

# Memorandum

To: Municipal Clients of Bernstein Shur  
From: Pat Scully  
Date: July 31, 2006  
Re: TABOR

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## **I. OVERVIEW OF TABOR.**

The purpose of the memorandum is to address certain questions raised by Initiated Bill 1, L.D. 2075, known as the Taxpayer Bill of Rights (“TABOR”). If approved by Maine voters in November 2006, TABOR would impose both revenue restrictions and expenditure restrictions on the State of Maine, quasi-governmental agencies, counties, municipalities, school administrative units, and certain other governmental entities with the authority to collect revenue. The revenue and expenditure restrictions are separate and distinct under TABOR and operate independently of one another.

### **A. Revenue Restrictions**

Section 2041(2)<sup>1</sup> of TABOR prohibits a municipality’s adoption of any “increase in revenue” except through the approval process provided in §2043. An “increase in revenue” is defined to include:

any legislation, local ordinance or tax levy that causes a net gain in revenue and:

- a) Enacts a new tax or fee;
- b) Increases the rate or expands the base of an existing tax or fee;
- c) Reduces the benefits or eligibility under the Business Equipment Tax Refund program established in Title 36, chapter 915 without providing the same level of benefits and eligibility under a comparable program or without providing a

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<sup>1</sup> TABOR would amend several provisions of Maine law, including the adoption of 5 M.R.S.A. Ch. 167, §§2041-2049, labeled the “Taxpayers’ Bill of Rights.”

100% property tax exemption for property eligible for reimbursement under Title 36, chapter 915;

- d) Repeals or reduces any tax exemption, credit or refund; or
- e) Extends an expiring tax or fee increase.

The term “revenue” is defined in §2042(7) to mean “taxes and fees collected by the State, a quasi-governmental agency or a local district” pursuant to State law.

Section 2043 of TABOR provides that any “increase in revenue” by a municipality may only be adopted if it is approved through two separate local votes. First, it must be approved by a 2/3 “supermajority” vote of the members of a municipality’s legislative body. In cities and some towns where the municipal charter vests legislative power in a council, this provision would require a 2/3 vote of the council. In all other towns, TABOR would require a 2/3 vote at a Town Meeting. In addition to this first vote of approval, the increase in revenue also must be separately approved by a majority of the voters in the municipality at its next general or special election.<sup>2</sup>

### **B. Expenditure Restrictions**

Section 2041(1) of TABOR prohibits local expenditures that exceed the cap established in §2044. Section 2044(2) caps spending by municipalities, providing that:

The maximum annual percentage change in fiscal year spending for a [municipality] may not exceed:

- A. The amount of revenue for the [municipality] for the previous fiscal year adjusted by the change in the assessed value of taxable real and personal property in the [municipality], or the amount of revenue for the [municipality] for the previous fiscal year adjusted by the inflation adjustment factor plus the population adjustment factor, whichever is lower; plus
- B. Any increases attributable to [increases in revenues] approved under [the two-vote process described in] section 2043.

The “inflation adjustment factor” is defined as the “increase in the Consumer Price Index for the most recently available calendar year as calculated by the United States Department of Labor, Bureau of Labor Statistics.” The “population adjustment factor” is defined as the “increase or decrease in population for the preceding calendar year over the prior calendar year as determined ... for each municipality based on federal census estimates.”

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<sup>2</sup> Section 2043(2) provides an exception from the requirement for the second vote of approval by the voters at the next general or special municipal election. The second vote is not required if: a) annual municipal revenue is less than annual payments on general obligation bonds, required payments related to pensions and final court judgments; or b) the measure is an emergency tax and the provisions of section 2049 are followed. However, the latter exception for an emergency tax is not applicable to municipalities, which have no power under Maine law to impose new taxes.

Section 2044(2) of TABOR provides a different cap for “local districts” that are “school administrative units.”<sup>3</sup> It provides that “the maximum annual percentage change in fiscal year spending for ... a school administrative unit equals the inflation adjustment factor plus the change in its student enrollment and any increases attributable to [increases in revenue approved through the 2-step approval process outlined in §2043].”

**II. QUESTIONS RAISED BY TABOR**

**Question 1: Does the wording of the proposed TABOR initiative require local expenditures to be reduced from the previous year’s revenues if the local expenditure limitation formula produces a negative number?**

Yes. The local expenditure limitation under §2044(2) of TABOR, as applied to municipalities, is a limitation on spending, not a limitation on spending increases. The limitation is determined by applying an adjustment to the municipality’s revenues in the prior fiscal year. To determine the maximum expenditures in a given year under TABOR, a municipality must compare: a) the change in the assessed value of all taxable real and personal property in the municipality, and b) the sum of the “inflation adjustment factor” plus the “population adjustment factor.” TABOR caps the current year’s expenditures at the prior year’s revenues adjusted by the lower of the two adjustments set forth above. For example, as shown Table 1, if in a given fiscal year the assessed value of all taxable property increases by 2% over the prior year, the Consumer Price Index (“CPI”) increases 3% and the population increases by 1%, municipal expenditures would be capped at a 2% increase over the prior year’s revenues (the 2% change in assessed value is less than the 4% sum of the CPI and the population increase).

**Table 1- Hypothetical Tabor Calculation of Municipal Spending Cap**

<b>Formula 1</b>	<b>CPI</b>	<b>Change in Population</b>	<b>Total</b>
	<b>3%</b>	<b>1%</b>	<b>4%</b>
<b>Formula 2</b>	<b>Change in Assessed Value</b>		<b>Total</b>
	<b>2%</b>		<b>2%</b>

Likewise, as shown in Table 2, if in a given fiscal year total assessed value increases 5%, but CPI increases only 1% and population decreases by 3%, then the lower of the two measures is the sum of the 1% CPI and the minus three percent (-3%) population adjustment, a net adjustment of minus two percent (-2%). In that example, TABOR clearly requires a 2% reduction in expenditures.

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<sup>3</sup> The term “school administrative unit” is not defined in TABOR. However, the term is used throughout Maine statutory provisions on education and is defined in 20-A M.R.S.A. §1(26) to mean: “the state-approved unit of school administration and includes a municipal school unit, school administrative district, community school district or any other municipal or quasi-municipal corporation responsible for operating or constructing public schools, except that it does not include a career and technical education region.”

**Table 2 – Hypothetical Tabor Calculation of Municipal Spending Cap**

<b>Formula 1</b>	<b>CPI</b>	<b>Change in Population</b>	<b>Total</b>
	<b>1%</b>	<b>-3%</b>	<b>-2%</b>
<b>Formula 2</b>	<b>Change in Assessed Value</b>		<b>Total</b>
	<b>5%</b>		<b>5%</b>

In evaluating citizen initiatives, Maine courts apply the ordinary rules of statutory construction. Opinion of the Justices, 2004 ME 54, ¶ 10, 850 A.2d 1145, 1149. The so-called “plain meaning” rule is the most basic rule of statutory construction. Under this rule the court first looks at the plain meaning of the statutory language, In re Estate of Footer, 2000 ME 69, ¶ 10, 749 A.2d. 146, 149, and interprets the statute in accordance with that “plain and ordinary meaning” unless the result would be illogical or absurd. Francis v. Dana-Cummings, 2005 ME 36, ¶ 3, 868 A.2d 196, 198. The Maine Law Court has consistently held that the plain meaning rule of construction is mandatory. “Words in a statute must be given their plain, common, and ordinary meaning such as people of common intelligence would usually ascribe to them.” Stockly v. Doil, 2005 ME 47, ¶ 11, 870 A.2d 1208, 1211 (quoting S.D. Warren Co. v. Bd. of Env’tl. Prot., 2005 ME 27, ¶ 15, 868 A.2d 210, 216. However, when the plain language of a statute is ambiguous, a court must turn to other indicators of legislative intent. Jordan v. Sears, Roebuck & Co., 651 A.2d 358, 360 (Me. 1994). In this circumstance, the court considers the statute’s history, underlying policy, and other extrinsic factors to ascertain legislative intent. Thompson v. Shaw’s Supermarkets, Inc., 2004 ME 63, ¶ 7, 847 A.2d 406, 409 (citing In re Wage Payment Litigation, 2000 ME 162, ¶ 4, 759 A.2d 217, 220-21. But if the meaning of a statute is obvious and the text, given its plain meaning, produces a plausible scenario, it is unnecessary and improper to look outside of the statute. Boivin v. Black, 225 F.3d 36, 40 (1<sup>st</sup> Cir. 2000). Further, in interpreting statutory language, nothing in a statute is treated as surplusage if a reasonable construction supplying meaning and force is otherwise possible. City of Bangor v. Penobscot County, 2005 ME 35, ¶ 7, 868 A.2d 177, 180 (citing Labbe v. Nissen Corp., 404 A.2d 564, 567 (Me. 1979).

These established principles of statutory interpretation compel the conclusion that §2044(2) requires negative adjustments in expenditures if population or the assessed value of property decreases from one year to the next. First, §2041(1) provides a strict and unequivocal rule that: “Annual ... local expenditures may not exceed the limits provided in this chapter.” This clause limits all local expenditures, not merely increases in expenditures. If the drafters of TABOR intended only to limit expenditure increases, they would have included language to that effect.

Second, §2044(2), which details the local expenditure limitation, includes no language indicating that its cap limits only increases in expenditures. It refers to a “maximum

annual percentage change in fiscal year spending (emphasis added),” not a maximum increase or maximum positive change.

The phrase “maximum annual percentage change” in the second sentence of §2044(2) suggests that the expenditure limitation TABOR imposes on municipalities will be in the form of a percentage change from the prior year. This is not the case. The specific calculation of the expenditure limitation on local districts (other than school administrative units) is detailed in §2044(2) and is a gross spending cap.<sup>4</sup> Section 2044(2)(A) provides that spending “may not exceed” the municipality’s “revenue ... for the previous fiscal year adjusted by [the lower of] the change in the assessed value of taxable real and personal property or ... the inflation adjustment factor plus the population adjustment factor...” This specific formula thus results in a maximum expenditure amount, not a maximum percentage change in expenditures.

Nothing in the language of §2044(2) limiting expenditures suggests that the spending cap applies only to spending increases or that application of the cap would not result in a required spending decreases if population, inflation or the assessed value of property decline. Under the plain meaning of the statute, one simply multiplies the prior year’s revenues by the “change in the assessed value of taxable ... property.” The language “change in the assessed value” applies equally to both increases and decreases. Had the measure been intended to apply only to increases in the assessed value of property, the provision would have been drafted to apply to “any increase in the assessed value of taxable ... property.”

Likewise, the alternative calculation adjusts the prior year’s revenues by the inflation adjustment factor plus the population adjustment factor. The definition of “inflation adjustment factor” refers to “the increase in” the CPI, without acknowledging that the CPI can decrease as well. However, the definition of “population adjustment factor” expressly includes a population “increase or decrease.” This “increase or decrease” language compels a conclusion that this factor can result in a negative adjustment to expenditures. Otherwise, the words “or decrease” would be rendered meaningless. As noted above, Maine law on statutory construction dictates against treating words as surplusage if a reasonable construction supplying meaning and force is otherwise possible. If a municipality’s population decreases by more than any increase in the CPI, the expenditure limitation under TABOR must be a negative adjustment. There simply is no language in §2044 to suggest that a municipality with declining assessed values of property or a declining population can avoid the expenditure limits of TABOR by adopting a flat budget.

Section 2044(2) can also require school administrative units (“SAU”) to reduce spending. For SAUs, §2044(2) provides a “maximum annual percentage change in fiscal year spending” that “equals the inflation adjustment factor plus the change in its student enrollment.” Unlike the language applicable to municipalities, this provision

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<sup>4</sup> Under Maine law, the rule of “ejusdem generis” requires that, when interpreting statutory language that includes specific provisions and words of general import, the general words, if their meaning is uncertain, should be controlled by the specific. Klingerman v. SOL Corp. of Maine, 505 A.2d 474 (Me. 1986).

results in a cap expressed as a percentage change from the prior fiscal year's spending. Under the plain meaning of this provision, if student enrollment decreases from one fiscal year to the next by a percentage that exceeds any increase in the CPI, the net adjustment is negative, and spending by the SAU must decrease accordingly, except to the extent an increase in revenue is approved through the two-step process provided in §2043. For example, if in a given fiscal year the CPI increases 2% from the prior year and student enrollment decreases 3%, §2044(2) requires the SAU to reduce its spending by 1%.

We find no language in any other sections of TABOR to suggest that the expenditure cap on municipalities limits only spending increases. Section 2041(3) provides as a rule of construction that “this chapter be interpreted liberally to restrain excess growth of state and local government.” The words “excess growth” in §2041(3), standing alone, could suggest that TABOR restricts only growth in spending and could not compel spending reductions. However, taken as a whole, §2041(3) supports an interpretation that TABOR requires reductions in expenditures when population or assessed property values decrease. This rule of interpretation directs the courts to interpret TABOR in a liberal manner that favors limiting spending and revenue increases. The more liberal reading of TABOR is certainly an interpretation that imposes the strictest limitations on taxes and spending. As mentioned above, when the plain language of a statute is ambiguous the court must turn to other indicators of legislative intent. To the extent that any ambiguity exists in TABOR as to whether it can require a reduction in expenditures, the statutory rule of construction provided in §2041(3) supports a liberal interpretation that more aggressively constrains local spending.

The interpretation above, that §2044(2) of TABOR can require spending cuts if the local expenditure limitation formula produces a negative number, is also supported by TABOR provisions limiting the State budget as proposed by the Governor. 5 M.R.S.A. § 1664 outlines the form of the State budget document and currently provides that the total General Fund appropriation for each fiscal year as included in the Governor's budget may not exceed an appropriation limitation based on income growth, population and inflation. Section 6 of TABOR would amend 5 M.R.S.A. § 1664 to replace the current budget limitation with language providing that the total General Fund appropriation contained in the Governor's budget submission:

“may not exceed the General Fund appropriation of the previous fiscal year multiplied by one plus the population adjustment factor plus the inflation adjustment factor as those terms are defined in section 2042, subsections 5 and 3, respectively.”

This language in Section 6 of TABOR imposes a limit on the State budget presented by the Governor to the Legislature that is determined by a purely mathematical formula. The current year's budgeted General Fund appropriation cannot exceed the prior year's appropriation adjusted by the sum of population changes plus any increase in the CPI. If population decreases by a percentage that exceeds any percentage increase in the CPI, the budget the Governor submits to the Legislature must be reduced from the previous year. Since Section 6 unambiguously requires the submission of a negative State budget if its formula results in a negative number, it is very difficult to argue that the municipal

expenditure limitations in §2044(2) of TABOR should be interpreted only to limit spending increases but never to require cuts.

**Question 2: Does the reference to the “change in the assessed value of taxable real and personal property” in a municipality referenced in §2044(2)(A) of TABOR apply only to comprehensive revaluations?**

No. Nothing in this provision or in any part of TABOR suggests that the phrase “change in assessed value” is intended to apply only to a comprehensive revaluation. The plain meaning of the language in §2044(2) is that a municipality, in calculating its expenditure limitation under §2044(2), considers the total assessed value of taxable real and personal property each fiscal year and compares it to the corresponding figure for the prior fiscal year. This is a required annual calculation under TABOR and is not linked to municipality-wide revaluations that are typically conducted once every several years.

The total assessed value of taxable property in a municipality usually changes every year as a result of many factors, including property sales, new construction, installation or removal of personal property, subdivisions of land, changes in land use regulations, changes in the taxable status of property or the eligibility of owners or property for tax exemptions, and enrollment of property in programs such as the Tree Growth program or the Farm and Open Space program. Maine law expressly requires that local assessors determine property values each year. Specifically, 36 M.R.S.A. § 708 requires that local assessors “ascertain as nearly as may be the nature, amount and value as of the first day of each April of the real estate and personal property subject to be taxed....” 36 M.R.S.A. § 383 requires that assessors determine the total assessed value of land and personal property in their municipality each year and to report those figures in their annual return to the State Tax Assessor. Given these explicit requirements of Maine law, the reference in § 2044(2) of TABOR to a “change in the assessed value of taxable real and personal property” clearly requires the municipality to calculate its expenditure limitations based on each year’s changes in the municipality’s total assessed property value.

**Question 3: May a community increase its tax rate without going through the override process if the municipality remains under the expenditure limitation?**

No. The revenue limitations set forth in §2043 are separately stated from, and operate independently of, the spending limitations found in §2044. Nothing in §2043’s limits on revenue increases is tied to or makes any reference to the spending limit in §2044. Section 2041 provides the basic two-part prohibition created by TABOR, expressed in two separate sub-sections. Section 2041(1) prohibits local expenditures that exceed the limits provided in TABOR, and §2041(2) prohibits an increase in revenue except “as provided in section 2043.” The limit on revenue increases is then set forth in §2043, while the cap on expenditures is set forth separately in §2044.

Section 2043(1) explicitly requires a two-step approval of every “increase in revenue” except those expressly excluded by §2043(2). An “increase in revenue” is defined broadly to include any local ordinance or tax levy that “causes a net gain in revenue and ... increases the rate or expands the base of any existing tax...” Therefore, any increase in a community’s property tax rate that causes any net gain in revenue requires the two-

step approval set forth in §2043(1). Nothing in §2043, or elsewhere in TABOR, exempts tax rate increases from the approval process simply because municipal spending does not exceed the separate spending cap set forth in §2044.

**Question 4: Does the Maine Taxpayer Bill of Rights affect bonding authority?**

Yes, indirectly. TABOR does not directly limit or impose conditions on a municipality's ability to issue bonds. Further, §2043(2) exempts municipalities from the "second step" requirement for voter approval of revenue increases where annual local revenue is "less than annual payments on general obligation bonds, required payments related to pensions and final court judgments." However, other than the narrow exemption in §2043(2), any increase in municipal revenues proposed or necessary to pay debt service on bonds would be subject to the approval requirements of §2043(1). Additionally, the expenditure of bond proceeds for municipal purposes, such as for capital projects, would be subject to the expenditure cap set forth in §2044(2). While TABOR does not preclude the issuance of bonds, it does directly limit a municipality's ability to increase revenues to pay debt service and to spend bond proceeds.