

## Borrowing for Maine's Transportation Needs

Advocates for sending a borrowing proposal to the voters in November to help capitalize improvements to the state's transportation infrastructure were in the Appropriations Committee room last Friday. Among the eight transportation bond proposals getting a public hearing, a half-dozen were devoted to expanding railroad capacity or repairing the state's highways and bridges. The other two transportation-related bond proposals were for the LifeFlight helicopter medical evacuation program and to develop a cargo port on Sears Island.

Friday's public hearings followed a slate of public hearings the day before promoting research and development and job creation bonds. 26 bond proposals were submitted to the Legislature last year, and last week's procedures culminated a public hearing process for all 26 measures that stretched back to last fall. Last October, for example, MMA testified in support of a bond proposal (LD 359) that would make sure Maine provides the necessary match to secure the full capitalization grants provided at the federal level for the drinking water and wastewater State Revolving Loan Fund programs.

**Rail.** The three bills seeking investment capital for Maine's rail systems were all priced in the \$20 - \$25 million range. One was seeking generic rail improvements in Western Maine. One was seeking specific improvements to make operational the Mountain Division rail line between Portland and Fryeburg. One was seeking generic rail improvements for both freight and commuter rail service without regional specificity. These last two proposals received the most attention.

LD 63, *An Act to Authorize a General Fund Bond Issue to Repair the Mountain*

*Division Rail Line.* This bill was introduced to the Committee by its sponsor, Sen. Bill Diamond (Cumberland Cty.), who explained the borrowing as necessary to complete the repair of a rail line running from Portland to Fryeburg to allow for the transport of freight. According to the testimony of Sen. Diamond

and other supporters, the \$20 million in bond funds could only upgrade the track to freight rail capacity. To achieve commuter rail capacity would require an even greater outlay to replace the gauge of much of the existing track to a higher grade. Several other legislators from the

*(continued on page 2)*

## One Size Fits All Construction Process

### *Prequalification or Disqualification – Committee to Decide*

On Wednesday this week the State and Local Government Committee held a public hearing on LD 1821, *Resolve, Regarding Prequalification Process for Contractors.* The bill directs the Departments of Administrative and Financial Services (DAFS) and Transportation (DOT) to convene a working group to determine the feasibility of utilizing a uniform prequalification process for university, community college and municipal projects funded in whole or in part with state revenues.

LD 1821 was authorized by the State and Local Government Committee at the request of the Maine Chapter of the Associated Builders and Contractors (ABC). The idea was to continue the work done in 2011 to provide uniformity in the prequalification processes used by state agencies. As a result of legislation adopted last year, since January 1, 2012 DAFS and DOT have been using a uniform process to prequalify contractors who bid on state bridge and highway construction, paving, marine construction, state government buildings, and traffic signal and lighting projects.

The state's uniform procedure includes

three basic elements: (1) a contractor application process; (2) a state-level "prequalification committee" responsible for determining whether contractors meet prequalification standards; and (3) an appeals process for challenging the decisions of the "prequalification committee". Contractors are required to undertake the full prequalification process every three years and to annually provide updated information on bonding, safety experience rating, and change in corporate status or address.

Although ABC was originally satisfied with the application of a unified prequalification at the state-level, they now want the uniform system to apply to other public entities as well, including municipalities.

As a result, LD 1821 was printed. Under the unified approach, businesses that prequalify with the state would not be required to prequalify under a locally adopted and administered prequalification process. Effectively, the working group proposed by LD 1821 would be assigned with the task of designing a single, uniform system that addresses the unique needs of bidding procedures on the local level for projects that are funded in part with

*(continued on page 4)*

## Borrowing (cont'd)

region, businesses along the Mountain Division rail line, Cumberland County, municipal officials from Standish and Baldwin, and other rail proponents testified in strong support of LD 63. One of the businesses most assisted by a functioning rail line is a wood pellet manufacturing company that specializes in a type of pellet being purchased by heavy industries in Europe that have converted from coal-fired to biomass-fired boilers. According to this company's testimony and the testimony of others, the availability of rail transportation for the pellets will greatly reduce the wear and tear on both the roadways and the environment if the manufactured pellets could be shipped to the freighters in Portland by rail rather than truck transport.

The other railroad bond generating the most attention probably gets this year's award for getting the most marketing points embedded within its title. LD 851, *An Act to Authorize a General Fund Bond Issue to Invest in Railroads To Reduce the Cost of Shipping to Maine Businesses, Attract Tourists to Maine and Facilitate the Development of Commuter Rail Transportation to Reduce the Use of Oil in Maine*, is sponsored by Sen. Barry Hobbins (York Cty.) but was presented to the Appropriations Committee by Sen. Dawn Hill (York Cty.). As printed, the bill would provide \$25 million for railroad reconstruction and expansion, utilizing a consultation process with the business and economic development sector to develop their highest railroad improvement priorities. Despite the fact that nothing in the bill

indicated what those priorities might be, the public hearing attracted a number of Brunswick residents concerned that the bond funds might be used to build a railroad layover and maintenance facility in a local neighborhood. The five people testifying with this concern were seeking a directive to be written into the bond proposal that would prohibit any bond revenue being used for that purpose. In contrast, another Brunswick resident living nearby the proposed maintenance building spoke in support of the facility's location decision. Town Manager Gary Brown addressed the Committee to provide some background for the layover's location decision and its compliance with both Brunswick's zoning ordinance and the historical use of the property.

**Highways and Bridges.** The two major bond proposals for highway and bridge repair and reconstruction are LD 894, sponsored by Sen. Bill Diamond and LD 1395, sponsored by Transportation Committee House Chair Rep. Richard Cebra (Naples). Sen. Diamond's proposal would provide \$62 million for highway and bridge repair, with the business sector helping prioritize the transportation infrastructure improvements according to economic development benefits. Rep. Cebra's bill is a straightforward \$50 million highway and bridges bond proposal where the prioritized projects would be determined by the Department of Transportation according to the long list of designed but unfunded projects in the queue.

LD 1395 was presented to the Appropriations Committee by Transportation Committee Senate Chair Ron Collins (York Cty.), who pointed out that:

- Transportation bonds are overwhelmingly popular with the voters who have approved borrowing for these purposes across the last five decades with unflinching support.
- The cost of borrowing is at a historic low.
- And the state's Highway Fund is not sufficiently capitalized to meet the state's transportation needs.

Sen. Dawn Hill presented LD 894 to the Committee and the public hearing began.

A representative of the H.O. Bouchard truck transport and freight

company in Hampden testified in favor of a responsible transportation bond on behalf of all the company's truck drivers who know Maine's roads only too well. The theme of this testimony was that deteriorated road infrastructure leads to higher transportation costs which hurt Maine's economy. Borrowing short term for a long term transportation investment is very financially prudent, from this company's perspective.

The Maine Better Transportation Association testified in favor of an even higher-value bond proposal covering a three-year issuance period for the dual purpose of making needed investments in the state's transportation network and putting something positive in the currently negative environment for the road construction industry.

The Maine Tourism Association testified in support, identifying Maine's tourist industry as highway-use dependent, both with respect to the arterial roads to get tourists to Maine from elsewhere, as well as the smaller roads to take them off the beaten path.

A representative of the Cyr Bus Company in Old Town testified in favor of a solid bond package for transportation, pointing out that the company's drivers often remark that they know the second they reach either New Hampshire or Canada because of the remarkably improved road surface. For a company that puts very expensive buses on the road with the principal goals of customer comfort and safety, the quality of Maine's roads and bridges is a top priority.

There was a great deal of additional support for a strong transportation bond proposal to be sent to the voters in November. MMA joined the supporters with the four reasons MMA's Legislative Policy Committee strongly supports a healthy transportation bond package. It turns out that MMA's arguments closely resembled Sen. Collins' comments when he presented the bill to the Appropriations Committee.

**Popular With Maine Voters.** Since 1951, the Legislature has sent 25 general transportation bonds to the voters (not including single-project, site-specific proposals). All but one of those bond packages were supported by the voters,

*(continued on page 3)*

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## Borrowing (cont'd)

and the transportation bond is typically the most popular bond on the ballot. Taking into consideration the condition of Maine's roads and the complaints being fielded at the local level, municipal officials are convinced Maine's voters would welcome the opportunity to show their support for a transportation bond.

**Low Interest Rates.** Municipal bond yields are at near historical lows. According to the bond rate information recently posted by WM Financial Strategies, the average 20-year bond rate in 2011 was 4.75%. As of February 16 of this year, the average rate had dropped to 3.65%. One year ago, in February of 2011, the rate was 5.35%. According to the Bond Buyer 20-Bond General Obligation Index, the current borrowing rates are at their lowest average in the last 40 years.

**Economic Development.** In addition to the enhanced public safety associated with roadway and bridge improvements, the \$62 million bond proposed in LD 894 focuses investments

on transportation infrastructure that are vital to business interests and development. As proposed, DOT is directed to consult with the business community to identify projects of highest priority to business and economic development interests. As a result of the business consultation effort, the \$62 million bond will be invested throughout the state so economies in all regions of Maine will benefit from the improvements made to area roads and bridges.

**Unmet Need.** The terms "unmet need" or "structural deficit" are bandied about so often in the Appropriations Committee room, the appropriators must tire of hearing them. There are plenty of folks who are of the reasonable opinion that "need" can be subjectively defined and not all "need" actually needs to be fully met. Having said that, it is hard to find anyone remotely familiar with the ever-flattening capacity of the state's Highway Fund who is willing to maintain that the Highway Fund alone is capable of even treading water with respect to identified bridge and highway repair

costs. As reported in the February 3, 2012 edition of the Legislative Bulletin, a bill is working its way through the legislative process (LD 1753, *An Act to Improve Transportation in the State*) that will lower the bar for Maine's road reconstruction goals from a "reconstructed" standard to a "fair or better" standard. As the chart shows, the state is lacking approximately \$300 million each biennium to achieve even that lower road quality standard.

The Committee has distilled down to 10 the number of bond bills it will have to work with, scattered among four broad categories: Education/Research and Development; Energy and Environment; Economic and Community Development; and Transportation. If there is a political willingness to advance a three dimensional bond package to the voters, the Committee has plenty of vehicle bills at its disposal. The next step is to hear from legislative leadership about the size of the borrowing package, if any, that will fall within the political parameters of acceptability.

**Table 1**  
**Transportation Improvement Cost – Structural Gap**  
*(In millions of \$)*

Biennium	Highway Fund Revenues	Total Need Multi-year Plan to Achieve "Reconstruction" Standard	Total Need Multi-year Plan to Achieve "Fair or Better" Standard	Gap Between Revenue and Multi-year Plan to Achieve "Fair or Better" Standard
2012-2013	\$563	\$921	\$805	\$242
2014-2015	\$512	\$966	\$827	\$315
2016-2017	\$519	\$1,002	\$850	\$331

Source: Maine Department of Transportation. Commissioner David Bernhardt's January 31, 2012 testimony in support of LD 1753, *An Act to Improve Transportation in the State*.

## Construction (cont'd)

state money.

A representative from ABC provided testimony in favor of LD 1821, saying the bill provided a means to explore whether or not the uniform system currently used by DAFS and DOT would be appropriate for other levels of governments and quasi-state agencies.

There was no other testimony, either in favor of the bill or opposed to it.

Instead, it was the “neither for nor against” category that brought out the bulk of the testimony, which was provided by the state’s Bureau of General Services (BGS), Maine AFL-CIO and MMA.

The AFL-CIO believes that the study process would benefit from the “laborer” perspective and urged the Committee to amend the membership of the working group to fill that void.

On behalf of the LePage Administration, Don McCormick, director of BGS, urged the Committee to support the exploration of the prequalification uniformity process through a letter of request to the state agency, rather than establishing the formal study found in LD 1821. Director McCormick assured the Committee that his Bureau was committed to identifying and implementing all changes possible to make conducting business in Maine easier. As a result, the Administration believes that the tasks in LD 1821 can be accomplished without legislation.

MMA first recommended that any working group on this topic include a representative from the Maine School Management Association because of the schools’ role with respect to major school construction projects. MMA also testified that municipal officials would oppose the mandatory application of a “one size fits all” prequalification process for two reasons.

First, local officials believe that if all municipalities are required to use the state’s process for all projects that include state funds, then the municipalities would lose the ability to offer and award contracts in a manner that best meets the unique needs of each community. Municipal officials believe that if property tax dollars are used to fund construction projects, then it is the property taxpayers in those communities who should retain the right to determine how contracts should be

awarded locally.

Second, municipal officials are genuinely concerned that applying the state’s uniform process at the local level would prevent smaller, local businesses from participating in projects funded with their own state and local tax dollars. That local-level concern is best articulated in the verbatim comments on the subject

from municipal officials provided in a sidebar to this article.

Although the more cautionary comments made at the public hearing seem to have resonated with some members of the State and Local Committee, it is difficult to tell how the bill will fare at its March 7 work session.

### Municipal Concerns with Uniform Prequalification Process

The following are comments provided by town and city officials in response to a survey MMA conducted on LD 1821, *Resolve, Regarding Prequalification Process for Contractors*. As detailed in this article, the bill would convene a working group to determine the feasibility of utilizing a uniform prequalification process for university, community college and municipal projects funded in whole or in part with state revenues.

- “Prequalification of bidders is not unique at the State or Federal levels. However, small businesses within the State represent one of the largest segments of business. Would such prequalification represent a potential barrier to these businesses? Also, with the ultimate goal for all levels of government being the most cost effective pricing, would such a process decrease the number of businesses able to respond? As a municipality with a standard, formal, open procurement policy, I am concerned that such a requirement would cause more harm than good in obtaining competitive bidding responses. At this time, provided a business can meet the qualification for one of our bid opportunities, we do not limit who can respond in any manner. Any sort of barrier, real or perceived, to bidding, in my opinion, is not in the best interests of the City.”

- “In our experience in the prequalification process required when using federal funds, we have found the process favors the larger corporations, especially those with a national presence. That tends to shut out the smaller local contractors from the bids which would not be consistent with our policy to buy local when possible.

- “I don’t believe it should apply to municipal projects where formal standard bid processes already exist. In some form, the State is already involved in the bid process for State funded projects, at least here in the City. The best examples I can cite are transportation projects. The State share varies by projects, usually 10%-20%. The City is required by the State to engage in a competitive bid process that must be approved by the State DOT. Depending upon the underlying funding sources, competitive bidding is already required. In addition, where it isn’t this would usurp local control.”

- “The town already has a well thought-out bid process and putting a prequalification process on top of it would be more of a hindrance than a help. Also, many of our local contractors are small shops who would undoubtedly take a pass on projects that would require additional work.”

- “This is another matter that should best be left to each municipality. We do not need Big Brother in Augusta telling us how we should select contractors. Most of us are experienced in doing that already. If it was offered as an option, communities could decide to use the service or not. However, I fear another mandate coming and we should oppose it.”

- “Maybe I just don’t have enough knowledge regarding this legislation, but I am curious as to why the State feels that all municipalities need to adopt their processes for all municipal projects. Many managers have for years protected the local dollar and gotten the best price for the best service.”

# Committee Marks Up The Dig Safe Laws

The Energy, Utilities and Technology (EUT) Committee voted unanimously (of members present) “ought to pass” this week on 1803, *An Act to Implement the Recommendations of the Dig Safe Work Group*.

**Backfill.** In the February 17 edition of the Legislative Bulletin, details were provided on two bills, LD 1790 and LD 1803, that dealt with amending certain rules and laws related to the “underground facilities protection program” or “Dig Safe”. Between the two bills, two areas of contention arose at the public hearings. The first contentious area was related to LD 1790, *Resolve, Regarding Legislative Review of Portions of Chapter 895: Underground Facility Damage Prevention Requirements, a Major Substantive Rule of the Public Utilities Commission*. One element of this bill reduced the tolerance zone for non-members of Dig Safe (which include most municipalities and public water and sewer utilities) from 36 inches to 18 inches on either side (surface level) of the underground facility.

The other, related area of contention was the proposal offered up in LD 1803 that would create a working group to facilitate the creation of a centralized, “one-call” Dig Safe system. “One call” is a euphemism for mandatory municipal membership in Dig Safe. Non-members of the Dig Safe system took issue with both of these proposals being advanced by Dig Safe members. The member/non-member conflict generated a recognition that if a new working group was created, more non-members needed a seat at the table as a matter of fairness. The 2011 working group included just three non-members of Dig Safe within a 22 member working group – not a very balanced effort, particularly when addressing this issue of making membership mandatory.

**Mark up at work session.** At the work session, the EUT Committee didn’t waste any time to clear up any uncertainty as to their preferred method of dealing with the concerns brought forth at the public hearing. Members of the EUT Committee voted to strike the uniform tolerance zone of 18 inches from the proposed Dig Safe rule changes in LD 1790 and include that as a matter to be studied further by a newly-created working group identified in LD 1803. In addition to determining whether a uniform tolerance zone is justi-

fied, the working group will take on the task of incentivizing the move to a one-call system that would mandate Dig Safe membership for all public water and sewer utilities, whether the utility is a municipal department or a separate utility district.

Some of the “incentives” that the group will be asked to consider are:

- Creating a new apportionment of the costs of Dig Safe membership so that members could pay a flat fee for each notification of pending excavation.

- Subjecting municipalities and publicly owned utilities to financial penalties for failing to mark the location of the underground water/sewer line in a timely manner or making those markings negligently.

- And, requiring municipalities that are not Dig Safe members (and other publicly owned water/sewer utilities) to maintain special insurance when excavating within the municipal right of ways.

The Public Advocate will establish and convene the Dig Safe working group. The group will look quite similar to the last working group that recommended, among other ideas, the tolerance zone amendment that concerned the water and sewer utilities. The suggested make-up of the group is as follows:

- Three builders or contractors (from diverse areas of the state).

- Three general contractors (from diverse areas of the state).

- Two public works officials (one from a large community, the other from a small community).

- One person with expertise in underground facility damage prevention.

- Two municipal officials.

- Two representatives of quasi-municipal water or sewer utilities (one small utility and one large utility).

- Two representatives of telephone utilities (one small rural company and one large company).

- One person representing cable television service providers.

- Two representatives of owners or operators of underground fuel facilities.

- One person representing owners or operators of a natural gas pipeline.

- One person representing an investor-owned transmission and distribution utility.

- One person representing a consumer-owned transmission and distribution utility.

- One person representing Dig Safe.

The Public Advocate chairs this working group.

A 2/3 majority vote of these working group members is necessary to recommend changes to the existing system. The recommendations that receive the super majority support will be included in a report that will be submitted to the EUT Committee no later than January 15, 2013.

**Closure.** LD 1803 will now be reported out of the EUT Committee and placed on the calendars of the House and Senate. MMA will monitor the activities of this working group over the summer and fall of 2012 and update municipal members as the working group digs into these subject areas and developments are uncovered.

## LEGISLATIVE HEARINGS

### Monday, March 5

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

LD 1827 – An Act To Amend the Laws Governing Prosecution of Individuals Possessing a Controlled Substance under Certain Circumstances.

**Energy, Utilities & Technology**  
**Room 211, Cross State Office Building, 10:00 a.m.**  
**Tel: 287-4143**

LD 1834 – An Act To Amend the Boothbay Region Water District Charter.

### Wednesday, March 7

**Taxation**  
**Room 127, State House, 1:00 p.m.**  
**Tel: 287-1552**

LD 1835 – An Act To Restore Equity in Revenue Sharing.

# Building a Consistent Maine Uniform Building and Energy Code

As detailed in last week's Legislative Bulletin, public hearings were held for two bills (LD 1619 and LD 1787) that attempt to remove inconsistencies in the Maine Uniform Building and Energy Code (MUBEC). At a work session yesterday afternoon, the Labor, Commerce, Research and Economic Development (LCRED) Committee voted unanimously (of members present) to pass both bills with amendments. These votes help straighten out a curve ball thrown last session at towns and cities with populations between 2,001 and 4,000 inhabitants through the uncoordinated enactments of conflicting MUBEC bills. The specifics follow.

**LD 1619.** The Committee vote on this bill entitled *An Act to Create Efficiencies in the Administration and Enforcement of the Maine Uniform Building and Energy Code* will ensure that: (a) municipalities can adopt the MUBEC-based codes "by reference" as that process is governed by Title 30-A MRSA, section 3003; (b) only municipal code enforcement officers in municipalities that have adopted MUBEC (4,000 or less in population) or are enforcing MUBEC (over 4,000 in population) must be MUBEC trained and certified; (c) only those municipalities mandated or voluntarily enforcing MUBEC are required to have municipal building officials or third-party inspectors inspect all buildings under construction

for compliance with MUBEC; and (d) the requirement to issue occupancy permits applies only to buildings that have been constructed according to MUBEC in those municipalities that are mandated or have voluntarily chosen to enforce MUBEC.

In addition, the Committee went along with an amendment to the bill requested by MMA that clarifies the appeal process for building inspections and occupancy permit issuance. Even though the building inspection appeal and occupancy permit appeal statutes are nearly side-by-side in Title 25 in Maine's law books, the appeal procedures are different and this amendment makes them parallel. Also, the proposed amendment to the bill adds language to MUBEC law in Title 10 so that if a municipality does not adopt a MUBEC enforcement ordinance through its "home rule" authority, an appeal process will still be available that matches what is permitted under Title 30-A, Section 4103.

**LD 1787.** The Committee then looked at the other bill, entitled *An Act to Create Efficiencies in the Administration and Enforcement of the Maine Uniform Building and Energy Code*. The unanimous "out to pass as amended" vote on this bill focused on where the Building Codes and Standards Board should be housed with the decision that the Board should be moved into a division within

the Office of the State Fire Marshal. The amended bill goes on to require a report to be delivered to LCRED Committee members during the second session of the 126<sup>th</sup> Legislature (in 2014) to assess how this move has impacted the effectiveness of the Bureau and its authority and responsibilities.

One element of the printed version of LD 1787 that the LCRED Committee did not support would effectively repeal the requirement in Maine that newly constructed buildings in municipalities over 2,000 in population be inspected for fire safety. This requirement has been in Maine law for approximately 100 years as far as we can tell. Some say it was enacted after the Great Portland Fire in 1866.

During the work session, Senator Doug Thomas (Somerset Cty.) expressed the opinion that the municipal population threshold of 2,001 that triggers the requirement that buildings be inspected by a municipal building official so to be safe from fire should be moved to 4,001 to be consistent with MUBEC. According to the Senator, this would ease confusion in the field of code enforcement. Changing this threshold was not supported by members of the LCRED Committee in its vote on Thursday but the Senator felt that a floor amendment might be in order.

These bills will next appear on the calendars of the House and Senate in the weeks ahead.