Legislative BULLETIN
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# Charging Tax Exempt Corporations for Direct Municipal Services

## *Non-profits Assert Same Status as "Public Institutions"*

On Wednesday this week, Senator Lisa Marraché (Kennebec County) presented a bill to the Taxation Committee on behalf of MMA's Legislative Policy Committee and the Maine Service Center Coalition. LD 1290, *An Act to Amend the Law Authorizing the Application of Service Charges to the Owners of Certain Real Property Exempt from Property Taxation*, would clarify, modernize and expand the applicability of the so-called "service charge" authority as found in the current tax code.

For a very long time a section of the statute governing the tax exempt status of non-governmental corporations and institutions has allowed municipalities, after adopting the appropriate ordinance, to levy "service charges" against a certain category of exempt institution. The purpose of the service charge statute is to allow municipalities to recover some of the direct costs of providing municipal services to tax exempt entities.

From the municipal perspective, there are two problems with the existing statute.

First, it provides no guidance as to how those service charges should be actually calculated. Since fees for service cannot be calculated on the basis of assessed value (as property taxes are calculated), the statute should provide a clearly acceptable methodology for calculating service fees.

Also, current law allows for the implementation of service charges only with respect to 100% tax exempt rental housing property. This category of exempt property represents a tiny sliver in the ever-widening universe of tax exempt institutions.

These two problems with the current law are interrelated; that is, in order to convince the Legislature that the application of the service charge statute should be expanded to cover tax exempt institutions more generally, the service charge law needs to be dusted-off, modernized, and, in the parlance of the day, made more transparently functional. Those are the goals of LD 1290.

In summary, LD 1290 does the following.

• First, just as is the case with current

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# Lawyers, Journalists and Money *...with a correction*

The April 3rd *Legislative Bulletin* described LD 679, *An Act to Allow a Court To Award Attorney's Fees in Successful Freedom of Access Appeals.* MMA opposes this bill. In general, LD 678, sponsored by Senator David Hastings (Oxford Cty.), provides that people who sue towns and cities on Right to Know Law violations can be provided their attorneys fees if they prevail in court, but it does not allow the municipality to get its attorneys fees when the municipality prevails.

The *Bulletin* indicated that if a municipality denied a public record request or improperly held an 'executive session', the bill "*would allow a Court to require the government to pay the requestor's attorney's fees if the Court finds that the government's denial was 'not for just or proper cause.'*" This is an accurate description of the bill as printed.

However, the Committee amended the bill to limit the award of attorney's fees and court costs only if the refusal to provide a public record or the improper executive session were conducted "*in bad faith* ." Also, the plaintiff must be a "*substantially prevailing*" plaintiff in order to receive attorneys fees. Our apologies to Sen. Hastings and the Committee for the inaccuracy of the previous article.

Even with that correction, municipal officials still object to the fact that the bill is a one-way street. Municipalities are not entitled to have their (taxpayer funded) attorneys fees reimbursed when the attorneys, the press and others file "bad faith" requests.

Furthermore, there continues to be no evidence of a problem.

The proponents in support of LD 679 provided a copy of a single decision of the Maine Supreme Court as evidence that this bill is needed. The case was from 1996. It dealt with a disgruntled former special education "director" whose contract with a school department was not renewed. Instead of accepting the non-renewal, she sued.

All of the allegations in her lawsuit

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## EXEMPTION (cont'd)

law, no service charges can be levied against any exempt institution unless the municipality, using the very public ordinance adoption process, enacts an ordinance specifying the categories of exempt property to which the service charges would be applied. All of the arguments made to the Legislature by the exempt institutions to protect them from service charges could be just as well advanced during the local ordinance adoption process. If the voters of the community agreed that service charges would be inappropriate given the beneficial public services provided by the tax exempt entities, the ordinance would not be adopted and the service charges would not be applied.

• LD 1290 narrows the types of direct municipal services that can be included in a service charge ordinance. Current law allows service charges to cover all municipal services except education and welfare. LD 1290 allows for the calculation of service charges only for police protection services, fire protection services and road-related public works.

• LD 1290 also establishes the manner to calculate the actual charges for each of the three services. For police and fire services, each exempt institution covered by the municipal ordinance could be charged only for the percentage of the municipality's police and fire budget that is represented by that institution's percentage of building square footage relative to the total building square footage of the entire municipality. The service charge for road services would be the percentage of the road budget represented by the institution's percentage of the municipal road frontage (i.e., the institution's road frontage relative to the road frontage of the entire municipality).

• Finally, LD 1290 authorizes the application of service charges only against the larger tax exempt institutions; that is, non-governmental tax exempt institutions with a real property value greater than $1 million or that receive more than $1 million each year in gross annual revenues.

Just as is the case with the current service charge statute, the specific categories of tax exempt property that would be subject to the service charges would be up to the voters of the municipality when adopting the required ordinance. For example, the ordinance could be written to apply service charges to the exempt "charitable" institutions, but not to exempt "literary and scientific" institutions, or vice versa. Whichever categories of exempt property are identified in the ordinance, the service charges would have to be levied against all properties in the municipality within those categories as long as they meet the $1 million threshold.

MMA's testimony in support of LD 1290 included an analysis provided by the City of Lewiston showing the service charge impact on a number of prominent exempt institutions in that City if LD 1290 were in effect (and the City Council adopted an implementing ordinance). The full implementation of LD 1290 on Bates College, for example, would result in a service charge of approximately $340,000, which represents 15% of what the College's tax bill would be if the College was not exempt. The service charges applied to one hospital in Lewiston would be slightly over 8% of what its taxes would be if it paid taxes. The full service charge to the other hospital – just over $70,000 – would represent 7.6% of the tax bill that the hospital would receive if it was not tax exempt.

**Opposition.** As might be expected, representatives of private colleges, hospitals, YMCAs, youth summer camps, and the organization representing non-profit organizations all testified in opposition to LD 1290.

The first rhetorical strategy of the opponents was to characterize the proposed service charges as nothing more than the taxation of non-profits, discounting the fact that under LD 1290 the charge would be rationally calculated to identify the actual financial burden on the municipality.

An additional argument of several opponents is that tax exempt institutions are the functional equivalent of public institutions. Therefore, levying a service charge for fire protection services, from their perspective, would be the equivalent of the town or city taxing itself for its own services. Even though all of these institutions are privately owned, they insist that the services they provide are so crucial to the protection and/or betterment of society in general, they should be treated from a tax perspective as though they were both publically funded and publicly governed; that is, completely exempt from all obligation to contribute to the public charge because they are "the public".

An other argument of the tax exempt institutions is that their operating margins are so thin – apparently in the .6% to 2% range – that any requirements to pay service charges could not possibly be absorbed or pushed on to their non-low income clientele which pay full market prices. Therefore, they would have to cut staff or programs, or both.

MMA and the other supporters of LD 1290 approached the issue from another perspective. It is time to put the claims of the tax exempt institutions to the test. If they are correct, and the services they provide are so valuable to the community or are recognized as invaluable to the larger region or greater society, no ordinances will be enacted to impose services charges because the local voters will understand that a total exemption from all obligations to contribute to the services they receive is, in the big picture, fair and equitable.

On the other hand, there may be some large-scale tax exempt institutions where that perception does not carry the day, and a modest, rationally-calculated contribution toward the property protection services provided directly to the tax exempt institution is also deemed by the local voters to be fair and equitable.

The work session on LD 1290 is scheduled for Thursday, May 7.


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# Sensible Foreclosure Notice Provision

The City of Biddeford, like many municipalities in Maine and across the nation, is dealing with the problem of home foreclosures. On Tuesday, the Insurance and Financial Services Committee took testimony on LD 641, *An Act to Notify Municipal Assessors of Foreclosure Actions*, sponsored by Representative Steve Beaudette (Biddeford).

The bill amends a section of Chapter 713 in Title 14 which deals with mortgage foreclosures. It would require that a municipality be provided the address and identifying information of the new deed holder following foreclosure; that is, the financial institution that commenced the foreclosure.

The Code Enforcement Officer and Tax Collector from the City of Biddeford testified in favor of the bill. They presented the Committee a 4-inch binder of material related to the 108 foreclosures that are currently taking place in Biddeford, as far as they know. Of the 108 foreclosures, the City was only provided direct notice in five cases; otherwise, the Tax Collector had to spend hours combing through various sources of data such as newspaper legal notices or the registry of deeds in order to determine the new owner.

The issue is not primarily an assessor or collector's issue. The real issue is public safety and the quality of life in neighborhoods where foreclosures take place. Oftentimes, a resident of a property who is having problems making mortgage payments "walks away" from the property months before foreclosure even begins. It is then several more months before a bank foreclosure is concluded. In that intervening period, the vacant property can quickly and easily become a blight on the neighborhood.

Code enforcement officers and others need to know who owns the property before they take any actions to secure it from squatters, drug users or even animals and the elements.

The solution proposed by this bill does not require the foreclosing financial institution to create a notice specifically for the municipalities. All the bill requires is that the financial institution provide the municipality a copy of the notices provided to the mortgage holders.

There was no real opposition to the bill although the financial institutions did request that the bill be clear as to which foreclosure notices be provided to the municipality. Some notices are public (that is, they are provided to the resident and a public registry or database) and some are private and provided only to the resident. Once a municipality possesses a document, it becomes a public record. The bankers' request is to not require the financial institutions to provide copies of non-public notices to the municipality.

The work session for LD 641 is scheduled for Monday, May 4th.

# Message Received – Law Enforcement by Camera Denied

On Tuesday this week, the members of the Transportation Committee sent a strong message to the municipal community as it voted unanimously, to support LD 1234, *An Act to Regulate the Use of Traffic Surveillance Cameras.*

LD 1234, sponsored by Rep. Rick Cebra of Naples, would prohibit the use of traffic surveillance cameras as tools to enforce the laws governing the operation of motor vehicles.

LD 1234 was dealt with by the Committee in parallel with another bill on the same subject, LD 1174. Sponsored by Rep. Don Pilon of Saco, LD 1174 would authorize municipalities to use surveillance cameras to monitor and enforce traffic violations. Under the terms of LD 1174, the registered owner of a motor vehicle caught on tape violating a traffic law would be the presumptive violator. The fine revenue generated as a result of camera enforcement would be returned to the community to help pay for the cost of the cameras. Once those capital costs are covered, the fine revenue would be diverted to the court system to help pay for security improvements.

The Committee voted "ought not to pass" on LD 1174 by the same margin it voted LD 1234 "ought to pass"

Much of the Committee's opposition to LD 1174 was focused on the "presumption of guilt"; that is, that the registered owner of the motor vehicle would be assumed to have committed the violation. Many Committee members expressed a fundamental problem with enacting a law that would require persons to prove their innocence. Considering that these traffic infractions have an impact on the driver's record, some Committee members found the presumption-of-guilt provision unfair.

To drive the point home, the Committee voted in support of LD 1234. Although under existing laws municipalities are prohibited from using cameras to enforce traffic violations, the Committee felt it was necessary that state law clearly spell out the prohibition. Although some Committee members believe that the ban on camera use should be permanent, others felt that the ban should be temporary. These Committee members believe that if the camera technology could be improved to the point that the actual violator could be identified, a future Legislature might consider amending the law to allow for the use of cameras to enforce traffic violations.

# Expending Public Dollars on Private Roads

The so-called "public purpose doctrine" captures an issue municipal officials take seriously. As provided under the doctrine, municipalities are prohibited from using public funds for private purposes. At times this limitation causes friction among residents in a community and municipal officials, particularly among residents that live on private roads. These residents sometimes believe that since they pay property taxes, their private roads should be maintained by the municipality.

Under existing law there is an exception that allows the legislative body to authorize the municipal officers to expend public resources on private roads for the purpose of providing fire and police protection services. Under this exception, the municipal officers can authorize the town plow, for example, to open up a snow covered private road in order to allow the fire truck to respond to an emergency.

As would be expected, from time to time there are efforts undertaken to expand the reasons for which the municipal officers can expend public funds to make repairs to private roads. LD 1315, *An Act to Amend the Private Way Laws with Regard to Road Associations*, would authorize municipal officers to expend public resources on private roads to protect water quality.

On Thursday of this week, the Transportation Committee held a public hearing on LD 1315. The proponents of the bill, including a representative from the Maine Congress of Lake Associations and the Department of Environmental Protection, provided testimony in favor of the bill. The proponents believe that the changes proposed in the bill would provide the tools necessary to help private road associations better address the impact poorly maintained camp roads have on water quality.

MMA provided testimony in opposition to LD 1315 for two reasons.

First, the bill creates an expectation that public funds can be expended to benefit private landowners. By adding water quality to the list, the authorized public-fund expenditure provision shifts from one that is emergency-based and ad hoc, to one that is circumstance-based and long-standing. Rather than responding to an emergency, municipalities could be pressured to make extensive private road repairs in the name of protecting water quality, even though water quality protection benefits would be only a small portion of the repair benefits actually bestowed.

Second, municipal officials question what will be added to the list in the future to justify using public resources to improve private property. Municipal officials are concerned that if the law continues to be amended, property taxpayers will be paying to provide regular maintenance on roads the general public doesn't even have the legal right to walk on.

In its testimony, the DEP related that LD 1315 resulted from the work of a stakeholder group that convened throughout the summer of 2009 to come up with solutions for addressing the impact private roads have on water quality. As a result of the stakeholder group's effort, three separate pieces of legislation were generated, including LD 1311 which is presently being considered by the Natural Resources Committee.

LD 1311, *An Act to Enable Municipal Assistance for Purpose of Protecting or Restoring Public Waters*, would authorize municipalities to expend public resources on private roads for the purpose of protecting water quality provided six standards are met. Some of those standards include requiring that the impacted lake's water quality actually be at some level of threat, and that the road association agrees to maintain the road once the repairs had been made.

The intent of LD 1311 is to create a demonstrable relationship between the expenditure of municipal funds on private roads and the improvement of lake water quality. Whether the creation of the six standards will satisfy the public purpose doctrine is still unknown.

The Department of Environmental Protection recommended to the Transportation Committee that LD 1315 be amended to provide a statutory link to the bill being considered by the Natural Resources Committee to create the standards for determining when public resources could be used on a private road for the protection of water quality.

The work session on LD 1315 has been scheduled for Thursday, May 7 at 1 p.m.

## LAWYERS (cont'd)

were summarily rejected by the trial court. She then appealed to the Law Court on five distinct grounds. Her first cause of action related to whether she was a teacher. The Law Court upheld the summary judgment against her on this count. [*Note: A summary judgment is granted when a court views all the factual evidence in the light most favorable to the plaintiff but in applying those facts to the law agrees with the defense that no violation of law occurred.*]

Her second cause of action was that she was denied "due process" because she was entitled to the contract with the school and the school department could not simply fail to renew it. Again, the Law Court rejected her argument and upheld the summary judgment award against her.

She then made three different complaints based upon alleged violations of Maine's Freedom of Access statutes. The first was that she was not provided the reasons for her non-renewal "on the record" as required by the Freedom of Access law. The Law Court found that a letter sent to the plaintiff by the school board that listed 20 different reasons for her non-renewal "*were sufficient to demonstrate that the School Committee had an adequate and rational basis for its decision*" and that the school department had substantially complied with the law.

Her fourth allegation was that the school board had improperly discussed her case while in "executive session" without her being given the opportunity to attend, as the Freedom of Access Act requires. Once again, the Law Court disagreed with the plaintiff and upheld the summary judgment.

Finally, her fifth allegation was that she was improperly denied access to vari-

*(continued on page 5)*

# Competing Principles Govern Public Employee Salary Debate

An individual's salary is a very personal matter. Most people simply don't ask others what they make for a living. Respecting the privacy of our neighbors and friends concerning their wages is a New England heritage.

Yet, the expenditure of public funds is a public matter and the salaries of municipal and state employees are paid with public funds.

Balancing these two competing principles is the purpose of LD 1353, *An Act Regarding Salary Information for Public Employees,* sponsored by Senator Lisa Marraché (Kennebec Cty.). The bill would treat as public records the salaries of public employees but only to the extent that the salary is identified with a position. It would not treat the individually-identifying information that goes along with each salary as a public record.

The bill presents the Judiciary Committee with a classic dilemma that forces Committee members to choose between strong and valid competing values: protecting individual privacy vs. transparency in the expenditure of public funds.

There is no vital reason for municipal salaries to be provided in a manner that discloses individual names. Associating the salaries with particular municipal positions, as the bill does, is adequate to most legitimate needs. For years, the Maine Municipal Association has published a "Salary Survey" for the benefit of our members. It provides useful information for municipal employers seeking good information about what comparable municipalities are paying their employees. It does not provide individual names.

Because municipalities and municipal workforces in Maine are so small, discovering the names that go along with the salaries is pretty easy. For example, MMA's Salary Survey lists salaries of town managers by municipality. Each year members of the press use our publication to list, by name, the salaries of town managers in Maine.

MMA's Salary Survey is similar to municipal budgets and municipal annual reports. Anyone who truly wants to know the salaries of municipal employees has plenty of available information to serve any legitimate transparency need.

However, the members of MMA's Legislative Policy Committee respect the Freedom of Access Act and they respect the public. They do not feel that the burden of proof for creating an exemption to the public records law should turn on whether someone can prove they need the information.

The burden instead rests on the shoulders of those who seek an exemption from the law.

As a result, MMA's Policy Committee was not able to identify a rational basis to create an exception to the Freedom of Access Act, and so voted to oppose the bill.

By contrast, the Legislature legitimately enacted a provision in 2007 that shields the "personal contact information" of municipal employees in order to protect these workers from harassment in their private homes. (See 1 MRSA §402(3)(O).) Local elected officials were not provided this shield.

Local officials are confident and secure in the belief that the Legislature will provide necessary exceptions to the public records law to protect public workers. They do not feel this bill qualifies.

Furthermore, they are not sure the bill would work as intended. That is, couldn't a member of the public request two separate public records and obtain the information the bill seeks to hide? A person could request a list of salaries by position on the first day, and then request a list of names by position on the second day. Only those employees who hold a common position (e.g., teacher) would have their privacy protected. Those employees who hold a unique position, (e.g., superintendant) would still be easily identified.

Local officials respect the privacy sensibilities of public employees. They also understand that there are individuals and groups who utilize the Freedom of Access laws for no reason other than to bruise the feelings of hard working public employees.

Municipal officials are proud of the work that municipal employees do for the public. They provide police and fire protection, they educate children, they enforce safety and environmental codes, they repair and maintain streets, they help knit the fabric of a community with parks and recreational services and they provide needed services to the less fortunate. And they do so for wages that are below the average private sector wages according to a study published by the Maine Heritage Policy Center.

Municipal officials believe that municipal employees should be proud of the important work that they do for below-average salaries. The solution to the critics and the bomb throwers is to not hide in the shadows but instead to more vigorously and proudly emphasize the important work that these employees do.

## LAWYERS (cont'd)

ous documents that she requested pursuant to the Freedom of Access Act. The timeline was such that she made a public records request on February 16th and the very next day she sued the school board. She was provided the documents she requested on May 5th, 10-weeks later.

It may be understandable why a school board would balk at immediately providing documents to a person suing the board. It probably makes sense to review the complaint, review the record request, send them both to your attorney and handle them both carefully.

However, in this case the Law Court held that balking under the Freedom of Access law is not allowed. The Law Court found that a summary judgment in favor of the school board was improper. It also awarded the plaintiff her court costs.

It appears that the Court did not award the school board (and its taxpayers) the court costs and attorney fees the school system incurred even though it prevailed on four of the five allegations both on the trial court and appeal court level.

If this Law Court decision is the best evidence to support the "need" for the taxpayers to be forced to pay a plaintiff's attorneys fees, LD 679 should be summarily rejected by the Legislature.

## LEGISLATIVE HEARINGS

*NOTE: You should check your newspapers for Legal Notices as there may be changes in the hearing schedule. Weekly schedules and supplements are available at the Senate Office at the State House and the Legislature's web site at* http://www.state.me.us/legis/senate/Documents/hearing/ANPHFrame.htm. *If you wish to have updates to the Hearing Schedules e-mailed directly to you, sign up on the ANPH homepage listed above. Work Session schedules and hearing updates are available at the Legislative Information page at* http://www.state.me.us/legis/.

### *Monday, May 4*

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

LD 1442 – An Act To Ban Racial Profiling.

**Insurance & Financial Services**
**Room 427, State House, 9:30 a.m.**
**Tel: 287-1314**

LD 103 – An Act To Ensure Protection from Harassment for Purchasers of Real Property through Auction.

**Legal & Veterans Affairs**
**Room 437, State House, 9:00 a.m.**
**Tel: 287-1310**

LD 1195 – An Act To Allow Noncitizen Residents To Vote in Municipal Elections.

LD 1344 – Resolve, To Authorize a Pilot Project on Ranked Choice Voting.

LD 1345 – Resolution, Proposing an Amendment to the Constitution of Maine To Increase the Required Number of Signatures for a Direct Initiative or a People's Veto and To Limit a Direct Initiative to One Subject.

### *Tuesday, May 5*

**Business, Research & Economic Development**
**Room 208, Cross State Office Building, 1:00 p.m.**
**Tel: 287-1331**

LD 1389 – An Act to Create State and Regional Quality of Place Investment Strategies for High-value Jobs, Products and Services in Maine.

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

LD 1390 – Resolve, Directing the State Tax Assessor To Adjust the State Valuation for the Town of Topsham.

LD 237 – An Act To Impose an Excise Tax on the Extraction of Water for Bottling.

LD 1427 – An Act To Compensate Maine Residents for the Impacts of High-voltage Transmission Lines.

### *Wednesday, May 6*

**State & Local Government**
**Room 216, Cross State Office Building, 3:00 p.m.**
**Tel: 287-1330**

LD 1064 – An Act To Increase Efficiency through Regionalization.

LD 1098 – Resolve, To Transfer Ownership of the Reed Center on the Stevens Campus in the City of Hallowell to School Administrative District No. 16.

LD 1220 – An Act To Create Incentives for the Consolidation of Municipal Services.

LD 1410 – An Act To Restore the Historical Town Boundary between Harpswell and Brunswick.

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

LD 1367 – An Act To Increase the Homestead Property Tax Exemption.

LD 1463 – An Act To Provide Equitable Property Tax Relief To Maintain Traditional Communities.

LD 958 – An Act To Encourage Renewable Energy Investment.

LD 842 – An Act To Exclude Business and Capitol Losses from Consideration as Income under the Circuitbreaker Program.

LD 1273 – An Act To Simplify the Application for Benefits under the Circuitbreaker Program.

LD 1392 – An Act To Promote Economic Development and Reduce Reliance on Automobiles through Transit-oriented Tax Increment Financing Districts.