

Public Meetings and “Remote Participation”

Bill would allow for off-site participation by appointed boards but prohibit for boards of selectmen, school boards, etc.

The Legislature’s Judiciary Committee voted unanimously on Wednesday to move forward with printing a new “remote meetings” bill which will be scheduled for a public hearing. The legislation was recommended by the Right to Know Advisory Committee, which provides advisory opinions to the Legislature regarding Maine’s Freedom of Access Act. The bill presents an effort to remove uncertainty surrounding the question of whether or not current Maine law allows members of public boards or commissions to participate in a public meeting without being physically present, via telephone or video conferencing.

With one key exception, the draft legislation mirrors a bill that was supported by MMA’s Legislative Policy Committee (LPC) in the past as establishing some basic parameters that all governmental and quasi-governmental entities would have to live by. The key exception is that the new bill would prohibit any remote participation by boards of selectmen, school boards or other elected boards while allowing remote participation for all appointed boards. Such a prohibition would put Maine in the company of only one other state that entirely prohibits local elected officials from utilizing remote technology, even in emergencies. Most U.S. states expressly allow remote participation.

Due largely to this distinction between elected and appointed members, the LPC voted this week to oppose the legislation. The Policy Committee expressed a wide range of perspectives during its meeting, but the most common sentiment was that discriminating between elected and

appointed boards was arbitrary and unfounded, and for local boards this ought to be a matter decided locally. To some LPC members the entire bill seemed to be a solution in search of a problem, given that no specific complaints about municipal misuse of remote participation had ever been brought to the Right to Know Advisory Committee’s attention.

In fact, the only actual instance of abuse of remote participation that has ever been shared with the Advisory Committee or the Judiciary Committee in the last several years, to our knowledge, is one 1978 vote to expend public funds conducted entirely over the phone by county officials. This solitary example convinced a majority of the Right to Know Advisory Committee members that elected officials will likely attempt to circumvent open,

public deliberations if the law allows it; that elected selectmen will take a mile if given an inch. The municipal perspective is decidedly less skeptical. There are clearly emergency situations where a three member board of selectmen, with one member in the hospital and the other off-island, needs to utilize an offsite participation capacity to function.

The Judiciary Committee’s vote to proceed on Wednesday does not necessarily reflect what the Committee’s ultimate vote on the merits of the printed legislation will be. Rather, it indicates the Committee members’ desire to debate the proposal in an effort to remove ambiguity from existing law.

From the municipal side, if the general parameters established in the bill were

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Bill Relaxing Oil Spill Reporting Clouds the Waters

On Thursday last week the Environment and Natural Resources Committee held a public hearing on a bill that would relax the system governing reporting accidental oil spills to the Department of Environmental Protection (DEP).

Current law on this issue is provided in two parts.

First, for the last 47 years there has been a flat prohibition on discharging oil (e.g., heating oil, kerosene, diesel fuel, etc.) into or upon any coastal waters, estuaries, tidal flats, beaches and seacoast lands, or into or upon any lake, pond, river, stream, sewer, surface water drainage,

ground water or other waters of the state or any public or private water supply or onto lands adjacent to those water supplies.

Second, with certain exceptions there is no general obligation to report an oil spill into or onto these water resource areas. Instead, there is a law that incentivizes oil spill reporting by immunizing the person or entity responsible for the spill from any fines or civil penalties associated with the discharge provided the DEP is notified within two hours of discovering the spill and the discharge is promptly removed. The Department’s 24/7 oil spill

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Oil Spill Reporting (cont'd)

hotline number is 1-800-482-0777.

It's a "safe harbor" quid-pro-quo. If you are upfront about the discharge, you've no worries with respect to possible fines or penalties.

That safe harbor law is the statute LD 1494 would amend.

Sponsored by Rep. Bob Duchesne of Hudson, LD 1494, *An Act To Revise Oil Spill Reporting Standards*, would do away with any reporting requirement for oil spills less than 10 gallons. The person responsible for the spill would still be protected from any fines or civil penalties, but the only obligation on that person would be to promptly remove the discharge in accordance with the DEP's rules or orders. (How the DEP could issue an order under that circumstance is a mystery.)

At least three other bills similar to LD 1494 have been submitted to the Legislature over the last 12 years seeking to exempt small spills, defined variously as either five or 50 gallons, from the reporting system. Two of those bills were killed in Committee. The third was converted into a resolve directing the DEP to implement "memorandums of agreement" with above ground oil handling and storage facilities to make the reporting system more convenient.

Support for LD 1494 came from the oil dealers' association (Maine Energy Marketers Association), the Maine Pulp and Paper Association (MPPA), a certain environmental consulting and engineering firm located in Westbrook, and the Department of Environmental Protection.

The proponents of the bill described it as a way to reduce unnecessary regulatory burden on companies handling petroleum products and free-up the DEP to concentrate on more significant environmental issues. Several proponents criticized the current law by suggesting that even spills from filling your lawn mower must be reported, which then bind up the DEP in red tape reporting and create permanent "red flag" reports negatively affecting future property transactions and business financing. MPPA testified that spills of less than 10 gallons pose no material harm to health or the environment.

The DEP's testimony in support of LD

1494 was interesting because it broke 180 degrees from the Department's historical position on this proposal, even under the current administration. Contrasting the DEP's current position in support of relaxing the reporting standard with its previous position in opposition restages the opening lines of Dickens' *Tale of Two Cities*.

DEP's current testimony suggests that current law mandates reporting of all spills. DEP's previous testimony always acknowledged that current law merely incentivizes reporting by creating a "safe harbor" from penalty in exchange for calling the hot line, and emphasized that reporting is not mandatory.

DEP's current testimony criticizes the current law for requiring people to report such incidents as gasoline spills from overfilling a lawn mower or when a drop of oil falls from a car onto a parking lot. DEP's previous testimony pointed out that no one needs to report spills that are so minor that no conceivable penalty would be sought or fine assessed.

DEP's current testimony implies that spills of less than 10 gallons do not create an actual threat to the environment. DEP's previous testimony acknowledged that even small spills can carry significant impacts.

DEP's previous testimony explained how the Department, through the implementation of "memorandums of understanding," has arranged a more convenient system for companies to report routine spills that occur on their own impervious surface premises. These agreements allow for logs to be kept of those incidents, rather than constant reporting, and were characterized by the DEP as effective and convenient. DEP's current testimony complains that the memorandum of understanding process is very time consuming and would deservedly be eliminated with the passage of LD 1494.

MMA and the Natural Resources Council of Maine (NRCM) testified in opposition to LD 1494. The NRCM testimony brought to the Committee's attention the strong testimony in opposition DEP has historically taken on this legislation. MMA's 70-member Legislative Policy Committee voted by more

than 2:1 in opposition to LD 1494 for several reasons.

• Municipalities deserve access to this information. Even small spills in certain sensitive waterbodies, public water supplies and sewers can be damaging and require some response or otherwise impact related municipal activities. A small spill could derail municipal compliance with federal Clean Water Act requirements. The 30 so-called MS4 municipalities in Maine, which are trying to deal with ever evolving federal mandates governing the health of the streams within their jurisdiction, could be especially vulnerable as a result of the lack of information that would occur if LD 1494 becomes law.

• Reporting requirements are not onerous. A notification requirement that absolves the person responsible for the discharge from any fine or penalty does not seem like too much to ask if it helps keep the municipality apprised of water contamination issues.

• Exemption threshold difficult to quantify. Within certain limits, any gallon-based threshold of exemption from the reporting requirement would be difficult to quantify or measure after the discharge.

• Cleanup oversight. The report triggers at least some potential oversight with respect to the clean-up or mitigation. No reporting, no potential for oversight.

The work session on LD 1494 was conducted on Thursday this week. After the ENR Committee considered the testimony presented on both sides, the vote was split pretty much down the middle with half of the Committee voting "ought not to pass" and the other half voting "ought to pass as amended." For those supporting the measure, the amendments to the printed bill would provide an exemption to the need to immediately report an oil spill to DEP if the oil spill:

- Is less than a certain gallon threshold (perhaps less than 10 gallons).
- Is not a spill of gasoline.
- Occurs only on an impervious area
- Is immediately contained and completely recovered within 24 hours.
- Involves no impact to ground water or surface water resources.
- Is not a spill that impacts municipal sewers or municipal storm water systems.

Compromise on Abandoned and Discontinued Roads Legislation

Several bills submitted to the Legislature in recent years would make Maine's towns and cities responsible for resolving what are in most cases private road disputes. A version of that legislation was presented to the Legislature in 2015 containing elements which could lead to positive outcomes without imposing significant municipal mandates. The bill, LD 1325, *An Act to Ensure a Public Process When Discontinuing a Public Road*, also included components that reflect a deep misunderstanding of the laws governing abandoned or discontinued roads. Between the Yin and the Yang of the printed bill, MMA staff worked to reach a consensus that would clarify road discontinuations moving forward and better enable abutting landowners to resolve road damage disputes on their own. The consensus amendment was accepted unanimously Wednesday by the Legislature's State and Local Government Committee.

The amended version of LD 1325 will still constitute a modest municipal mandate. As printed, the bill would have entirely eliminated the statutory presumption of abandonment that has existed in law for decades which allows the status of active town ways to be "discontinued by abandonment" after at least 30 years of public non-maintenance. If enacted as printed, LD 1325 would have left the discontinuation process as the only option for municipalities to be legally relieved of maintaining what are often long-forgotten roadways. As amended, the road abandonment statute remains intact. For the sake of public information LD 1325 does require the municipal officers, if they choose to determine that a town way has been discontinued by reason of abandonment, to file that determination in the registry of deeds.

With respect to the formal process of discontinuing publicly maintained town ways, LD 1325 will codify into law the same procedural steps that MMA's Legal Department has long recommended as the most reliable method of ensuring a discontinuance is effective. Those six steps entail notifying abutting property

owners of the proposed discontinuance, publicly meeting to discuss the proposed discontinuance, filing an order of discontinuance, holding a public hearing on that order, considering whether damages ought to be awarded to abutters before finally approving of the order, and finally filing a certificate of discontinuance, if approved by the legislative body, with the registry of deeds.

The amendment also addresses two additional commonly raised concerns. The most universal concern expressed by proponents at these abandoned roads-related legislative hearings seems to be that members of the public are running roughshod over privately maintained roads simply because a public easement remains on the private road. Legislation was enacted last year to make damage to public easements a crime. In the amended version of LD 1325, the abutters to a road discontinued to municipal maintenance but subject to a public easement are provided a civil cause of action against

anyone who causes damage to the road in a manner that impedes reasonable access. Law enforcement and emergency response professionals who operate their vehicles on public easements in the scope of their employment would be immune from that civil liability.

The final proponents' concern addressed in this legislation encourages but does not require municipalities to develop or update existing lists of the status of maintained and discontinued roads. This section of the bill encourages the municipalities to share such lists with the Maine Department of Transportation along with the municipally maintained road status updates they currently provide to MDOT for Local Road Assistance Program purposes. County commissioners, landowners, road associations, surveyors and other interested parties are encouraged by this legislation to share relevant information with municipalities and MDOT to aid with the development of road inventory lists.

Reinforcing Voter Control Over School Budgets

As described in the January 15, 2016 edition of the Legislative Bulletin, MMA joined Governor LePage in opposing LD 1475, *An Act To Facilitate the Use of State Education Subsidies*. As proposed by Sen. Rebecca Millett of Cumberland County, the bill authorizes a school system to include on the school budget validation referendum warrant an article permitting the school board to spend any additional state aid received by the school that was not anticipated when the school budget was adopted. The permission would allow the school board to spend the money as it sees fit.

While the proponents of LD 1475 believe the change in law is necessary to avoid follow-up, costly school budget meetings and validation referenda to determine how the voters want to spend unanticipated state aid, the opponents saw the change as unnecessary. Under exist-

ing law, school boards already have the authority to place articles on the school budget warrant governing the management of unanticipated state revenue. Nothing in existing state law preempts that authority and many school systems regularly exercise it.

At this Wednesday's work session on LD 1475, Sen. Millett responded to MMA's concerns by recapping a conversation she had with the Attorney General's (AG) Office regarding the inclusive and permissive nature of the bill.

According to Sen. Millett, the AG's Office agrees that the current law is silent on how school boards can use unanticipated state subsidy for K-12 education and the practice among school districts has been to either use the funds for school related purposes or to reduce the previously established local commitment to the school

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LEGISLATIVE HEARINGS

Note: You should check your newspapers for Legal Notices as there may be changes in the hearing schedule. For the Legislative Events Calendar, see the Legislature's web site at <http://www.mainelegislature.org/legis/calendar/>. If you wish to look up schedules by Committee, go to <http://www.mainelegislature.org/legis/bills/phwkSched.html>.

Monday, January 25

Criminal Justice & Public Safety
Rm. 436, State House, 1:00 p.m.
Tel: 287-1122

LD 1536 – An Act To Provide Ballistic Vests to State Law Enforcement Officers.

Education & Cultural Affairs
Room 202, Cross State Office Building, 10:00 a.m.
Tel: 287-3125

LD 1516 – An Act to Allow School Resource Officers To Have Jurisdiction at Off-site Events.

LD 1517 – An Act To Enable an Alternative Organizational Structure To Purchase Group Health Insurance for Its Employees.

1:00 p.m.

LD 1544 – An Act To Improve Teaching Assignments in Maine's Public Schools.

Veterans & Legal Affairs
Room 437, State House, 10:00 a.m.
Tel: 287-1310

LD 1539 – An Act To Expand the Early Processing of Absentee Ballots.

Tuesday, January 26

Agriculture, Conservation & Forestry
Room 214, Cross State Office Building, 1:00 p.m.
Tel: 287-1312

LD 1485 – An Act To Allow the Director of the Bureau of Parks and Lands To Transfer Ownership of Snowmobile Trail Maintenance Equipment to Incorporated Nonprofit Snowmobile Clubs.

Insurance & Financial Services
Room 220, State House, 1:00 p.m.
Tel: 287-1314

LD 944 – An Act Regarding Recovery of Emergency Response Costs Related to an OUI Offense.

Wednesday, January 27

Criminal Justice & Public Safety
Rm. 436, State House, 10:00 a.m.
Tel: 287-1122

Carryover Work Sessions:

LD 195 – An Act Regarding County Jails.

LD 1387 – An Act Regarding the State Board of Corrections.

LD 823 – An Act To Update the Concealed Handgun Permit Law.

Legislative Bulletin

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Public Meetings (cont'd)

applied equally to all public bodies, they would create a level playing field of reasonable remote meeting rules to be followed. Those rules would require: (1) the board to adopt a policy authorizing remote participation and establishing the circumstances under which a member may participate when not physically present; (2) public meetings to be properly noticed; (3) a quorum of the body to be physically present, with certain exemptions; (4) members of the body to be able to hear and speak to each other during the proceeding; (5) members located outside of the physical meeting place to identify all persons present at their remote location; (6) all votes taken during the public proceeding to be taken by roll call vote; (7) remote members to have received relevant documents and materials to be discussed prior to the public proceeding; (8) no remote participation in judicial or quasi-judicial proceedings; and (9) at least one proceeding annually to be held with all members physically present.

Stay tuned for the notice of the public hearing on this bill.

School Budgets (cont'd)

budget. Sen. Millett indicated that the AG's office believes it is appropriate and helpful to explicitly express in state statute that the district voters are authorized to decide how unanticipated revenues will be utilized and that, as crafted, LD 1475 does not limit the options available to the voters even though it authorizes only one specific use of those funds.

Despite receiving feedback from the AG's office that the printed bill does not limit voter control, in an effort to alleviate any lingering concerns over LD 1475, Sen. Millett offered an amendment.

As discussed by the Committee, the amendment would authorize a school board to include an article on the school budget validation referendum ballot proposing to: (1) utilize unanticipated funds for school purposes; (2) reduce property tax burden; or (3) a combination of the two aforementioned options.

The amended version of LD 1475 was unanimously supported by the twelve Education Committee members participating in the work session.

IN THE HOPPER

(The bill summaries are written by MMA staff and are not necessarily the bill's summary statement or an excerpt from that summary statement. During the course of the legislative session, many more bills of municipal interest will be printed than there is space in the *Legislative Bulletin* to describe. Our attempt is to provide a description of what would appear to be the bills of most significance to local government, but we would advise municipal officials to also review the comprehensive list of LDs of municipal interest that can be found on MMA's website, www.memun.org.)

Judiciary

LD 1572 – An Act To Ensure Nondiscrimination against Gun Owners in Public Housing. (Sponsored by Sen. Cushing of Penobscot Cty.)

This bill prohibits a rental agreement for the provision of public housing, defined as any housing financed in whole or in part with public funds subsidizing housing accommodations, from containing a provision prohibiting or restricting a tenant from owning, using, possessing, bearing or transporting a firearm, firearm component or ammunition on those premises if otherwise lawfully qualified to do so. The prohibition does not apply if such a prohibition is required by federal law.