

## Bill Seeks to Strengthen Tree Growth Tax Law

### Minority Report Reinstates Bureau's Audit Program

On May 16 the members of the Taxation Committee held a public hearing on LD 1599, *An Act to Improve the Maine Tree Growth Tax Law*. The bill, sponsored by Representative Stephen Stanley of Medway on behalf of Governor LePage, proposes to strengthen the Tree Growth Tax program by ensuring that the laws guiding implementation of the current use system focus squarely on commercial timber harvesting activities.

To that end, LD 1599 proposes to: (1) increase the minimum lot size for Tree Growth program enrollment from 10 to 25 acres grandfathering existing less than 25 acre parcels; (2) limit qualifying activities to those directly related to commercial harvesting by removing from the list of eligible activities Christmas tree cultivation and related operations (e.g., tipping for ornamental wreaths and boughs, etc.); (3) require forest harvesting plans to include schedules describing how the forestry operations will be managed; and (4) reauthorize the Bureau of Forestry to conduct random audits of forest management and harvesting plans to ensure compliance with state law.

While municipal officials are supportive of LD 1599, the reauthorization of the Bureau's Tree Growth parcel auditing authority, which was established for several years but sunsetted on Dec. 31, 2014, is of special interest. Municipal officials, particularly in coastal areas, believe that the Tree Growth program can too easily be used as a means for sheltering value, rather than harvesting trees. As a result, a state-level review of these practices is helpful for accountability purposes.

The importance of this audit function is highlighted by the work the bureau did on Vinalhaven at the request of the com-

munity's tax assessor. In March 2016, the bureau notified the owners of 28 Tree Growth parcels that a program compliance review was going to be conducted

throughout the year. Before the bureau even stepped foot on the island, 11 parcels were either transferred to the Open

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## Veto Threatens Equal Protections For Municipal Employees

In 1985, the 112<sup>th</sup> Legislature chose to protect certain private information belonging to public employees from exposure to the general public under Maine's Freedom of Access Act (FOAA). Since that time, various types of state employee information have been deemed not to be a public record by successive legislatures, and each time the protections for state employees were afforded to municipal employees as well. The sole exception came with the most recent change back in 2007.

At that time, the Legislature removed the following types of employee information from state, but not local public records: social security number, age, ancestry, ethnicity, national origin, race, marital status, mental or physical disabilities, personal contact information, personal employment benefits choices (e.g., payroll deductions, deferred compensation, savings and pension plans, and health and life insurance, etc.), religion, and sex.

LD 146, *An Act To Protect the Confidentiality of State and Local Government Employees' Private Information*, sponsored on behalf of MMA by Representative Jay McCreight of Harpswell, sought to extend the same types of protections – afforded to state employees a decade ago – to municipal and county employees as

well. By a unanimous vote, the Judiciary Committee recommended LD 146 “ought to pass as amended” on March 29. The amended bill, which in compliance with federal employment law also provides that state and local employees' genetic information and sexual orientation is not subject to a FOAA request, was passed to be enacted by the full Legislature on May 11.

On Tuesday, Governor LePage vetoed this legislation. In his veto letter, the Governor explained his view that LD 146 “strikes the wrong balance” between the public's right to know and the privacy interests of public servants. He expressed support for making social security numbers confidential, but simply added, “the public should have a right to know about those who make decisions on behalf of the public while serving in government.”

On Wednesday, by a vote of 97 to 43, the House overrode the Governor's veto. The Senate is slated to take this veto up on Tuesday, May 30. Enough senators are reportedly considering sustaining the Governor's veto that the bill could in fact meet its end in that body. Municipal officials who agree that local employees ought to be afforded the same protections that state employees have had for 10 years without issue are encouraged to contact their senators.

Space program or withdrawn from the Tree Growth program altogether. Of the remaining 17 parcels, the bureau found that 10 should be transferred to the Open Space program or withdrawn from the Tree Growth program. During the course of the audit, the bureau found that many of the forest management plans in place were “custodial” in nature, contained weak harvesting recommendations, and in some cases the parcels themselves were not conducive to growing trees.

By the time the bureau had completed its audit, only seven of the 28 originally enrolled parcels were found to be in compliance with the Tree Growth tax program.

While municipal assessors can request assistance from the bureau to determine landowner compliance with the Tree Growth program, as was the case in Vinalhaven, the auditing function proposed in LD 1599 provides the department with the flexibility necessary to target a review of Tree Growth parcels that have not been actively engaged in timber harvesting. As provided for in the bill, the bureau would be authorized to conduct random audits of Tree Growth enrolled parcels that have not been harvested for over 20 years, focusing attention on island, coastal and waterfront parcels, where the difference between the current use value and market value of the property is significant. The auditing authority proposed in LD 1599 is appropriately designed to target land owners who may be taking advantage of the program, rather than those who are actively harvesting or managing their properties according to their forest management plans and state law.

As would be expected, there was mixed reaction to LD 1599 among the in-

terested parties. At the public hearing, the Department of Agriculture, Conservation and Forestry (DACF), Huber Resources Corporation, the Maine Forest Products Council and MMA provided testimony in support of the bill. Representatives from the Maine Farm Bureau Association, Maine Woodland Owners, The Nature Conservancy and several licensed foresters testified in opposition to the Governor’s initiative. While most of those testifying at the public hearing believe a review of the Tree Growth program is warranted, there was significant disagreement over the process for achieving that goal, with some opponents raising concerns that the approach provided in the bill was too one-sided.

At its May 18 work session, the Taxation Committee voted “ought not to pass” on LD 1599 by a margin of 7 to 3. Committee members on the majority report have requested that DACF facilitate a meeting of the interested parties to discuss possible amendments to the Tree

Growth program.

As amended by the minority report, the bureau would be provided the authority to conduct audits of Tree Growth enrolled properties that have not been harvested for over a 20 year period. Owners found in noncompliance with the program as a result of the audit would be provided with three options: (1) comply with the program requirements within an 18-month period; (2) withdraw from the program and pay five years’ worth of back taxes; or (3) enroll in the Open Space program. Under the terms of the bill, the Bureau’s auditing authority would expire on January 1, 2020.

LD 1599 is now heading to the House and Senate for debate. Taking into consideration the lopsided Committee vote in opposition to the bill, the proposal to reinstate Maine Forest Service’s Tree Growth auditing function is in an underdog position. Municipal officials who believe the Bureau’s auditing authority is warranted should contact their legislators.

## An Eclectic Collection of Updates

It is that time of year when public hearings and work sessions are coming to a close and the members of the Legislature are spending more time in the House and Senate chambers deciding the fate of the several hundred bills submitted for consideration. As a result, reports on legislative activities can be more aptly described as updates. What follows are briefings on bills that MMA has been following throughout the session.

**PTSD Presumption Mandate Still Questioned.** The May 5 Legislative Bulletin described the deliberations of the Labor, Commerce, Research and Economic Development Committee over whether or not LD 848, *An Act To Support Law Enforcement Officers and First Responders Diagnosed with Post-traumatic Stress Disorder*, constitutes an unfunded state mandate on municipalities. The legislation would add a new “rebuttable presumption” to workers’ compensation law that when a law enforcement officer, firefighter, or emergency medical services worker is diagnosed by a licensed physician or

psychologist as having post-traumatic stress disorder (PTSD), the PTSD would be presumed to be a work related injury and, therefore compensable.

On Wednesday, the Committee revisited this mandate question. As was the case eight years ago when the Legislature enacted a similar presumption related to firefighter cancer, the Workers’ Compensation Board explained to the Committee the belief that LD 848 does not constitute a mandate. The current chair’s analysis was based on the low number of cases litigated over the past five years dealing with first responder and law enforcement PTSD. In response, MMA suggested to the committee that rather than analyzing the number of cases litigated to date, it might make more sense to review the requirements of the bill directly alongside the definition of “state mandate” in Maine’s Constitution to objectively determine if the constitutional definition is met.

There is no dispute to the fact that LD 848 shifts the burden of proof in these

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workers' compensation claims from the employee to the employer. LD 848 shifts that burden expressly. Shifting this burden to the employer is unquestionably a "required modification or expansion of a local government's activities," which is one half of the definition of "state mandate" in Maine's Constitution. The other half asks whether a cost results from that expansion or modification.

Adding to this legal analysis is past experience. In 2009, staff at the Maine Workers' Compensation Board issued a cost estimate of the 124<sup>th</sup> Legislature's LD 621, which created another "rebuttable presumption" within the Workers' Compensation statutes, in that case establishing that firefighters diagnosed with cancer contracted the cancer as a work-related injury. At the time, the board chair stated, "I don't think this legislation would have any particular cost effect... claims would be extremely rare." Prior to the passage of LD 621, four firefighter cancer claims were submitted to the MMA Risk Management Services Division. Since LD 621 was enacted, 27 claims have been submitted with insurance-related costs approaching \$3 million, thus far. Those costs do not include the municipal employee staff time associated with researching the evidence associated with these claims.

LD 848 will also increase the number of claims, regardless of whether the municipality chooses to settle or adjudicate any particular workers' compensation claim. An increase in claims will lead to an increase in the municipal employers' obligation to research, analyze, and respond to such claims. In order for the municipalities to defend themselves in response to these claims, the newly required work will need to be conducted, at least in part, in consultation with municipal attorneys. As has been demonstrated by the firefighters' cancer presumption, these costs are significant.

Because several members were absent, the committee tabled its answer to the question of whether or not to designate the amended version of LD 848 as a mandate until all could be present. This issue is likely to be revisited at the committee's meeting on Tuesday, May 30.

**Increased State Funding for County Jails.** On Wednesday, the members of the Criminal Justice Committee voted unanimously in support of an amended version of LD 1490, *An Act Regarding Community Corrections Funds*, which was sponsored by Senator Scott Cyrway (Kennebec Cty.). As amended by the committee, the bill, in part, increases the state appropriation for county jails by \$3.8 million in both FY 18 and FY 19, growing the state's share from the current \$12.2 million to \$16 million each year.

The increase in state-level funding was determined on the basis of the data provided to the committee by Kennebec County Administrator, Robert Devlin. According to the data gathered by Mr. Devlin, in FY 18 counties will spend nearly \$90 million to operate the state's 15 jail facilities, but receive only \$86 million of revenue. In rough numbers, \$64 million in county jail funding comes from the property taxpayers; \$12 million from the state's General Fund coffers, and the remaining \$10 million from miscellaneous sources of revenue (e.g., fees, boarding, fines and surcharges, etc.). The Committee's action on LD 1490 will cover the projected \$3.8 million jail operations funding shortfall for both FY 18 and FY 19.

While the Criminal Justice Committee and county officials who worked on this issue are to be commended for their efforts, much of the credit for this unanimously supported funding proposal is owed to Representatives Karen Gerrish of Lebanon and Martin Grohman of Biddeford who serve on the committee. Both representatives volunteered to work with the interested parties to develop a proposal that appropriately funds county jails without shifting additional burdens onto the state's property taxpayers. Municipal officials greatly appreciate those efforts.

The final decision on funding the county jails does not rest with this bill, however. The final, final decision will depend on how this proposed appropriation fits within the overall state budget, as developed by the Appropriations Committee and legislative leadership.

**Road Maintenance Mandate Carried Over For Further Study.** The previous Legislative Bulletin discussed the State and Local Government Committee's public hearing on LD 1588, *An Act To Maintain Mail Routes and Access to Residential Structures*. On Monday, the committee held its work session on the bill, which as printed would effectively inhibit the ability of municipalities to discontinue or abandon town ways, while also significantly expanding municipal maintenance responsibilities on public easements throughout the state.

At the work session, committee members expressed a range of responses to the legislation, from sympathy for strained municipal budgets to sympathy for residents whose homes abut roads that are not publicly maintained. Recognizing both the complexity of Maine's road discontinuation and abandonment laws as well as legislators' desire to address citizen concerns, the committee voted unanimously to request that LD 1588 be carried over to the 2018 legislative session.

If the carry-over request is approved by the presiding officers, a subset of the State and Local Government Committee will meet later this year to further study this area of law, analyze the variety of road-related issues being reported, and recommend some method of addressing those issues. According to Committee Co-Chair, Representative Danny Martin of Sinclair, the hope for the study group would be to settle this perennial legislative issue "once and for all." MMA shares that hope, and stands ready to provide information that would help the subcommittee navigate Maine's long-standing public easement policies.

**Streamlining Appeals Of Municipal Land Use Decisions.** Also on Monday, the State and Local Government Committee unanimously signed off on an amended version of LD 1381, *An Act To Clarify Appeals of Municipal Land Use Decisions*, sponsored by Representative Kim Monaghan of Cape Elizabeth. The bill was submitted to address issues raised by the Maine Supreme Court in the 2016 case *Bryant v. Town of Camden*.

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# How to Invest \$180 Million

## Municipal Officials Construct Desired Bond Package

This session 36 bills requesting roughly \$1.2 billion in bond revenue were submitted by members of the Legislature for consideration by their peers on the Appropriations Committee. The bond requests seek funding for a variety of different projects, including research and development, railway infrastructure, riverfront community development, higher education, elderly housing, roads and bridges, and broadband expansion. It is anticipated that in the next few weeks the Appropriations Committee will hold hearings on the bond proposals, winnow down the options, and provide to the Legislature a package of bond proposals for consideration. If approved by the Legislature, the bond initiatives will be presented to the voters at the November 2017 referendum election for final adoption.

Rather than taking positions on each of the submitted bond bills, MMA's Legislative Policy Committee (LPC) establishes its bonding priorities through a survey of the Policy Committee's membership designed to determine both the size of the bond package and the initiatives to be funded over a two year period. The results of the 2017 survey are presented in the accompanying table.

In summary, the LPC supports a biennial bond issue of \$180 million, dedicating 60% of that total to the three major categories of highways and bridges, jobs and economic development, and broadband expansion. Six categories of capital spending (e.g., Land for Maine's Future, rail, energy

conservation, downtown revitalization, low income housing, and research and development) were designated approximately \$10 million each over the biennium, with somewhat smaller amounts for public water facilities and culvert replacements, rounding out the bonding priorities of direct municipal impact. Nearly \$4 million dollars in borrowing is recommended for "other" capital investments, including for higher education, elderly housing, etc.

During Governor LePage's six years in office voters have approved

\$456 million in spending, with 78% (\$354 million) targeted at funding improvements to Maine's aging infrastructure (e.g., roads, bridge, water, sewer, etc.). If history repeats itself, it is likely that the state's FY 2018 – FY 2019 bonding package will be roughly \$100 million in each year of the biennium, with funding for infrastructure improvements consuming a majority of that financing package. MMA's Policy Committee is hoping broadband expansion is finally recognized as necessary infrastructure, worthy of investment.

### LPC FY 2018 – FY 2019 Bond Package

	\$	%
Highway and Bridges	66,600,000	37%
Jobs Bond/Economic Development	23,400,000	13%
Broadband Expansion	18,000,000	10%
Land for Maine's Future	10,800,000	6%
Rail	10,800,000	6%
Energy Conservation/Weatherization	9,000,000	5%
Public Facilities/Downtown Revitalization	9,000,000	5%
Low Income Housing	9,000,000	5%
Research and Development	9,000,000	5%
Drinking Water	7,200,000	4%
Culvert Replacement	3,600,000	2%
Other	3,600,000	2%
<b>Total</b>	<b>180,000,000</b>	<b>100%</b>

## An Eclectic Collection of Updates (cont'd)

In the *Bryant* decision, the court expressed concern with the increases in costs and delays to both the judicial system as well as development projects resulting from separate appeals flowing to the courts from the municipal planning board, zoning board of appeals, and code enforcement officer when those appeals all relate to the same development proposal. Judicial doctrine requires finality of decision-making

before an administrative decision is ripe for appellate review, and the court held that home rule authority does not allow municipalities to override this doctrine to authorize multiple "piecemeal" court-level reviews. In its decision, the court expressed as a goal for municipalities the adoption of appeals procedures that are "standardized, understandable, and comprehensive".

LD 1381 addresses this issue by

deeming local land use decisions "final" and ripe for judicial review on appeal only after the application has received all municipal administrative approvals the various municipal review boards are required to make under local land use ordinances. These boards include not only planning boards and boards of appeals, but also site plan or design review boards and historic preservation review boards.