MASSACHUSETTS MUNICIPAL ASSOCIATION
MUNICIPAL LAW UPDATE

2015 SELECTED STATUTES AND CASES

Presented by:

Christopher J. Petrini, Esq.
Petrini & Associates, P.C.
372 Union Avenue
Framingham, MA 01702
cpetrini@petrinilaw.com

and

Brandon H. Moss, Esq.
Murphy, Hesse, Toomey & Lehane, LLP
300 Crown Colony Drive
Quincy, MA 02169
bmoss@mhtl.com

Moderated by:

Donald V. Rider, Jr., Esq.
Marlborough City Solicitor
140 Main Street
Marlborough, MA 01752
drider@marlborough-ma.gov

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I. STATUTES

A. H.B. 3858, the New Proposed Public Records Legislation

On November 18, 2015, House Bill 3858, "An Act to improve public records" ("HB 3858"), amending the Public Records Law, G.L.c. 66. The Bill provides significant changes to the Public Records Law which, if passed, would require agencies of the Commonwealth, including cities and towns, to designate one or more employees as records access officer to coordinate an agency's or a municipality's response to public records requests.

Other significant amendments address: the content and timeliness of responses to public records requests; the procedure for and scope of appeals to the supervisor of public records; the addition of a cause of action under G.L.c. 231A for injunctive relief if an agency or municipality fails to furnish a copy of all or part of a public record; protection from disclosure of firearms license information and of home addresses and telephone numbers of certain court employees, law enforcement personnel and victims of adjudicated crimes; protection from disclosure of information about victims of domestic violence and of persons providing or training in family planning services; and mandated publication of specific public records in accessible in a commonly available electronic copies on searchable internet websites.

The highlights of HB 3858 include:

- A new Section 6A which imposes the requirement that the records access officer issue a written response to the person who submitted the requestor first class or electronic mail within 10 business days following the initial receipt of a request for public records including:

  (i) confirmation of the receipt of the request;

  (ii) identification of any known public records or categories of public records that the agency or municipality intends to produce and any, known records, categories of records, or any portion of a record, that the agency or municipality intends to withhold accompanied by specific reasons for such withholding; provided, that nothing in the written response shall limit an agency's or municipality's ability to redact or withhold information in accordance with state or federal law;

  (iii) identification of any public record sought that does not exist or is not within the possession, custody, or control of the agency or municipality that the records access officer serves;

  (iv) a statement as to why the agency or municipality requires additional time to produce all other public records sought;

(v) a reasonable timeframe in which the agency or municipality shall produce all other public records sought; provided, that, for an agency, the timeframe provided shall not exceed 60 days following the initial receipt of the request for public records; and, for a municipality, the timeframe provided shall not exceed 75 days following the initial receipt of the request for public records; provided further, that an agency or municipality may, by agreement of the requester, establish a date beyond the timeframes set forth herein;

(vi) an estimate of any fees that may be charged to produce the records; and

(vii) an invitation to the person making the request for public records to contact the records access officer to discuss a reasonable modification of the scope of the request.

- Replacement of the existing Section 10 with a new section to require that the records access officer permit inspection of or furnish public records to the requestor within 10 days, and a detailed procedure for appeals to the supervisor of public records. The new Section 10 also provides that the attorney general shall designate an individual within the office of the attorney general to serve as a primary point of contact for the supervisor including, but not limited to, a primary point of contact for any notice regarding an agency's refusal to comply with the supervisor's order.

- Section 10(e) requires the requestor to pay reasonable fee to obtain public records, as determined by the records access officer. However, the statute provides that the bases for such fees are limited to the actual cost of any storage device or material provided to a person in response to a request for public records and specifies how fees for producing public records must be calculated, including instances when a vendor is engaged to do so. Whenever an agency or municipality assesses a fee that is $25,000 or more, or claims that the reasonable and actual costs of engaging a vendor are $25,000 or more, the statute provides that a requester may immediately file an action seeking judicial review of the reasonableness of the fee or vendor quote in accordance with subsection (f) of section 10A.

- A new Section 10A which permits a requestor to file a complaint with the Superior Court pursuant to G.L.c. 231A for injunctive relief if an agency or municipality fails to furnish a copy of all or part of a public record; issues a response indicating that it does not intend to produce a public record; or fails to comply with any order issued by the supervisor of records. Section 10A permits the court to award reasonable attorney fees and other litigation costs reasonably incurred by the complainant, and may order the agency or municipality to waive or reasonably reduce any fee assessed to the requestor. If the Superior Court determines that the assessment of reasonable attorney fees and other litigation costs reasonably incurred is not warranted, the statute requires the judge to issue written findings specifying the reasons for such denial.

- Section 10A states that if a complainant has obtained judgment in a G.L.c. 231A action and has demonstrated by a preponderance of the evidence that the defendant agency or

municipality, acted maliciously or in bad faith in withholding or failing to timely furnish the requested record or any portion thereof, the Superior Court may assess punitive damages against the defendant agency or municipality an amount not less than $1,000 nor more than $5,000.

- Section 10A further provides that the attorney general may intervene as of right in any complaint, and may also file suit under G.L.c. 231A. If the attorney general prevails in in a G.L.c. 231A action, the court is required to assess against the defendant agency or municipality a civil penalty in an amount not less than $1,000 nor more than $5,000 for each violation found. The payment of any such civil penalty paid to or received by the attorney general shall be paid into the general fund of the Commonwealth.

- The addition of a new Section 10B which prohibits the commissioner of the department of criminal justice information services, the department of criminal justice information services and its agents, servants, and attorneys including the keeper of the records of the firearms records bureau of said department, or any licensing authority, as defined in G.L.c. 140, § 121 from disclosing any records divulging or tending to divulge the names and addresses of persons who own or possess firearms, rifles, shotguns, machine guns and ammunition or from disclosing the names and addresses of persons licensed to carry or possess firearms or ammunition to any person, firm, corporation, entity or agency except criminal justice agencies as defined G.L.c. 6, § 167 except to the extent such information relates solely to the person making the request and is necessary to the official interests of the entity making the request.

- Section 10B exempts the release of records in the custody of the employers of such personnel or the public employee retirement administration commission or any retirement board established under chapter 32 regarding the home addresses and home telephone numbers of law enforcement, judicial, prosecutorial, department of youth services, department of children and families, department of correction and any other public safety and criminal justice system personnel, and of unelected general court personnel. While disclosure to an employee organization under G.L.c. 150E, a nonprofit organization for retired public employees under G.L.c. 180 or to criminal justice agencies as defined in G.L.c. 6, § 167 is permitted, the names, home addresses, and telephone numbers of family members are not subject to disclosure.

- Section 10B also exempts the disclosure of the home addresses and telephone numbers or places of employment or education of victims of adjudicated crimes, of victims of domestic violence and of persons providing or training in family planning services and the name and home address and telephone number, or place of employment or education of a family member of any of the foregoing shall not be public records in the custody of a government agency which maintains records identifying such persons as falling within such categories and shall not be disclosed.

- A new Section 19 which requires records access officers shall consult with their chief executive officer or the Massachusetts office of information technology pursuant to the

provisions of G.L.c. 7D to ensure, where feasible, that the system or database is capable of providing data in a commonly available electronic format.

- Section 19 also requires that every agency provide specific public records in accessible in a commonly available electronic copies, of the following types of records on a searchable internet website: (i) final opinions, decisions, orders, or votes from agency proceedings; (ii) annual reports; (iii) reports to the General Court; (iv) notices of regulations proposed under chapter 30A; (v) notices of hearings; (vi) winning bids for public contracts; (vii) awards of federal, state and municipal government grants; (viii) minutes of open meetings; (ix) agency budgets; and (x) any public record information of significant interest that the agency deems appropriate to post; provided, that any agency may withhold any record or portion thereof in accordance with state or federal law.

B. An Act to Modernize Municipal Finance and Government (filed with the House on December 7, 2015; House Docket No. 4338)

The following is a list of the pertinent provisions of this proposed Act for municipalities:[1]

- M.G.L. c. 30, § 39M (Sections 1 to 3, 6 and 7, 9 to 12)
  - Less-than-full competitive bidding for "horizontal" construction contracts under M.G.L. c. 30, § 39M would be raised by $10,000 to $50,000
  - A new "middle tier" would be established for contracts between $10,000 and $50,000, allowing: an award to the offeror who can perform at the lowest price, provided that there is public notice of the contract and written responses from at least three persons who customarily perform the work; or use of the statewide contracts from the Operational Services Division or a blanket contract to obtain at least three bids.
- Construction Contract Exemption (Sections 4, 226)
  - "[T]he installation, repair and maintenance of telecommunication and data cabling and wiring; telecommunication, security, audiovisual and computer equipment; and carpeting" would be subject to procurement under M.G.L. c. 7, §§ 7, 51 and 52, unless an awarding authority determined it would be in the best interest to procure the work through M.G.L. c. 30, § 39M or M.G.L. c. 149, §§ 44A-44J.
- Amending Uniform Procurement Act (Section 5)
  - An existing exemption for contracts for bank services with maintenance of a compensating balance would be eliminated from Chapter 30B.
- Procurement Advertising (Sections 8, 229)
  - In lieu of newspaper publication, public advertising under Chapter 30B would be permissible on the COMMBUYS system or in the Central Register.
- Retiree Health Insurance Premium Apportionment (Section 13)
  - M.G.L. c. 32B, § 9A 1/2 would be repealed.
- OPEB Trust Funds (Sections 14, 239)

[1] The speakers wish to thank Kathleen Colleary, Bureau Chief of the Municipal Finance Law Bureau, for preparing a summary of the Act.

    - Governmental units would be allowed to create an Other Post-Employment Benefit (OPEB) Trust Fund that meets the legal requirements for trusts and with the Governmental Accounting Standards Board, instead of only a reserve/stabilization fund. An OPEB fund established prior to the effective date of the Act would remain in effect unless the provisions of the statute were reaccepted.
- Town Meeting Warrant Advertising (Section 18)
    - A Town Meeting warrant could be advertised by posting in any manner prescribed or approved under the Attorney General, instead of the current requirements of approval by bylaw or Attorney General approval.
- Rental Revolving Fund (Section 19)
    - Municipalities could create a revolving fund for rental or lease of public buildings or properties, or space in public buildings or properties (excluding public buildings or properties under School Committee control). Funds received could be expended for upkeep of the rental or leased facility without further appropriation.
- City Reserve Funds (Section 20)
    - The appropriation from a reserve fund for extraordinary or unforeseen expenditures would be permitted to be up to 5% of the tax levy from the prior fiscal year, instead of 3%, and would match the amount currently allowed for towns and districts.
- Stabilization Funds (Section 21)
    - The appropriation of funds into a stabilization account would be a majority (not 2/3) vote, although appropriations out of the fund would remain subject to a 2/3 vote. A municipality could all or at least 25% of a particular fee, charge or other receipt to a stabilization fund (with certain exceptions). There would be no limit on the amount reserved.
- Parking (Sections 22 to 24)
    - Revenue received from municipal parking meters would be placed in the general fund, unless specifically directed to a separate fund by city or town vote.
- Notices/Advertising (Sections 25 to 29, 36 to 39)
    - Notices under M.G.L. c. 40, §§ 32, 32A and M.G.L. c. 40A, § 5 can be advertised by posting in the manner prescribed or approved under the Open Meeting Law (including zoning-related notices).
- Certification of Local Property Assessments (Sections 31 and 32, 243)
    - The certification by the Department of Revenue would be increased from three years to five years, for fiscal years starting on or after July 1, 2017.
- Delinquency (Sections 33 and 34)
    - Under M.G.L. c. 40, § 57, which allows the denial of permits and licenses, for unpaid taxes and other charges, the delinquency list could be prepared periodically, as opposed to annually; this list serves as the basis for denial of a permit or license.
- Municipal Fines Lien Collection (Section 35)
    - A lien could be issued upon real property for unpaid fines.
- Treasurer/Collector (Sections 49 and 50)

    - Municipalities could combine the offices of treasurers and tax collectors into a single appointed provision, without special legislation.
- Direct Deposit (Section 53)
    - Upon local acceptance, municipalities can require direct deposit for paying employees.
- Approval Bill Warrants (Sections 54 and 55)
    - The board of selectmen and any other multi-member body may designate one of its members for approving bills, payrolls, drafts and orders, provided that a record of actions is provided for the next meeting.
- Injured on Duty Fund (Section 57)
    - A municipality or district may establish a special fund for police officers and firefighters injured on duty, to pay leave compensation or medical bills from the fund, instead of charging such amounts to departmental appropriations.
- Charter Initiate (Sections 58 and 59)
    - Boards of selectmen, town managers, mayors or city managers can initiate the adoption or revision of a charter by filing a request with the board of registrars of voters.
- Debt Purposes (Sections 60, 62 and 63, 172)
    - Amendments to borrowing laws. Borrowing is permitted for a court judgment for more than one year if authorized by the Municipal Finance Oversight Board.
- Lease Purchases (Section 68)
    - This section would allow the use of tax-exempt lease-purchase financing agreements by municipal departments and authorize borrowing to pay off such an agreement if it will create interest savings.
- Emergency Spending (Section 69)
    - Automatic approval of payment for liabilities incurred would be allowed for emergencies and disasters involving a Governor-issued state of emergency.
- Court Judgments (Sections 71 and 72)
    - Payment permitted without appropriation of final court judgments and final adjudicatory claims with municipal counsel certification that no appeal can or will be taken and as required by municipal charter, ordinance or bylaw, from available funds.
- Snow and Ice Removal (Section 73)
    - Prior approval by board of selectmen or city council not required for deficit spending for snow and ice removal, and instead only chief administrative officer approval required.
- Year End Transfers (Sections 74 and 75)
    - Elimination of limits on types and amount of appropriation transfers at year end under M.G.L. c. 44, § 33B.
- Departmental Revolving Fund (Sections 84 and 85)
    - Amendments to revolving funds statutes to create flexibility by removing department per fund and total fund caps, broadening types of department receipts that can be created, and permitting creation of revolving funds by bylaw or ordinance. Also, the statute for revolving funds for parks and recreation program fees would be eliminated.
- Refundable Consulting Fees (Section 89)

    - The provisions of M.G.L. c. 44, § 53G for refundable consulting fees would be expanded to included fees for outside consultants established under the rulemaking authority, statute, ordinance or bylaw.
- Elections (Sections 96 to 98)
    - Change to the hours requirement for municipalities to conduct voter registration sessions.
- Right of First Refusal (Section 114)
    - Establishment of right of first refusal for property owned by a charitable organization or a church is being sold or developed for a non-exempt purpose, similar to a right of first refusal for forest, farm or recreational land.
- Liquor Licenses (Sections 209 to 220, 238, 240)
    - Municipalities, other than Boston, could establish quotas for liquor licenses issued to facilities allowing on-premises drinking (which would be non-transferable) and to managers of special outdoor events. The amendment would not modify the statutory quota for off-premises facilities (*e.g.,* liquor stores), although other provisions allowing supplemental licenses over the minimum quota and limiting the total number of licenses to any person or corporation would be eliminated. The number of licenses permitted under current law may continue, unless modified by a municipality under the municipal plan authorized by these sections.
- Municipal Procurement (Sections 222 to 225, 227 to 228)
    - The "vertical" construction procurement statute under M.G.L. c. 149, § 44A would be amended to raise the total dollar threshold for less-than-full competitive bidding from $25,000 to $50,000. Other changes would be similar to "horizontal" construction as noted above for "middle tier" contracts. Also, the dollar threshold for contracts in which competitive bidding is required would be raised from $100,000 to $150,000 for the first tier and for the requirement for the filing of "sub-bids" and "sub-trade" bids.
- Double Poles (Section 232)
    - Municipalities could enforce a statutory prohibition on the maintenance of double poles remaining ninety days after enactment of local legislation authorizing such enforcement. Penalties would be up to $1,000 per occurrence.
- Small Claims Actions (Sections 234 and 235)
    - The small claims session would have jurisdiction over locally assessed personal property taxes regardless of amount (which could be used when there was only personal liability).
- Civil Service Exemptions (Section 241)
    - A municipality could exempt positions from the civil service law by vote of the governing body or executive, instead of special legislation.

II. CASES

Selected Cases for Discussion:

A. Reed v. Town of Gilbert, Ariz., 135 S.Ct. 2218 (2015)

On June 18, 2015, the United States Supreme Court struck down as unconstitutional the Town of Gilbert, Arizona's Sign Code holding that the Town's Sign Code's provisions unconstitutionally targeted the content of "Ideological Signs," "Political Signs," and "Temporary Directional Signs." We take this opportunity to summarize this important decision and offer practical advice for clients wishing to implement or modify a similar practice.

The Town of Gilbert, Arizona (Town), has a comprehensive code (Sign Code or Code) that prohibits the display of outdoor signs without a permit, but exempts 23 categories of signs, including three relevant here. "Ideological Signs," defined as signs "communicating a message or ideas" that do not fit in any other Sign Code category, may be up to 20 square feet and have no placement or time restrictions. "Political Signs" were defined in the Code as signs "designed to influence the outcome of an election" and were allowed to be a maximum of 32 square feet in area, and could only be displayed during an election season. "Temporary Directional Signs," were defined as signs directing the public to a church or other "qualifying event." Temporary Directional Signs were subject to the following restrictions: No more than four of the signs, limited to six square feet, may be on a single property at any time, and signs may be displayed no more than 12 hours before the "qualifying event" and 1 hour afterward.

The Good News Community Church (Church) and its pastor, Clyde Reed posted signs each Saturday bearing the Church name and the time and location of Sunday church services that were held at various temporary locations in and near the Town. The Church did not remove the signs until around midday each Sunday. The Church was cited for exceeding the time limits for displaying its Temporary Directional Signs and for failing to include an event date on the signs.

Unable to reach an accommodation with the Town regarding the Code, petitioners filed suit, claiming that the Code abridged their freedom of speech. The District Court denied petitioners' motion for a preliminary injunction, and the Ninth Circuit affirmed. Upon review, the Supreme Court found that the restrictions in the Town's Sign Code "depend[ed] entirely on the communicative content of the sign" and were therefore unconstitutional. In concurrences to the opinion, several of the Justices observed that the court's holding may have a later effect on reasonable municipal rules that have been unchallenged for some time. The Town itself argued that the decision will impair cities' and towns' ability to ensure traffic safety and preservation of local aesthetic values.

The Court stressed that sign bylaws or ordinance that are "narrowly tailored to the challenges of protecting the safety of pedestrians, drivers, and passengers" would survive constitutional review, and observed that municipalities do have the power to enforce reasonable sign regulations in a content-neutral manner, listing the following examples of constitutionally valid rules:

1. The size and location of signs, and whether signs may be free-standing or attached to buildings;
2. Whether signs may be lighted or unlighted;
3. Whether signs must have fixed message s or may have changing messages as do electronic signs;
4. Whether the sign is placed on commercial or residential property;
5. Restrictions on the number of signs on a piece of property; and
6. Time limits for the display of signs.

B. **Thayer v. City of Worcester, C.A. No. 13-40057-TSH, 2015 WL 6872450, --- F. Supp. 3d --- (D. Mass. Nov. 9, 2015)**

The City of Worcester (City) adopted ordinances directed at reducing panhandling, and focused its attention on "aggressive panhandling." One of the ordinances prohibited begging, panhandling and soliciting in an aggressive manner; the other ordinance prohibited standing or walking on a traffic island or roadway, other than to cross at an intersection or crosswalk, or to go into or leave a vehicle or "for some other lawful purpose. While the District Court denied the Plaintiffs' motion for a preliminary injunction, which was affirmed by the First Circuit, except as to a prohibition of nighttime solicitation.

This case was impacted by the decision in Reed cited above; following Reed, the First Circuit vacated its prior opinion and judgment and remanded the case back to the District Court. Subsequently, the District Court issued a decision granting summary judgment for the Plaintiffs and denying summary judgment to the City.

Two of the Plaintiffs were unemployed City residents, who were unemployed and had been homeless at times over the years. The Plaintiffs regularly stood in public areas in the City, using signs with messages to request assistance or money from others. These Plaintiffs solicited for assistance from City traffic islands prior to the ordinances being enacted, and they indicated their intent to continue to do so but for the ordinances. The third Plaintiff was an elected School Committee member, who regularly campaigned on traffic islands and rotaries in the City; this third Plaintiff was concerned about enforcement of the ordinances against her.

The District Court recognized that the First Amendment to the United States Constitution protected soliciting contributions, which is expressive activity. Additionally, political campaigning (*e.g.*, displaying political signs and waving to pedestrians and passing motorists) was also protected by the First Amendment. The areas implicated by the ordinances – sidewalks, streets, traffic islands, and medians – were recognized as traditional public forums for purposes of the First Amendment.

Applying Reed in a similar manner as other courts, the District Court held that the aggressive panhandling ordinance was content-based and therefore subject to strict scrutiny. To satisfy such scrutiny, the ordinance would need to "further[ ] a compelling interest and is narrowly tailored to achieve that interest." Strict scrutiny is "exacting," and exceptional standard to satisfy, as such content-based regulations are "presumptively invalid."

The preamble to the aggressive panhandling ordinance referenced a concern with coercion associated with aggressive panhandling, and therefore this ordinance was intended to protect the safety and welfare of the public. The District Court recognized that the City had a valid interest in addressing the safety and convenience of residents on public sidewalks and streets. While the interests were valid, the aggressive panhandling ordinance failed to satisfy strict scrutiny because it was not the least restrictive means available to accomplish those interests. The District Court held that, while the government could enact regulations to protect the safety of panhandlers and those being solicited, the specific threat to public safety must be identified and the corresponding laws must precisely and narrowly restrict only the conduct that creates such a threat.

On the other hand, the District Court recognized that the ordinance prohibiting standing or walking on a traffic island or roadway (with exceptions for certain purposes) was content-neutral. This ordinance does not target a specific view point or subject matter, and instead was adopted for public safety reasons. Under intermediate scrutiny, this ordinance required a substantial government interest, and be narrowly tailored to serve that interest, without being "substantially broader than necessary to achieve the government's interest." This ordinance was held invalid because it was over-inclusive and imposed a serious burden on speech, by proscribing virtually activity on median strips and traffic islands; it applied to all median strips and traffic islands, irrespective of size and character, and did not account for particular pedestrian and vehicular traffic patterns. There was no demonstrated need for the broad sweep of this ordinance, and a less intrusive means of regulation was not considered.

C. Richmond v. Peraino, C.A. No. 15-10933-LTS, 2015 5315193, ---F. Supp. 3d ---- (D. Mass. Sept. 11, 2015)

In this case, Steven Richmond ("Mr. Richmond"), one of the Plaintiffs, sought a License to Carry or a Permit to Purchase so that he could possess a handgun in his residence for self-defense purposes and transport a handgun to a firing range. In 1975, Mr. Richmond was convicted in Florida for simple possession of less than an ounce of marijuana, a misdemeanor. Mr. Richmond paid the fine and did not serve any jail time. Mr. Richmond did not have any felony conviction or any conviction of a statutory disqualifier for a License to Carry. Mr. Richmond originally held a License to Carry, but it was revoked because of a statutory disqualifier for a person who "has, in any other state or federal jurisdiction been convicted [of] . . . a violation of any law regulating the use, possession or sale of a controlled substance." M.G.L. c. 140, § 131(d)(ii). Mr. Richmond was similarly barred from holding a Permit to Purchase.

Prior case law held that, under the Second Amendment to the United States Constitution, "a categorical ban on gun ownership by a class of individuals must be supported by some form of 'strong showing,' necessitating a substantial relationship between the restriction and an important governmental objective." This case followed the reasoning and result in Wesson v. Town of Salisbury, 13 F. Supp. 3d 171, 178 (D. Mass. 2014), a case where one out-of-state conviction for simple possession of marijuana did not operate as an automatic disqualifier for issuance of a License to Carry.

While the conviction was in Florida, if it had been in Massachusetts, possession of less than one ounce of marijuana was not an automatic disqualifier because, if the individual had no prior drug convictions, the punishment would be probation and, upon successful completion, the case would be dismissed and the records would be sealed. The sealing of such a record of conviction, under M.G.L. c. 94C, § 34, is not a conviction for purposes of a disqualification or other purpose. Also, the District Court noted that possession of small amounts of marijuana was decriminalized in 2008, and this decriminalization prohibiting any penalties or sanctions for such small amounts of marijuana. Therefore, if the drug offense had occurred in Massachusetts, the applicant would not have been automatically disqualified and, given that the only distinction was the state where the conviction occurred, the Commonwealth of Massachusetts had previously noted that a disqualification was not "'substantially related' to an interest in preserving public safety and preventing crime." Applying this exclusion would otherwise infringe upon the Second Amendment's right to possess firearms in the home for self-defense.

Accordingly, declaratory and injunctive relief was ordered, based on the facts presented. The Defendant Chief of Police was ordered not to apply the automatic disqualifier under the License to Carry and Permit to Purchase statutes, but the District Court noted that it did not address any other disqualifications that could apply, whether the Plaintiff was otherwise suitable for the License to Carry or Permit to Purchase, or the restrictions that could apply.

D. Champa v. Weston Public Schools, 473 Mass. 86 (2015)

In this case, the question presented was whether settlement agreements between a public school and the parents of a public school student who requires special education services are "public records" or exempt from disclosure. On transfer from the Appeals Court, the Supreme Judicial Court, Botsford, J., vacated the judgment of the Superior Court and remanded the case is remanded for further proceedings consistent with the court's opinion that [1] settlement agreements between public school and the parents of a student who required special education services were "education records" under Family Educational Rights and Privacy Act (FERPA), and thus personally identifiable information therein was not a "public record"; [2] agreements amounted to an unwarranted invasion of the student's personal privacy, and thus personally identifiable information therein was not a "public record"; and [3] confidentiality clause in agreements would not preclude application of public records law.

On January 17, 2012, plaintiff Michael Champa, a resident of the school district, made a public records request for, "[c]opies of all agreements entered into by the [school district] with parents and guardians, as part of the [individualized education program (IEP)] process, in which the [school district] limited its contribution to education funding or attached conditions for it for out of district placements" for school years 2007–2012. On January 30, 2012, the school district's interim director of student services replied by letter stating that the information requested was not a matter of public record because "disclosure of the requested student records, in whole or in part, would constitute a violation of the Family Education Rights and Privacy Act (FERPA) and the Massachusetts [Student] Record Regulations."

The plaintiff sought review by the supervisor of public records, who ruled that the records sought are exempt from disclosure. The plaintiff then filed suit in the Superior Court, seeking a declaration that the agreements were public records as well as a permanent injunction ordering their disclosure.

Commenting that the record before the court was limited, the SJC agreed with the school district that settlement agreements were likely to contain information regarding a student's disability, progress, and needs important to the student's "educational process" and "educational needs" pursuant to 603 C.M.R.§§ 23.02-23.03, and therefore qualified as part of a "student record." The court observed however, that Massachusetts student records law and regulations protect student records only as they pertain to certain information citing to C.M.R.§§ 23.02-23.03 and 23.07(4). Accordingly, the Court determined that that under the public records law, any "segregable portion" of the record must be disclosed, if with the redaction it independently is a public record. G.L. c. 66, § 10 (a).

Turning to the settlement agreements, the court acknowledged that both Federal IDEA and the Massachusetts special education law, G.L. c. 71B, contain provisions protecting the confidentiality of the educational records of students with disabilities who receive special education services. However, the court reiterated that "[n]othing in these statutes suggests that records relating to students are confidential once all personally identifiable information is removed."

As to the privacy exemption under G.L. c. 4, § 7, Twenty-sixth (c), the court considered "whether disclosure would result in personal embarrassment to an individual of normal sensibilities, whether the materials sought contain intimate details of a highly personal nature, and whether the same information is available from other sources." Acknowledging that the requested agreements might contain information that would link the name of the individual student (and his or her family) to information about the services and programming the child will receive and information about the child's disability, progress, and needs that amounts to an unwarranted invasion of the student's personal privacy, the court found that the disclosure of such information "is highly personal, and disclosure may result in embarrassment and potentially lead to stigma bringing it within the scope of exemption (c)."

What is notable about this decision is that the court indicates that contractual confidentiality terms in settlement agreements regarding special education services may not entirely protect such agreements from public view: "Although the agreement may have served as a private settlement of a dispute between the school district and one of the families living in the school district, the fact that the school district and the family contractually agreed to keep the settlement private cannot, by itself, trump the public records law and the school district's obligation to comply with the law's requirements.

E. Coghlin Elec. Contractors, Inc. v. Gilbane Bldg. Co., 472 Mass. 549 (2015)

One of the innovations of the Construction Reform Act of 2004 was to introduce Construction Management at Risk ("CM at Risk") as an allowed alternative delivery method for certain Massachusetts public construction building projects. See G.L. c. 149A, §§ 1-13. Ten

years later, the Supreme Judicial Court took on an appeal that presented an important question about whether the CM at Risk model allocates risk for design defects differently than the traditional design-bid-build model. The SJC decided that appeal earlier this month, in the much awaited decision of Coghlin Electrical Contractors, Inc. v. Gilbane Building Company, et al., SJC -11778 (September 2, 2015), finding that public owners assume a continued but narrowed risk for design defects in CM at Risk projects. The Court's decision also provides guidance how a public owner may eliminate this risk entirely.

In Gilbane, project subcontractor Coghlin Electrical Contractors, Inc. sued Construction Manager At Risk ("CMAR") Gilbane Building Company alleging that it was forced to incur additional costs as a result of design errors. In turn, Gilbane sued project owner Division of Capital Asset Management and Maintenance (DCAM), alleging that DCAM is responsible for design errors pursuant to the common law doctrine under which project owners are construed to impliedly warrant that the project design plans and specifications are sufficient for their intended purpose (i.e., free from defects). This common law principle is often referred to as the Spearin doctrine because the U.S. Supreme Court affirmed it in U.S. v. Spearin, 248 U.S. 132 (1918).

The Superior Court (Davis, J.) allowed DCAM's motion to dismiss Gilbane's third-party complaint, on the grounds that the owner's traditional implied warranty was inapplicable in the CM at Risk context because, unlike in a traditional design-bid-build project, the CMAR participates in the design process. The Superior Court also relied on the strong indemnity language in the DCAM contract with Gilbane requiring "Gilbane to indemnify, defend, and hold harmless DCAM from all claims, damages, losses, and expenses 'arising out of or resulting from the performance of the Work.'"

In reversing the Superior Court, the SJC rejected the wholesale exclusion of the implied warranty in CM at Risk projects. However, the SJC limited the implied warranty in the CM at Risk context, finding that the construction manager "may benefit from the [Spearin Doctrine] implied warranty only where it has acted in good faith reliance on the design and acted reasonably in light of the CMAR's own design responsibility." The SJC further clarified that "[t]he greater the CMAR's design responsibilities in the contract, the greater the CMAR's burden will be to show, when it seeks to establish the owner's liability under the implied warranty, that its reliance on the defective design was both reasonable and in good faith." Thus, to recover for damages resulting from defective design specifications, the CMAR must show that (a) it relied in good faith on the plans and specifications (including proactively identifying and attempting to resolve specification inconsistencies wherever possible) and that it (b) acted reasonably in relying on the extent of the construction manager's assumption of its own design responsibilities under the CMAR contract.

At first glance, Gilbane may be viewed as a victory for contractors, however, the decision also includes at least two practice pointers for municipal counsel: First, the SJC held that the owner's implied warranty of plans and specifications is more limited in the construction manager at risk context than in the design-bid-build context. Second, the SJC was careful to note that public owners can avoid application of the Spearin doctrine by including express language in the contract documents (which the public owner provides) expressly disclaiming any express or implied warranties regarding the sufficiency of the plans and specifications. In addition to

including such disclaimer language in the CMAR contract and bidding documents, the public owner should include companion language in its contract with the designer stating that the designer is obligated to defend, indemnify and hold the public owner harmless from any claim by the CMAR alleging defective plans or specifications. By implementing these dual drafting precautions, counsel for the public owner can avoid the unintended application of implied warranties to the unexpected financial harm of public owners.

F. Doe v. City of Lynn, 472 Mass. 521 (2015)

A certified class of sex offenders subject to Lynn's "Ordinance Pertaining to Sex Offender Residency Restrictions in the [city]" ("Ordinance") on January 12, 2011 challenged the constitutionality of the ordinance, which imposed restrictions on the right of sex offenders to reside in the city. The Superior Court, Essex County, Timothy Q. Feeley, J., invalidated the ordinance under the Home Rule Amendment, and city appealed. Affirming the Superior Court's ruling, but declining to reach the broader constitutional grounds asserted by the plaintiffs and the amici, the Supreme Judicial Court (Hines, J.) held that ordinance was inconsistent with the comprehensive scheme of legislation under G.L. c. 6, §§ 178C–178Q. St. 1999, c. 74, as amended by St. 2003, c. 26, § 12, and by St. 2013, c. 63 ("the Sex Offender Registry Law") enacted to protect the public from convicted sex offenders and thereby manifested a "sharp conflict" with state law and rendering the ordinance unconstitutional under the Home Rule Amendment.

The City of Lynn adopted the Ordinance to "reduce the potential risk of harm to children of the community by impacting the ability of registered sex offenders to be in contact with unsuspecting children in locations that are primarily designed for use by, or are primarily used by children." The city's rationale in adopting the Ordinance was that "[r]egistered sex offenders continue to reside in close proximity to public and private schools, parks and playgrounds"; that "registered sex offenders will continue to move to buildings, apartments, domiciles or residences in close proximity to schools, parks and playgrounds"; and that the Massachusetts sex offender registry law is silent as to location restrictions for such offenders.

The Ordinance imposed broad restrictions, with only narrow exceptions, on the ability of level two and level three registered sex offenders to reside in the city: the residential exclusion zone for level two and level three sex offenders is 1,000 feet from a school or park, and included in its description of "school" all public, private, and church schools, and any other business permitted as a school. The Ordinance also applied to all temporary and permanent residences except a "residence at a hospital or other healthcare or medical facility for less than fourteen consecutive days or fourteen (14) days in the aggregate during any calendar year."

Although the Ordinance contained exceptions for minors, persons "residing with a person related by blood or marriage within the first degree of kindred", persons who had established a permanent residence within a restricted area by purchasing real property or by being the lessee of an unexpired lease or rental agreement prior to the effective date of the ordinance, and persons who established a permanent residence before the school or park creating the applicable restricted area was established, the court regarded the Ordinance as unduly punitive: Failure to comply with the ordinance resulted in a $300 per day penalty for each day that a sex offender

remained in a restricted area thirty days after receiving a notice to move. A "subsequent offense" resulted in notice of violation of the ordinance being given to the sex offender's "landlord, parole officer and/or probation officer, and the ... Sex Offender Registry Board."

In remarks that surely drew the close attention of municipal counsel, the SJC observed first that the geographical and temporal reach of the Ordinance effectively prohibited, at least in some degree, all 212 registered level two and level three sex offenders residing in the city, as of April 22, 2014 from establishing residence, or even spending the night in a shelter, in ninety-five per cent of the residential properties in Lynn. The court further observed that a sex offender required by the Ordinance to move from his or her residence could encounter similar restrictions in attempting to relocate to nearby cities and towns as forty municipalities have adopted sex offender residency restrictions.

The court then summarized the legislative intent and history of the offender registration requirement, offender classification, and community parole supervision for life mechanisms within the Sex Offender Registry Law to conclude that the statute "evinces the Legislature's intent to have the first and final word on the subject of residency of sex offenders." The court then opined that the Ordinance not only effected "a wholesale displacement of sex offenders from their residences" but that it also "frustrated the purpose of the registry law and, therefore, is inconsistent and invalid under the home rule provisions."

In a final note, the court enumerated several other statutes enacted to protect the public from registered sex offenders that weighed against the utility of the Ordinance: the "[mandate] that transient benefits be withheld, G.L. c. 18, § 38, and motor vehicle licenses and registration be suspended, G.L. c. 90, § 22(j), if a sex offender has not maintained current registration information," the prohibition in General Laws c. 6, § 178K (2) (e), inserted by St. 2006, c. 303, § 6, against level three sex offenders from living a rest home or other regulated long-term care facility, and the limitation on a sex offender's ability to live with adopted or foster children, G.L. c. 119, § 26A, or to work as a child care provider, G.L. c. 15D, §§ 7, 8, a school bus operator, G.L. c. 90, §§ 8A, 8A 1/2, or an ice cream truck vendor, G.L. c. 265, § 48.

G. DaRosa v. City of New Bedford, 471 Mass. 446 (2015)

This case addressed work product as an exemption under the Public Records Law. Previously, in General Electric Co. v. Department of Environmental Protection, 429 Mass. 798 (1999), the Supreme Judicial Court held that work product was not exempt from disclosure under the Public Records Law unless it fell within a statutory exemption.

Here, the City of New Bedford (City) was sued by property owners due to alleged environmental contamination. The City Solicitor hired an environmental consultant to evaluate the issues and to identify parties potentially responsible for the contamination, who could be legally responsible for cleanup costs. The consultant services were provided to the City Solicitor as part of the pending property owner lawsuit. Subsequently, the City filed a third party complaint against various third party defendants. During discovery, these third party defendants challenged the City's reliance on the work product protection and attorney-client privilege to withhold documents, including a draft evaluation report.

While the Superior Court judge held that the documents would otherwise be considered work product under the Massachusetts Rules of Civil Procedure, he noted that such documents were non-exempt under the Public Records Law, as a result of General Electric as they were received by the City Solicitor. The Superior Court held that the records were not protected by the attorney-client privilege. As a result, the City was ordered to produce the records.

The discovery order was ultimately considered on appeal by the Supreme Judicial Court. As a starting point, the Supreme Judicial Court recognized that Exemption (d) to the Public Records Law applied to "policy deliberations," which consisted of "inter-agency or intra-agency memoranda or letters relating to policy positions being developed by the agency; but . . . shall not apply to reasonably completed factual studies or reports on which the development of such policy positions has been or may be based." The Supreme Judicial Court compared this Exemption (d) against the counterpart provision in the Federal Freedom of Information Act.

The Supreme Judicial Court revisited its General Electric decision and held that there may be implied exemptions to the Public Records Law. For example, the attorney-client privilege or documents subject to a judicial protective order in discovery were implied exemptions.

In turn, the Supreme Judicial Court concluded that decisions made by a government agency in litigation, such as litigation strategy or case preparation, could be considered "policy deliberation." Decisions made in anticipation of litigation or during litigation were "policy" decisions, and the need for nondisclosure was even more so in litigation than other contexts, given the adversarial process involved and potential use by an opposing party.

The Supreme Judicial Court distinguished between "opinion" work product and "fact" work product. "Opinion" work product consists of "the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation," and is exempt from disclosure under Exemption (d). "Opinion" work product may be prepared in anticipation of litigation or for trial by or for a party or a party representative; the holding here equated the protection for "opinion" work product with that existing under the Massachusetts Rules of Civil Procedure.

Conversely, "fact" work product is non-exempt, even if it is part of a policy position, where the work product is a "reasonably completed factual stud[y] or report[ ] on which the development of such policy positions has been or may be based." If "fact" work product is not located in a "factual study or report" or the "factual study or report" containing it is not "reasonably completed," then it is exempt from disclosure until the time of reasonable completion of the study or report. Where a factual study or report is reasonably complete and is intertwined with opinions or with analysis resulting in opinions, the purely factual portion of the study or report is non-exempt and the discussion or analysis portion is exempt, even if it contains facts.

The Supreme Judicial Court left it to the Superior Court to determine whether Exemption (d) applied to the challenged documents. Nonetheless, the Supreme Judicial Court recognized

that reports, letters or memoranda written by the outside consultant could be considered "intra-agency" documents for purposes of Exemption (d). In so holding, the Supreme Judicial Court recognized that the documents were received by the government, prepared at the government's request, and assisted the government with performing its own functions – therefore it was immaterial that an outside consultant prepared the documents, and instead the applicability of Exemption (d) turned on the content of the documents.

Additionally, the Supreme Judicial Court held that the outside consultant report was not protected by the derivative attorney-client privilege. Such a privilege exists "only when the [third party's] role is to clarify or facilitate communications between attorney and client . . . as where 'the [third party] functions as a 'translator' between the client and the attorney,' . . . and is therefore 'nearly indispensable or serve[s] some specialized purpose in facilitating the attorney-client communications.'" The derivative attorney-client privilege may apply to translating technical information or foreign language; but the outside consultant's analysis did not qualify because it did not involve translating confidential communications from the client and instead involved an analysis of technical data relating to the subject site.

H. **Murray v. Town of Hudson 472 Mass. 376 (2015)**

This case considered the applicability of the recreational use statute, M.G.L. c. 21, § 17C, to a student from a visiting high school participating in an athletic contest. The purpose of the recreational use statute is to enable property owners to allow the use of their land for broad, public, and purposes, and accomplishes this result by barring certain types of claims. Unless the property owner has engaged in willful, wanton or reckless conduct – to which the statute does not apply – the recreational use statute applies when a property owner "lawfully permits the public to use such land for recreational . . . purposes without imposing a charge or fee therefor" and applies to personal injury, including minors. Thus, the recreational use statute, if the requirements are satisfied, bars claims for ordinary negligence.

Here, the Plaintiff was a student from a visiting high school, who was injured during warmups in the bullpen. The ballgame was located at a public park owned by the Town of Hudson (Town), maintained by the Hudson Department of Public Works, and used by the Hudson High School. The Plaintiff asserted claims under the Tort Claims Act and the recreational use statute, alleging negligence and wanton and reckless conduct from a bullpen that was asserted to be dangerous. This bullpen area was designed and built by a former Town employee, and maintained by the Town and student athletes.

Because the recreational use statute applies where government entities allow free access to their land from public use, the Town was permitted to invoke its protections. However, the Supreme Judicial Court noted that the recreational use statute did not apply to claims between a school and its students, as barring such claims was not consistent with the original purpose of the statute (*i.e.*, "to encourage landowners to give the public free access to their land for recreational purposes by protecting them from negligence claims if a member of the public were to be injured on the land"). As a result, a school has a duty of care for delivering "reasonably safe school premises for school-related activities, including interscholastic sports." A "special relationship"

existed between a school and its students, which nullified the application of the recreational use statute.

The Supreme Judicial Court declined to distinguish between using a Town ballpark for interscholastic baseball games versus using a field on the premises on the Town high school. Similarly, the Supreme Judicial Court declined to distinguish in the relationship between the Town and its students versus students from an opposing high school: "This not only would be poor sportsmanship; it would be bad law." As a result, the Town had the same duty of care for students on a visiting team as it does for its own students, which is to provide a reasonably safe playing field.

The Supreme Judicial Court also addressed the presentment requirement under the Tort Claims Act. The Plaintiff's presentment letter alleged "negligent design," but the lawsuit also included a "negligence maintenance" claim. This discrepancy was not a fatal defect, because a presentment letter only needs to include sufficient facts for which public officials reasonably can determine the legal basis of the claim, and whether it articulates a claim for damages recoverable under the statute. The presentment letter here was not required to specify the specific theory of negligence, and instead it was sufficient that the claim was based on negligence and willful, wanton or reckless conduct; the letter did not limit itself to a specific negligence theory, and the Town was reasonably able to investigate the circumstances and potential liability of a claim.

I. **Showtime Entertainment LLC v. Town of Mendon, 472 Mass. 102 (2015)**

In this case, the Town of Mendon (Town) adopted a general bylaw prohibiting the sale or consumption on the premises of an adult entertainment business, and prohibiting such businesses from obtaining an alcohol license. The First Circuit certified questions concerning the constitutionality of this alcohol prohibition to the Supreme Judicial Court under Article 16 to the Massachusetts Declaration of Rights only.

The Supreme Judicial Court applied the intermediate scrutiny standard of review. To satisfy this standard of review, the alcohol prohibition had to: (1) be supported by studies or evidence evincing a "countervailing State interest; and (2) if the alcohol prohibition was so supported, it had to be narrowly tailored.

Under the first part of the analysis, the judicial record or the legislative record for the regulation must demonstrate a "countervailing State interest in the form of the mitigation of negative secondary effects. This evidence must have been actually considered by the municipality, although it need not be conscripted by the municipality, and can instead involve reliance upon third party studies and evidence.

Here, the text of the alcohol prohibition expressly referenced an interest in crime prevention, based on potential secondary crime effects from combining adult entertainment and alcohol. The pre-enactment studies and other evidence presented at the Special Town Meeting adopting the alcohol prohibition was sufficient. The Plaintiff did not provide affirmative evidence sufficient to challenge the countervailing state interest in crime prevention; an article

challenging certain adult entertainment studies was based upon studies that were not used by the Town.

However, the alcohol prohibition was not narrowly tailored and did not satisfy the second part of the analysis. Narrow tailoring requires a regulation to address "the source of the evils the [town] seeks to eliminate . . . and eliminates them without at the same time banning or significantly restricting a substantial quantity of speech that does not create the same evils." Narrow tailoring means that the governmental regulation cannot be "substantially broader than necessary to achieve the government's interest," although it is not the least restrictive means. This requires a court to consider the effect of other speech impacted by a regulation.

The alcohol prohibition was not narrowly tailored because it applied to other forms of entertainment involving nudity, such as "work[s] of unquestionable artistic and socially redeeming significance" (*e.g.* a performance of Equus or Hair), and was broader than necessary. These other forms of entertainment were not the source of the targeted secondary effects as identified in the studies relied upon by the Town, but would be subject to the alcohol prohibition. Consequently, the Town had to use other, narrower ways of achieving its interest in crime prevention.

J. **Galenski v. Town of Erving, 471 Mass. 305 (2015)**

The case addressed the inconsistency of a local policy for retiree healthcare premiums against state law. In 1956, the Town accepted M.G.L. c. 32B and, based on specific local option provisions of that statute that were accepted, the Town was required to make available group health insurance coverage for its retired employees. In 2001, the Town of Erving (Town) accepted M.G.L. c. 32B, § 9E, a local option statute under which the Town contributed over fifty percent of the health insurance premiums of its retirees.

The Plaintiff worked as a public school teacher in other Massachusetts municipalities and, between 2006 and 2012, she was employed as a school principal in the Town. Prior to the Plaintiff's employment, the Town adopted a policy requiring retired employees to have worked for the Town for at least ten years before it would contribute to group health insurance premiums of retired employees, although retiree's falling below this service threshold could participate in the Town's group health insurance plan at one hundred percent of the insurance premium. When the Plaintiff retired, she was allowed to stay on the Town's group health insurance plan; however, the Town declined to contribute to her health insurance premiums because of the policy as she was not employed by the Town for ten years.

On appeal, the Supreme Judicial Court recognized that M.G.L. c. 32B, which provided various insurance benefits for government employees, was a local option statute, and only took effect if accepted by a governmental unit. If a municipality accepts M.G.L. c. 32B, "it provides the exclusive mechanisms by which and to whom the [municipality] may provide group health insurance." If a municipality has accepted M.G.L. c. 32B, an employee automatically receives group insurance coverage unless he or she provides written notice to opt out. The "default" provision in M.G.L. c. 32B, § 9 requires a municipality to continue coverage for retirees if group health insurance coverage is provided to its active employees; unless M.G.L. c. 32B, §§ 9A or

9E are accepted, the retiree must pay the full premium cost. Under M.G.L. c. 32B, §§ 9A, if accepted, the municipal contribution is fifty percent of the retiree's insurance premium; conversely, if M.G.L. c. 32B, § 9E is accepted, a municipality can choose to pay "a subsidiary or additional rate" more than fifty percent of the retiree's health insurance premium. Also, M.G.L. c. 32B, § 9E prohibits "different subsidiary or additional rates to any group or class within that [governmental] unit."

The Town argued that its service policy was consistent with M.G.L. c. 32B, § 9E. However, the Supreme Judicial Court disagreed, instead interpreting M.G.L. c. 32B in general and M.G.L. c. 32B, § 9E in particular. Accordingly, the Supreme Judicial Court held that M.G.L. c. 32B contained "unambiguous mandates" that had to be followed by a municipality that accepted it, even if the acceptance was voluntarily. Inasmuch as the Town voluntarily accepted M.G.L. c. 32B, § 9E, it was required by that section to contribute over fifty percent of the premiums of "employees retired from the service of the town."

Moreover, the Supreme Judicial Court held that the Plaintiff was an "employee" under M.G.L. c. 32B, § 2, as she satisfied the requirement of at least twenty hours of service, regularly, in the service of the Town during the regular work week of permanent or temporary employment and her overall thirty years of creditable service entitled her to retirement benefits.

The Plaintiff's participation on the Town's group health insurance plan while employed with the Town statutorily entitled her to continue group health insurance as a retiree, per M.G.L. c. 32B, § 9. However, the service policy violated M.G.L. c. 32B, § 9E because it established a subclass of retirees not entitled to contribution for health insurance premiums, even if those employees otherwise were entitled to superannuation retirement benefits. The service policy was invalid because it was inconsistent with state law, by: (1) creating different insurance premium contribution rates for different groups of employees; and (2) exempting the Town from paying any portion of the insurance premiums for a group of employees, even though M.G.L. c. 32B, § 9E mandated a contribution of more than fifty percent of the costs of a group's insurance premiums.

Finally, in response to the Town's concern that the Plaintiff worked in multiple municipalities, the Supreme Judicial Court recognized that M.G.L. c. 32B, § 9A ½ established a reimbursement scheme for such situations, resulting in a proportional recovery of contributions from other municipalities employing the retiree. When a municipality accepts M.G.L. c. 32B, § 9E, it is immaterial that a retiree worked in other communities, and instead all retirees are entitled to a contribution.

K. Cumberland Farms, Inc. v. City Council of Marlborough, 88 Mass.App.Ct. 528 (2015)

Cumberland Farms, Inc. ("Cumberland Farms"), appealed from a judgment of the Superior Court upholding the denial by the city council of Marlborough (council) of Cumberland Farms' application for a G.L. c. 148, § 13 fuel storage license, arguing that Superior Court judge applied an incorrect standard of review and that he based his decision on improper factors. The Appeals Court (Cypher, J.) held that arbitrary and capricious standard of review applied , and that the denial of application was not arbitrary or capricious.

Cumberland Farms filed applications with the Marlborough city council for a special permit under G.L. c. 40A, § 9 and for a fuel storage license pursuant to G.L. c. 148, § 13 in pursuit of a plan for a gasoline station and a convenience store in the city. Two meetings of the council's urban affairs committee on the special permit application were held between June, 2012, and March, 2013, but because the council did not consider the final conditions to the special permit, it issued by constructive grant on March 28, 2013. The urban affairs committee discussed the fuel storage license application on May 21, 2013, and June 19, 2013, but failed to take action at the latter meeting. On August 2, 2013, Cumberland Farms filed a complaint in the Superior Court seeking injunctive relief to require the council to take action. Before the complaint was considered in that court, the council voted on September 23, 2013, to deny the application for a fuel storage license, without providing any findings or an explanation of its reasoning.

On November 12, 2013, Cumberland Farms filed its complaint for certiorari in accordance with G.L. c. 249, § 4 in Superior Court seeking judicial review of the council's decision. Following a hearing on Cumberland Farms' motion for judgment on the pleadings, a judge denied Cumberland Farms' motion and affirmed the council's decision. Judgment entered, and this appeal followed.

After first explaining that the standard of review under G.L. c. 249, § 4 may vary according to the nature of the action for which review is sought, the court confirmed that the arbitrary and capricious standard of review applied because the board was free to use its judgment and to exercise administrative discretion in granting or withholding a license. Because the arbitrary and capricious standard of review "requires only that there be a rational basis for the decision" and because "in exercising its wide discretion to issue or withhold licenses, a licensing authority may take into account other factors affecting public interests and welfare" referencing Scudder v. Selectmen of Sandwich, 309 Mass. 373, 376, 34 N.E.2d 708 (1941); Kidder v. City Council of Brockton, 329 Mass. 288, 290, 107 N.E.2d 774 (1952), the court upheld the denial of the fuel storage license, adding that "[t]here is no longer any room for doubt that factors [such as noise, traffic, and adjacent residential areas] may properly form the basis of ... a city council's decision to deny an application under [G.L. c. 148,] § 13." E.A.D. Realty Corp., 6 Mass.App.Ct. at 827, 371 N.E.2d 446. See Hood Indus., Inc. v. City Council of Leominster, 23 Mass.App.Ct. 646, 650, 505 N.E.2d 189 (1987).

L. Celco Construction Corp. v. Town of Avon, 87 Mass. App. Ct. 132 (2015)

This case addressed a contractor's attempt to secure an equitable adjustment under M.G.L. c. 30, § 39N. In particular, the Plaintiff contractor submitted penny bid for excavating a project site (*i.e.,* charging $0.01 per cubic yard of rock excavated and disposed of), which was less than its actual cost. In preparing its bid, the Plaintiff assumed that the actual amount of rock at the project site was significantly less than the unverified estimate stated in the procurement documents, and therefore it thought that the lower unit price would provide it with a competitive advantage over other bidders whose unit price bids were closer to the actual cost of removal.

The Plaintiff requested an equitable adjustment under M.G.L. c. 30, § 39N because the actual amount of rock was 1,500 cubic yards more than the estimate; the Plaintiff sought equitable adjustments for $220 and $190 per cubic yard, the latter based on an alleged "change in the conditions depicted by the plans and specifications. The Plaintiff also claimed that the additional rock rendered its performance more difficult, although there was no evidence that the character of the rock on the project site was different, that the actual unit cost increased because of the larger amount of rock, or that there was any concealed condition.

The Massachusetts Appeals Court recognized that M.G.L. c. 30, § 39N allows either party to a public construction contract to seek an equitable adjustment in contract price if "the actual subsurface or latent physical conditions encountered at the site differ substantially or materially from those shown on the plans or indicated in the contract document." This statute eliminates unknown risks for both parties, by enabling a public owner to receive bids without amounts incorporated to address risk and by allowing bidders the potential for compensation for subsurface or latent site conditions that increase costs.

Here, the contract bid documents did not restrict the total cubic yards of rock and instead contained an explicit disclaimer of the accuracy of that amount, stating that 1,000 cubic yards was identified only to compare the various bids received. The total amount of rock to be excavated was expressly described as "indeterminate" in the contract bid documents. There was no discrepancy between the actual conditions and the contract bid documents as to the nature of the rock or the means and cost to remove it. "Particularly in a contract such as the one in the present case, in which the contract price is comprised of the aggregate of line items for various elements of the work, which in turn are based on unit prices for the quantities involved in each line item, no equitable adjustment is warranted by reason of a variation in the estimated quantities, standing alone, as compared to a deviation in the condition or character of the physical condition."

The Massachusetts Appeals Court determined that the standard of M.G.L. c. 30, § 39N was not met. Instead, the Plaintiff proceeded at its own risk for bidding a unit price entirely unrelated to its expected cost to perform the work, which was no basis for an "equitable" resolution. Finally, the Massachusetts Appeals Court rejected the Plaintiff's claim for promissory estoppel based on alleged statements by the Water Superintendent, as there was no evidence that he had legal authority to exceed the contractual rock removal rate. The Plaintiff's claim for quantum meruit (unjust enrichment) failed because a party could not ignore the

statutory limitations on a municipality's ability to contract by providing services first and attempting to recover subsequently on another legal theory.

M. **Parkview Electronics Trust, LLC v. Conservation Commission of Winchester, No. 13-P-276, 2014 WL 10987315 (Mass. App. Ct. Jan. 12, 2016)**

This case involved a local wetlands bylaw that was more restrictive than the Wetlands Protection Act (WPA). Specifically, the local wetlands bylaw had a broader standard for "land subject to flooding" than the WPA. Under applicable law, in order for a more stringent wetlands bylaw to be controlling, the grounds for denial must specifically rest on those more stringent provisions.

The definition of "land subject to flooding" was broader under the local wetlands bylaw than under the WPA and therefore the local wetlands bylaw was considered more demanding than the Act. The Plaintiff developer sought an order of resource area delineation (ORAD), and it challenged the ORAD that issued by arguing that it was not based "exclusively" on the more restrictive provision of the local wetlands bylaw.

The ORAD issued by the Winchester Conservation Commission (ConCom) referenced both the WPA and the local wetlands bylaw. To the extent it was based only on the WPA, the ORAD decision was subject to being superseded by the Department of Environmental Protection (DEP). Conversely, to the extent the ORAD was timely issued by the ConCom and was independently based on a local wetlands bylaw, such independent reliance was not subject to review by DEP.

The ConCom asserted jurisdiction under the WPA, but this was in error and superseded by a subsequent decision of DEP. Regardless, to the extent that the local wetlands bylaw was relied upon, it provided an alternative ground for regulation by the ConCom. Clarifying an earlier decision, the Massachusetts Appeals Court held that "in order for a local commission to ensure that its decision is not subject to DEP review, the commission must base its decision exclusively on local law. Insofar as a commission's decision is based on local law *and* State law, DEP has jurisdiction to review it and supersede that portion of the commission's decision that is based on State law. For this reason, local commissions purporting to act under both State law and independently under local law should make it clear in their written decisions and orders that there is a dual basis for their determinations."

Finally, the Plaintiff challenged the local definition for "land subject to flooding." However, challenges to the vagueness of statutes that do not involve the First Amendment are considered on an "as-applied basis." While the Plaintiff challenged the definition of "flooding" as being so general and broad as to apply to puddles on private properties, the Massachusetts Appeals Court disagreed and noted that applying the local wetlands bylaw to constructing a berm to hold back floodwater was proper. Also, the Massachusetts Appeals Court cited prior flooding events in construing the term, and it also interpreted the local wetlands bylaw in light of its general purpose.

Speakers' Biographies:

CHRISTOPHER J. PETRINI is founding principal of Petrini & Associates, P.C. (PandA), a municipal law firm in Framingham. Mr. Petrini's practice focuses on municipal law and public construction law and litigation. Mr. Petrini has served as Town Counsel to the town of Framingham since 2001, and has served as special counsel in public construction litigation for dozens of cities, towns and school districts throughout the Commonwealth. Mr. Petrini is a cum laude graduate of Georgetown University (A.B.) and a graduate of Duke University School of Law (J.D.) with high honors, where he also earned his master's degree in philosophy. After law school, Mr. Petrini served as a judicial law clerk to the Honorable Theodore M. McMillian of the U.S. Court of Appeals for the Eighth Circuit in St. Louis. Mr. Petrini is a past president of the Massachusetts Municipal Law Association and is a member of the MMLA Executive Board. He also is a Regional Vice President of the International Municipal Lawyers Association and is co-chair of the Construction Committee of the Civil Litigation Section of the Massachusetts Bar Association. Mr. Petrini has been selected as a New England Super Lawyer on four separate occasions, most recently in 2014.

BRANDON H. MOSS is a Partner at Murphy, Hesse, Toomey & Lehane, LLP, concentrating in the public/municipal law, employment law, and litigation/appellate practice areas. Mr. Moss serves as Town Counsel to the Towns of Bedford and Mendon, Airport Counsel to the Norwood Airport Commission, and he has served as Special Counsel to other municipalities. His experience includes, but is not limited to, land use, telecommunications, local legislation, municipal liability, governance, aviation, contract/procurement, waterfront, and gaming issues. Mr. Moss has been a speaker on a number of issues involving public entities, including the Public Records Law, Conflict of Interest Law, Open Meeting Law, trial practice, and civil rights. He is co-author of the chapter entitled "Remedies Available Upon Judicial Review of Administrative Decisions" for the Massachusetts Administrative Law Manual (LexisNexis/Matthew Bender, 2014) and author of "Suitability Challenged: The Judicial Creation of Suitability Standards for Firearms Licensing" (Massachusetts Lawyers Journal, June 2014). He presently serves on the Executive Board of the Massachusetts Municipal Lawyers Association and is the Chair of the Massachusetts Bar Association Public Law Section Council. Mr. Moss received his Bachelor of Science degree in Economics (cum laude) from The George Washington University and his Juris Doctor (With Honors) from The George Washington University Law School.

Moderator's Biography:

DONALD V. RIDER, JR. serves as Marlborough city solicitor. He received a law degree from the University of Wisconsin Law School, a master's degree in political science from Boston College, and an undergraduate degree in history from Middlebury College. He previously served as an assistant city solicitor for the city of Worcester, where he became the head of the litigation unit and handled civil cases in state and federal courts, both trial and appellate. Mr. Rider has spoken at events hosted by the Massachusetts Municipal Lawyers Association, Massachusetts Continuing Legal Education, and the Massachusetts Municipal Association. In addition, he has authored articles published by the Massachusetts Bar Association and MCLE. Mr. Rider presently serves as MMLA President.