

Special Appropriations Table

The action of the Senate to send a bill to the Special Appropriations “table” is both a cause for celebration and concern. On the positive side, bills sent to the Appropriations table have received initial support from a majority of both the members of the House and the Senate. Essentially, the Legislature believes that the idea behind the bill is a good one.

However, the problem is that state funding is necessary to implement the bill. All of the bills needing state funding make their way to the Appropriations table to compete for available revenue, if any additional revenue is available after all state budget decisions are finalized. There are typically two types of bills that are sent to the table. First, bills that create new programs or studies needing funding or bills that limit the revenues flowing to the General Fund are sent to “the table”. Second, bills are sent to the table that have the effect of increasing the cost of providing local services (i.e., state mandates) which as a general rule require 90% of the cost of that mandate to be borne by the state. The Legislature can avoid the constitutional requirement to fund 90% of the municipal mandate by a two-thirds vote of both the House and the Senate.

The process for ensuring that a bill receives funding from the Appropriations table is tedious, time consuming and frustrating. Many legislators are fighting for funding for their particular interests. Only those legislators who vigilantly watch the Appropriations Committee’s work are successful. Very few bills, particularly during tough fi-

ancial times, survive the process. Bills failing to garner Appropriations Committee support are eventually voted out “ought not to pass” or amended to strip the elements of the bill requiring funding.

This session it is likely that revenue to fund the bills on the Appropriations table will run somewhere between meager to nonexistent.

As of Thursday of this week (June 2nd), seventy-seven bills had been placed on the Appropriations table. It is possible that by the time Maine’s lawmakers process all the legislation that is in the hopper, nearly 200 bills will have been sent to the table. Of the bills currently on the table, nine are of

municipal interest. What follows is a description of the bills MMA has been tracking. Seven of these bills seek additional state revenue. Two of the bills are mandates.

It is clear that many of these bills will die on the table. Municipal officials should concentrate on the tabled bills of the highest priority. For those high-priority bills, we urge municipal officials to contact their legislators and ask them to work with the Appropriations Committee members to get these bills funded. Members of the Senate can be reached at 1-800-423-6900. Members of the House can be reached at 1-800-423-2900.

Priority Bills Needing Additional State Funding

LD 70, *An Act to Amend the Laws Governing the Funding of State Special Elections*. LD 70 was one of the

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Erosion of Spending Limits

Since the two political parties have been divided on many important issues this session, including the budget and bonds, it was surprising that both parties would unite to support LD 1666, *An Act to Allow Counties a One-year Exemption for Jail Costs from the Limitation on County Assessments*. On Wednesday of this week (June 1st), the House voted that LD 1666 ought to pass as amended by a margin of 126-17.

As amended by the State and Local Government Committee, LD 1666 would exempt the FY 06 inmate medical and boarding costs borne by the counties from the LD 1 spending limitations. As further amended by the House, the bill would place additional limits on the exemption by limiting the growth in FY 06 inmate medical and

boarding costs to no more than the average annual percent increase in these expenditures over the previous three years. In some cases, this alternative “cap” would allow for 35% annual increases in those spending lines.

LD 1666 is of great concern to the municipal community. Municipal officials do not understand why the legislators who fought for the enactment of spending limitations would choose to immediately relax those limitations for one level of government. They do not understand why the Legislature would want to move away from a uniformly applied spending limitation system to one that treats different levels of government differently. Under

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bills included as part of the MMA Legislative Policy Committee's 2005 – 2006 legislative platform. As amended by the Committee, this bill would require the state to reimburse municipalities for the direct costs the municipalities incur to hold a statewide "special election". As defined in the amendment, a special election is a statewide election scheduled by the state for any time other than the annual November general election or the June primary election held in even-numbered years. The reimbursement to each municipality would be calculated on the basis of the municipality's population. The "special election reimbursement rate" is calculated at the rate of 95 cents per resident for the smallest municipalities to 25 cents per resident for the largest municipalities, to capture the economy of scale pertaining to actual election costs.

Although this bill would increase costs to the state when the state chooses to schedule a special election, that additional expenditure could be avoided in one of two ways. First, the Legislature has the discretion to schedule any special election, such as a bond referendum, during a regularly scheduled June or November election, thus avoiding additional state costs. Second, the Legislature by a two-thirds vote of the House and Senate could vote not to fund the municipal cost of a specially scheduled statewide election. It is estimated that this bill would relieve municipalities of the estimated \$447,000 it costs to conduct statewide special elections at the local level.

LD 371, *An Act to Distribute Revenue in the Law Enforcement Agency Reimbursement Fund to Municipalities*

Legislative Bulletin

A weekly publication of the Maine Municipal Association throughout sessions of the Maine State Legislature.

Subscriptions to the *Bulletin* are available at a rate of \$20 per calendar year. Inquiries regarding subscriptions or opinions expressed in this publication should be addressed to: *Legislative Bulletin*, Maine Municipal Association, 60 Community Drive, Augusta, ME 04330. Tel: 623-8428. Website: www.memun.org

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and Counties. LD 371 was another bill included as part of the MMA Legislative Policy Committee's 2005 – 2006 legislative platform. The purpose of the bill is to ensure that the portion (6%) of the fine revenue currently collected for traffic infractions that is required to be reimbursed to municipalities and counties for participating in the prosecution of a motor vehicle infraction is actually distributed to municipalities and counties. Currently, any balance in the fund at the end of the fiscal year is transferred to the state's General Fund.

As amended by the Committee, this bill would distribute the unused revenue in the Law Enforcement Agency Reimbursement Fund at the end of each fiscal year in two ways: 1) 10% of the unused revenue would be distributed to the Law Enforcement Benevolent Fund for the purpose of providing financial assistance to law enforcement officers injured in the line of duty and to cover uninsured medical expenses of law enforcement officers and members of their immediate families who suffer from non work-related illnesses or injuries; and 2) the remaining balance would be distributed among the municipalities that provide direct law enforcement services on population-based formula and among the counties on the basis of the populations of municipalities that do not provide direct law enforcement services.

The FY 06-07 fiscal impact of LD 371 is \$1.2 million.

Mandates on Table

LD 1268, *An Act to Amend the Law on Junkyards, Automobile Graveyards and Automobile Recycling Businesses.* This bill makes several corrections and adjustments to the laws governing the licensing of junkyards, automobile graveyards and automobile recycling businesses. The one element of the bill that triggers the "mandate" designation is a requirement that municipalities provide notice to the Secretary of State of a public hearing regarding the revocation or suspension of a license, a relatively rare occurrence.

The changes proposed in LD 1268 are important to municipal officials. For that reason, municipal officials would rather the bill be amended than voted "ought not to pass" for lack of funding. Municipal officials believe that the bill

should be amended to remove the Secretary of State notice mandate or to make that notification discretionary. MMA is interested in working with the Secretary of State and all interested parties to amend the bill to ensure enactment. MMA is also willing to communicate to municipalities the importance of voluntarily providing the notice to the state.

LD 1161, *An Act to Provide for Variance Notification in the Shoreland Zoning Law.* As amended, this bill would require municipalities to forward to the Commissioner of the Department of Environmental Protection (DEP) any information relating to a request for a variance from a shoreland zoning ordinance at least 20 days before the municipality's Board of Appeals acts on the request (see related article in this edition of the *Bulletin*).

Although there has been no formal designation of the amended bill as a mandate as of yet, from the municipal perspective the requirement to notify DEP of a request for a variance to a shoreland zoning ordinance is clearly falls under the mandate definition. In order for a bill to receive a mandate designation, the bill must require a municipality to modify its activities in a manner that requires additional municipal expenditures. The additional municipal expenditures are not terribly significant, but the amended version of LD 1161 would require municipalities to expend the resources necessary to provide a notice that is currently not being provided, and otherwise accommodate the subsequent state intervention in the appeal process.

LD 1161 is currently on the table with a fiscal note that does not appear to be related to the amended version of the bill.

Other Municipal Bills on Table

LD 196, *An Act to Enhance MaineCare Reimbursement Rates for Ambulance Services.* This bill would require the Department of Health and Human Services to conduct an annual review of the state's MaineCare reimbursement rates paid for ambulance services. The bill also requires that those rates be annually adjusted to reflect, at a minimum, the reimbursement rates provided under the federal Medi-

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care program.

The FY 06-07 fiscal impact of LD 196 is \$3.9 million.

LD 557, *An Act to Provide Relief from the Cost of Rescue Services to Certain Communities*. This bill would require the state to reimburse municipalities with populations under 200 and that have no direct access to Interstate 95 for the costs associated with providing fire, ambulance or other rescue services for accidents that occur on Interstate 95.

The FY 06-07 fiscal impact of LD 557 is \$4,000.

LD 670, *An Act to Protect Children Using Maine's Athletic Fields and Parks from Drug Dealers*. This bill would authorize municipalities to designate certain areas within the town or city as "safe zones", such as athletic fields, parks, playgrounds and recreational facilities. Any municipality designating a "safe zone" must identify the zone with an informational sign provided by the Commissioner of Public Safety. The bill specifies that the participating municipalities must pay for any signs they order.

The FY 06-07 fiscal impact of LD 670 is undetermined at this time. The cost to the state is dependent on the number of signs requested by municipalities. With the offsetting revenue obtained by the state from the participating municipalities, this bill should come off the table intact.

LD 775, *An Act to Provide a Stable Source of Funding for the Safe Drinking Water Revolving Loan Fund*. This bill would appropriate \$2 million over the FY 06-07 biennium for raising the minimum state funding necessary to leverage \$10 million in federal funding over the two-year period for the safe drinking water revolving loan fund.

LD 1125, *An Act to Establish the Homeland Security Relief Fund*. This bill would establish the Homeland Security Relief Fund and appropriate \$1 million to capitalize the fund in FY 06. The bill would allow the fund to grow with additional future transfers from the General Fund to a sum not to exceed \$5 million. The funds would be available as the first resource used when state emergencies or disasters are declared.

Required Notification . . . To Whom, By Whom

The legislative history of LD 1161, *An Act to Require Notification from the Department of Environmental Protection and the Maine Land Use Regulation Commission upon Permit Application, Issuance and Denial* is worth exploration.

As the title indicates, the original bill proposed to require the state Department of Environmental Protection and LURC to provide notice to various parties, including municipalities, upon the DEP or LURC taking certain actions.

As amended, the bill pulls a 180-degree turn. The state would not need to provide municipalities additional notice. Instead, the bill would require municipalities to give the state additional notice.

This was actually an amended amendment. The original amendment, would have authorized the DEP and the Attorney General's Office to participate in court actions regarding various planning board or zoning board of appeal actions even if those state agencies did not participate in the proceedings before the planning board or zoning board of appeals (ZBA).

Current law, pursuant to a 1998 law court decision, does not grant the state automatic "legal standing" to participate in shoreland zoning cases. Instead, the state must participate in the "lower" proceedings of the ZBA. The original amendment would have overturned this decision.

The Natural Resources Committee did not support this amendment. However, the Committee amended the amendment such that municipalities are required to provide the DEP with notice of all requests for variances in the shoreland zone. Under the finally amended version of LD 1161, if a developer makes an application to build a structure in the shoreland zone and the planning board decides that the structure would require a variance from the zoning board of appeals, then when the developer requests the variance

from the ZBA, the municipality must send a copy of that notice and the original application to the DEP.

LD 1161 is designed to give the DEP an opportunity to participate in the proceedings before a zoning board of appeals and thereby protect the state's legal standing. If DEP chooses not to participate then the state has waived its right to participate in subsequent court proceedings.

MMA's position on such a proposal was not given, since MMA's Legislative Policy Committee only reviews legislation and no legislation mandating such notice be given was ever drafted.

On the one hand, the bill is a clear mandate which will increase municipal costs, albeit very modestly. Further, the policy underlying the bill that local zoning boards are making incorrect or illegal decisions and the DEP and AG need to be there to second-guess these decisions presents some problems.

However, providing DEP and the AG notice so that they can reasonably participate in proceedings in which they have historically shown interest is not all that objectionable. Also, the state has often provided assistance to local ZBA's that are dealing with aggressive and litigious developers.

Further, this notice requirement had been on the books until the early 1990s. The amendment merely restores this former provision.

LD 1161 has gone from a printed bill that did X to a final bill that is 180 degrees different from X. The bill, with its very convoluted path through the process, is currently on the Appropriations table.

The amendment has a fiscal note attached relative to the state's General Fund. It is not clear what state expenses generated this fiscal note. However, the bill should have, and will ultimately have, a fiscal note indicating that the bill is a municipal mandate.

Bill Seeks to Reverse Court's Liability Decision

A month ago, the *Legislative Bulletin* reported on LD 936, *An Act to Amend the Tort Claims Act*. The summary of the bill states that "This bill reverses the effect of the Supreme Judicial Court decision in Norton v. Hall".

That case involved a tragic car accident, resulting in the deaths of two teenagers, involving a county sheriff's deputy responding to an emergency call. The court case concerned the immunity of government agencies for car accidents that occur while a public safety official is responding to an emergency.

Generally, local, county and state government can be sued for damages resulting from the negligent operation of a motor vehicle. In 2001, the Supreme Judicial Court upheld a very limited exception to that rule is for public safety officials in emergency situations.

The rationale of the majority opinion is that "The exercise of discretion involves more than a decision in the abstract to respond. Actions taken by a law enforcement officer in response to an emergency implicate the discretionary judgment of the officer and the immunity protecting government entities and their employees extends to those actions. The operation of the cruiser on the way to the emergency is an integral part of, and cannot be separated from, the initial decision to respond."

However, the emotional pull of the tragic car accident caused some legislators to rethink, and seek to reverse, that majority decision of the Law Court.

Municipalities have one primary concern with reversing that decision. There is a concern that if immunity is lifted, public safety officials will consciously or subconsciously second-guess their response strategies out of fear of lawsuits. The Maine Chiefs of Police Association made this point to the Judiciary Committee "We are also concerned that if the operation of a police vehicle is exempted from the

Maine Tort Claims Act, police officers may refuse to act appropriately in response to an emergency situation when the circumstances require it."

Two attempts were made to work with the bill, both of which were rejected by a majority of the Judiciary Committee. First, it was suggested that the immunity only be lifted for cases involving serious injury or death. The Norton case was a tragedy and was front and center before the Committee. Providing these families the opportunity to seek financial compensation may be appropriate. However, as drafted, every collision, even those that only involve minor injuries or only property damage may go forward. The Committee and the bill sponsor would not agree to that modification.

Second, it was suggested that the immunity be lifted for cases involving "reckless" operation of a motor vehicle rather than the "negligent" operation of a motor vehicle, which is a lower standard. It was asserted that recklessness is a "criminal" standard not a "civil" standard and finding insurance coverage for reckless behavior would be difficult.

However, no one made any attempt to discover the insurance implications of the bill as written. No insurance industry representatives were asked to testify on the inability of insurance to cover recklessness. Further, the proponent's assertion that recklessness is not a "civil" standard is contradicted by the fact that this is exactly the standard that is used in the State of New York for its public safety officials.

Beyond rejecting the two attempts to better target LD 936, the Committee actually amended the bill to make sure individual police officers would also be liable in these circumstances. The bill as printed only removed the immunity of the government entities. It left the immunity for the individual officers in place. The Maine Trial Lawyers Association offered an amendment to remove the individual employee's im-

munity as well. A majority of the Judiciary Committee went along.

The government entity typically covers the individual's liability and the law caps the individual's exposure to only \$10,000 per event. Coming out of Committee, LD 936 will remove the exemption for the individual officers.

The suffering of the Norton family is difficult to confront. However, the bill does not seek to improve officer training, discipline or policy. It only provides some degree of financial compensation. Unfortunately, the bill is not narrowly tailored to tragedies like those endured by the Nortons. It broadly opens the door for lawyers to bring lawsuits. That is rarely a step in the right public policy direction, where more targeted alternatives are available.

LIMITS(cont'd)

the existing LD 1 system, each level of government has a spending limit as well as a mechanism for overriding the limit. If the counties need to override the LD 1 spending limit, they can do that with a majority vote of all the members of the county's budget committee and a majority of the county commissioners.

By approving these midcourse changes, the Legislature is taking the first step toward completely eroding the spend limitation system. The spending limitation system has not had an opportunity to work, but already the Legislature is second guessing itself. What level of government will seek the exemption next year, and for what uncontrollable cost? Will schools lobby the Legislature to provide an exemption from the LD 1 caps to address the increasing cost of insurances or unfunded education mandates? Will municipalities lobby the Legislature to provide an exemption from the LD 1 caps to carve out energy and paving costs, health insurance, environmental mandates, etc.? The support of LD 1666 is just the first step in the eventual demise of the spending limitation system.

Fortunately, on Thursday this week (June 2nd), the Senate voted "ought not to pass" on LD 1666 by an equally strong margin of 26 to 7.

Statewide Codes: Uniform or Not?

The Legislature is poised to adopt at least three codes related to construction that will be of interest to municipalities.

As municipal officials are aware, the Legislature adopted a model building code last session. The Maine Model Building Code is based upon the 2003 International Code Council's ("ICC") Building Code. At that time, lawmakers did not mandate that any municipality adopt the model code. Instead, the Legislature merely restricted future voluntary code adoptions by municipalities to this one choice.

The policy rationale of last session's action is that over time municipalities, which now have a variety of different building codes on the books, will be "funneled" into the same building code. Uniformity of building codes has long been a policy goal of the Legislature in the belief that uniformity will aid design professionals, builders and municipal code enforcement officers by making the process of construction more efficient.

Adoption of a single model building code provided some challenges for the Legislature in that other codes are implicated by the adoption of a build-

ing code. The law which adopted the Maine Model Building Code specifically noted that eight other related codes were not adopted by reference. These eight other codes include: fire safety, electrical, oil and solid fuel, propane and natural gas, boiler and pressure vessel, elevator code, energy efficiency code, rehabilitation code and plumbing code.

This session, the Legislature has taken up bills related to the appropriate statewide code for three of the above eight codes listed: energy efficiency, rehabilitation and plumbing.

For energy efficiency, the Utilities and Energy Committee has voted to support both LD 1591, *Resolve, Regarding Legislative Review of Chapter 920: Maine Model Building Energy Code, a Major Substantive Rule of the Public Utilities Commission*, and LD 1681, *An Act Regarding Energy Codes*. These bills are similar but not identical to the model building code adopted last session. One of the primary similarities is that the Maine Model Energy Code will be largely predicated upon the ICC's energy code. This way, both the model building code and the model energy code will be from the same "In-

ternational" family of codes.

For rehabilitation of existing buildings, the Governor has signed Public Law 2005, Chapter 200, which establishes the ICC's rehabilitation code as the model code for Maine. Again, the state has chosen to synthesize the model building code enacted last session with the rehabilitation code enacted this session by using the "International" or ICC family of codes.

For purposes of the plumbing code, the Legislature has before it LD 1056. This bill provided the Legislature two options: Committee Amendment A, which requires the adoption of the "International" (ICC) plumbing code and Committee Amendment B, which requires the adoption of the Uniform Plumbing Code. Generally, code enforcement officers support the ICC code and plumbers prefer the UPC code. This battle of plumbing codes has been waged for years before the Legislature.

In a deviation from its stated policy of promoting code uniformity, the House and Senate have voted to enact LD 1056 and adopt the UPC, breaking away from the International family of codes.