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September 6, 2017

Stephen F. Tougas
78A Gilbert Street
Quincy, MA 02169

Re: Initiative Petition No. 17-09: A Law to End All Tolling in Massachusetts

Dear Mr. Tougas:

In accordance with the provisions of Article 48 of the Amendments to the Massachusetts Constitution, we have reviewed the above-referenced initiative petition, which was submitted to the Attorney General on or before the first Wednesday of August of this year. I regret that we are unable to certify that the proposed law complies with Article 48.

Because the measure would eliminate tolls, which are security for bonds that have been issued by the Massachusetts Department of Transportation, we must conclude that it is inconsistent with the state constitutional "right to receive compensation for private property appropriated to public use" and, therefore, may not be certified under Article 48, Init., pt. 2, §§ 2, 3. Our decision, as with all decisions on certification of initiative petitions, is based solely on Article 48's legal standards. It does not reflect any policy views the Attorney General may have on the merits of the proposed law.

1. Right to Receive Compensation for Private Property Appropriated to Public Use

The first section of the petition proposes to strike Section 13 of G.L. c. 6C, which governs toll roads, collection of tolls, and use of toll revenue. In its current form, section 13 authorizes MassDOT to set, charge, and collect tolls to pay the costs of operating the turnpike and metropolitan highway system and to pay principal and interest on bonds. Thus, striking Section 13 would eliminate the revenue source securing the notes or bonds issued by MassDOT pursuant to trust agreements entered into with bondholders. The petition contains no provision to compensate bondholders for the loss of this security for payments due them under the trust agreements.

We take official notice of the fact that MassDOT has issued approximately \$1.8 billion worth of bonds and corresponding security interests to bondholders related to the metropolitan



highway system. See Yankee Atomic Elec. Co. v. Secretary of the Commonwealth, 402 Mass. 750, 759 & n.7 (1988) (in making certification determinations on Art. 48 initiative petitions, the Attorney General should consider facts evident on the face of the petition, as well as facts subject to judicial and official notice). The MassDOT bonds, which are secured with pledges of toll revenue, were issued in 2010 and remain outstanding, with the last payment due in 2039.

Through the elimination of tolls and toll revenue, the petition would effectuate a taking of bondholders' security interests under the trust agreement (i.e., private property). At the same time, the petition contains no provision ensuring just compensation for that taking. For that reason, the Attorney General cannot certify that the petition meets the requirements of Amend. Art. 48. See Dimino v. Secretary of the Commonwealth, 427 Mass. 704, 711-712 (1998) (invalidating Attorney General's certification of initiative petition proposing to eliminate toll collections on Massachusetts roads without "ready means" to compensate bond-holders).

2. Other Potential Certification Issues

In addition to the takings problem identified above, the petition may suffer from other infirmities that could prevent the Attorney General's certification of the measure. We do not resolve here whether these issues would require the Attorney General to decline to certify the petition, but share them with you for your consideration in the event you decide to resubmit your petition in the future.

First, it is possible that the petition would fail the "relatedness" requirement of Amend. Art. 48. Under that requirement, a measure's provisions must bear a "meaningful operational relationship" to one another, so as to "permit a reasonable voter to affirm or reject the entire petition as a unified statement of public policy." Carney v. Attorney General, 447 Mass. 218, 220, 231 (2006).

Here, the SJC could conclude that the two provisions of the petition—eliminating all tolls and limiting access to and allowing destruction of an account holder's toll records—do not bear a "meaningful operational relationship" to each other. The purpose of eradicating toll collection so that the public bears no cost for traveling on Massachusetts roads does not have a close operational relationship with limiting access to individual account holders' data. They may not "complement each other in the means of accomplishing [a] common purpose." Dunn v. Attorney General, 474 Mass. 675, 681 (2016); see also Gray v. Attorney Gen., 474 Mass. 638, 648-649 (2016) (concluding that petition's provision eliminating certain curriculum standards was not sufficiently related to provision that would increase transparency in standardized testing process).

Second, the measure may not qualify for certification because it does not "propose a law" and thus is not "in proper form." Paisner v. Attorney General, 390 Mass. 593, 598-599 (1983). To "propose a law," the measure must, when considered "as a whole," have "binding effect" that would implement real and binding change in existing law. Mazzone v. Attorney General, 432 Mass. 515, 530-531 (2000) (citations omitted).

If this measure were enacted as currently drafted, it would repeal only Chapter 6C, § 13, which authorizes the imposition of tolls. However, the measure would have no effect on G.L. c. 6C, § 3(18), which likewise enumerates MassDOT's "powers" to "fix and revise from time to time and charge and collect tolls for transit over the metropolitan highway system and the turnpike," which would remain in effect. G.L. c. 6C, § 3(18). Thus, the petition might not effectuate a binding change in the law because, if it were enacted, MassDOT would retain continuing authority to charge tolls in accordance with its statutory authority under § 3(18).¹ Thus, it could be concluded that Petition 17-09 does not "propose a law" with binding, legal effect and, therefore, does not comport meet the requirements of Amend. Art. 48.

Because Petition 17-09 is inconsistent with the right to receive compensation for private property appropriated to public use, we are unable to certify it as meeting the requirements of Article 48.

Very truly yours,



Juliana deHaan Rice
Deputy Chief, Government Bureau
617-963-2583

cc: William Francis Galvin, Secretary of the Commonwealth

¹ If the measure, read as a whole, would eliminate MassDOT's authority to charge and collect toll revenue, then could not be certified for the reason discussed above: its inconsistency with the right to compensation for private property appropriated to public use.