

LEGISLATIVE BULLETIN

Retiree COLA to Cost Employers Over \$100 Million

Bulletin 18 — 2019 Session
April 26, 2019

On Wednesday the Senate Executive Departments and Administration Committee heard testimony 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 by July 1, 2019. We have previously reported that the cost to terminally fund this COLA is slightly less than \$77 million, which will be paid by increasing future employer contribution rates.

A recently revised fiscal note on [HB 616](#) states that the terminal cost is approximately \$75 million if employers pay the entire amount up front in fiscal year 2021. However, that is not how the COLA will be financed—it will be paid through increased employer contribution rates over the next 20 years. While the fiscal note indicates the annual cost to NHRS local government employers is \$4.3 million and \$4.5 million in fiscal years 2020 and 2021, respectively, that annual cost will be ongoing and increasing for 20 years. Very similar to a mortgage that is paid over time, resulting in the total cost's being much higher due to the effect of interest, the COLA will cost local government employers (municipalities, school districts and counties) far more than \$75 million—in fact, approximately **\$116 million**—due to the assumed payroll growth factor (an average of 3 percent) that is used in the actuarial computation of future pension liabilities. This ongoing increase in pension costs will result in increased property taxes.

NHMA testified about the true cost of the COLA and again expressed concern that financing retiree COLAs through increased employer contribution rates violates the unfunded mandate provision in Part 1, Article 28-a of the New Hampshire Constitution. We also pointed out that the 2017 [Decennial Retirement Commission Report](#) dated January 2018 (available at www.nhrs.org under the “Funding and Investments/Reports and Valuations” tab) recommended on page 39 that the legislature make a one-time payment of \$500 per retiree in 2018, *and whenever funding is available from the state general fund*, noting that such a payment creates no future obligation, and can be funded in the normal state budget process. From this recommendation it appears that the commission recognized that funding retiree COLAs from employer contributions would be an unconstitutional unfunded mandate.

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There are other options to assist retirees at the lower end of the pension pay scale, such as the \$500 payment that was made in 2018 and cost the state less than one tenth of what is proposed in **HB 616**. **Please contact members of the [Senate Executive Departments and Administration Committee](#) and urge them to avoid an unfunded mandate by changing the financing of retiree COLAs (or other less costly supplemental retiree payments) to state dollars rather than property tax dollars.** Also let your own [senator](#) know of your concerns with **HB 616**, as we expect the bill to be on the agenda for a Senate vote within the next few weeks.

Local Option Hotel Occupancy Fee

HB 641, an NHMA policy bill that allows municipalities to enact a local option hotel occupancy fee, is scheduled for a hearing before the Senate Election Law and Municipal Affairs Committee on **Wednesday, May 1, at 11:30 a.m., in LOB Room 102**. The bill authorizes municipalities to collect a local option occupancy fee of up to \$2 per room, or as a percentage of the price of the room not to exceed \$2 per night. The fee may not be assessed on rooms with an average daily price of \$40 or less. Revenues from the fee would be deposited in a capital reserve fund, tourism support fund, revolving fund, or other special revenue fund as authorized, and used to augment funding for the costs of municipal services associated with the increase in tourism and transient traffic.

In a town, adoption of this optional fee would be at an annual or special town meeting. Adoption in a city or charter town would be in accordance with the procedures provided in the city/town charter. In all cases, a public hearing is required before a vote by the legislative body.

Municipalities interested in assessing and collecting this optional occupancy fee are encouraged to testify at the hearing on Wednesday or provide written testimony in support of **HB 641** to the [Senate Election Law and Municipal Affairs Committee](#).

House Committee Unanimously Recommends Postponement Bill

On Thursday, the House Election Law Committee voted unanimously to recommend Ought to Pass on **SB 104**, the NHMA-supported bill preserving local authority to postpone town meetings and local elections. It will now go to the full House on the consent calendar.

This week's to-do list

- ✓ Urge your senator to oppose the unfunded mandate in **HB 616** (retiree COLA) and insist that any state-mandated COLA be paid for *by the state*.
- ✓ Ask members of the Election Law and Municipal Affairs Committee to support **HB 641**, the local option hotel occupancy fee. While you're at it, ask them to support **HB 409**, increasing the maximum local option municipal transportation improvement fee.
- ✓ Tell your representatives that towns already spend enough money on lawyers, and ask them to oppose **SB 36**.
- ✓ Sign up for one (or more) of the many NHMA workshops and webinars coming up in May.

Senate Passes Utility Valuation Bill

One of the more contentious chapters in the recent history of municipal legislation came to a quiet end, or near-end, yesterday, when the Senate passed [HB 700](#), the utility valuation bill, on an almost unanimous voice vote with no debate. Because the Senate made no changes to the bill, it does not need to go back to the House. It will go to the governor for signature, and we have every reason to believe he will sign it.

The bill will take effect 60 days after signature by the governor, and will apply to tax years 2020 and later. Every utility company is required to report to each municipality, by May 1 of each year (starting in 2020), the original cost and net book value of all assets it owns in the municipality. We strongly encourage assessors and other local officials to begin getting acquainted with the bill's provisions (if you're not already). If you have questions, we will answer them to the best of our ability; but the New Hampshire Association of Assessing Officials also has been following the bill very closely, and should be a good resource for assessors who have questions.

Local Option Funding for Transportation Improvements

On Thursday the Senate Election Law and Municipal Affairs Committee heard overwhelming testimony in support of [HB 409](#), an **NHMA policy bill** that would increase the cap on the local option transportation improvement fee from \$5 to \$10. As we reported in last week's [Bulletin](#), this fee is added to the annual municipal motor vehicle registration fee and is used to fund multi-modal transportation-related costs for roads, bridges, sidewalks, bicycle and pedestrian facilities, and public transportation services, including services for the elderly, as approved by the local legislative body.

Similar to past hearings on this bill, support came from a variety of constituencies, including city and town officials, a regional planning commission, a regional transportation organization, and the New Hampshire Department of Environmental Services. As explained by one municipal official, this fee already exists in law, so the policy issues regarding assessment of the fee and use of the funds were already addressed when it was enacted 22 years ago. **HB 409** merely raises the cap on the fee to adjust for inflation and restore the purchasing power the fee initially provided when enacted in 1997. Additionally, this local option fee supports a goal of the [New Hampshire Climate Action Plan](#), which calls for integrated, multi-modal transportation systems that reduce emissions from the transportation sector by reducing traffic congestion and reliance on the use of motor vehicles.

HB 409 supports NHMA's legislative policy adopted by our members last fall to exercise local control of *non-property tax revenue streams* with legislative body approval to meet demands for services and infrastructure needs. This fee provides *local* dollars used for *local* projects approved by the *local* legislative body of each municipality. Assessment of the fee itself must first be approved by the legislative body, as would any increase in the fee proposed in **HB 409**—a text-book example of *local* control!

Please contact members of the [Senate Election Law and Municipal Affairs Committee](#) and urge their support of local control by recommending **Ought to Pass on HB 409**.

More Lawsuits, More Attorney Fees

The House Judiciary Committee held a hearing last week on [SB 36](#), a well-intentioned bill that states, “Any state or public entity acting under color of New Hampshire law which subjects . . . any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the New Hampshire constitution shall be liable for any actual damages to the injured party.”

The bill is essentially a state version of a federal statute, 42 U.S.C. § 1983, which provides that any government entity or agent that deprives a person of any rights secured by the United States Constitution will be liable to that person in an action for damages or a suit in equity. **SB 36** would provide the same relief with respect to violations of the state constitution.

It sounds reasonable, right? If a citizen can sue the government for violating his or her *federal* constitutional rights, shouldn’t there be a similar cause of action for violating *state* constitutional rights?

However, there is more to it than that. First, a violation of the state constitution will, in almost all cases, also be a violation of the federal constitution, so there is already a cause of action under 42 U.S.C. § 1983. Second, in the few instances where the state constitution provides broader rights than the federal constitution, there is almost certainly a state *statute* that already provides a remedy.

For example, the state’s equal protection provision is broader than the federal constitution’s 14th Amendment, so there could be an equal protection violation where section 1983 does not provide a remedy. But such a violation would almost certainly also be a violation of the state’s anti-discrimination statute, RSA 354-A, for which the victim may bring an action for damages. In short, there are few if any gaps where someone whose state constitutional rights are violated would not already have a claim under either federal or state law (or both).

If the only problem were redundancy, it would not be a big issue. The bigger problem is that **SB 36** provides for an automatic award of attorney fees to a prevailing plaintiff. This provides a strong incentive for a plaintiff in an ordinary civil action to claim a constitutional violation as well, and it is reasonable to anticipate that creative trial lawyers will find ways to do so. A claim for violation of the anti-discrimination statute will be supplemented by an equal protection claim under the state constitution. For that matter, a Right-to-Know Law complaint might well be supplemented by a claimed violation of Part 1, Article 8 of the New Hampshire Constitution, which states that “the public’s right of access to governmental proceedings and records shall not be unreasonably restricted.”

More claims mean more expense. And if a municipality is found to have committed even an innocent violation, **SB 36** would require it to pay the plaintiff’s attorney fees. This is unusual. Very few types of civil claims provide for an award of attorney fees to the prevailing party. Attorney fees are not awarded, for example, in Right-to-Know Law cases unless the defendant committed a knowing or intentional violation. Under **SB 36**, a constitutional claim for the same violation would require an automatic award of attorney fees.

(More lawsuits— Continued from Page 4)

NHMA suggested at the hearing that, at the very least, the attorney fees provision be removed to limit the incentive to file more claims. Members of the Judiciary Committee seemed surprised at the suggestion that trial lawyers would be motivated to file new and novel claims. We're surprised that they were surprised. We have no doubt that this bill will lead to more litigation and higher legal expenses, with significant benefit to lawyers but negligible benefit to anyone else—and to the detriment of taxpayers. As we have mentioned several times in prior Bulletins, many legislators this year have professed their intent to provide relief to local property taxpayers. We fully support that goal—after all, taxpayers are citizens, too. This bill is a step in the wrong direction.

The committee has a work session on the bill next Thursday, April 30, and an executive session on May 14. Given the committee's dismissal of our concerns at the hearing, we are not optimistic of a good result in the committee. But please let your representatives know you are concerned about this bill.

OHRVs on Town Roads

The Senate Transportation Committee has a hearing scheduled for next Tuesday on [HB 591](#), which amends various laws dealing with off-highway recreational vehicles (OHRVs) (more frequently referred to as ATVs). NHMA does not have a significant interest in most of the bill's provisions, but the bill was amended in the House to add provisions regarding the use of OHRVs on class V and class VI roads.

Under current law, “city or town councils and boards of selectmen may authorize the use of sidewalks and class IV, class V or class VI highways and bridges, or portions thereof, for use by OHRVs.” The statute does not prescribe any process for authorizing the use, so the governing body can simply take a vote at any meeting to authorize use of OHRVs on municipal roads, without a public hearing or any kind of notice.

The use of OHRVs on class V and class VI roads has become an extremely contentious subject in several municipalities, as residents living along these roads have complained about excessive noise and dust. **HB 591** addresses this issue by requiring a public hearing, with notice to abutters, before permission is granted to use municipal roads, and further requiring that the question be submitted to the legislative body (town meeting in most towns) after approval by the governing body.

NHMA does not have a position on the bill, or on whether a public hearing and legislative body approval should be required. We did draft the language establishing the new process, but only to ensure that *if* the legislature wants to establish a new process, it is one that makes sense and is workable. We are aware that some interested parties want to delete that language and will make that request at the hearing. We do not oppose that, as long as it is not replaced by something that creates problems for local officials.

Anyone who is interested should attend the hearing or contact members of the [Transportation Committee](#). The hearing is scheduled for **Tuesday, April 30, at 1:15 p.m., in LOB Room 103.**

HOUSE CALENDAR

TUESDAY, APRIL 30, 2019

MUNICIPAL AND COUNTY GOVERNMENT, Room 301, LOB

11:00 a.m. **SB 103-L**, authorizing municipalities to engage in multi-town bonding projects.

SENATE CALENDAR

TUESDAY, APRIL 30, 2019

ENERGY AND NATURAL RESOURCES, Room 103, SH

9:30 a.m. **HB 464**, relative to the definitions of solar energy systems and wind-powered energy systems for assessed value of real estate exemptions.

10:30 a.m. **HB 358**, relative to combustion of wood residue at municipal waste combustors.

TRANSPORTATION, Room 103, LOB

1:15 p.m. **HB 591**, amending the laws governing OHRVs and snowmobiles.

WEDNESDAY, MAY 1, 2019

ELECTION LAW AND MUNICIPAL AFFAIRS, Room 102, LOB

9:00 a.m. **HB 479-FN**, relative to eligibility for the low and moderate income homeowners property tax relief.

9:45 a.m. **HB 618-L**, relative to the definition of contracts relative to official ballot default budgets.

10:00 a.m. **HB 706-FN-A**, establishing an independent redistricting commission. **NHMA Policy.**

11:30 a.m. **HB 641-L**, allowing municipalities to collect an occupancy fee from operators of local room rentals. **NHMA Policy.**

HOUSE FLOOR ACTION

There was no House floor action for the week.

SENATE FLOOR ACTION

Thursday, April 25, 2019

HB 259, relative to building code violations. **Passed.**

HB 343, relative to application of the state fire code to foster homes. **Passed.**

HB 396-FN-L, relative to delay or denial of records under the right-to-know law. **Passed with Amendment.**

HB 663, relative to the definition of agriculture and existing agricultural uses. **Passed with Amendment.**

HB 700, relative to valuation of utility company assets for local property taxation. **Passed.**

HB 713-FN-L, relative to transportation of pupils. **Passed.**

2019 NHMA UPCOMING EVENTS FOR MEMBERS

May 3	Regional Right-to-Know Workshop in Dover
May 8	2019 Local Officials Workshop (All day), Lebanon
May 10	How to Avoid Costly Mistakes! A Wage & Hour Compliance Workshop
May 14	Webinar: Who Not to Hire!
May 17	A Guide to Effective Code Enforcement Workshop
May 21	2019 Local Officials Workshop (All day), Sugar Hill
May 30	NHMA/NHMLA – Managing Public Rights of Ways Workshop
June 8	(Saturday) 2019 Local Officials Workshop (All day), Concord

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.