Telecommunication Tower Siting

Protection of Local Zoning Authority

On January 9, 1998 the Department of Telecommunications and Energy (DTE), formerly the DPU, ruled in favor of telecommunication companies and against cities and towns, by allowing wireless telecommunication companies to be defined as public service corporations under M.G.L. Chapter 40A, §3. This decision allows wireless telecommunication companies to apply to the DTE for exemption from city and town zoning by-laws and ordinances to site a telecommunications tower. The wireless telecommunication companies maintain the ability to appeal any adverse action by a city or town to any court of competent jurisdiction, as provided by the federal Act.

Legislative Actions

Senators Michael Morrissey (Quincy) and Susan Fargo (Lincoln) have filed legislation on behalf of the MMA that would overturn the DTE decision that allows wireless telecommunication companies the ability to by-pass local zoning and planning by-laws or ordinances. There were 30 other sponsors to the bill.

In related action, the Senate adopted an amendment by Senator Bruce Tarr (Gloucester) and 18 other Senators to a supplemental appropriations bill, that would overturn the DTE decision. The House version of the supplemental appropriations budget does not contain any language relative to siting of telecommunication towers.

Instead of reversing the recent DTE decision, the House passed legislation that creates a communications tower siting review board under the purview of the DTE. Appointed by the Governor, the board would have the authority to override local decisions on denials for siting of telecommunication towers. The MMA has concerns with this legislation even though it allows for a MMA and local elected official appointee. We believe the board is unnecessary and would still provide telecommunication companies with an avenue to avoid taking the local decision-making process seriously. The telecommunication companies would retain their option of going to the courts if they do not receive a favorable decision before the communications tower siting review board.

Appeal to the Supreme Judicial Court

The City of Marlborough and the Town of Hanover, participants in the DTE decision, have the option of appealing to the Massachusetts Supreme Judicial Court to overturn the DTE decision. Both communities have filed for an extension, delaying the notification to the DTE. They are awaiting DTE approval.

For further information on this issue,
please contact Thatcher Kezer of the MMA staff

County Pension Costs

Abolished County Retirement Systems Face Staggering Increases

The member communities in the Middlesex, Worcester, and Hampden County Retirement systems will incur gigantic pension cost increases unless the Governor and the Legislature act before the end of the 1998 fiscal year.

Chapter 48 of the Acts of 1997 called for the immediate abolition of Middlesex County and sets June 30, 1998 as the date for the abolition of Worcester and Hampden Counties. However, the Governor and the Legislature could not agree on a plan for paying for the pension costs for active and retired county employees.

This is the legislative history of the problem. The Governor and the Senate wanted the state to assume the responsibility for paying the costs for retired county employees as well as the unfunded liability costs of active county employees who were transferred to the state. The House, on the other hand, wanted pension costs to be considered a county debt and therefore to be paid by the county tax, capped at its fiscal 1997 level, for however long it took to pay off the pension debt. The House prevailed in conference committee. The Governor vetoed the conference committee language and then twice submitted legislation that would have the state assume responsibility for the pension costs for active and retired county employees. The Legislature has not acted on the either of the Governor's bills.

Without legislative action, the responsibility for paying for county employees' pension costs within an abolished county will become the responsibility of the member municipalities of the *county retirement system* . Those communities that have their own retirement will not be liable for *any* of these costs. Thus, the cost increases for the member municipalities of the county retirement system in Middlesex, Worcester, and Hampden counties are expected to increase anywhere from 15% to 51%.

The MMA is seeking to have this issue resolved as part of the fiscal 1999 budget debate. We are working with the Representatives and Senators in the affected counties to adopt the legislation filed by the Governor and supported by the Senate to have the state pay for the retirement costs of active and retired county employees from the abolished counties.

For further information on this issue,
please contact David Baier of the MMA staff

Street Cutting Standards Under Review

Cities and towns not allowed to recover costs for inspection and repair of roads poorly repaired after utility cuts

Two recent Supreme Judicial Court rulings have struck down city ordinances that were created to protect communities from having to expend hundreds of thousands of dollars annually to restore into proper condition, roads and sidewalks that are disfigured or made dangerous due to improper restoration work done by utility companies repairing their lines and pipes. The decisions struck down city ordinances in Somerville and Newton that required utilities to pay maintenance and inspection fees as a prerequisite to opening a public way.

The MMA is working closely with the Massachusetts Highway Association and is reviewing both an administrative resolution through the DTE and filing legislation that would address the problem. This is an important issue because communities should have the authority to inspect and order that roads be returned, as much as possible, to their original condition after excavation by utilities. Further, communities should be able to assess fees to cover the costs of inspections and any repairs performed by the community. Currently, the DTE maintains the oversight of street cutting by certain utilities.

Cities and towns have complained of poor resurfacing work by utilities, and in many instances have experienced serious degradation in the condition of affected roads. Communities also say their efforts to inspect and enforce standards have been frustrated by the DTE and now, the recent SJC rulings. The DTE position is that the "operators" are capable of repairing roadways without municipal intervention.

At the insistence of the MHA, the DTE filed a Notice of Compliance Review to review the standards employed by public utility operators when restoring municipal street surfaces after performing excavations. The DTE will assess the standards for compliance with the best industry practices for street excavation and repair.

For further information on this issue, please contact Thatcher Kezer of the MMA staff

Fiscal 1999 State Budget Update

Cherry Sheet Program
Payment-in-Lieu-of-Taxes/State-Owned Land

The State-Owned Land account on the Cherry Sheet, commonly known as the PILOT account, provides reimbursements to cities and towns for lost property tax revenue attributable to the value of certain tax exempt state-owned land [not the value of buildings or other improvements]. Full funding of this account [0611-5510] would require $21.3 million in fiscal 1999 based on statewide exempt valuation estimated at $1.275 billion and a state-wide average tax rate of $16.70 per thousand dollars of valuation.

Last year as part of the fiscal 1998 state budget act, the Legislature and Governor Cellucci adopted a schedule to fully fund the PILOT program over a five year period [Section 178 of Chapter 43 of the Acts of 1997]. The appropriation for fiscal 1998, year one of the schedule, totaled $10 million.

The Governor's fiscal 1999 recommendation of $12 million for the PILOT account appears to fall short of the amount required under the funding schedule. The appropriation for fiscal 1999, year two of the section 178 schedule, should be approximately $14.1 million using the most straight-forward way of calculating the PILOT amount for the year.

A list of the Cherry Sheet PILOT amount approved for your municipality for fiscal 1998 and a preliminary estimate of the amount for fiscal 1999 can be obtained on Mass. Local Net or by calling the MMA office.

The Massachusetts Municipal Association has asked Representative Paul Haley, Chairman of the House Committee on Ways and Means, to fully fund at $14.1 million year two of the PILOT schedule in the ways and means committee budget recommendation scheduled to be debated by the House in early May.

The Honorable Paul R. Haley, Chairman
House Committee on Ways and Means
State House, Room 243
Boston, MA 02133

For further information on this Cherry Sheet account, please contact John Robertson of the MMA staff

Early Retirement Bills

Teachers, Police officers, and Fire fighters

Two measures that would allow municipal workers to retire early are before the Public Service Committee and are expected to be reported out in the next few weeks.

H. 2768 is the so called "Rule of 90" legislation. This measure would allow teachers to retire with full benefits when their years of service and age, added together, equal ninety. The amount that the individual would have to contribute has yet to be determined but is expected to fully fund the buy out.

The bill pertaining to police and fire retirement, H. 552, would allow officers to retire after 25 years of service and will most likely include a 12% contribution from the public safety officer in the last three years of service.

The teachers unions, in hearings throughout the state, have argued that early retirement will improve the quality of education by allowing older teachers to retire and that the measure would improve equity in retirement benefits between teachers as the system currently favors those who follow a traditional teaching career. Unions have also argued that these measures would save municipalities money by allowing older, higher salaried teachers to be replaced with younger teachers with lower salaries.

The MMA believes that any promised cost savings would be fleeting and not create enough savings that a municipal contribution to this benefit would be justified. Additionally, the link between retiring teachers and improved educational systems is tenuous as that argument overlooks the many important contributions senior teachers make to a school system. The MMA will to monitoring both measures closely making sure there are no hidden costs to municipalities.

For further information on this issue,
please contact Heather Hartshorn of the MMA staff

Uncompensated Care Pool Surcharges:

What municipalities need to know

As one of its first acts of the legislative session, the Legislature passed an Act Making Health Insurance Available to Uninsured and Underinsured Residents of the Commonwealth which became Chapter 47 of the Acts of 1997. One of its major provisions was a change in the mechanism by which free hospital care for indigent patients is provided. The MMA, throughout the process, consistently advocated for an municipal exemption from paying directly into the pool. Unfortunately, the exemption was not included in the final version of the bill. At the present time, insurers are beginning to pass along costs to municipalities.

The Auditor's office is currently examining the increased cost to determine whether it is a mandate under the anti-mandate provisions of the Massachusetts Constitution or Chapter 29 section 27C of the general laws. As the Supreme Judicial Court struck down a similar ruling by the Auditor in the late 1980s, the prospects for this are not great, nor was the Legislature receptive to this argument during their initial consideration of this measure.

Policymakers are unlikely to revisit the policy because they feel negotiations between hospitals and insurers will eventually sort matters out and address the issue of any surpluses that may have been created in this fiscal year. Additionally, the Legislature has undertaken several efforts to decrease the amount of care sought in the high-cost emergency room setting, which may control and possibly decrease the long term costs of the pool.

Prior to passage, hospitals were in charge of collecting the entire amount, $315 million, from insurers. The reform legislation mandated that the hospitals pay $215 million and insurers now pay $100 million directly to the state. Because hospitals have not decreased their charges to insurers, a $100 million dollar windfall was created for the hospitals. Legislators point out that what some might view as a windfall only covers the cost of free care in the state. The Uncompensated Care Pool is funded by a surcharge on all payments made to hospitals and ambulatory surgery centers. According to Division of Health Care Finance and Policy regulations, this payment is 5.06% of this portion of the hospital bill and may drop next year. Hospitals inform the insurers of their total costs and insurers are then required to calculate what they owe and pay the state accordingly.

Municipalities who use insurers as primarily administrative bodies, using self-funded plans, will most likely see this cost passed along directly as a specific line item on their bill, making it easier for municipalities to determine fair costs. Some insurers have incorporated the fee directly into the hospital

portion of the bill, making it more difficult to determine what portion of the bill pays for the pool. Others, whose insurers function as risk aggregators, may be asked to pay higher premiums. As hospital costs are typically only one-third of services provided, the large premium increases that some insurers have proposed are unfounded. Increases of 1-2 percent are more likely to be appropriate.

Currently, several strategies to attempt to alleviate this fee are being pursued by individual municipalities. The first group of cities and towns is withholding this portion of the bill until they are informed by the Auditor that it is not an unfunded mandate. A second group of municipalities is holding back the Uncompensated Care Pool portion of their bill until their insurers clarify how the fee is calculated. Finally, a third group is trying to closely manage negotiations on premiums that include these costs on future contracts with their health care providers, as some insurers are thought to be suggesting rate increases that can not be justified by the pool costs.

The MMA recommends a strategy of scrutiny of this portion of your bill as these costs may decrease in the future due to lowered overall uncompensated pool costs and a possible decrease in the pool surcharge fee next year.

For further information on this issue, please contact whomever of the MMA staff

Managed Care Reform

In recent years, concern over the cost management techniques of the HMO industry and the potential of these to create incentives for inadequate care has received a great deal of attention from a variety of sources. Although most of the evidence of need for change is anecdotal, the sense that the managed care industry needs increased regulation, rightly or wrongly, has caught the attention of many policymakers throughout the country and here in Massachusetts as well.

Last summer a comprehensive reform bill, H. 4637, was drafted by members of the Health Care and Insurance Committees but this measure was met with concern by House Leadership and the affected industry. The legislation, currently before the House Committee on Ways and Means, is now in the process of being redrafted and is expected to be released in the next few weeks. The new bill, with no bill number as of this writing, is expected to be much narrower in scope than the original measure.

Representative Harriette Chandler, one of the chief architects of the plan, recently visited the MMA Committee on Labor and Personel to describe the major changes that will be proposed in the redraft. First, increased information on HMO's will be available, including how doctors are compensated, what sort of medication and experimental procedures are covered, and their accreditation status. Much is this information is already compiled by large purchasers and accreditation groups but is not readily available to members of the general public. Second, the plans would be encouraged to improve grievance procedures and a state office would be created to review situations where agreement could not be reached. Thirdly, the state would mandate coverage of an emergency room visit if a "prudent layperson" would seek care in that circumstance.

Municipal officials should be most concerned with the potential inclusion of mandatory **point of service** coverage. This would allow individuals to choose doctors outside of their managed care plans. Costs of administering this would be horrific for municipalities even if the direct cost of the service was passed along to the employee. Whether or not this provision will be included in the final legislation has yet to be determined.

Additional concerns over the impact of the bill have been expressed by the Mass. Association of HMOs. They see many of the reforms as reasonable in spirit, but the details would prove onerous for the industry and increase the cost of managed care. Concerns also arise as other health care entities are exempt from the regulations, making HMOs less competitive.

The Senate is thought to favor more expansive reform of the managed care industry, thus this measure faces great obstacles in passing both houses before the end of the legislative session.

For further information on this issue,
please contact Heather Hartshorn of the MMA staff

Disability Retirement Update

Municipalities Have Few Options in Re-hiring Previously Disabled Employees; The Issue Heads to Court

Under the terms of the Disability Reform Act, Chapter 306 of the Acts of 1996, previously disabled retirees have a near absolute right to return to the job from which they retired if a three-member medical panel determines that their injury is no longer disabling. Prior to the passage of Chapter 306, such an employee would have had to obtain the department head approval before returning to their old job.

As a result of Chapter 306, a number of communities have been taken to court by previously disabled employees who are now seeking to return to work. One case, O'Neill vs. The City of Cambridge, has been selected by the Massachusetts Supreme Judicial Court for review. This case best illustrates the difficulty and potential danger of implementing a well-intended but deeply flawed return-to-work provision.

The facts of the case are these. In 1972, a Cambridge police officer was granted a disability retirement because of injuries sustained in an automobile accident. In 1989, a three-member medical panel determined that he was no longer disabled. He sought reinstatement to the police department. The Police Chief denied his re-appointment citing that since his retirement, he has been charged with assault and battery, shoplifting, and his brother has taken a restraining order out against him. With the passage of Chapter 306, he once again sought reinstatement, this time needing only to pass the three-member medical panel. Cambridge gain refused to reinstate him and the case went to court. The lower court ruled that Cambridge was required to reinstate him. However, as part of the decision, the judge wrote: *"The City's public policy concern merits serious consideration. Under the statute as amended, the City may have to reinstate to its police force persons who have been convicted of serious crimes, or who have engaged in other misconduct, during a period of disability retirement, that is clearly inconsistent with the high standard of character required of police officers. The concern, however, is properly addressed to the legislature."* This case is now before the Supreme Judicial Court.

The MMA has identified six public policy issues that we believe should be considered before any previously disabled individual returns to work.

Character. Before returning to work, especially in the police and fire service, previously disabled employees should be subject to the same kind of background check they would undergo in applying for a public sector job in the first place. Thus, an individual that engaged in shoplifting, perjury, and was subject to a restraining order would not be eligible to return to work.

Medical Panels. Under the current law the regional medical panel is only asked to determine whether or not the individual is still disabled from the original injury that caused their retirement. This has led to situations where employees have recovered from their original injury but have other physical or psychological problems. The law should be amended so that the medical panel must examine the whole person in order to determine whether or not the individual is physically fit enough to return to work.

Training. Current law provides that an individual that has been away from the police force for more than five years is required to be retrained. The MMA is urging that this requirement be reduced to two years to conform with Chapter 306 which gives an individual an absolute right to return to their old job. In addition, the training should explicitly include the completion of the police academy. Further, the individual should be required to meet all of the physical requirements of a police academy.

Fitness Standards. After a ten-year delay, fitness standards were finally promulgated for police and fire personnel last year. The standards only apply to individuals who began work after the effective date of the standards. The MMA urges the Legislature to have the fitness standards apply to returning employees as well. This would help ensure that returning employees are capable of doing the job and will not return to service for a short period of time only to become re-injured and disabled again.

Time Limit. One constant in the cases that the MMA is aware of regarding returning workers is the startling length of time that individuals have been away from their job. In the case of the Cambridge police officer, he has been retired for 25 years. The MMA is urging the Legislature to consider some reasonable length of time, between 5 and 10 years, beyond which a disabled retiree would not have the absolute right to return to work.

Creditable Service. It is fundamentally unfair that an individual who received disability retirement benefits and subsequently returns to work would receive creditable service time for the period he was receiving a disability pension without having to pay a penny into the retirement system. The MMA is urging the Legislature to consider amending Chapter 32 to require creditable service to be purchased for the years an individual was receiving a disability retirement.

For further information on this issue,
please contact David Baier of the MMA staff

COLA For Municipal Retirees

A Description Of The New Process

Last year the Legislature passed and the Governor signed Chapter 17 of the Acts of 1997, An Act Relative to the Cost-Of-Living-Adjustment for retirees. Chapter 17 shifted the responsibility for paying for the costs of municipal COLAs from the state to cities and towns. Since the passage of Proposition 2 1/2 in 1980 the state had assumed the cost of providing COLAs.

Chapter 17 provides a limited local option acceptance process for the new COLA responsibility that does not include a full role for the local executive branch, and allows retirements boards to make their recommendations without first developing a revised funding schedule that reflects the full impact of paying for the COLAs. In the case of a community with its own retirement board, the first step in acceptance is for the retirement board to vote to recommend accepting the provisions of Chapter 17. Then, the town meeting or city council votes to accept the recommendation of the retirement board. In the case of a community that belongs to a county retirement system, the county retirement board votes to recommend accepting the provisions of Chapter 17. Then the county pension advisory board, which consists of the municipal treasurers of the member communities of the county retirement system votes to accept the recommendation of the county retirement board. In either case, once a community or the county pension advisory board has accepted the provisions of chapter 17 that acceptance is irreversible.

For those communities that accept the provisions of Chapter 17, each year PERAC will notify the local retirement board of the previous year's cost-of-living index capped at a maximum of 3%. Then, the local retirement board, on a yearly basis, decides (by itself) whether or not to grant the PERAC recommended COLA.

How Are Cities and Towns Paying For This?

Private sector employers would be required by federal law to increase current pension funding by a sum that would cover the costs for both active and retired employees. Cities and towns are not covered by that federal law and therefore have funding options that are more or less prudent depending on the option selected. In reality, the options boil down to three: using investment income to pay for the COLA, lengthening the funding schedule, or doing both.

- **Investment income.** Many communities are being told that there will be no additional cost to the community in accepting Chapter 17 because of the spectacular returns of the stock market in recent years. Once again, it is best to remember the adage: "THERE IS NO SUCH THING AS A FREE

LUNCH." In general, municipal and county retirement board funding schedules have assumed a return of 8% per year on investments. In most the actual return has been much higher. However, the modest 8% in investment return is used to smooth out inevitable cycles in the stock market. Using investment income to pay for COLAs means that these funds will not be available to keep the funding schedule on track when the stock market goes down. Thus, a two or three year downturn in the stock market could result in a potential double digit increase in pension funding costs in order to maintain the target date for eliminating the unfunded liability. This would be true even if the retirement board voted not to grant a COLA during the years of a downturn. Communities that decide to pay for the COLA using investment income must be willing to accept the potential of dramatic pension cost increases when either the economy or the stock market or both hit the skids.

- **Lengthening the schedule**. Communities could decide, with PERAC approval, to push back the time by which the community's unfunded pension liability is paid off. For example, instead of paying off the liability in the year 2028, a community could add ten years to schedule. The resulting "savings" of taking longer to pay off the debt could be applied to pay for the new liability of the COLA benefit. The down side to this choice is that the financial rating agencies may take a negative view of taking longer to pay off debt, and this could be reflected in the bond rating of the community.
- **Combination.** Communities could decide to use both a longer schedule and investment income to pay for the COLA. This choice would reduce the most extreme negative aspects of the first two choices but would still leave communities vulnerable to a stock market downturn or a bond rating reduction.

Alternatives

Under the provisions of Chapter 17, communities are left with only two alternatives: accept the Chapter 17 process and its potentially grave fiscal risk or deny municipal retirees a COLA. However, some communities are considering filing home rule petitions to create alternatives to Chapter 17.

The town of Hingham is considering a proposal that would grant a yearly dividend, as opposed to a COLA. The town would establish a dividend fund of approximately $1.5 million. This would allow the town to pay an annual 3% COLA for the next nine years. Each year the town would contribute the first three percent of investment income in excess of the eight percent investment income assumed by the retirement board's funding schedule. If the retirement board meets this goal of 11% investment return in each of the next four years, then the dividend account would be fully funded.

The advantage of the Hingham plan is that it would allow the town to maintain its current funding schedule and fully fund the dividend account without increasing the scheduled town appropriation for retirement.

The towns of Arlington and Brookline are considering home rule petitions that would change the granting of the yearly COLA to include the annual approval of town meeting in addition to the approval of the retirement board.

For further information on this issue, please contact David Baier of the MMA staff

Comm. and Rpts, from City Officers #2 5247

Communicaitn was received from Mayor Francis H. Duehay, transmitting an information packet fromt he Mass. Municipal Association.

In City Council April 6, 1998

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