Maine State Legislature
OFFICE OF POLICY AND LEGAL ANALYSIS
13 State House Station, Augusta, Maine 04333-0013
Telephone: (207) 287-1670

TO: Joint Standing Committee on Health and Human Services

FROM: Erin Dooling, Esq., Legislative Analyst

DATE: March 4, 2020

SUBJECT: Constitutional Analysis of LD 1961, "An Act to Establish the Trust for a Healthy Maine"

LD 1961, "An Act to Establish the Trust for a Healthy Maine" proposes to create a public instrumentality named the Trust for a Healthy Maine to receive money paid to the State of Maine pursuant to the tobacco settlement and to distribute that money to state agencies or designated agents of the State for the purposes of funding tobacco use prevention and control, ensuring adequate resources for other disease prevention efforts and, generally, promoting public health.

The Committee raised several questions at the public hearing about the extent of the proposed trust's authority. Those questions relate directly to the Legislature's authority afforded in Maine's Constitution. The purpose of this memorandum is to provide the Committee with an overview of the Maine Constitution in relation to the authority of the Legislative branch of government and to provide a discussion of the specific constitutional issues generated by this bill.[1]

Maine Constitution

The foundational structure of Maine's government is essential to understanding the Legislature's authority. Maine's Constitution divides state government into three branches: "The powers of this government shall be divided into 3 distinct departments, the legislative, executive and judicial." Me. Const. art. III, § 1. Each branch has a different role under Maine's Constitution: "The first was to pass laws, the second to approve and execute them, and the third to expound and enforce them." *Ex parte Davis*, 41 Me. 38, 53 (1856) (quotation marks omitted).

[1] Other drafting issues, notes and questions are identified on the bill analysis for LD 1961.

These branches are co-equal, meaning that each branch is "severally supreme within [its] legitimate and appropriate sphere of action." *Id.*

The next section of Maine's Constitution provides for the separation of the powers of the three branches of government: "No person or persons, belonging to one of these departments, shall exercise any of the powers properly belonging to either of the others, except in the cases herein expressly directed or permitted." Me. Const. art. III, § 2. Separation of powers under the Maine Constitution "means that a constitutional grant of power to one branch of government effectively forbids the exercise of that power by any other of the three branches of government."[2] *In re Dunleavy*, 2003 ME 124, ¶ 6, 838 A.2d 338.

After establishing the authority of the Legislature to convene, Maine's Constitution provides: "The Legislature, with the exceptions hereinafter stated, shall have full power to make and establish all reasonable laws and regulations for the defense and benefit of the people of this State, not repugnant to this Constitution, nor to that of the United States." Me. Const. art. IV, pt. 3, § 1. This constitutional provision has three parts: (1) The Legislature has "full power" to make laws; (2) that power is limited only by the Maine and U.S. Constitutions; and (3) the laws must be for the "defense and benefit" of the people of Maine. *See id.*

The Legislature is sometimes described as having "plenary" or "absolute" authority by virtue of the broad grant of authority in this constitutional provision. This means that the Legislature's authority is not restricted, reduced or qualified by any law other than the Maine or U.S. Constitutions.[3] *See id.* When a court considers whether the Legislative branch of government has a particular power, the court "measures the limitations upon [the Legislature's] authority" by the Maine Constitution. *See, e.g.*, *Sawyer v. Gilmore*, 109 Me. 169, 180, 83 A. 673, 678 (1912). In contrast, when a court considers whether the Executive or Judicial branches of government have a particular power, the court "measures the extent of [the] authority specifically granted to that branch of government by the Maine Constitution. *Id. See also Opinion of the Justices*, 137 Me. 350, 353, 19 A.2d 53, 55 (1941) ("It is, of course, well settled that legislative power is measured by limitation, not by grant, and is absolute and all-embracing except as expressly or by necessary implication restricted by the Constitution.")

[2] "[T]he separation of governmental powers mandated by the Maine Constitution is much more rigorous than the same principle as applied to the federal government." *State v. Hunter*, 447 A.2d 797, 799 (Me. 1982).

[3] *Compare* the United States Constitution at Article I, Section 8, which enumerates Congress's authority.

Analysis of LD 1961

At the public hearing on LD 1961, the Committee asked several questions about the authority of the public instrumentality proposed to be created by this bill, which mostly related to whether it would establish a "wall" preventing the Legislature from accessing the tobacco settlement funds. The effectiveness of LD 1961 in establishing such a "wall" must be analyzed under Maine's constitutional law.

A. A Legislature May Not Bind Future Legislatures

As described in the previous section, the Maine Legislature has absolute authority to enact legislation, which is subject to limitation only by the constitutions of Maine or the United States. Me. Const. art. IV, pt. 3, § 1; *Sawyer*, 109 Me. at 180, 83 A. at 678; *Opinion of the Justices*, 137 Me. at 353, 19 A.2d at 55. Within its sphere of authority the Legislature may "enact any law of any character or on any subject." *See Baxter v. Waterville Sewerage District*, 146 Me. 211, 215, 79 A.2d 585, 588 (1951). It follows, then, that the Legislature has the authority to repeal, amend or disregard any legislation. *See, e.g.*, *Manigault v. Springs*, 199 U.S. 473, 487 (1905). For any law passed by the Legislature, "subsequent sessions of the Legislature may choose to follow it, or they may choose to repeal it, either expressly or by implication." *Opinion of the Justices*, 673 A.2d 693, 695-96 (Me. 1996) (opining that if the bill at issue became law the "bill would not be enforced by the courts against future Legislatures"); *See also Baxter*, 146 Me. at 215, 79 A.2d at 588 (providing that "[a]t any legislative session . . . the legislators may amend or repeal any law of their predecessors."). This principle of constitutional law is often described as the inability of the Legislature to bind future Legislatures.

The Law Court considered this constitutional principle in *SC Testing Technology, Inc. v. Department of Environmental Protection*, 688 A.2d 421 (Me. 1996), regarding a breach of contract suit arising out of an emissions testing program. In that case, the Department of Environmental Protection (DEP) entered into a contract with SC Testing Technology, Inc. to implement an emissions testing program the Legislature enacted in 1991. *Id.* at 422-23. In 1995 the Legislature repealed the program and SC Testing Technology, Inc. sought to enforce certain provisions of the contract. *See id.* at 423-24. The Court determined that because of the Legislature's broad authority to enact laws, a party entering into a contract with the State "does so with the understanding that the Legislature may at some future time take action that nullifies the subject matter of the contract." *Id.* Accordingly, the Court concluded that no contractual provision could guarantee "that the legislation authorizing the program would not be repealed by a subsequent legislature" because a state agency, in agreeing to such a provision, "would be in no

better position than the Legislature itself to bind future Legislatures." *Id.* at 425. This example illustrates the breadth of the Legislature's authority to enact or repeal legislation, despite its potential effects on the activities of state entities.

1. Fund for a Healthy Maine

The principle of not binding future Legislatures and its corollary, that the Legislature is not bound by previous Legislatures, is not unfamiliar to this Committee. The principle is often discussed in relation to the Fund for a Healthy Maine statute. *See* 22 M.R.S. § 1511 (2018). That statute provides that allocations from the Fund are limited to certain enumerated "prevention and health promotion purposes" and that allocations "must be used to supplement, not supplant, appropriations from the General Fund." *Id.* § 1511(4), (6). However, reading that statute as restricting how the Legislature allocates funds conflicts with the Maine Constitution. The Fund for a Healthy Maine statute is therefore insufficient to prevent the Legislature from allocating tobacco settlement funds for any public purpose it chooses.

The Legislature has used its constitutional authority to allocate money in the Fund for public purposes not identified in the Fund for a Healthy Maine statute. The Legislature typically drafts such allocations by "notwithstanding" the statute. *See, e.g.*, P.L. 2019, ch. 343, § BBBB-1 (emergency, effective June 17, 2019) ("Notwithstanding any law to the contrary, the State Controller shall transfer $14,500,000 from the Fund for a Healthy Maine dedicated revenue . . . to the MaineCare Stabilization Fund . . ."). Even if a particular program meets the purposes of the statute, the Legislature may deallocate Fund for a Healthy Maine funds to reduce or terminate a state agency's program. *See, e.g.*, P.L. 2011, ch. 380, § A-1 (emergency, effective June 20, 2011) (reducing the home visiting program within the Department of Health and Human Services); P.L. 2011, ch. 657, § A-1 (eliminating the home visiting program and the family planning program within the Department of Health and Human Services). The Legislature may also decide to deallocate money from the Fund for a Healthy Maine to the unappropriated surplus of the General Fund. *See, e.g.*, P.L. 2011, ch. 380, § TTT-1.

Alternatively, the Legislature may use its constitutional authority to amend or repeal the Fund for a Healthy Maine statute. For example, it could amend the statute to reduce or expand the purposes of the Fund. *See, e.g.*, P.L. 2011, ch. 617, § 1 (adding "[p]revention, education and treatment activities concerning unhealthy weight and obesity" as one of the prevention and health promotion purposes). The Legislature may also decide to repeal the Fund for a Healthy

Maine statute, as it did with the emissions testing program in *SC Testing Technology, Inc*. The Legislature's constitutional authority to exert control over public funds is plenary.[4]

2. Trusts

The statutory language proposed in LD 1961 purports to create a trust that would prevent the Legislature from accessing the tobacco settlement funds unless the Legislature dissolved the trust by repealing the law. Generally, a trust is "a property interest held by one person (the trustee) at the request of another (the settlor) for the benefit of a third party (the beneficiary)." BLACK'S LAW DICTIONARY 1817 (11th ed. 2019) (emphasis omitted).

The Legislature sometimes encounters charitable trusts. In a charitable trust, a person or organization (the settlor) gifts or bequeaths private money or property for a specific charitable purpose (the trust) to the State (the trustee) for the benefit of the public (the beneficiary). *See, e.g.*, 20-A M.R.S. § 1705 (2018) (providing that a community school district "may accept and receive money or other property, outright or in trust, for any specified benevolent or educational purpose"). In accepting the charitable funds, "the State has a legal responsibility to expend the monies" for the stated purposes of the charitable trust and "generally cannot divert these monies to a wholly unrelated purpose." Op. Me. Att'y Gen. 1992-07. In this context, the Legislature is acting as the trustee, which requires the Legislature to protect the trust. *Id.*

LD 1961 does not create a charitable trust. The funds coming to the State from the tobacco settlement are not being donated by a settlor for a specific charitable purpose that the State must accept in order to receive the funds. If that were the case, the Legislature would have been legally obligated to use the funds for specific charitable purposes at the time it entered into the Master Settlement Agreement. Accordingly, any public funds not held pursuant to a charitable trust, such as the tobacco settlement funds, are subject to legislative "discretion in making allocations for any designated governmental purpose, including reallocation to the general fund." *Id.*; *See also* Op. Me. Att'y Gen. 2003-01.

Even if LD 1961 created some sort of non-charitable trust, "[a]t most, the Legislature could be characterized as a trust grantor or settlor that can change its mind about the appropriate use of funds under its control." Letter from G. Steven Rowe, Attorney General, to Senator Hall

[4] "Under all constitutional governments recognizing three distinct and independent magistracies, the control of the purse strings of government is a legislative function. Indeed, it is the supreme legislative prerogative, indispensable to the independence and integrity of the Legislature, and not to be surrendered or abridged, save by the Constitution itself, without disturbing the balance of the system and endangering the liberties of the people. The right of the Legislature to control the public treasury, to determine the sources from which the public revenues shall be derived and the objects upon which they shall be expended, to dictate the time, the manner, and the means, both of their collection and disbursement, is firmly and inexpugnably established in our political system." Op. Me. Att'y Gen. 2005-02 (quoting *Welden v. Ray*, 229 N.W.2d 706, 709 (Ia. 1975)).

and Representative Bliss (May 20, 2003). To read the statutory language of LD 1961 as a limitation on Legislative authority would be "an attempt to amend the Constitution of the State of Maine through improper means." *See, e.g.*, Opinion of the Justices, 673 A.2d at 695-96. With regard to the Legislature's authority over public funds, in particular, the statute cannot be read as a limitation on that authority. Otherwise, the "trust" would be irrevocable, which "would amount to the surrender of legislative power. The Constitution does not permit this. . . . Accordingly, the Legislature cannot establish a public funds trust sufficient to prohibit reallocation of funds by subsequent legislative action." Letter from G. Steven Rowe, Attorney General, to Senator Hall and Representative Bliss (May 20, 2003).

Consequently, LD 1961, if enacted, would appear to have no greater legal significance in its effect on the Legislature's constitutional authority than the existing Fund for a Healthy Maine statute.

B. Delegation of Legislative Authority

The following discussion will examine the creation of the Trust for a Healthy Maine as a "body corporate and politic" and related constitutional analysis of the delegation of Legislative authority to that entity.

A "body politic" is generally used to describe a public instrumentality that the Legislature has "invested with [the] powers and duties of government." *See, e.g.*, *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 70, n. 9 (1989). Some examples in Maine statutes establishing a body corporate and politic include, the Maine State Housing Authority, 30-A M.R.S. § 4722 (2018), the Wild Blueberry Commission, 36 M.R.S. § 4312-C(1) (2018), and the Efficiency Maine Trust, 35-A M.R.S. § 10103(2) (2018). A body corporate and politic is a creature of statute. *Cent. Pac. R.R. Co. v. Cal.*, 162 U.S. 91, 125 (1896) ("No persons can make themselves a body corporate and politic without legislative authority."). As such, a body corporate and politic has only the powers and duties delegated to it by the Legislature in its authorizing legislation.

At the public hearing the Committee asked whether the trustees identified in LD 1961 could dissolve the trust. LD 1961, as drafted, does not statutorily grant the trustees authority to dissolve the trust and therefore the trustees would not be permitted to dissolve the trust.

LD 1961 proposes to delegate to the Trust for a Healthy Maine the authority to decide how to distribute tobacco settlement funds. Under the Maine Constitution, the Legislature has the authority to delegate to a government entity the power "of the State to expend public money." *Crommett v. City of Portland*, 150 Me. 217, 230, 107 A.2d 841, 849 (1954). In order to delegate legislative authority the authorizing legislation must provide "sufficient standards to

guide the administrative body in the exercise of its discretionary functions respecting implementation of the law to particular situations." *Opinion of the Justices*, 261 A.2d 58, 76 (Me. 1970). The purpose of these standards is "so that (1) regulation can proceed in accordance with basic policy determinations made by those who represent the electorate and (2) some safeguard is provided to assist in preventing arbitrariness in the exercise of power." *Me. Sch. Admin. Dist. No. 15 v. Raynolds*, 413 A.2d 523, 529 (Me. 1980); *see also State v. Boynton*, 379 A.2d 994, 995 (Me. 1977) ("The purpose of the non-delegation doctrine . . . is to protect the citizen against arbitrary or discriminatory action by public officials.")

LD 1961 identifies the powers and duties of the proposed public instrumentality, requires a public hearing on the proposed plan to disburse public funds and requires input on the proposed plan from people with specified expertise. Although the Legislature may decide that more detailed standards are in the public interest, the bill as currently drafted appears to provide sufficient standards under the Maine Constitution for the Legislature to delegate its authority to disburse public funds to this public instrumentality.[5]

C. Legislators May Not Exercise Executive Powers

As discussed previously, the Maine Constitution "effectively forbids the exercise of th[e] power [of one branch of government] by any other of the three branches of government." *In re Dunleavy*, 2003 ME 124, ¶ 6, 838 A.2d 338. LD 1961 affects the separation of powers doctrine in two ways.

1. Legislators may not engage in Executive functions

The separation of powers doctrine means that legislators are prohibited by the Maine Constitution from engaging in Executive functions. *See, e.g.*, *Curtis v. Cornish*, 109 Me. 384, 391-92, 84 A. 799, 802 (1912) (holding that the Chief Justice, belonging to the Judicial branch, cannot perform Executive functions, such as making appointments to a tribunal). LD 1961 provides that "[a] member of the Senate who serves on the joint standing committee of the Legislature having jurisdiction over health and human services matters" and "[a] member of the House of Representatives who serves on the joint standing committee of the Legislature having jurisdiction over appropriations and financial affairs" must be appointed as trustees to the board of the public instrumentality proposed to be established by the bill. The trustees of the Trust for a Fund for a Healthy would be authorized by LD 1961 to engage in traditionally Executive functions, including rulemaking and administering public funds. Thus, legislators appointed to

[5] "In recent times, the Law Court has consistently upheld state statutes against charges of improper delegation, even if the statutory guidance has been fairly minimal." Tinkle, *The Maine State Constitution* 70 (2d ed. 2013)

the board would be engaging in activities in the sphere of authority occupied by the Executive branch.

It is well-settled that legislators may not serve in the Executive branch and vice versa because it violates the separation of powers doctrine. *Bamford v. Melvin*, 7 Me. 14, 18 (1830); *see also* Op. Me. Att'y Gen. 1981-12 (a legislator may not serve on the Maine Indian Tribal-State Commission); Op. Me Atty's Gen. 1980-154 (a legislator may not serve as a member of the Maine Insurance Advisory Board); Op. Me. Att'y Gen. (Apr. 8, 1975) (a legislator may not serve as a member of the boards of the University of Maine, the Maine Maritime Academy or the Maine Law Enforcement Planning and Assistance Agency); Op. Me. Att'y Gen. (June 20, 1973) (a legislator may not serve as a member of the Land Use Regulation Commission); Op. Me. Att'y Gen. (Jan. 17, 1973) (a legislator may not serve as a member of the Commission on Drug Abuse); State Employee as political candidate, Op. Me. Att'y Gen. (1962), *reprinted in* 1961-1962 Me. Att'y Gen. Ann. Rep. 121 (state employees may not run for legislative office or serve as legislators).

The consequence of a legislator accepting a position in an Executive agency is significant. Legislators appointed to the board would necessarily vacate their position in the Legislature, as it is constitutionally incompatible under the separations of powers doctrine. "The general rule . . . that the acceptance of and qualification for an office incompatible with one then held is a resignation of the former, is one certain and reliable, as well as one indispensable for the protection of the public." *Howard v. Harrington*, 14 Me. 443, 445-47, 96 A. 769, 769-71 (1916) (further providing that "[w]here one has two incompatible offices, both cannot be retained. The public has a right to know which is held and which is surrendered. It should not be left to chance, or to the uncertain and fluctuating whim of the office-holder to determine.") (quoting *Stubbs v. Lee*, 64 Me. 195, 198 (1874)); *see also* Op. Me. Att'y Gen. (Apr. 8, 1975). Legislators, however, may serve on a commission to study and report recommended changes to the Legislature without running afoul of the Maine Constitution. Op. Me. Att'y Gen. (Apr. 8, 1975).

2. Making appointments to an Executive agency is an Executive power

LD 1961 authorizes the President of the Senate, the Speaker of the House of Representatives, and the members of the Senate and House who are the leaders of the party with the second largest number of members to make appointments to the board of the Trust for a Healthy Maine. The Maine Constitution provides, in pertinent part, that "[t]he Governor shall nominate, and, subject to confirmation provided herein, appoint . . . all other civil and military officers whose appointment is not by this Constitution, or shall not by law be otherwise provided

for." Me. Const. art. V, § 8. Requiring the Legislature to make appointments to the board, as proposed in LD 1961, may conflict with the Maine Constitution in that "the power to appoint is an executive function" because appointment "is one of the keys to control over the apparatus of government." Tinkle, *The Maine State Constitution* 118 (2d ed. 2013).

Conclusion

The effect of LD 1961, if enacted, will be governed by the Maine Constitution, which affords plenary authority to the Legislative branch of government to enact legislation and maintain control over appropriations and allocations of public funds. Additionally, certain provisions of LD 1961, as written, appear to conflict with the Maine Constitution's separation of powers provisions.