,768,854	\$ 1,698,861,198	\$ 2,877,630,052	-1%	\$ 156,424,711	\$ 62,500,000	-2%
FY 2017	\$ 1,232,956,053	\$ 1,806,045,313	\$ 3,039,001,366	5%	\$ 155,174,541	\$ -	-100%
FY 2018	\$ 1,290,204,000	\$ 1,880,808,617	\$ 3,171,012,617	4%	\$ 161,938,227	\$ -	-
FY 2019	\$ 1,348,646,000	\$ 1,958,700,378	\$ 3,307,346,378	4%	\$ 168,725,829	\$ -	-

* FY 2009 – FY 2014 Based on Actual Sales and Income Tax Revenue.

**FY 2015 – FY 2019 Based on Projected Sales and Income Tax Revenue published in the Revenue Forecasting May 2015 Report.

**Distributed revenue sharing in FY 2016 - FY 2019 based on Governor's budget proposal.

Where Are They Now?

Update on bills working through the process

We are often quick to write an article in the Legislative Bulletin about a public hearing on a bill of municipal interest but sometimes slower to provide information about what happened to the proposed legislation as it is subsequently “worked” by the legislative committee of jurisdiction. As the public hearings fade away and lawmakers begin to round the final bend of this legislative session toward the always exhausting home stretch, here’s an update on some municipally important legislation that commanded space in the Bulletin when originally introduced. These four bills were all assigned to the Legislature’s Labor, Commerce, Research and Economic Development Committee.

LD 1191, relaxing the MUBEC mandate. One of the more recent bills considered by the Committee is a proposal regarding the Municipal Building and Energy Code that was developed by MMA’s Legislative Policy Committee and submitted on behalf of MMA by Senate President Mike Thibodeau (Waldo Cty.). What the municipal community was trying to accomplish with LD 1191, *An Act To Remove the Municipal Mandate To Enforce the Maine Uniform Building and Energy Code*, was to simply convert the “shall enforce” in current Maine law to a “may enforce”, instead. In that way, a municipality over 4,000 in population, currently mandated to enforce the MUBEC system, could choose instead that the code to be enforced entirely by the private sector “third party inspection” system. The impetus behind LD 1191 should be no mystery given the Legislature’s decision over the last six years to dramatically reduce the funds previously provided to the towns and cities to financially support the mandates imposed on them by state government.

LD 1191 was given its public hearing on April 22 along with a couple of other MUBEC bills, one of which would eliminate MUBEC altogether (LD 1120) and the other of which would change the population level triggering mandatory municipal enforcement from 4,000 to 5,000 (LD 1093).

Update. On Tuesday this week

the Committee voted “ought to pass as amended” on LD 1191 by a slender majority vote along party lines, with the Committee’s Independent legislator joining the panel’s Republicans in support of the bill. Presented by Senator Amy Volk (Cumberland Cty.), the amended version of LD 1191 would allow the legislative body of municipalities between 4,000 and 10,000 in resident population to opt-out of an obligation to enforce MUBEC. The amended bill, as far as it goes, puts into effect what MMA’s Legislative Policy Committee was trying to accomplish, which was to create an option at the municipal level to either appropriate property tax dollars to enforce the code or allow it to be enforced at the private-sector level. The state’s electrical code is an example of a code enforced at the private sector level throughout much of the state. The only difference is that MMA’s original bill provided the option to all 89 municipalities currently mandated to enforce MUBEC. The version supported by a majority of the Committee provides the option to a subset of that group of 89 towns and cities...the 70 municipalities in Maine that have populations between 4,000 and 10,000.

After voting 7-6 “ought to pass as amended” on LD 1191, a unanimous Committee voted “ought not to pass” on the bill to repeal MUBEC altogether (LD 1120).

LD 299, boiler inspections. In early March the Committee held a public hearing on LD 299, *An Act Protect Children in Municipal and School Facilities by Requiring Boiler Inspections*, sponsored by Sen. Dawn Hill (York Cty.). LD 299 would reinstate a mandate that the Legislature actually repealed in 2014 requiring the municipalities and the schools – and no one else on the face of the earth – to have their low pressure heating boilers inspected by the state for \$80 a boiler. The state’s “inspection,” as a general rule, relies on the inspections of those boilers that is accomplished already by the municipal and school insurance companies.

Update: The Committee reviewed the final language and the draft fiscal

note of an amended version of LD 299 on Tuesday this week. The amended bill reinstates mandatory state inspections for low pressure boilers located in schools only. The low pressure boilers located in (non-school) municipal buildings would remain exempt from state inspection, which is the general rule for all boilers of that size. The Committee’s vote on the amended version of LD 299, which was taken in early April, was unanimous.

The need for a fiscal note on LD 299 is created because the bill clearly meets the definition of a state mandate. The Committee was presented with three options as to how it might deal with the mandate issue, two of which are the options provided in law and the third of which end-runs the mandate law. The three options provided to the Committee by its legislative staff were: (1) amend the bill to fund the mandate; (2) place the required “mandate preamble” on the bill to give the Legislature the opportunity to override the mandate funding requirement with a 2/3 vote (or better) in both the House and Senate; or (3) do neither, and simply enact the requirement as though it was not a mandate. The Committee tentatively agreed to take the third option. Specifically, the Committee is proposing to explain to the Legislature in a summary statement that LD 299 is not really a mandate since the bill re-institutes a mandate that was repealed only a short time ago. This practice of enacting mandates without either funding them or formally overriding the funding obligation, which are the two options the Constitution would appear to require, is becoming a strategy increasingly employed by the Legislature.

LD 587, contract indemnification. In mid-March the Committee was presented with LD 587, *An Act Regarding Contract Indemnification*, sponsored by Sen. Andre Cushing (Penobscot Cty.). LD 587 would prohibit construction contracts from including any broad indemnification agreements. Negotiated into contracts, often in concert with a related “duty to defend” requirement, the purpose of indemnification is to consolidate the task of managing claims of injury or damage

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State Agency (cont'd)

Legal Counsel, Linda Montgomery, the Attorney General's role infringes on the balance of power between the branches of government and amounts to an effective veto over the Executive and Legislative branches with respect to rule changes. The State and Local Government Committee, which held the public hearing on LD 1354, was reminded that only the Governor is afforded veto power under Maine's Constitution.

From the proponents perspective, the intention of the bill would be for state agencies to continue seeking and considering the Attorney General's input on proposed rules, but that input would be advisory only and the buck would stop with the Governor in terms of whether or not the rule takes effect. Some Committee members questioned whether this change amounts to a re-write of the Attorney General's job description. The Governor's Chief Counsel responded that the change merely recognizes how the Attorney General wears two hats, drawing a line between the Attorney General's functions as an advisory attorney to state government and the function of the Attorney General's Office as the law enforcement authority for the entire state.

Also testifying in support of LD 1354 were Patrica Aho, the Commissioner of the Department of Environmental Protection, and Kevin Wells, the General Counsel to Maine's Department of Health and Human Services. Their testimony focused on technical aspects of the legislation. Outside of the Administration itself, the only advocate for LD 1354 was the Maine Realtors' Association. That Association's testimony focused on another element of LD 1354 that would prohibit the enactment of agency actions that result in the regulatory "taking" of private property.

The Secretary of State's Office testified in opposition to LD 1354, as did one current and one retired Assistant Attorney General, Maine Equal Justice Partners, Maine Audubon Society, the Natural Resources Council of Maine, the ACLU of Maine, Rep. Mark Bryant (Windham), and MMA.

Former Assistant Attorney General Jeff Pidot claimed the bill would do the opposite of its title. Assistant Attorney

General Gerry Reid pointed out the current requirement has been in effect for well over 50 years and rule reviews are not typically contentious, arguing that the rule determinations from the Attorney General's Office were never used to obstruct or "veto" the Governor. The law requires the Attorney General's review to be discrete, examining solely the "form and legality" of the proposed rule, which cannot be based on opinion. Deputy Secretary of State Julie Flynn asked how her Office will know whether the agency was within the scope of its rulemaking authority when handling the rules she has to work with.

Maine Equal Justice Attorney Jack Comart explained some instances where the state agency goes too far in its presumed rulemaking authority, suggesting that the agencies may become so invested in the rules they are developing that the process is not always legally followed. Comart referenced the current litigation over the 2014 DHHS General Assistance policy directives regarding the issuance of General Assistance benefits to asylum seekers as one example.

The question for the courts in that case is whether the directives DHHS adopted as a policy change constituted a "rule" that needed to go through the required notice and hearing rulemaking process. DHHS and the Governor believe the Executive has the authority to issue those directives, or rules, without going through the process required by the Administrative Procedures Act, while the Attorney General held otherwise. This disagreement likely provided some impetus for the introduction of LD 1354.

MMA's testimony acknowledged the litigation but focused on how the bill does not offer any alternative to the Attorney General's oversight, increasing the likelihood of state agencies exerting authority beyond their bounds, precipitating court challenges to rulemakings. Rep. Bryant testified by bringing an editorial from the Ellsworth American to the attention of the Committee on which he serves. The piece read, in part, "The last thing Maine needs, at this juncture, is to spend time and money on a bunch of unnecessary lawsuits because the legality of its own rules and regulations is at issue."

The work session on LD 1354 has not yet been scheduled.

Where Are They (cont'd)

occurring at the site of the construction project with the contractor that controls the site. Otherwise, the lawsuits alleging work site injury or damage, as well as the number of parties subject to those lawsuits, can redundantly expand into more litigation for everyone. A bill of this type has been submitted to the Legislature in every biennium over the last decade or more.

Update. A month ago the Committee voted "ought to pass" on LD 587 by a 7-6 party line vote with the Committee's Independent legislator joining the Republicans in support of the measure. A fiscal note indicating that the enactment of the bill could increase liability exposures and litigation costs for the Department of Transportation and Maine Turnpike Authority will be included in the bill's presentation to the full Legislature.

LD 530, selectpersons/councilors required to attend labor negotiations. The Committee held a public hearing in late March for LD 530, *An Act To Improve Public Sector Collective Bargaining Laws*. Sponsored by Senator John Patrick (Oxford Cty.), LD 530 would apply to municipalities where the employees belong to labor unions. The bill would require that at least one member of a selectboard or town or city council attend every contract negotiation meeting with the labor union's bargaining agent.

Update: The Committee issued a divided recommendation on LD 530, with the Democrats and the Committee's Independent legislator voting "ought to pass" and the Committee's Republicans voting "ought not to pass". That same division was reflected in the votes taken on LD 530 in the House and Senate, with the Republican-controlled Senate voting to oppose the bill and the Democrat-controlled House voting to support the mandated attendance. Both the House and Senate "insisted" on their positions, and LD 530 died between the chambers.

Likely not the only bill to suffer that fate in 2015.

LEGISLATIVE HEARINGS

Note: You should check your newspapers for Legal Notices as there may be changes in the hearing schedule. For the Legislative Events Calendar, see the Legislature's web site at <http://www.mainelegislature.org/legis/calendar/>. If you wish to look up schedules by Committee, go to <http://www.mainelegislature.org/legis/bills/phwkSched.html>.

Monday, May 11

Appropriations & Financial Affairs

Room 228, State House, 10:00 a.m.

Tel: 287-1316

LD 1019 – Governor's change package to proposed biennial budget: Change Package Items under the Jurisdiction of the Joint Committee on Criminal Justice and Public Safety.

1:00 p.m.

Change Package Items under the Jurisdiction of the Joint Committee on Health and Human Services.

2:00 p.m. (or upon completion of the 1:00 block)

All Change Package Items Not Previously Covered.

Labor, Commerce, Research & Economic Development

Room 208, Cross State Office Building, 9:30 a.m.

Tel: 287-1331

LD 1372 – An Act To Encourage the Redevelopment of Upper Floors of Buildings in Downtowns and on Main Streets.

State & Local Government

Room 214, Cross State Office Building, 1:00 p.m.

Tel: 287-1330

LD 1377 – Resolve, To Establish the Commission To Study the Reduction of Unfunded and Outdated Municipal Mandates.

LD 1378 – An Act to Amend the Laws Governing the Issuance of Bonds and To Effectuate the Issuance of Bonds To Support Maine's Natural Resource-based Economy.

Taxation

Room 127, State House, 1:00 p.m.

Tel: 287-1552

LD 718 – An Act To Avoid Loss of Revenue to the State.

LD 1254 – An Act To Implement and Fund an Integrated Beach Management Program.

Tuesday, May 12

Health & Human Services

Room 209, Cross State Office Building, 1:00 p.m.

Tel: 287-1317

LD 101 – An Act To Strengthen and Reform Maine's Welfare System.

LD 133 – Resolve, To Establish the Task Force on Independence from Public Assistance.

LD 452 – An Act To Require a Work Search for Job-ready Applicants for Benefits under the Temporary Assistance for Needy Families Program.

LD 816 – An Act To Reform Welfare and Eliminate the Welfare Cliff.

LD 885 – An Act To Promote Enhanced Eligibility Verification in Maine's Welfare System.

LD 1375 – An Act To Increase Accountability in Maine's Welfare Programs.

Judiciary

Room 438, State House, 1:00 p.m.

Tel: 287-1327

LD 1094 – An Act To Improve Tribal-state Relations.

Thursday, May 14

Inland Fisheries & Wildlife

Room 206, Cross State Office Building, 1:00 p.m.

Tel: 287-1338

LD 1196 – An Act To Correct and Clarify Maine's Fish and Wildlife Laws.

Judiciary

Room 438, State House, 1:00 p.m.

Tel: 287-1327

LD 775 – An Act To Streamline Judicial Review of Certain Land Use Decisions.

LD 962 – An Act To Require the Attorney General To Investigate the Death of a Person in Police Custody or in a Correctional Facility.

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