

Municipal #1  
Issue: Mandate Relief Redesign Team

February 28, 2011

## NYSBA MUNICIPAL LAW SECTION

Comments for Consideration by Governor Cuomo's

Mandate Relief Redesign Team

Municipal officials have long been managing mandates handed down by the state government, whether the mandate is funded, under-funded or unfunded.<sup>1</sup> As there is no uniformly accepted definition of what constitutes an “unfunded mandate,” there is no recognized, comprehensive inventory of the unfunded mandates that are placed on municipalities. Nevertheless, there are a number of laws and regulations that are universally recognized as such due to their prevalence and associated costs on municipal affairs.

Some require that certain services or programs be offered to the public by the municipality for the benefit of the public at large. Others establish procedural or administrative parameters within which a municipality must operate, but do not provide any identifiable benefit to the municipality or the public at large. Often, this latter mandate category is designed to promote a legislatively determined public policy of the state, benefiting a narrow class of individuals, at the cost of the municipality. It is from this latter category of mandate that the need for fiscal relief is greatest.

These comments are not intended to question the validity or wisdom of the various public policies underlying mandates; rather, these comments are intended to identify those mandates that have the greatest impact on municipal expenses and to highlight the inequity of having municipalities bear the financial burden of carrying out these policies.

Meaningful mandate relief is particularly important at this time, as Governor Cuomo's property tax cap proposal is working its way through the Legislature. Having already passed the Senate, the bill may be up for consideration in the Assembly in the near future. If enacted, municipalities (other than New York City) would not be able to increase their property tax levy beyond 2 percent or a legislatively determined “inflation factor,” whichever is less. Currently, the inflation factor appears to be considerably less than 2 percent.

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<sup>1</sup> For purposes of this report, “municipal” and “municipalities” includes county, city, town, village and school districts.

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Opinions expressed are those of the Section/Committee preparing this memorandum and do not represent those of the New York State Bar Association unless and until they have been adopted by its House of Delegates or Executive Committee.

To further compound matters, the proposed real property tax cap comes at a time where the overall economy, and the state's own fiscal condition have placed municipal budgets under tremendous pressure. Municipal revenues from mortgage recording taxes and sales taxes remain below 2008 levels, and the 2011-2012 Executive Budget proposes a number of cuts to state aid for municipalities. In light of these cuts in state aid, and with the likelihood that a real property tax cap will limit the ability of municipalities to make up for this and other declining revenue sources, it is more important than ever that the State Legislature address the issue of mandates.

Any discussion on mandate relief must not be limited to future mandates while leaving existing mandates intact. Although prohibition of future new mandates is an important component to comprehensive mandate relief, it is the expenses associated with existing mandates that have driven real property taxes in New York State to be the highest in the nation. And even with a prohibition against new mandates, the cost of complying with existing mandates will continue to drive property taxes higher; left unchecked, this cost alone will soon consume all allowable growth in future tax levies under the Governor's proposed tax cap.

To illustrate how these mandates operate to increase municipal costs, and the difficulties that municipal officials have administering them, a handful of mandates are discussed below. It is not surprising that many of these mandates are directly related to public works and public employment, as these are two of the leading expense items for municipalities. It is for that very same reason, however, that if there is to be any meaningful relief afforded to municipalities from these mandates, the local costs of these mandates cannot be ignored.

**Disability Benefits for Law Enforcement and Firefighters** (GML §§ 207-c; 207-a). The General Municipal Law contains two provisions which have created costly benefits required to be paid for by local governments. Section 207-c requires all counties and municipalities outside the City of New York to provide for the full payment of salary, benefits and all hospitalization costs for police officers, sheriffs, sheriff deputies, corrections officers and other law enforcement personnel who are injured or become ill as a result of the performance of duties associated with law enforcement work. Section 207-a is the comparable state law provision for paid firefighters. These payments potentially continue for years or even decades until there is a recovery from the illness or injury, a disability retirement determination or the attainment of retirement age.

These sections had been previously interpreted to require the injury or illness be related to the heightened risk associated with those positions, and not merely a substitute for Workers' Compensation benefits.<sup>2</sup> However, since the 2003 New York State Court of Appeals'

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<sup>2</sup> General Municipal Law § 207-c is a legislative plan intended to provide additional protection to police officers who are injured or sickened in the course of their duties, in recognition of the heightened risk of injury attendant to their public service (*see Matter of Balcerak v. County of Nassau*, 94 N.Y.2d 253, 259, 701 N.Y.S.2d 700, 723 N.E.2d 555; *Matter of Dobbartin v. Town of Chester*, 292 A.D.2d 382, 383-384, 738 N.Y.S.2d 688; *McCaffrey v. Town of East Fishkill*, 42 A.D.3d 22, 833 N.Y.S.2d 175 (2<sup>nd</sup> Dept. 2007)).

decision in *Matter of Theroux v. Reilly et al*, which eliminated the heightened risk analysis, all officers or firefighters injured or becoming ill during the performance of their duties, regardless of the duties performed or the nature of the injury or illness, are entitled to the payment of the full benefits at the expense of the local government.

Since *Theroux* was decided, GML §§ 207-c and 207-a benefits have been awarded to employees for injuries such as spilling coffee, slipping on the parking lot ice, and falling off a chair. These injuries should be covered by traditional workers compensation benefits, while the greater benefit of GML §§ 207-c and 207-a should apply to injuries resulting from heightened risk, which was the way the law had been interpreted prior to the 2003 Court of Appeals decision.

Another problem that municipalities face when administering these benefits is the duration of the benefit. Since these benefits are discontinued upon the granting of a disability retirement under the State Disability Retirement System, the injured officer, who is receiving his or her gross salary tax free, has little financial incentive to cooperate in, and may in some cases even contest the approval process. Although the municipality has the authority to submit an application for disability retirement on behalf of a permanently injured officer, the process for approving disability retirement can be a lengthy one and requires the cooperation of the officer.

Additionally, for firefighters (but, oddly, not for police officers), even after an accidental disability or performance-of-duty disability pension is granted to the employee, the municipality is still responsible for the difference between the amounts received under the pension and the amount of the employee's regular salary or wages. This benefit continues until the employee's regular retirement age. General Municipal Law section 207-a(2). When active employees receive general wage increases, this in turn increases the "difference" between the pension benefits and regular salary. This results in the potential for decades of payments by a municipality to an inactive, retired employee, the amount of which increases each year, and which can easily reach hundreds of thousands of dollars for each such firefighter. Firefighters should be treated the same as police officers pursuant to General Municipal Law section 207-c(2), under which locally-paid benefits cease upon the granting of an accidental disability or performance-of-duty retirement pension.

To compound matters, municipalities are limited in their ability to offset this expense from other sources. Pursuant to General Municipal Law § 207-c(2), the municipality is permitted to discontinue its payments only if the police officer receives benefits from one of three other sources — an accidental disability retirement allowance under Retirement and Social Security Law § 363; a disability retirement allowance under section 363-c of that statute; or a "similar accidental disability pension provided by the pension fund of which he [or she] is a member."

Since the federal Social Security Disability Insurance (SSDI) benefits are not specifically enumerated in the statute, a municipality may not reduce its payments by reason of an officer's receipt of such benefits because the courts have concluded that SSDI benefits do not constitute an accidental disability pension similar to the statutory allowance provided for in Retirement and Social Security Law §§ 363 and 363-c.

Relying on the legislative history, the Appellate Division, Second Department has acknowledged that:

[t]here was thus a widespread recognition, by both the legislative and executive branches, that a disabled firefighter might, by virtue of receiving SSDI benefits, collect more than the wages he had been earning while healthy, and that the bill that came to be enacted as General Municipal Law § 207-a(2) provided no basis upon which a municipality could reduce the wages it was paying the disabled firefighter by the amount of SSDI benefits that the firefighter was receiving. Nevertheless, the Legislature did not address the issue in the legislation. (*McCaffrey v. Town of East Fishkill*, 42 A.D.3d 22 (2<sup>nd</sup> Dept. 2007)).

The financial disincentive to return to work created by these benefits, coupled with the municipality's inability to offset the costs, create an unsustainable system that requires the municipality to pay both the full salary of the injured worker plus the costs of any overtime or additional staffing necessary to maintain the level of police or fire service in the community.

**Public Pensions:** According to the New York Association of Counties, nine state mandates consume 90 percent of a county's tax levy.<sup>3</sup> Of these nine state mandates, pensions rank fourth in terms of impact, accounting for approximately \$600 million in local tax impact. And this cost is expected to increase at an alarming rate. Indeed, the New York State Conference of Mayors & Municipal Officials January 31, 2011 memorandum in opposition to the proposed tax caps reports that the "projected growth in City pension & health insurance costs in 2011 and 2012 will far exceed the growth in property tax levies allowed under a cap."

Pension reform, therefore, is a necessary element in imposing a tax cap that is sustainable and will allow municipalities to continue to provide essential services. While the recent Tier V pension implementation is a step in the right direction, more is needed.<sup>4</sup>

To assist in relieving this burden, contributions to pension plans may need to be negotiable in the same way health insurance participation is negotiated locally. Further, rather than a defined benefit program, a 401K type pension plan may need to be initiated. In addition, the amount and duration of contributions from employees should also be open to negotiation. Vesting at a later date should also be examined both as an element of negotiation between labor and management and as a component of the pension offered. Opening and renegotiating existing contracts may provide yet another avenue of discussion for addressing

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<sup>3</sup> See "The County Call to Cut Property Taxes in NYS" December 2010, Stephen J Acquario, Executive Director, NYSAC.

<sup>4</sup> 2009 Laws of N.Y. 504 created a new tier (Tier V) in the pension system for individuals entering public employment on or after January 1, 2010. The new tier is designed to lower pension costs for public employers.

this issue. Lastly, authorization for municipalities to establish a pension reserve or trust for future benefits will help municipalities manage these costs moving forward, and is consistent with the accounting obligations set forth by the General Accounting Standards Board.

To make a tax cap feasible, there needs to be a means by which the existing structure of benefits can be recast. Excluding existing benefits from the tax cap could accommodate relief, but only in the distant future.

**Wicks Law** (Gen. Mun. Law 101): Intended to promote competition and protect the rights of workers and subcontractors, the Wicks Law requires municipalities to separately bid the plumbing, electrical and heating, ventilation and air conditioning (HVAC) components of work on projects with an aggregate cost exceeding \$3 million in New York City, \$1.5 million in Nassau, Suffolk and Westchester counties, and \$500,000 in the rest of New York State. In addition to separately bidding each of the above units of work, the municipality often must bid at least one additional contract to a general contractor for the remainder of the project (*e.g.*, foundation, structure, roof and interior finishing).

Most municipalities subject to the Wicks Law do not have personnel with the expertise required to coordinate the work being performed by the various contractors. Often, the municipality must also hire a project engineer or manager to oversee and coordinate the work of the four prime contractors. Either way, the coordination of the separately let contracts makes the construction project susceptible to costly delays and disputes that often lead to expensive litigation. Overall, compliance with the Wicks Law can increase the cost of a public works project approximately 8 to 30 percent.<sup>5</sup>

**Prevailing Wage** (Labor Law § 220): Another common public works mandate is the State’s prevailing wage law, Labor Law § 220. This law requires laborers to be paid prevailing wages on all public works contracts. These wages can increase the costs of a public works contract 20 to 30 percent. Even when compared to other states with prevailing wage laws, local governments in New York experience higher costs on public works projects due, in part, to the method utilized to calculate prevailing wage.

In large part, these costs are driven by how the term “prevailing wage” is defined in New York law. Labor Law §220 (5)(a) defines prevailing wage as the rate of wage paid by the locality by virtue of a collective bargaining agreement between labor organizations and employers in the private sector. In other words, the prevailing wage in any community is going to be based on union wages in that locality. Often, these wages are grossly disproportionate to what non-union labor would cost in the locality.

Understanding that the requirement to pay the prevailing rate of wage is a constitutional requirement, there is nothing in the Constitution that would prohibit changing the definition of “prevailing wage” in the Labor Law to more accurately reflect true wages paid in the locality, providing needed relief from this mandate.

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<sup>5</sup> “You Can’t Cap What You Can’t Control,” New York State Conference of Mayors, November 2010

**Triborough Amendment to the Taylor Law** (Civil Service Law § 209-a.1(e)). The Triborough Amendment makes it unlawful for an employer to unilaterally change the terms and conditions of an expired agreement unless the union has engaged either in a strike or a work stoppage. The effect of this provision is to require a public employer to maintain the status quo even subsequent to expiration of a collective bargaining agreement. In many cases, the public employer must continue to pay contractual “step” increases and insurance premium increases until a new agreement is reached. This would hold true even where the cost of these increases alone exceeds the proposed property tax levy cap. The result is that for many public employers needed cost maintenance or reduction measures cannot be implemented absent union agreement or extensive reductions in staff and/or services.

### **Conclusion**

As alternative revenue sources continue to deteriorate and real property taxes are capped, the need for meaningful mandate relief cannot be ignored. This will undoubtedly require innovative ideas, difficult decisions, and a measure of compromise from all parties involved. The Municipal Law Section of the New York State Bar Association understands the challenges inherent to effecting such change, and offers its experience and resources to help meet that challenge.