

Road Maintenance Mandate Redux

Over the past five legislative sessions bills have been submitted that would in one way or another mandate municipal maintenance of public easements on discontinued or abandoned roads. This year's version of the road discontinuance bill is LD 1588, *An Act To Maintain Mail Routes and Access to Residential Structures*, sponsored by Representative Gary Hilliard of Belgrade on behalf of Governor LePage. The bill, which received a public hearing on Wednesday before the State and Local Government Committee, makes several changes to the laws governing the abandonment and discontinuation of town ways, with a new focus on the question of whether or not the way contains a residential structure.

As proposed, LD 1588 would:

- Prohibit municipalities from discontinuing a public easement when the public easement provides the sole access to any property, while simultaneously requiring the municipality to keep the public easement passable.
- Prohibit municipalities from discontinuing any town way abutted by a home when the town way is the only means of access to the residence. This proposed change goes on to require the municipality to maintain for motor vehicle access any town way that cannot be discontinued for this reason.
- Nullify the presumption of abandonment after 30 years of non-maintenance whenever a residential structure is on the town way and the town way is the sole means of access to that structure.
- Mandate that, "Wherever there is an established mail route over a right-of-way held by a municipality, the municipal officers of the municipality shall ensure that the way is kept safe for the

use of the mail carrier throughout the year in accordance with United States Postal Service regulations."

In addition to the sponsor and the Governor's Office, five citizens testified in favor of the legislation. The first

two to testify were David and Roberta Manter of Fayette. In Mr. Manter's view, the Legislature's initial intention was that public easements were to be used for moderate access-only use,

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Home Rule Marijuana

It was "municipal day" in the Marijuana Legalization Implementation Committee room on Tuesday, with an agenda dedicated to considering how the regulatory system at the local level should work with respect to the five categories of recreational (or "adult use") marijuana retail establishments: cultivation facilities, manufacturing facilities, testing facilities, retail stores and social clubs.

A specific focus of the discussion was how the state regulatory system and the local regulatory systems might interface most effectively.

The catch-phrase of the day was "home rule," and there did not appear to be an objection from either legislators or the several marijuana legalization advocates to making sure local governments are provided all the land use regulatory authority and business licensing authority they need to regulate these establishments to the degree the town meetings and town and city councils see fit.

That is perhaps not surprising, given the generous nod the authors and proponents of the Marijuana Legalization Act embedded into the text of the initiated law. Maybe not all the marijuana legalization advocates feel this way, but those that are participating most actively in the committee's weekly meetings

have apparently adopted a somewhat nontraditional business model. It is a model characterized by welcoming reasonable regulations, being transparent about the nature of their commercial practices all the way from cultivation through to retail sale, and ensuring that those municipalities open to hosting the various retail establishments are entirely comfortable with their operations. In sharp contrast, in other areas of public policy municipal advocates are more typically presented with legislative efforts to preempt or weaken local government regulatory authority and asked to respond to business complaints about "home rule" creating a messy and unnavigable "patchwork quilt" of regulation. Not the case with the recreational marijuana advocates. Theirs is a refreshingly mellow alternative approach. Patchwork quilts can be beautiful.

The session on Tuesday began with some choreography and ended with an "open mic" opportunity.

MMA presented to the committee a slate of proposed amendments to the initiated law, prepared by the Association's Legal Services Department, designed to fully implement the home rule authority that the Marijuana Legalization Act advanced forthrightly in

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but this authority has been improperly expanded by Maine courts to allow public easements to be used by heavy trucks for logging or other purposes. Mr. Manter believes that when property is transferred from one owner to another, in addition to the Latin phrase *caveat emptor*, or “buyer beware,” the term *caveat venditor* should be recognized. This principle holds sellers accountable, too.

Mrs. Manter described what are referred to as “minimum maintenance highways” in the Midwest as a potential middle ground model for Maine. These highways reportedly require public maintenance to keep a road passable, and nothing more. Her testimony was followed by a resident with access issues to his property which lies near the town line between Paris and West Paris, another with access issues in the town of Anson, and another with a potential access issue in New Vineyard. Among the questions raised by these proponents was whether towns could grant private rather than public easements to allow access to otherwise landlocked parcels, and why municipalities are permitting new residences on roads the town does not maintain. These legal questions illustrate the types of quandaries people are facing, but are difficult to answer without more detail.

MMA’s testimony in opposition to LD 1588 focused on the following points:

- A new mandate on municipalities to keep an untold number of public easements passable year-round could

backfire against the 50-plus year state policy of promoting retention of these easements, as the maintenance costs could lead many towns to discontinue the easement altogether.

- Prohibiting local governments from modernizing the status of what was once a town way to a private roadway, even when the entire community desires such a change, fundamentally interferes with the authority local legislative bodies have over local roads.

- It does not make sense to nullify the presumption of abandonment and to, instead, force local governments to petition the courts for relief from the mandate to maintain roads in each instance that a town way is vacated. The abandonment statute saves property taxpayers legal costs by helping put to rest legal uncertainties surrounding the status of unused ways.

- A mandate to maintain all mail routes for safe mail carrier passage year-round on all public easements would be simply unaffordable. Local property taxpayers are already spending nearly \$90 million annually for winter road maintenance on active town ways.

While municipal officials oppose LD 1588, they are sympathetic to the opponents’ argument that the seller of a property should be required to disclose to the buyer information regarding the status of an abutting road. To that end, MMA’s Legislative Policy Committee supported LD 871, *An Act To Require Disclosures Relating to the Sale of Residential Real Property Accessible Only by a Private Way*, which requires

sellers of residential property to disclose the known means of access to that property, whether by public or private way, along with the currently required lead paint and asbestos disclosures. On private ways, sellers would, to the best of their knowledge, notify buyers of the person or entity responsible for repair and maintenance of the way, including information regarding relevant road associations. This bill was supported by a 12-1 vote in favor of passage by the Judiciary Committee on Thursday.

MMA was joined in its opposition to LD 1588 by Woolwich selectperson Allison Hepler. Ms. Hepler explained to the Committee the responsibility of municipal officials to be good stewards of taxpayer dollars, the priorities towns have to make with respect to how best to use their limited resources, and the careful thought that goes into local discontinuation deliberations. The Maine Water Environment Association and Natural Resources Council of Maine also opposed LD 1558. Both organizations share MMA’s concern that the cost of maintaining public easements could lead to the elimination of public easements and, in turn, the ability of the public to access natural resources or of the public water and wastewater utilities to expand or maintain infrastructure.

At the conclusion of Wednesday’s public hearing, MMA was asked to work with a representative of the Governor’s Office to find some sort of common ground solution before the Committee’s work session on Monday, May 22, at 9a.m.

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spirit but somewhat ineptly in statute. A description of the more substantive elements of MMA's proposed amendments to regulatory components of the Marijuana Legalization Act is provided in a sidebar to this article.

A city's experience. Sanford's City Manager, Steven Buck, followed with an overview of the process Sanford officials went through over the last couple of years, working with the local leaders in the medical marijuana industry to develop that city's regulations governing commercial caregiver facilities. Those regulations are now woven within Sanford's overall land use and business licensing codes. As a result of the effort, which is widely regarded as successful, amendments to the city's land use code were adopted in the areas of odor management; facility security; electrical standards appropriate to usage; plumbing code upgrades; access, egress and other life safety standards; sprinkler requirements for facilities over 6,000 square feet; inspection protocols, including how to avoid facility contamination; air quality standards; noise standards for the ventilation systems; carbon dioxide and other industrial gas storage standards; waste disposal and hazardous waste disposal standards, etc.

According to Mr. Buck, the keys to that effort's success were both patience and maintaining in the forefront of all discussions and negotiations two central "givens": (1) medical caregiver facilities are an "allowed use" under state law, and (2) the city is entitled to regulate that allowed use in the same objective and rational manner that it regulates all other allowed uses that present similar neighborhood and community-wide impacts.

An industrial town educating itself. Tim Curtis, Madison's Town Manager, described for the Committee how his town, which is currently working through the loss of its century-old paper mill industry, is educating itself about the Marijuana Legalization Act. A planning committee has been established including membership from the select board, various other boards at the municipal and school level, people with

public health expertise, law enforcement and the general public.

Madison voters, as was the case in many towns across the state, voted narrowly against the Question 1 initiative. According to Mr. Curtis, the viewpoints on the planning committee as to the propriety of legalizing the recreational use of marijuana run the full spectrum. The planning committee members quickly recognized that an education effort had to precede the development of any plan. Even as Mr. Curtis was addressing the lawmakers, the planning committee members back in Madison were taking advantage of the mandatory "school budget validation" referendum that was occurring to set up a booth outside the polling place to run a straw poll questionnaire to ascertain the general direction the townspeople might want to take.

Mr. Curtis reminded the committee that Madison does not have town wide zoning, as is the case throughout the towns of Somerset County, and the initiated law needs to be clarified to ensure that the regulatory tools the town does employ, such as its designated safe zones and its site plan review procedures, can be applied to the retail marijuana facilities.

Given the amount of unused industrial space in Madison, Mr. Curtis predicted that to the extent his community was open to retail marijuana facilities, the focus might be more on the cultivation, manufacturing and testing components of retail production than on the store shops and retail sale.

A smaller community's concerns. Fayette's Town Manager, Mark Robinson, presented a different perspective to the committee. Fayette's voters opposed the Question 1 initiative last November and at the annual town meeting in June an article to prohibit all retail facilities will be on the warrant. In an effort to assemble information for the town's voters, Mr. Robinson researched the impacts of marijuana legalization in Colorado and other western states. That research has led him to recommend that Maine slow down the implementation effort. At the center of his concern is

the increasingly potent marijuana being produced today compared to the relatively weak marijuana of yesteryear. The concentration levels of the psychoactive ingredient in marijuana products, THC, are an order of magnitude higher than in the past. According to Mr. Robinson, data coming out of the western legalized states indicates the impacts on the individual users are more intense, potentially negative and long term, and certainly not fully known. The negative impacts on society, from education to public health to law enforcement and public safety, could be very significant.

The message to the committee from the Town of Fayette is that our society's past mistakes and failures with respect to the consumption and regulation of tobacco and alcohol do not have to be repeated with the implementation of legalized marijuana. More time is necessary to get the regulatory system appropriately calibrated. Meanwhile, the statewide moratorium should be extended.

Additional municipal input. Also addressing the Committee were:

- Paul Nicklas, in-house counsel for the City of Bangor, reiterated the need for full bore home rule authority, using as an example legislation that has been proposed that would allow existing medical marijuana dispensaries and caregiver facilities to transition to recreational marijuana retail stores on a fast track. For any number of reasons, Mr. Nicklas recommended that this transition authority be made entirely conditional on home rule authority.

- Anne Krieg, the Executive Director of the Mid-Coast Regional Planning Commission, identified several areas in the initiated law that in her opinion needed to be addressed, including the awkward interplay between state and local licensing procedures and the completely unworkable timeframes to turn around municipal approvals. Ms. Krieg also was concerned about the lack of express municipal authority to establish adequate licensing fees, especially for such potentially complicated and litigation-inducing licensing decisions

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as determining which applicants among many will be successful in obtaining a local license when the number of local licenses is limited.

- The Chair of Houlton's Town Council, William McCluskey, presented to the committee through a representative, who indicated that Houlton was open to being a welcoming community but may restrict retail establishments in the town with respect to location. Among the issues raised by the Aroostook County community was a matter of first impression, at least for the committee, regarding a section of the Marijuana Legalization Act that applies to personal use and cultivation of marijuana. The personal use of marijuana and cultivation for personal use is generally not subject to municipal regulation. The initiated law allows a person to cultivate up to six flowering marijuana plants on that person's property or on someone else's property with written permission of the property owner. As a result, personal use "grower cooperatives" can be formed, with many people obtaining permission from a single person to grow their personal-use marijuana for them. That type of agricultural operation, short of agricultural zoning, is beyond the reach of local regulation.

- And finally, Representative Will Tuell of East Machias stepped to the microphone to put in a plug for home rule authority. It is a mystery how Rep. Tuell keeps up with everything going on at the State House, but he seems to have a nose for home rule debates. No matter what public policy issue is under discussion, and no matter the committee room where the discussion is occurring, if there is a significant home rule impact, you can count on Rep. Tuell to show up at the committee room at the most opportune time to make a pitch in support of local decision making authority. His testimony is made especially effective because of his style of delivery, unscripted, of unmistakable genuine and strongly-held belief, laced with a gentle sense of humor that is so very easy on the ear, especially the municipal ear.

Major Elements of MMA's Recommended Amendments to the Initiated Marijuana Law

- Clarify that plantations have the same authority to regulate marijuana retail facilities as is provided to the towns and cities.
- Establish that the municipal authority to limit the number of retail establishments applies to all five types of retail establishments and not just to marijuana retail stores.
- Redesign the initial steps of the state's licensing process. Under the initiated law, an applicant for a state license for a retail marijuana establishment of any type must present an application to the state licensing authority describing the proposed establishment and the municipality where it is going to be located. The state then sends the application to the proposed municipality, along with 50% of the state licensing fee, and the municipality is required to report back to the state within 14 days if the application is found to be "compliant". In the alternative process proposed by MMA, the applicant for a state license would be required to include in the state application a certification from the municipal officers of the proposed host municipality. The required certification would attest to the fact that no ordinance has been adopted in that municipality to prohibit the proposed facility. If the municipality has adopted an ordinance to limit the number of any type of retail marijuana establishment, that information would also be provided in the certification. In this way, the state licensing authority would know prior to issuing a license that the municipality's subsequent land use and licensing approval of the facility was not prohibited and, therefore, is potentially viable.
- Require the state licensing authority, which would now receive in the licensing process information from the proposed host municipality regarding any limitations on the allowed number of retail facilities, to only issue the number of licenses for that municipality that fall within the limitation.
- Remove a provision in the initiated law which allows cultivation facilities, after being licensed and established in a municipality, to expand their use to include a retail store even if the new store exceeds a limitation on the number of retail stores within the municipality.
- Address the circumstance, which is not dealt with in the initiated law, when a municipality adopts a prohibition on one or more of the types of retail facilities after some of these facilities have been legally established in the municipality. As proposed by MMA, the state licensed facilities legally established prior to the municipal prohibition would be allowed to retain their state license and municipal operation for three state licensing periods (three years) before the municipal prohibition would be effected at the state licensing level.
- Provide that home rule authority applies with respect to both a municipality's land use regulatory approach and licensing approach to marijuana retail facilities, so that municipalities that do not have comprehensive town-wide zoning systems would be expressly allowed to regulate these establishments under their site plan review ordinances.
- Establish that the preemptions and limitations in the state's "right to farm" law do not apply to marijuana retail facilities.
- Authorize municipalities to establish licensing fees in accordance with the state statute governing municipal fees.
- Allow municipalities to adopt and apply business licensing standards (i.e., operational performance standards) that will likely be different in nature than the state's licensing standards.
- Establish a "breathing room" window of moratorium that would apply for a fixed period of time after the state's full implementation of the initiated law goes into effect to provide time for municipalities to develop and adopt their local regulations. The "welcoming" municipalities that want to give approval to the marijuana retail establishments within the moratorium period would be free to do so.

Update On Labor-Related Legislation

The following is a brief snapshot of the status of this year's most significant bills related to the municipal employer-employee relationship before the Labor, Commerce, Research and Economic Development Committee.

LD 848, *An Act To Support Law Enforcement Officers and First Responders Diagnosed with Post-traumatic Stress Disorder.* This legislation would add a new "rebuttable presumption" to state law. As proposed, when a law enforcement officer, firefighter, or emergency medical services worker is diagnosed by a licensed physician specializing in psychiatry or a licensed psychologist as having post-traumatic stress disorder, the posttraumatic stress disorder is presumed to have arisen out of and in the course of the worker's employment. The May 5 edition of the Legislative Bulletin discussed the Committee's

deliberation as to whether or not LD 848 constitutes an unfunded state mandate. At the time, the Committee tabled the bill in order to give further consideration to this question. The Committee is slated to take this question up again at a date to-be-determined the week of May 22.

LD 1348, *An Act To Expand the Rights of Public Employees under the Maine Labor Laws.* This bill would grant to all unionized public employees (e.g., law enforcement officers, firefighters, snowplow drivers, etc.) the right to strike. On Tuesday, the Committee voted 8-5 against passage of LD 1348. Five Committee members voted in favor of passage of the bill as printed.

LD 1358, *An Act To Improve Public Sector Labor Relations.* This bill proposes to make an arbitrator's decision regarding public wages and benefits

legally binding. On Tuesday, the Committee voted 7-6 in favor of passage of LD 1358. The minority voted ought not to pass.

LD 1566, *An Act To Enact the Maine Fair Chance Employment Act.* This legislation would prohibit employers from asking applicants for employment to disclose information concerning the applicant's criminal history, or considering such information, until after the applicant has received a conditional offer of employment. It also would restrict the way a private employer, or the state and its political subdivisions, may use criminal history information in the course of making employment decisions. At Tuesday's work session, the Committee voted unanimously to request that LD 1566 be carried over to the next legislative session.