

LEGISLATIVE BULLETIN

Alarming Bill on Lawsuits Against Municipalities

Bulletin 07, 2019 Session
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A troubling bill that could lead to significant legal costs for municipalities got a surprisingly close vote in committee last week, and there is a serious danger that the House could pass it.

HB 210 provides that a person “aggrieved” by a municipality’s enactment or enforcement of an unlawful ordinance or regulation may file suit against the municipality. If the court finds in favor of the petitioner, it will enjoin enforcement of the ordinance or regulation, issue a declaratory judgment declaring the ordinance or regulation void, award attorney fees and costs to the petitioner, and award actual damages up to \$100,000.

Depending on how the word “aggrieved” is interpreted, the bill is either redundant or unconstitutional in part, but it may still create problems for municipalities.

Under existing law, anyone who is personally affected by an ordinance or regulation already may seek a declaratory judgment as to its validity. Further, under Part 1, Article 8, of the New Hampshire Constitution (as amended in 2018) and RSA 491:22, a taxpayer may seek a declaratory judgment on a local ordinance or regulation that involves the spending of public funds—that is, the taxpayer has “standing” to challenge the law. If the ordinance or regulation does not involve public funds, anyone who is not personally affected does not have standing to challenge it, and the New Hampshire Supreme Court has held that the legislature cannot create standing in such cases. In short, someone who has standing has a remedy already (so the bill is redundant), and someone who *doesn’t* have standing can’t be granted standing (so the bill is unconstitutional if it is read to grant standing in those cases).

So far, then, the bill does nothing. However, in those “redundant” cases where someone does have standing, the bill creates a problem, because it provides for an automatic award of attorney fees if the plaintiff prevails. Ordinarily, attorney fees and costs are awarded to a prevailing party only in very specific circumstances, typically when the losing party’s position was frivolous or taken in bad faith.

INSIDE THIS ISSUE

Water Quality Standards	2
Mini Davis-Bacon	3
Retirement Contribution	3
State Aid Grants	4
Utility Valuation	4
Hotel Occupancy Fee	5
DES Water Quality Rules	5
House & Senate Calendars	6
NHMA Events	7

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(Municipal Liability— Continued from Page 1)

If a municipality takes an absurd position in litigation, then it *should* have to pay attorney fees—and it already would under existing law. But most municipal officials are not legal experts, and they do their best to follow the law. Municipalities (and taxpayers) should not be punished for errors made in good faith. A business that loses a lawsuit is not required to pay the plaintiff’s attorney fees; for that matter, the state is not required to pay attorney fees when it loses a case. So why would the legislature impose such a penalty on local government?

We anticipated that the House Municipal and County Government Committee would support municipalities and vote easily to kill **HB 210**, but the committee deadlocked, 9-9, on the bill, so it will go to the floor with no recommendation **next Thursday, February 14**. ***Please make sure your representatives know that the bill will cost municipalities significant money in legal fees, and ask them to kill HB 210.***

SB 287 Proposes Stricter Water Quality Standards

On **Tuesday, February 12, at 10:00 a.m., in State House Room 103**, the Senate Energy and Natural Resources Committee will hold a hearing on **SB 287**, which directs the New Hampshire Department of Environmental Services (NHDES) to revise the water quality standards for certain perfluorochemicals referred to as PFCs by setting standards at significantly lower levels than the department has proposed. (See article later in this Bulletin.) For example, the standard for a combined level of certain PFC compounds would be 23 parts per trillion under **SB 287**, while the department’s proposed standard is 70 parts per trillion. To put the “parts per trillion” in perspective for those of us who do not regularly deal with such a concept, this has been described as the difference between 23 grains of sand versus 70 grains of sand in an Olympic-size swimming pool.

The fiscal note for **SB 287** indicates that the increased costs associated with the bill are indeterminable. However, NHDES was able to estimate some potential impacts of the bill, providing low and high estimates for both capital and operational costs for treatment, wastewater disposal to groundwater, landfill sites, and hazardous waste sites. The total of these estimates ranges from a **low of \$79 million to a high of \$138 million** – with even the high end likely to be a conservative estimate in our opinion. How those costs are to be funded is not addressed in the bill.

Numerous bills last year attempted to legislate water quality standards, but were killed in favor of **SB 309**, which required NHDES, by January 1, 2019, to initiate rulemaking for PFCs based on health risk assessments and by considering the ability to detect and remove the contaminant along with the costs and benefits to affected parties. NHMA and others supported the standard-setting process enacted in **SB 309** along with the necessary resources it provided to NHDES to establish standards based on peer-reviewed scientific data regarding health risks and a comprehensive understanding of the impact and practicality of the recommended standards. NHDES is in the early stages of the standard-setting process enacted in **SB 309**, a process we continue to support.

“Mini Davis-Bacon” Bill

The [Senate Commerce Committee](#) has a hearing scheduled next week on [SB 271](#), which would require payment of the “minimum prevailing hourly rate of wages and benefits for work of a similar character” for any public works construction project for the State of New Hampshire. This is a state-level version of the federal Davis-Bacon Act, which requires payment of the prevailing wage on public works projects using federal funds.

It is unclear whether [SB 271](#) would apply to municipal public works projects. Most of the bill’s language refers only to the [state](#) or its “agency, officer, board commission, or authorized agent,” and it contains an express exemption for county and municipal projects. However, that exemption is somewhat unclear. It reads:

This chapter shall not apply to workers who are employed on public works construction projects for county or municipal bodies, or any political subdivision or the agencies thereof, *unless such a public works construction project is funded wholly or in part with state-administered funds* that meet or exceed the threshold for executive council approval for the relevant state contract.

(Emphasis added.)

We are not certain how the term “state-administered funds” will be interpreted. If a municipality paves a road using money from its highway block grant, the project is “funded wholly or in part” by money from the state, but is it “state-administered”? If a town constructs a wastewater treatment facility in anticipation of receiving a state aid grant for a percentage of the cost, does that count? We believe the answer to both questions is no—some of the money *comes* from the state, but in both cases it is administered by the town. On the other hand, when a local bridge is replaced or renovated using state bridge aid, the town pays 20 percent to the state and the state manages the project; that seems like a project that is funded in part with “state-administered funds.”

To the extent the bill does apply to municipal projects, we would be concerned. Compliance would impose a significant administrative burden, but the bigger concern would be the cost to taxpayers. The more municipalities have to pay for construction costs, the fewer roads, bridges, and wastewater facilities they will be able to build.

The hearing is scheduled for **Tuesday, February 12, at 1:00 p.m., in State House Room 100**. We will follow the bill closely, and we encourage interested members to do so as well.

State Contribution for Retirement Costs

On Tuesday the House Executive Departments and Administration Committee voted 15-5 to recommend Ought to Pass on [HB 497](#), an **NHMA policy bill** that restores a portion (15%) of the state contribution toward the New Hampshire Retirement System costs for teachers, police, and firefighters. As we have noted in previous Bulletins, this will relieve local governments (cities, towns, counties, and school districts) of approximately **\$42 to \$43 million** in retirement costs annually in fiscal years 2020-2021. A chart for [police/fire](#) and a separate chart for [teachers](#) show the actual state contributions in fiscal year 2011, totaling \$44 million on a town-by-town basis, and provide a *reasonable estimate* of the impact [HB 497](#) would have in reducing retirement costs for each municipality.

(Retirement Contribution— Continued from Page 3)

HB 497 will go the full House for a vote very soon and, if passed, will then go to the House Finance Committee for funding consideration. Strong support in the House on this initial vote will send a powerful message to the Finance Committee regarding the importance of restoring a portion of the state retirement contribution. Please urge each of your representatives to support the Committee’s recommendation of **Ought to Pass on HB 497**.

Senate Committee Supports Wastewater SAG

On Tuesday, the Senate Energy and Natural Resources Committee held a hearing on [SB 254](#), an **NHMA policy bill** that appropriates \$3,652,347 in fiscal year 2020 and \$3,781,024 in fiscal year 2021 to fund the state share of 70 eligible and completed wastewater projects in 35 municipalities across the state under the state aid grant (SAG) program. [Click here](#) for the list of projects that would be funded by these grants. After hearing testimony from only one member of the public, the chair asked the remaining dozen-plus supporters who had signed up to speak to submit their written testimony instead, so the hearing could be closed and the committee could go into executive session for a vote on the bill – which it did, unanimously recommending Ought to Pass. We thank the many municipal officials who came to testify.

SB 254 now goes to the full Senate for a vote, and if passed, will go to the Senate Finance Committee for funding consideration. Much like the retirement contribution bill mentioned above, a strong initial Senate vote will help garner support as this bill proceeds to the Finance Committee. **Please urge your Senator to support the committee recommendation of Ought to Pass on SB 254.**

Tame Hearing on Utility Valuation

The House Ways & Means Committee heard testimony for close to two hours this week on [HB 700](#), which would establish a statutory formula to determine the value of public utility property for local property tax purposes. About a dozen people testified—legislators from both parties, members of the assessing standards board, assessors, municipal representatives, and utility representatives. In what was almost certainly an unprecedented spectacle in this arena, no one disagreed about anything significant.

Incredibly, no one opposed the bill. NHMA expressed its “tentative, cautious, lukewarm non-opposition,” while others were ever-so-slightly more exuberant. All agreed that the bill was far from perfect and made no one happy, but that maybe—just maybe—they could live with it. There are a few details that need to be addressed, but there seemed to be no significant disagreement on those, either.

The bill was described in [Legislative Bulletin #5](#). As we said then, we are not assessors, so we strongly encourage local officials to review the bill with their assessors to understand how it will affect their municipalities. The train is leaving the station, and with no one opposing it, **HB 700** will soon be picking up steam. If you have any concerns about the bill, please let us know, and register your concerns as well with members of the [Ways & Means Committee](#).

Local Option Hotel Occupancy Fee

On Tuesday, the House Municipal and County Government Committee heard lengthy testimony on [HB 641](#), an **NHMA policy bill** that authorizes municipalities to assess and collect a local option hotel occupancy fee. This is certainly not an option that all, or even many, municipalities would exercise even if allowed to do so. However, the municipal officials who testified in support of the bill made compelling arguments as to why collection of a hotel occupancy fee will help ease the financial burden placed on their property taxpayers by added public safety and infrastructure costs associated with tourists or with significant growth in their daily “population” from serving as a regional economic hub.

Vermont has a similar local option provision, adopted by about a dozen municipalities, which has had no negative impact on the competitive nature of its tourism industry, contrary to what one opponent of **HB 641** insisted. With the decline in the percentage of the meals and rooms tax revenue distributed to municipalities over the past ten years, along with the suspension of revenue sharing, alternative local option revenue streams are needed to allow municipalities to meet their service and infrastructure needs without relying solely on property taxes. Again, while **HB 641** may not be of interest to most municipalities, we nevertheless urge the Municipal and County Government Committee to recommend Ought to Pass on **HB 641** to assist those communities seeking the help this bill will provide.

NHDES Proposes Water Quality Standards

In last week’s [Bulletin](#), we reported that the New Hampshire Department of Environmental Services (NHDES) is proposing new and amended administrative rules regarding water quality standards, monitoring, compliance, reporting, and public notification for certain perfluorochemicals referred to as PFCs. Click here for a copy of the [proposed administrative rules](#) and the [Summary Report](#) documenting how the NHDES arrived at the recommended standards.

As we noted last week, the administrative rulemaking notice states that the proposed rules do not mandate or assign any new, expanded or modified programs or responsibilities to any political subdivision in such a way as to necessitate additional local expenditures by the political subdivision in violation of Part I, Article 28-a of the New Hampshire Constitution. However, page 11 of the report includes estimated costs for public water systems to comply with the proposed standards based on existing sampling data available to NHDES.

Public hearings on the proposed rules are scheduled at the following three locations. The deadline for submission of written comments is **4:00 p.m. on Friday, April 12, 2019**.

- Monday, March 4, 2019 at 5:30 p.m.—All Purpose Room, James Masticola Upper Elementary School, Merrimack, NH
- Tuesday, March 5, 2019 at 1:00 p.m.—Auditorium, NH Department of Environmental Services, 29 Hazen Drive, Concord, NH
- Tuesday, March 12, 2019 at 5:30 p.m.—NHDES Pease Field Office, Room A, 222 International Drive, Suite 175, Portsmouth, NH

Note: Public hearings on related proposed rules [Env-Wq 402 Discharges to Groundwater of Wastewater Containing Certain PFCs](#) and [Env-Or 603 Amendment to Ambient Groundwater Quality Standards](#) will be held at the same times and locations indicated above.

HOUSE CALENDAR

TUESDAY, FEBRUARY 12, 2019

EXECUTIVE DEPARTMENTS AND ADMINISTRATION, Room 306, LOB

10:30 a.m. **HB 667-FN**, relative to testing wells before issuing a certificate of occupancy.

RESOURCES, RECREATION AND DEVELOPMENT, Room 305, LOB

10:00 a.m. **HB 261**, requiring the commissioner of the department of environmental services to revise rules relative to arsenic contamination in drinking water.

2:00 p.m. **HB 192-FN-L**, abolishing fluoridation in water.

SCIENCE, TECHNOLOGY AND ENERGY, Room 304, LOB

3:00 p.m. **HB 464**, relative to the definitions of solar energy systems and wind-powered energy systems for assessed value of real estate exemptions.

TRANSPORTATION, Room 203, LOB

10:00 a.m. **HB 674-FN**, relative to the impoundment of motor vehicles.

11:00 a.m. **HB 639**, relative to speed limits in cities and towns.

WEDNESDAY, FEBRUARY 13, 2019

EDUCATION, Rooms 210-211, LOB

9:00 a.m. **HB 101**, relative to regulating possession of firearms in a school district.

LABOR, INDUSTRIAL AND REHABILITATIVE SERVICES, Room 307, LOB

10:30 a.m. **HB 406**, relative to reporting and investigation of serious injuries and death in the workplace.

RESOURCES, RECREATION AND DEVELOPMENT, Room 305, LOB

1:00 p.m. **HB 543**, relating to the protection of wetlands.

1:45 p.m. **HB 326**, relative to the definition of prime wetland.

TUESDAY, FEBRUARY 19, 2019

ENVIRONMENT AND AGRICULTURE, Room 303, LOB

10:00 a.m. **HB 426**, establishing a committee to study allowing town clerks to accept proof of certain exemptions from the rabies vaccine for the purpose of registering dogs.

FINANCE JOINT WITH SENATE FINANCE, Rooms 210-211, LOB

10:00 a.m. Governor's budget presentation.

SENATE CALENDAR

TUESDAY, FEBRUARY 12, 2019

COMMERCE, Room 100, SH

1:00 p.m. **SB 271-FN-L**, relative to requiring prevailing wages on state-funded public works projects.

1:45 p.m. **SB 60**, relative to advance notice to hourly employees of work schedules.

TUESDAY, FEBRUARY 12, 2019 (Continued)

ENERGY AND NATURAL RESOURCES, Room 103, SH

- 9:45 a.m. **SB 163**, relative to permits for operation of solid waste management facilities.
10:00 a.m. **SB 287-FN**, requiring the commissioner of the department of environmental services to revise rules relative to perfluorinated chemical contamination in drinking water.

FINANCE, Room 103, SH

- 1:00 p.m. **SB 169**, relative to recovery of expenditures from the drinking water and groundwater trust fund.

TRANSPORTATION, Room 103, LOB

- 1:30 p.m. **SB 56**, establishing a committee to study motor vehicle registrations of active duty military personnel.
2:15 p.m. **SB 221**, establishing a commission to study highway fund revenue for hybrid and electric vehicles.

WEDNESDAY, FEBRUARY 13, 2019

EXECUTIVE DEPARTMENTS AND ADMINISTRATION, Room 101, LOB

- 9:00 a.m. **SB 174**, proclaiming an annual observance of Juneteenth.

WAYS AND MEANS, Room 100, SH

- 10:00 a.m. **SB 301-FN-A-L**, relative to the rates of the business profits tax and business enterprise tax, and relative to revenue sharing with cities and towns.

2019 Upcoming NHMA Workshops and Webinars for Members:

- Feb. 13: NHMA Webinar: Something's in the Air: Outdoor Wood Boilers and Open Burning Regulations
Mar. 13: NHMA Webinar: The Right-to-Know Law and Governmental Records
Mar. 26: Regional Right-to-Know Workshop—The Right-to-Know Law and Governmental Meetings (6:30-8:30 p.m.—Derry Municipal Center)

To register for an upcoming event, go to our website: www.nhmunicipal.org and scroll down on the left under CALENDAR OF EVENTS. Click on the green bar *View the Full Calendar* and go to the workshop or webinar you are interested in. For more information, please call NHMA's Workshop registration line: (603) 230-3350.