

LEGISLATIVE BULLETIN

Increasing Alarm About Constitutional Claims Bill

Bulletin 21 — 2019 Session
May 17, 2019

The House Judiciary Committee voted this week to recommend passage of **SB 36**, the bill providing that any government entity that deprives a person of rights secured by the New Hampshire Constitution will be liable to that person in an action for damages. By a 12-7 vote, the committee approved [an amendment](#) that replaces the entire bill, but only after narrowly rejecting, by a 10-9 margin, a further amendment supported by NHMA.

We wrote about this bill in [Legislative Bulletin #18](#), expressing concern that the bill would result in duplicative litigation when governmental conduct that violates a state statute might also be deemed to violate the state constitution. For example, the bill would allow someone filing a complaint under the Right-to-Know Law to add a claim for violation of Part 1, Article 8 of the New Hampshire Constitution, which guarantees public access to “governmental proceedings and records.”

There are any number of other existing cases that could be converted into constitutional claims under **SB 36**: employment discrimination claims, eminent domain appeals, zoning appeals, even road layout cases. **SB 36** guarantees (1) a jury trial and (2) in almost all cases, an award of attorney fees to a prevailing plaintiff, neither of which would otherwise be available in most of these cases, so they would immediately become more expensive.

NHMA’s proposed amendment is simple—it would add one sentence to the committee amendment: ***“This section shall not apply to any case in which the plaintiff has a separate statutory remedy.”*** This would avoid the multiplication of claims while still honoring the intent of the bill.

NHMA does not oppose the stated goal of the bill, which is to provide a remedy to someone whose state constitutional rights have been violated *when he or she has no other remedy*—such as a federal constitutional claim or a statutory or common law tort claim. The bill is intended, as several people stated at the committee hearing, to “fill the gap,” and “provide a key to the courthouse.” Our proposed amendment would accommodate that purpose. If the plaintiff had no other remedy, the amendment would

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allow application of the newly created constitutional claim, complete with jury trial and an award of attorney fees. Only in cases where the plaintiff *already has a remedy* would the amendment deny an *additional* claim.

Our concern about duplicative litigation is not something we have imagined, nor is it new. The New Hampshire Supreme Court recognized exactly the same concern over 30 years ago. When a town declined a request to lay out roads to benefit certain properties, the property owners appealed under RSA 231:34. In addition to the statutory remedy, they sought money damages for deprivation of their property rights under the New Hampshire Constitution. The supreme court declined to allow such a claim. Writing for a unanimous court, Justice David Souter stated:

We frankly fear, however, that provision of a *supplemental cause of action* to provide an additional remedy for a constitutional violation in these circumstances would inevitably lead to the conversion of every road dispute into a constitutional tort action. . . . Unlike the statutory appeal for layout, such a damages action would carry a *right to jury trial* and, hence, to a trial separate from the layout appeal. The likely *multiplication of litigation* resulting from a local squabble would be too high a price to pay for such a supplemental cause of action.

Rockhouse Mt. Property Owners Assoc. v. Town of Conway, 127 N.H. 593, 599 (1986) (emphasis added). Without our amendment, **SB 36** would accomplish by legislative action exactly what the supreme court declined, for sound public policy reasons, to do by judicial action.

The only objection we have heard to our proposed amendment is that the analogous federal statute, 42 U.S.C. § 1983, does not contain a similar provision. That is hardly persuasive. We think most legislators would agree that New Hampshire law doesn't always need to mimic federal law regardless of the merits.

We have one other concern about the bill. Under the committee amendment, a claim would be filed against a "natural person," not against a municipality or the state. This suggests that in all cases the lawsuit would be filed against the *individual municipal officials or employees* who were responsible for the claimed violation. The bill does provide for mandatory indemnification by the municipality, but that will be of little comfort to the newly elected zoning board member who finds himself named individually in a lawsuit claiming he violated the constitution by voting to deny a variance. As every municipal official knows, it is hard enough to find people to fill elected or appointed positions; the prospect of being sued individually for good-faith actions taken in the ordinary course of business is certain to drive more volunteers away.

This week's to-do list

- ✓ Contact your representatives and urge them to **support the floor amendment on SB 36**, relative to constitutional claims, and to **kill the bill if the floor amendment fails**.
- ✓ Ask your senator to **support a floor amendment to HB 616**, the retiree COLA bill, to have the COLAs paid by the state, and to **kill the bill if the floor amendment fails**.
- ✓ Repeat the first two items.
- ✓ Contact your senator if you are concerned about the costs of stricter arsenic standards under **HB 261**.
- ✓ Call the governor and ask him to sign **HB 409**, the municipal transportation improvement fee bill, and **HB 365**, the net metering bill.

All of this could be solved, or at least significantly mitigated, by the one additional sentence included in the amendment we proposed. That amendment will be offered again as **floor amendment #2033h** when the bill goes to the House **next Thursday, May 23**.

When **SB 36** comes up for consideration, the first item will be the committee amendment. Whether that passes or fails, the next item will be the floor amendment, and then the House will vote on the bill with whatever amendment(s) have passed. We are asking representatives to:

- Vote FOR the committee amendment (which is an improvement on the original bill); then
- Regardless of what happens with the committee amendment, ***vote FOR floor amendment #2033h. This is by far the most important message.***
- If the floor amendment passes, we do not object to passage of the bill as amended.
- ***If the floor amendment fails, then the bill must be voted down.***

Please contact all your representatives as soon as possible with the above message, and let them know how dangerous this bill is without the floor amendment. This is one of the most important votes for your city or town this year.

Property Tax Increases to Fund Retiree COLAs

On Thursday the Senate Executive Departments and Administration Committee voted 3-2 to recommend Ought to Pass on **HB 616**, which provides a 1.5 percent cost-of-living adjustment (COLA) to New Hampshire Retirement System (NHRS) retirees who have been retired at least 5 years on July 1, 2019. The cost of this COLA will be paid by increases in future employer contributions rates over the next 20 years and will result in increased property taxes. As we reported in [Bulletin #19](#), the cost to local government employers (cities, towns, school districts and counties) is estimated to be approximately **\$116.3 million**; the cost to the State of New Hampshire is estimated to be **\$26.7 million**, for a total cost of **\$143 million**.

At the committee meeting two weeks ago, a proposed amendment was distributed that would have provided a temporary supplemental allowance (TSA) of \$500 to each retiree with 20 years of creditable service who had been retired at least 5 years prior to July 1, 2019 with a pension of \$30,000 or less—to be paid from the state general fund, not by employers. This proposed amendment was identical to **HB 1756**, which passed in the 2018 session, provided a \$500 TSA to retirees last summer, and cost the state about \$8 million. Unfortunately, the TSA amendment was not brought forward at the committee meeting on Thursday, presumably due to the governor’s announcement earlier in the week supporting **HB 616** – which mandates increased employer costs to pay for the COLAs.

We have no issue with retiree COLAs. It’s how the COLA is funded that concerns us. If the state believes COLAs are important, why is it not willing to pay for them? According to the fiscal note on **HB 616**, the cost of the COLA, if paid by June 30, 2019 is **\$65 million**, an amount well below the anticipated June 30, 2019 year-end state surplus of **\$173 million to \$194 million**.

(Retiree COLAs— Continued from Page 3)

However, neither the governor or the House chose to make the COLA a budget priority by paying for it from anticipated state surplus, instead opting to charge local government employers over the next 20 years. As we have previously explained, paying for the COLA over time is very similar to paying a mortgage over time, which results in the total cost being much higher due to the effect of interest. This is why the cost of the COLA jumps from **\$65 million in 2019 to \$143 million** in total over the next 20 years.

We also understand lawmakers want to provide some monetary remuneration for retirees with low pensions. Funding a \$500 TSA, as was done last year, is a way to provide those with the lowest pensions *more* than a 1.5% increase, at a reasonable cost to the state. In fact, such a TSA could be provided each year of the upcoming biennium for less than \$20 million of state funds, without charging property taxpayers over the next two decades for **\$116 million**.

Finally, **HB 616** in its current form is very likely an unconstitutional unfunded mandate, as explained in our April 27 [Article 28-a letter](#) to the committee.

Please contact your [senator](#) and urge him or her *not* to support the committee recommendation of Ought to Pass on **HB 616**, but instead **support a floor amendment** that provides a payment to retirees funded by the state. In the absence of such a floor amendment, urge them to avoid the unfunded mandate on property taxpayers by ***killing the bill***.

Stricter Arsenic Standard

On Tuesday the Senate Energy and Natural Resources Committee voted unanimously to recommend [amendment 2019-1913s](#) to [HB 261](#), which requires the Department of Environmental Services (DES) to lower both the maximum contaminant level (MCL) in drinking water and the ambient groundwater quality standard (AGQS) for arsenic from 10 parts per billion (ppb) to no more than five ppb. The amendment requires the effective date of the stricter arsenic standard to be no sooner than July 1, 2021. Our understanding is that at least a two-year period before stricter standards take effect is consistent with what the federal Environmental Protection Agency provides when establishing new or revised MCLs, and in some cases the delay may be up to 6 years.

The amendment also clarifies that competitive grants and/or loans from the Drinking Water and Groundwater Trust Fund may be available to assist with the capital costs of compliance with new or revised MCLs or AGQS. However, as we have explained in previous *Bulletins*, the fiscal impact of the stricter arsenic standard will increase system operation and maintenance costs, since the treatment media will need more frequent replacement. Such maintenance costs are not eligible for trust fund grants or loans. Additionally, it is anticipated that municipal landfills and wastewater facilities will also see increased costs to comply with the stricter arsenic standard.

Analysis of the estimated costs and estimated potential health benefits (6 to 19 fewer bladder/lung cancer cases and 4 fewer skin cancer cases in New Hampshire over the next *70 years*) as a result of implementing the stricter arsenic standard is detailed in the DES [Review of the Drinking Water MCL and AGQS for Arsenic report](#) issued December 31, 2018.

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HB 261 with the recommended committee amendment will go to the full Senate for a vote next week. Please contact your senator if you have concerns about this bill.

Help Push Net Metering Over the Finish Line

As we reported last week, the House concurred with the Senate’s amendment on [HB 365](#), the **NHMA policy bill** that increases the capacity limit for net metering projects to five megawatts. The bill could arrive soon on the governor’s desk. The governor vetoed a similar bill last year, and although the bill did garner solid veto-proof majorities in both houses this year, the many supporters of **HB 365** would prefer to avoid the need for another override campaign.

We know many local officials support this bill, and you know who you are. Please consider calling the governor’s office and urging him to *sign HB 365*.

Local Option Transportation Improvement Fee

On Wednesday the Senate voted 15 to 9 to pass [HB 409](#), the **NHMA policy bill** that increases the cap on the local option transportation improvement fee from \$5 to \$10. As we have explained in previous *Bulletins* (and contrary to some comments during debate on the Senate floor), revenue raised from this local option fee must be placed in a capital reserve fund, and can only be spent on transportation related projects or services after appropriation by the legislative body of the municipality. Additionally, RSA 261:153, VI specifically prohibits the money from being spent on non-transportation appropriations.

NHMA thanks the many legislators, local officials, and others who have diligently advocated in support of this local option fee increase over the past several years. **HB 409** now heads to the governor for final action. We encourage local officials to contact the governor and ask him to sign the bill.

Solid Waste Reporting Returns

It’s started, right on time. By “it,” we mean the Lazarus-like return of bills thought to be dead. In this case it is **SB 79**, the bill that requires municipalities to report annually on the amount of solid waste sent to landfills or incinerators, the amount recycled or otherwise diverted, and efforts to achieve source reduction, reuse, recycling, and composting. As we reported previously, NHMA had worked out an amendment with the Department of Environmental Services to address our concerns with the bill, and submitted it when the House Environment and Agricultural Committee had a hearing on the bill in April. That committee, however, decided to retain the bill, and that was that.

But that wasn’t really that. This week the Senate amended an unrelated bill, **HB 560**, which would have restricted the distribution of single-use carryout bags, by deleting the entire bill and substituting the text of **SB 79**, with [our amendment](#). The Senate then passed the bill. (“How can they do that?” you ask. “Isn’t that a non-germane amendment?” Perhaps, but under Senate rules, “The prohibition on non-germane amendments shall not apply in the case of a bill . . .

(Solid Waste— Continued from Page 5)

previously found ought-to-pass by the Senate being added to a subsequent bill” If that seems heavy-handed, don’t worry—the House has a similar rule.)

Here, then, is where we are. **SB 79** itself is still retained in the House Environment and Agriculture Committee, and it is not going anywhere this year. But **HB 560** now contains the **SB 79** language with our amendment. **HB 560** will now go back to the House, which presumably will be unhappy that the Senate (1) removed the carryout bag restriction that the House had passed and (2) passed the solid waste reporting language that the House committee had retained. The bill seems destined for a committee of conference.

HOUSE CALENDAR

TUESDAY, MAY 21, 2019

PUBLIC WORKS AND HIGHWAYS, Room 201, LOB

11:15 a.m. **SB 285-FN**, establishing a coastal resilience and economic development program.

SENATE CALENDAR

There are no hearings of municipal interest.

HOUSE FLOOR ACTION

There was no House floor action for the week.

SENATE FLOOR ACTION

Wednesday, May 15, 2019

HB 110-FN-A, relative to the cost of fiscal analysis of legislation relating to the retirement system. **Passed with Amendment.**

HB 128, establishing a committee to study veterans property tax credits and exemptions. **Passed.**

HB 149, relative to the apportionment of costs in cooperative school districts. **Inexpedient to Legislate.**

HB 272, relative to temporary workers. **Re-referred.**

HB 281, relative to flow devices designed to control beaver damming and minimize the risk of flooding behind an existing beaver dam. **Passed.**

HB 303, relative to certification of building code compliance inspectors. **Re-referred.**

HB 326, relative to the definition of prime wetland. **Passed with Amendment.**

HB 345, relative to certification of devices for the electronic counting of ballots. **Passed.**

(Senate Floor Action— Continued from Page 6)

HB 358, relative to combustion of wood residue at municipal waste combustors. **Inexpedient to Legislate.**

HB 384, relative to access to historic burial sites on state-owned land. **Re-referred.**

HB 407-FN, clarifying the non-taxability of certain telecommunications devices and equipment. **Tabled.**

HB 409, relative to the maximum optional fee for transportation improvements charged by municipalities when collecting motor vehicle registration fees. **Passed. NHMA Policy.**

HB 415, relative to the official ballot referendum form of town meetings. **Passed. NHMA Policy.**

HB 443, relative to municipal watering restrictions. **Passed with Amendment.**

HB 539-FN, establishing a committee to study the implementation of the One4All ballot in municipal elections. **Passed with Amendment.**

HB 560-FN, (New Title) relative to required reporting on waste reduction. **Passed with Amendment.**

HB 562, relative to the state building code. **Passed with Amendment. NHMA Policy.**

HB 582-FN, relative to the regional greenhouse gas initiative cap and trade program for controlling carbon dioxide emissions. **Passed with Amendment.**

HB 591, amending the laws governing OHRVs and snowmobiles. **Passed with Amendment.**

HB 592, relative to OHRV operation and license. **Passed with Amendment.**

HB 710-FN, relative to adoption of state building code and fire code amendments. **Passed with Amendment.**

2019 NHMA UPCOMING EVENTS FOR MEMBERS	
June 6	Municipal Trustees Training, Concord
June 13	2019 Fundamentals of Local Welfare
June 14	NHMA/NHMLA: Ethics for Municipal Attorneys
June 25	Municipal Trustees Training, Gorham
June 26	Webinar: 2019 Legislative Wrap-up

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.