Legislative BULLETIN

A PUBLICATION OF MAINE MUNICIPAL ASSOCIATION

Vol. XXVI No. 5 February 6, 2004

# March of Mandates

In 1992 the voters amended Maine's Constitution to limit the Legislature's ability to easily pass unfunded state mandates onto the towns, cities and property taxpayers. For the first decade after that vote, unfunded mandates stopped coming out of Augusta, with the noted exception of the "Learning Results" mandate on the schools, which some legislators are still insisting is not an unfunded mandate, although it's hard to follow their reasoning.

Unfunded state mandates are cropping up much more frequently now. In other articles in this edition of the *Bulletin* there is: (1) a review of a bill that would mandate a regimen of harbor master training; (2) a recommendation for mandated recycling of discarded computers and televisions that would prohibit municipalities from recovering their directly-incurred recycling costs through disposal fees; and (3) a change to election law that will require significant increases to election administration that must be conducted on the local level.

Two weeks ago, the *Bulletin* reported on a bill that is still under the consideration of the State and Local Government Committee that would mandate all municipalities to package their budgets into certain formats and transmit them to the State Planning Office, for the stated purpose of promoting "transparency" in budgeting. Another bill discussed in that January 23 *Bulletin* that has received a favorable Committee report would mandate the replacement of certain types of firefighter turnout gear.

Nine months ago, the Legislature mandated the implementation of "gifted and talented" programs throughout K-12 education without even acknowledging it as an unfunded mandate, and that was after the Education Committee had been informed by the Legislature's nonpartisan legal analysts that the bill was, in fact, a new state mandate.

The latest unfunded state mandate to come up for consideration this legislative session is not coming from the Legislature, at least not directly. It's coming from the Board of Boilers and Pressure Vessels, which is one of the 31 occupational licensing boards that are organized within (and staffed by) the Department of Professional and Financial Regulation.

The Board of Boilers is poised to adopt a set of rules that will require all municipalities that have buildings containing heating boilers to cause some of their staff to become licensed boiler operators and to employ those staff to physically inspect the operation of all heating boilers in municipal and school buildings on periodic 24 hour or weekly rotations, depending on the size of the heating boiler.

MMA, the Maine School Management Association and municipal officials testified in opposition to the proposed rules on Thursday this week. From the municipal perspective, the proposed rules represent a discriminatory, unnecessary, unfunded state mandate.

**Discrimination.** The foundation of the proposed rule is a very old state law, which flatly exempts all steam heating boilers, hot water heating boilers and hot water supply boilers from the jurisdiction of the Board, *except for boilers located in schoolhouses or owned by municipalities*. There is no coherent public policy justification for this discrimination. If the jurisdiction of this "Boiler Board" should apply for reasons of

*(continued on page 2)*

## LPC Meeting Cancelled

The next meeting of MMA's 70-member Legislative Policy Committee (LPC), scheduled for next Thursday, February 12, has been cancelled.

No bills of municipal interest have been printed since the LPC last met on January 15th. There is nothing substantive to report on any tax reform proposal being developed by the Legislature, and Governor Baldacci's proposal to repeal the personal property tax has yet to be presented to the Legislature. Similarly, the supplemental budget for fiscal year 2005, which would include the Governor's proposed funding level for K-12 education, has yet to surface.

A convening of the LPC could not be productive without these proposals to work with. It is anticipated that the next-scheduled meeting of the LPC, set for March 11th, will have a full agenda.

## MARCH (cont'd)

public health and safety to town buildings and schoolhouses, that jurisdiction should be applied to thousands of other places of public accommodation (nursing homes, theaters, restaurants, shopping malls, etc.). By neglecting to make recommendations to the Legislature to correct the obvious flaw in the underlying law, the Board is tacitly supporting the discriminatory public policy that is driving its regulatory products, the fees from which are supporting its enforcement bureaucracy.

**Unnecessary.** It is our understanding that the incidence of personal injury or death in the modern era related to failures of conventional low-pressure hot water heating boilers in municipal buildings is next to zero. There are some property damage claims, to be sure, but it is clearly not the case that the public policy driving this regulatory mandate is to protect towns and schools from some incidental property damage. The only possible foundation for these unwelcome rules is a clear threat to public health and safety, and the presence of such a threat is unsupported by the evidence.

**Unfunded mandate.** Even small communities can have multiple low pressure heating boilers in several buildings – the town office, the schools, the library, the fire station, and the community center. Most of these boilers are the same general size as the heating boilers in a single family home or apartment building. Maine's larger communities can easily have a couple of dozen boilers to manage. The rules being proposed by the Board will have direct financial consequences on hundreds of municipalities, hundreds of schools, and hundreds of thousands of property taxpayers throughout the state. The constitutional definition of a state mandate is a required modification of a local government's activities that will necessitate an additional expenditure of resources, and these rules clearly meet that definition.

MMA respectfully requested that the Board go back to the drawing board with respect to the heating-boiler elements of the proposed rules. An objective analysis should be conducted to determine the real threat, if any, to public health and safety presented by the presence of conventional low-pressure hot water heating boilers in *all places* of public accommodation. According to the conclusions of that objective analysis, the statutory and regulatory scheme regarding those boilers should be rewritten. In the meantime, the Board's requirements regarding the operational licensing and attendance of low pressure heating boilers should be suspended.


**Legislative Bulletin**

A weekly publication of the Maine Municipal Association throughout sessions of the Maine State Legislature.

Subscriptions to the *Bulletin* are available at a rate of $20 per calendar year. Inquiries regarding subscriptions or opinions expressed in this publication should be addressed to: *Legislative Bulletin*, Maine Municipal Association, 60 Community Drive, Augusta, ME 04330. Tel: 623-8428. Website: www.memun.org

**Editorial Staff:** Geoffrey Herman, Kate Dufour, Jeff Austin, and Laura Veilleux of the State & Federal Relations staff.


# Voting for 17 Year Olds

Since the partisan breakdown over the enactment of the FY 04 supplemental budget last week, Republicans and Democrats can't seem to agree on many issues. Taking this partisan mood into consideration, it is unlikely that many initiatives needing a two-thirds majority vote will succeed. In some cases, however, the political atmosphere has not slowed progress. Instead, the lack of bipartisan support appears to have ignited legislator creativity.

On Wednesday of this week, the House illustrated its ingenuity as it enacted an amended version of LD 640, RESOLUTION, *Proposing an Amendment to the Constitution of Maine to Reduce Voting Age Qualifications by 12 Months,* by a margin of 74-67.

As originally proposed, the resolution, sponsored by Rep. Glenn Cummings (Portland), would have sent out to voters a proposed amendment to the state's Constitution that would reduce the minimum voting age from 18 years of age to 17. Any legislation proposing a constitution amendment must receive support from a super majority of the members in the House and Senate. Recognizing that it would be difficult to receive support from two-third of both bodies, the Legal and Veterans Affairs Committee amended the bill to circumvent the need for a constitutional amendment.

As amended, the bill changes state laws to allow a 17 year old who will be 18 years old on or before the November general election to participate in the state's primary election held in June. While the qualifying 17 year old has a say in who will vie for a seat in the Maine House or Senate, that person would be prohibited from participating in any other "piggyback" election issues (e.g., municipal referenda, state bond questions, etc.) that may also be decided at the June election.

While municipal election personnel have no objections to seeking an amendment to Maine's constitution allowing 17 year olds to vote, they are concerned with the amended version of LD 640. Although not explicitly required in the bill, to implement the change, municipal election officials would effectively be required to create two separate voter lists. One voter list for qualifying 17 year olds limited to cast votes in the state primary election and a second voter list of voters eligible to vote on all issues. It has also come to light that municipalities utilizing electronic voter registration software might incur some programming costs. Some municipal election officials believe that existing systems will need to be reprogrammed to allow for the generation of lists that appropriately identify eligible voters according to the criteria proposed in the bill.

*(continued on page 3)*

# Excise Tax and Big Rigs

Annually, the Transportation Committee deals with at least one bill that directly or indirectly has an impact the motor vehicle excise tax laws. Nearly every time the issue is addressed, several questions are raised, solutions for addressing concerns are proposed and general opinions are offered on the benefits and problems with the existing excise tax system.

At a public hearing on Tuesday of this week, the excise tax was once again at the center of attention as the Transportation Committee heard testimony on LD 1700, *An Act to Amend the Motor Vehicle Laws.* As expected, many members of the Committee asked questions about the system and received several different responses. Unfortunately, some of the responses provided were misleading or incorrect.

For the record, motor vehicle owners are assessed an excise tax for the privilege of operating vehicles over Maine roads. The excise tax is assessed in lieu of a personal property tax and therefore municipalities are not required to spend the revenues solely for road maintenance. The municipal right to use excise tax revenues for a variety of municipal purposes, just as property taxes may be used, is protected in Maine's Constitution.

In Part IV, Section 19 of Maine's Constitution, revenue from fees, excise and license taxes relating to registration, operation and use of vehicles on public highways are to be expended solely for maintenance and repairs of public highways, *provided that those limits do not apply to revenue from an excise tax on motor vehicles imposed in lieu of the personal property tax*.

The collection of excise tax is important to municipalities, because it helps to reduce the burden on property taxpayers. In 2002 for example, the excise tax revenue raised relieved property taxpayer burden by $170 million, a benefit greater than the $144 million municipalities received from both the revenue sharing and homestead exemption property tax relief programs combined.

Although the excise tax was originally assessed on the basis of the sales price, it is now assessed on the "maker's list price" so that the tax would be uniformly applied and not assessed inequitably on the basis of unrelated variables such as the time of year of purchase, the place of purchase, or the purchaser's skills at negotiating prices.

The only exemption to a list-price assessing system is on the assessment of excise tax for commercial vehicles weighing more than 26,000 pounds. The excise tax on the big trucks is calculated on the basis of the sales price. The loss of excise tax revenue associated with this unique assessing calculation is reimbursed to the municipality under the state's Municipal Excise Tax Reimbursement Fund.

At least that is how the commercial vehicles excise tax program is currently working.

LD 1700, sponsored by Sen. Pamela Hatch (Somerset Cty.), makes several changes to motor vehicle laws, but the most controversial elements of the bill impact the way excise taxes are assessed on commercial vehicles. As proposed, the bill would limit the benefit of the sales-price based calculation to the big rigs that are less than 6 years old. Any big truck older than 6 years would be assessed an excise tax based on the manufacturer's retail price.

According to the Bureau of Motor Vehicles, the change limiting participation is necessary because the Bureau is not appropriately staffed to run the program as it is currently designed. Only by limiting the participation in the program can the Bureau of Motor Vehicles continue to properly support the program with existing resources.

Although at the public hearing the state supported the change, the commercial trucking industry opposed the change and municipalities took a "neither for nor against" position on the bill, the testimony was generally similar. Representatives from each of the interested parties expressed a willingness to work together to create an alternative benefiting municipalities, the commercial vehicles industry and the state. However, that task has already proven difficult, if not impossible.

Without the support from the Transportation Committee to fund an additional position within the Bureau of Motor Vehicles, any change to the existing system will impact either the commercial vehicles industry or municipalities. In order to address the Bureau's concerns, the choices are to limit participation the program, which results in an increase to the excise taxes paid on commercial vehicles, or to limit the number of years municipalities are reimbursed for the loss excise tax revenue, which results in increase pressure on the property taxpayer.

Although MMA will continue to work with interested parties, under no circumstance will municipal officials support a solution to shift commercial vehicle excise taxes or the state's cost of the program to the property taxpayer. Any loss of motor vehicle excise tax revenue will result in an unacceptable property tax increase. An increase that Maine's property taxpayers cannot afford.

The work session on LD 1700 has not been scheduled.

## *VOTING (cont'd)*

During the House debate, it became clear that the Legislature believes that reducing the voting age from 18 to 17 years of age, for state primary elections only, would foster lifelong participation in elections and instill a sense of belonging that could potentially reduce the massive out-migration of Maine's youth.

Although some members of the House raised concerns about the impacts the change would have on municipalities, that issue was quickly deemed insignificant. Rep. Cummings suggested that the municipalities "can figure out" how to make the changes work.

The issue is now tabled in the Senate.

# Harbormaster Certification Required

The Legislature's Marine Resources Committee, by a vote of 5-4 is recommending passage of LD 1680, *An Act to Establish Harbor Master Standards and Course Requirements*. The bill was sponsored by Senator Karl Turner (Cumberland Cty.) on behalf of the Maine Harbormasters Association (MHA). The MHA's president and vice-president, harbor masters from Scarborough and Falmouth, spoke on behalf of the bill.

The bill, as amended by the Committee, will require individuals to be certified in order to serve as harbor masters. Certification will require completion of a "basic" harbor master course within a year of appointment and an advanced/update course every three years thereafter. Technically, these courses do not yet exist, but it is likely that they will be based on existing annual courses offered by the MHA at the Maine Maritime Academy.

Furthermore, in an effort to avoid the unfunded mandate label, the committee voted to require that the harbor master be individually responsible for payment of the course fees (and any attendant costs such as meals and lodging, since the course covers three days). The fees are presumed to be around $50 per year. The costs to the municipalities of meals, lodging, wages and travel compensation will vary. Whether or not this legislative technique of declaring the mandated training fees to be the responsibility of the municipal employee rather than the municipality will work to end-run the mandate provision of the constitution, which is supposed to be interpreted liberally, is unclear.

MMA's policy committee voted to oppose the bill and MMA testified against it. The testimony made clear that municipal officials are fully capable of deciding what type and amount of training is appropriate for the harbor master position. Harbor master duties vary widely across the state. Some harbor masters are basically police officers who are authorized to carry weapons and make arrests. Others are part-time volunteers who primarily manage moorings. Since the job duties are established in large part by local ordinance rather than state law, town officials should decide the qualifications for the job.

Several members of the committee felt that since harbor masters often enforce the state's watercraft law, all harbor masters should be required to attend basic training. That argument makes sense on its face, but the hearing and subsequent work session failed to produce any testimony or evidence of any kind to suggest the current system isn't working perfectly well. Harbor masters have been enforcing the state's watercraft laws to varying degrees for years. No one had any evidence that the current system wasn't working. If the system was broken, a proposal to fix it might be more understandable.

The Town of Addison has appointed four harbormasters. One of them, a volunteer named Oscar Look, Jr., manages Addison's year round access point. Mr. Look attended the harbor master training course many years ago and found it to be a positive experience. However, he disagrees that "refresher" courses every three years would help him, or the people of Addison. Further, if the state were intent on going down a path of "certification" he would seriously consider ending his 15+ year career as a volunteer.

In the end, vague arguments by the harbormaster proponents about getting everyone "on the same page" seemed to carry the day. The success of that argument is surprising when the contents of that "page" (i.e., the substance of the training programs that MHA wants to mandate) are currently blank and the contents of the existing course were not clearly presented to the committee.

Another surprisingly effective argument in support of the bill was the specter of terrorism in the harbors. While increasing harbor security is a shared concern, it is a marked change in state policy to begin to rely on harbormasters to provide homeland security functions. If the state is concerned about increasing harbor security, it should increase its funding for the state marine patrol which is directly responsible for patrolling the State's coastline.

The training program offered by MHA is by all accounts very good. MMA, which offers many training courses itself, fully supports and encourages municipal employees including harbor masters to attend training courses that are available. Yet, requiring state certification for all of Maine's harbor masters, without any showing of need and without any state financial support for those harbor masters, does not appear necessary at this time.

# Zoning Strip Clubs

On Tuesday, the Legislature's Business Research and Economic Development Committee (BRED) heard testimony on LD 1801, *An Act to Control Adult Entertainment Establishments*. The bill, which was only a "concept draft" and therefore did not propose specific legislation, was offered by Representative Ross Paradis (Frenchville). The bill called for the state to take two actions: license adult entertainment establishments, and establish statewide zoning setback standards. MMA's Legislative Policy Committee opposed the bill because of its preemption of home rule authority regarding zoning decisions.

It appears that the bill stems from a single incident in Brewer. The facts of the Brewer case are a little muddled. What is fairly clear is that Brewer has long attempted to establish strict set back requirements of the type the LD 1801 promotes. Nevertheless, an adult entertainment establishment was able to open its doors close to a church and LD 1801 is the result.

MMA testified that its members generally support zoning setbacks for adult entertainment establishments. The objection to the bill is the underlying assertion that town officials are

*(continued on page 6)*

# Recycling Computers and TVs

The Department of Environmental Protection (DEP) submitted its report on the recycling of cathode ray tubes (CRTs) to the Natural Resources Committee this week. The Committee chose to report out the draft legislation that is contained in the report, with one amendment. That legislation will get printed and a public hearing and work session will follow.

As many municipal officials are aware, the state has banned the disposal of household CRTs (primarily TVs and computer monitors) by means of incineration or landfilling beginning in 2006. The only choice will be to recycle these products. However, no recycling plan was established when the ban passed. The DEP report is that plan.

The plan relies heavily on manufacturer responsibility and, to a lesser extent than originally proposed, upon municipal responsibility. The municipal workload will increase under this bill. At this point, we are hopeful (but by no means assured) that the municipal financial exposure created by the legislation is contained.

Computer manufacturers will be responsible for devising a system of collection and recycling of their products beginning in 2006. The state will provide the funding for the recycling of the so-called "orphan" computers until 2012. "Orphan computers" are any computers that are disposed of between 2006-2012 for which the manufacturer no longer exists (e.g., a Wang computer).

In 2012, the computer manufacturers will be responsible for managing the recycling of both their own computers and any orphans. The method by which the manufacturers will choose to divvy up the orphan costs is left to those manufactures.

Televisions are handled only slightly differently because of their longer life spans and less valuable recoverable material. The state will provide the funding for the recycling of all televisions between 2006-2012. In 2012, a TV manufacturer's responsibility will be the same as computers – individual responsibility for its own TVs and collective responsibility for orphans.

The state is proposing to establish an advanced recovery fee (ARF) of $6.00 for every television sold in Maine between 2006-2012 in order to provide the revenue needed to cover the state's share of costs for recycling TVs and orphan computers during that period. In 2012, the $6.00 ARF would expire.

The plan, as described so far, only covers the recycling of CRTs *from the time these products are collected at consolidation facilities, not transfer stations*. Currently, there are only 12 facilities in Maine that are licensed, or could be licensed, as consolidation facilities. The legislation does not propose to mandate that any entity operate as a consolidation facility; DEP assumes that market forces will address this issue.

The rub from the municipal perspective is that the plan relies on (but does not obligate) municipal transfer stations to act as the first point of collection and storage. Furthermore, municipalities are to be responsible for the transportation of these CRTs from the transfer station to the 12 or so consolidation facilities.

As for the transportation obligation, the state is proposing to hold municipalities harmless for the costs of CRT transportation. It is currently the municipal obligation to provide for the disposal of household waste (municipal solid waste – MSW), including TVs and computers. Municipalities pay a certain amount per ton for the disposal of MSW. The report proposes to only expose the municipalities to CRT transportation costs up to their existing MSW disposal rate. If it costs a municipality more to have CRTs transported to a consolidation facility than it does to have it hauled as MSW, then the state promises to cover the difference. While the devil is in the details on the actual administration of this concept, it is potentially workable.

A second issue from the municipal perspective is the potential for DEP to increase handling and storage regulations for transfer stations that choose to accept CRTs after 2006. Currently, household CRTs do not require any special handling rules (such as the Universal Waste rule - "UW") if they are completely segregated as residential-source CRTs only. If a transfer station mixes household CRTs with business CRTs, which is inevitable, the UW rules would apply.

The draft report states that existing rules are sufficient and that no rule changes are needed. Representative Saviello pressed the DEP to be flexible to accommodate retail establishments that may want to accept used CRTs as a marketing tool. MMA is urging the DEP to be flexible towards municipalities as well.

The last potentially troubling point was the committee amendment that was attached to DEP's draft legislation. That amendment prohibits towns from collecting fees from individuals who bring TVs and computers to a transfer station. These "end of life" (EoL) fees have been around for some time in many communities and cover actual municipal costs on a user-fee basis. That practice would be banned.

The idea is that the public should not be hit twice, once by state ARF when the TV is bought, and then again by the town when the TV is disposed. (It is unclear if the committee meant to limit the EoL ban to only TVs and not computers since there is no ARF on computers.) However logical this ban may be, it is astoundingly unfair.

The state doesn't want to tap its existing revenues to cover its new costs related to this program so it puts a new fee on TVs. Yet, the towns, which will also have increased costs, are prohibited from using an existing municipal revenue source to cover its increased costs or otherwise implement a user-fee system.

The issue of safe disposal of CRTs will not go away if nothing is done. The disposal ban still looms, and the public expects transfer stations to accept broken TVs and computers. The DEP plan is generally headed in the right direction. It appropriately places the bulk of the burden on the manufacturers of these products who profit from their sale. Yet, it also places new burdens on towns without clearly protecting them from increased costs. If the towns could be more assured that this plan does not become another unfunded mandate, it may just work.

## LEGISLATIVE HEARINGS

***Monday, February 9***

**Utilities & Energy**
**Room 209, Cross State Office Building, 10:30 a.m.**
**Tel: 287-4143**
LD 1692 – An Act To Enhance Pine Tree Development Zones.

***Tuesday, February 10***

**Judiciary**
**Room 438, State House, 1:00 p.m.**
**Tel: 287-1327**
LD 1765 – An Act To Clarify the Responsibilities under the Adult Protective Services Act.

**Taxation**
**Room 127, State House, 1:00 p.m.**
**Tel: 287-1552**
LD 1824 – An Act To Provide Property Tax Relief to Maine Homeowners.

***Wednesday, February 11***

**Taxation**
**Room 127, State House, 1:00 p.m.**
**Tel: 287-1552**
LD 1763 – An Act To Promote Responsible Pet Ownership.

***Thursday, February 12***

**Business, Research & Economic Development**
**Room 208, Cross State Office Building, 1:00 p.m.**
**Tel: 287-1331**
LD 1663 – An Act To Provide Assistance to Municipalities Regarding Downtown Rehabilitation Building Codes.

**Judiciary**
**Room 438, State House, 2:00 p.m.**
**Tel: 287-1327**
LD 1822 – An Act To Increase Access of Domestic Violence Victim Support Agencies to Certain Information.

**Labor**
**Room 220, Cross State Office Building, 1:30 p.m.**
**Tel: 287-1333**
LD 1815 – An Act To Establish the Maine Jobs, Trade and Democracy Act.

## ZONING (cont'd)

incapable of making these zoning decisions. Without commenting on the facts of the Brewer case, the legislative standard for removing local control over an issue from all towns can't be as low as the fact that some people are unhappy with one decision in one municipality.

Furthermore, it would be very difficult for the state to agree to a standard setback distance (200', 500', 1000'). Even if the state were able to agree on a standard setback, towns would want more control over where these establishments would go (i.e. further limit them to industrial zones) and additional zoning decisions would be made locally. All of this leads one to conclude that if local zoning decisions are going to be made anyway, standardized setbacks are completely unnecessary.

The concerns raised at the public hearing by supporters of the bill were rational and reasonable. However, they seem more appropriate for planning board meetings or town meetings rather than statewide legislation.