

**MASSACHUSETTS MUNICIPAL ASSOCIATION  
MUNICIPAL LAW UPDATE**

**2014 SELECTED STATUTES AND CASES<sup>1</sup>**

Moderated by:

John D. Finnegan, Esq.  
Tarlow Breed Hart & Rodgers, P.C.  
101 Huntington Avenue  
Boston, MA 02199  
jfinnegan@tbhr-law.com

Presented by:

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

and

Donald V. Rider, Jr., Esq.  
City Solicitor  
City Hall, 4<sup>th</sup> Floor  
140 Main Street  
Marlborough, MA 01752  
drider@marlborough-ma.gov

---

<sup>1</sup> We acknowledge and thank Christopher L. Brown, Esq., an associate at Petrini & Associates, P.C., for his assistance and efforts with research and preparation of the presentation materials.

## **I. STATUTES**

### **A. DOMESTIC VIOLENCE LEAVE LAW – G.L. c. 149, §52E**

1. New employment protections for an employee who is, or whose family member is, a victim of abusive behavior, including domestic violence
2. Requires an employer (public or private employers who employ 50 or more employees in Massachusetts) to provide paid or unpaid leave for a qualifying employee
3. Attorney General is responsible for enforcement and can seek injunctive or other equitable relief to enforce the law
4. **Employer responsibilities:**
  - (a) Provide notice to employees of rights and responsibilities under the law
  - (b) Provide up to 15 days of paid or unpaid leave (as determined by the employer) from work in a 12 month period provided certain criteria are met
  - (c) Keep information related to the employee's leave confidential
  - (d) Do not discharge, discipline or discriminate in any other matter against an employee for exercising rights under the law
  - (e) Upon employee's return from leave, restore employee to original job or an equivalent position
5. **Employee responsibilities:**
  - (a) Provide advance notice of the leave, except in cases of imminent danger to the health or safety of the employee or the employee's family member
  - (b) Provide documentation supporting the leave if requested by the employer

### **B. SICK LEAVE LAW (BALLOT INITIATIVE) – effective July 1, 2015**

1. Creates new paid or unpaid earned sick time for nearly all employees
2. Attorney General is responsible for enforcement (regulations are expected in the near future), employees have a private right of action as well.
3. The law only applies to cities and towns if the law is accepted “by vote or by appropriation as provided in Article CXV of the Amendments of the Constitution of the Commonwealth.”

Article CXV. No law imposing additional costs upon two or more cities or towns by the regulation of the compensation, hours, status, conditions or benefits of municipal employment shall be effective in any city or town until such law is accepted by vote or by the appropriation of money for such purposes, **in the case of a city, by the city council in accordance with its charter, and in the case of a town, by a town meeting or town council**, unless such law has been enacted by a two-thirds vote of each house of the general court present and voting thereon, or unless the general court, at the same session in which such law is enacted, has provided for the assumption by the commonwealth of such additional cost.

4. Employers with 11 or more employees, leave must be paid.
5. Employees may earn up to 40 hours of sick leave per year, and may carry over up to 40 hours to the next year.
6. New employees may begin using earned sick time 90 days after hire
7. Employers with existing paid leave policies are not required to provide any additional sick time, provided the policy permits employees to use at least 40 hours per calendar year for the purposes covered under the law
8. Earned sick time may be used if the employee is ill, has a medical appointment, must care for an ill family member, or to receive assistance related to domestic violence.
9. Collective bargaining agreements, contracts or benefit plans with more generous provisions are not overridden by the new law.
10. Accrued unused earned sick time under the law does not need to be paid on separation from employment.
11. Medical certification may be required by an employer if an employee is absent for more than 24 consecutively scheduled work hours, but leave may not be denied or delayed pending receipt of the certification.
12. Advance notice is required if the need for leave is foreseeable.

## **II. COURT DECISIONS**

### **A. CONSTITUTIONAL RIGHTS**

Doe v. Acton-Boxborough Regional School District, 468 Mass. 64 (2014).

The parents of students in a school district brought an action challenging the constitutionality of daily recitation of the Pledge of Allegiance in the district's schools. The trial court granted summary judgment in favor of the district and the Supreme Judicial Court took the parents' appeal on direct appellate review. The SJC held that G.L. c. 71, §69, which calls for the voluntary recitation of the pledge in schools did not violate the equal protection provision of the state constitution and did not violate G.L. c. 76, §5, the school anti-discrimination statute.

Flaherty v. Knapik, 999 F.Supp.2d 323 (D. Mass. 2014).

First Amendment and other claims were brought by two government officials and a private citizen against a city mayor contending that he ordered the removal of signs near an intersection because the signs supported his political rivals. The parties each moved for summary judgment, with the Court allowing and denying in part each of the motions. On the First Amendment claims, the Court found that mayor's removal of the signs, regardless of his actual intent, constituted a content-based restriction of free speech. The Court found for the mayor on the plaintiffs' claim under the Massachusetts Civil Rights Act because there was no evidence the mayor acted through threats, coercion, or intimidation as is required to support such a claim.

Thayer v. City of Worcester, 755 F.3d 60 (1<sup>st</sup> Cir. 2013)

Individuals who frequently sought donations from pedestrians on traffic medians and individuals who frequently held political campaign signs on such medians, brought an action challenging Worcester's ordinances prohibiting aggressive panhandling and walking on traffic medians for other than "lawful" purposes. The plaintiffs moved for a preliminary injunction. The trial court denied the motion and the individuals appealed. The First Circuit affirmed the lower court's decision, holding (1) that the ordinances at issue were content neutral, (2) that the individuals failed to make a prima facie showing that the ordinances were susceptible to a substantial number of applications that are not necessary to further the government's legitimate interest, (3) that the individuals provided no evidence suggesting a discriminatory pattern in the City's enforcement of either ordinance to support an equal protection claim, and (4) that the ordinances were not unconstitutionally vague.

### **B. TORTS**

Patterson v. Christ Church in the City of Boston, 85 Mass. App. Ct. 157 (2014)

A tourist injured in the Old North Church in Boston sued the church for injuries sustained in a fall inside the church. The trial court entered summary judgment in favor of the church where the church claimed the protection of the recreational use statute, G.L. c. 21, §17C. The Appeals Court affirmed, finding the statute barred the tourist's negligence claims because the tourist did not directly or indirectly pay a fee to enter or tour the

church, distinguishing this case from the recent SJC case, Marcus v. Newton, 462 Mass. 148 (2012), which analyzed the statute's application to a member of a private softball league which paid a permit to the City of Newton for use of a field. The Appeals Court rejected the plaintiff's argument that the operation of a gift shop by the church, and the payment of an annual fee to the church by a non-profit organization for the right to organize tours and historical programs at the church eviscerated the church's liability exemption under the recreational use statute.

## C. EMPLOYMENT

Fernandes v. Attleboro Housing Authority, 2014 WL 6460260, SJC-11580 (Mass., Nov. 19, 2014).

Former housing authority employee sued his former employer, alleging violation of Wage Act where he contended he was misclassified and therefore deprived of wages to which he was entitled, and then was terminated after he complained about the misclassification and filed a complaint with the Attorney General's Office. The employee prevailed at trial. In a post-trial motion, the housing authority argued that as a civil service employee, the Civil Service Commission had exclusive jurisdiction over such claims and therefore they should be dismissed. The employee filed a post-trial motion seeking reinstatement to his former position. The trial court denied both motions, there were cross-appeals filed by both parties, and the Supreme Judicial Court took the appeal on its own motion from the Appeals Court. Affirming the trial court's decision, the SJC held that civil service employees are not required to bring Wage Act claims through the Civil Service Commission, and that reinstatement is not an available remedy under the Wage Act for a prevailing plaintiff.

Springfield v. Civil Service Commission, 469 Mass. 370 (2014).

The City and a terminated city employee each sought review of a Civil Service Commission decision reducing the employee's original termination to a six-month suspension, but finding that employee would subsequently have been suspended and then terminated based on his indictment and conviction for filing false income tax returns under G.L. c. 268A, §25 (allowing unpaid suspensions for misconduct in office). The Superior Court affirmed, and cross-appeals were filed. The case was then transferred to the SJC. The SJC held that the employee, who held civil service tenure in his original appointed position but later accepted a provisional appointment to another position was a "tenured employee" within the meaning of the civil service law and thus was entitled to appeal his subsequent termination to the Civil Service Commission. The Court also held that the employee's post-termination indictment for filing false income tax returns arose from off-duty conduct and thus would not have supported a suspension.

MacLean v. T.D. Bank, N.A., 2014 WL 3530813 (D. Mass. July 14, 2014).

Former employee brought a Wage Act claim against his employer bank alleging the employer failed to pay him for all his accrued PTO time. The employee had reached a settlement agreement with his employer and the employer argued that the settlement

agreement barred the employee's claims. Interpreting the recent SJC decision, Crocker v. Townsend Oil Co., 464 Mass. 1 (2012), the trial court allowed the employer's motion to dismiss, finding that the employee released his Wage Act claims in the settlement agreement. The Court held that a release of Wage Act claims does not require express reference to the Wage Act but can be accomplished by a "plainly worded and understandable" reference to the rights under the Wage Act being released. The settlement agreement contained language releasing "any and all claims or rights under federal, state or local laws, regulations or ordinances relating to the payment of wages, bonuses, incentives and other compensation to employees ...." and "any and all rights, entitlements, claims or obligations of any kind whatsoever relating to, arising out of or connected directly or indirectly with any employment agreements, commissions agreements or compensation agreements with the Company...." The employee filed a notice of appeal but the matter subsequently settled and was voluntarily dismissed.

#### **D. LABOR**

Twomey v. Middleborough, 468 Mass. 260 (2014)

Retired town employees brought an action against the Town of Middleborough, its board of selectmen and its town manager, seeking declaratory relief and a writ of mandamus to require the Town to implement the vote of a special town meeting approving an article purporting to establish the percentage of the total monthly premium for insurance coverage by a health maintenance organization (HMO) to be paid by the employees. At the time of their retirement, the Town contributed 90% of the total premium costs. The selectmen voted to make the retirees' contribution percentage the same as "general government employees" of the Town, reducing the Town's premium contribution to 80% of the total cost. In the meantime, at the request of the Middleborough Retirees Insurance Group, an article was placed on the warrant for a special town meeting seeking to freeze the rate of contribution for retirees at the previous 90%/10% split. The parties each filed motions for summary judgment. The trial court ruled for the Town, finding that the selectmen had the authority under G.L. c. 32B, §16 to determine the premium contribution rate for Town retirees and that Middleborough's town meeting could not override this decision. The case was appealed and transferred to the SJC on its own motion. The SJC affirmed the trial court's decision.

#### **E. BIDDING/PROCUREMENT**

Hanover v. New England Regional Council of Carpenters, 467 Mass. 587 (2014)

The Town of Hanover brought an action against a carpenters' professional association (NERCC), alleging that NERCC had committed abuse of process in an underlying action by taxpayers who had sought to enjoin Hanover from paying a contractor who had allegedly engaged in fraud in bidding on a contract for the construction of the Town's new high school. See Fordyce v. Hanover, 457 Mass. 248 (2010). The Town alleged that NERCC committed abuse of process by commencing and maintaining the underlying litigation, providing legal counsel, and controlling the taxpayers' interest. In response to the Town's complaint, NERCC filed special motion to dismiss under G.L. c. 231, §59H, the anti-SLAPP (strategic litigation against public participation) statute. The Superior

Court denied the motion, and NERCC appealed. After transferring the case on its own initiative from the Appeals Court, the SJC held that, on an issue of first impression, NERCC had engaged in protected petitioning activity by providing support for taxpayers' underlying litigation, and reversed the lower court decision.

## **F. CONSTRUCTION**

Coghlin Electrical Contractors, Inc. v. Gilbane Building Co., Worcester Superior Court Civil Action No. WOCV2013-01300.

The defendant general contractor on a Construction Manager at Risk project (a new Department of Mental Health psychiatric facility in Worcester) asserted third party claims against the Division of Capital Asset Management in response to a subcontractor's claim for additional costs incurred due to alleged design changes and errors. Gilbane contended that DCAM, as the contractual owner of the project, was responsible for any damages caused by design changes and errors that Gilbane ultimately might be required to pay Coghlin. The Superior Court allowed DCAM's motion to dismiss Gilbane's third-party complaint based on an indemnification provision in the contract. The Court noted that despite traditional common law protections for construction contractors shifting responsibility for design errors to the owner, under the Construction Manager at Risk public construction alternative delivery method set forth in G.L. c. 149A, the indemnification provision in the CMR Contract for the project in favor of DCAM applied to Gilbane's third-party claims and therefore the claims were barred as a matter of law. Gilbane appealed the Court's decision and the Supreme Judicial Court transferred the case on its own initiative from the Appeals Court. The case is currently in the briefing stage and the SJC has requested amicus briefs. Oral argument will likely take place in spring or early summer 2015. The SJC's decision likely will be significant for public construction and the future utility of the CM at Risk delivery method for public owners.

## **G. LAND USE / ZONING**

### **1. ADVERSE POSSESSION**

1148 Davol Street LLC v. Mechanic's Mill One LLC, 86 Mass. App. Ct. 748 (2014).

The issue in this case was whether the plaintiff owner of 1148 Davol Street in Fall River would be allowed to count toward the 20-year adverse possession period the years that title to the defendant owner's abutting parcel at 1082 Davol Street had been held by the city of Fall River. The city acquired 1082 Davol in 1975 and sold it in 1989, eventually coming into the defendant's ownership. Meanwhile, the plaintiff's predecessors had acquired 1148 Davol Street in 1975 and began in 1975 to use for parking a 25,000 square foot strip of the parcel at 1082 Davol that lay at the 1082 / 1148 boundary. The parties stipulated that the plaintiff's predecessors exercised uninterrupted control over the disputed strip which was actual, open, notorious, and adverse for 32 years, from 1975 to 2007. In 2007, the plaintiff bought 1148 Davol. After a dispute over the ownership of the strip ensued, the plaintiff filed suit in 2008 – 19 years after Fall River had sold 1082 Davol in 1989, but 33 years after the city had acquired 1082 Davol in 1975. Invoking G.L. c. 260, § 31 as a defense, the defendant owner of 1082 Davol argued that the

plaintiff's adverse possession claim did not begin to run until Fall River had transferred 1082 Davol to a private party in 1989. However, the lower court ruled that a private record owner of once-public land opposing an adverse possession claim cannot invoke § 31 as a defense. The Appeals Court affirmed, noting that while a 1987 amendment to § 31 had added broad protections allowing the Commonwealth and its subdivisions to recover land held for public purposes, nothing in § 31 evinced a legislative intent that such protections also benefit a subsequent private owner.

## **2. ALLEGED DEPRIVATIONS OF LANDOWNERS' RIGHT TO DEVELOP AND/OR USE THEIR LAND**

Barth v. City of Peabody, 2015 WL 134300 (Appeals Court 2015)(unpublished).

After notifying the owner of a structure that it was unsafe, the city of Peabody demolished the structure, rendering the lot unbuildable. The plaintiff then purchased the lot. He applied for a variance with the Peabody zoning board of appeals. The variance was denied, but the plaintiff did not appeal the denial pursuant to G.L. c. 40A, § 17. Instead, he filed a complaint against the city for an allegedly unlawful eminent domain taking of the structure and for alleged denial of his equal protection rights. In affirming the lower court's decision to grant the city summary judgment, the Appeals Court ruled that the plaintiff's failure to appeal the variance's denial deprived the lower court of jurisdiction to entertain the plaintiff's eminent domain and equal protection claims.

South Commons Condominium Association v. City of Springfield, \_\_\_ F. 3d \_\_\_, 2014 WL 7272776 (1<sup>st</sup> Cir. 2014).

On June 1, 2011, a tornado devastated portions of the city of Springfield, including the downtown. A state of emergency was declared by the city's mayor as well as the governor. The plaintiffs consisted of a condominium association as well as the owners and some of the residential and commercial tenants of downtown buildings that had been significantly damaged. Believing that the buildings presented an immediate danger to public safety that required their demolition, the city ordered residents to leave the buildings. The next day, June 2, the city's contractor demolished the plaintiffs' buildings. No opportunity was given to the residents to stop the demolition, nor did the city undertake any engineering studies or analyses to confirm the need to address the danger the buildings posed or to assess whether demolition might be avoided. Filing a suit against the city (and its mayor and building commissioner) nearly a year later, the plaintiffs claimed that the tornado did not cause sufficient damage to their buildings to justify the City's drastic response, and that the city instead acted rashly in demolishing the buildings without giving the plaintiffs the chance to show how demolition could have been avoided. The lower court dismissed the plaintiffs' constitutional claims that they had been deprived of procedural due process (notice and opportunity to be heard). The U.S. Court of Appeals for the First Circuit affirmed that dismissal, ruling that G.L. c. 139, § 2 provided an adequate post-demolition remedy to the plaintiffs, by authorizing a property owner to seek damages for an already-demolished building. The First Circuit also affirmed the lower court's dismissal of the plaintiffs' claim that their right to substantive due process had been violated. A substantive due process claim must allege executive action that objectively "shocks the conscience." Here, the most that the



plaintiffs alleged was that the city had misjudged the gravity of the damage the tornado had caused, and thus that the demolition order had been ill-advised in the plaintiffs' estimation.

### 3. APPEALS UNDER G.L. c. 40, § 17

M&K Partner LLC v. Scardino, 2014 WL 3798081 (Land Court 2014).

A plaintiff appealed the Stoughton Planning Board's decision to grant site plan approval to a developer to construct an industrial building on property abutting the plaintiff's. The developer, joined by the Planning Board, moved to dismiss the appeal, challenging the validity of a town of Stoughton zoning by-law which provided that the "the appeal of *any* decision of the Planning Board hereunder shall be made in accordance with the provisions of MGL c. 40A, § 17" (emphasis in original). The developer claimed that the by-law ran counter to prior Massachusetts caselaw, which sometimes required an immediate appeal and other times required that an appeal wait until a building permit has been issued. The Land Court observed that those were situations where the town by-law made no provision for site plan appealability, and that such situations turned on whether the decision on site plan had a discretionary element. Thus, if the reviewing body had discretion to refuse site plan approval, then the decision was considered in the nature of a special permit and immediately appealable pursuant to G.L. c. 40A, § 17; but if there was no discretionary element because the use was 'as of right' and the most the board could do was impose reasonable conditions, then review was held to await the building permit. Here, however, Stoughton had enacted a by-law explicitly providing for immediate appeal of any site plan decision. The Land Court approved the by-law's validity, ruling that a town may adopt a by-law (and a city an ordinance) providing for immediate appeal of a site plan review decision, even if it is of the non-discretionary type otherwise not appealable until issuance of a building permit. For the Court, such a by-law provides clarity for the parties, mitigates the waste of both private and town resources when a court finds the appeal premature, and benefits both the parties and the town who will all know whether a site plan approval will survive scrutiny before undergoing the additional effort and expense associated with a building permit.

Miles-Mathias v. Zoning Board of Appeals of Seekonk, 84 Mass. App. Ct. 778 (2014).

Plaintiffs were aggrieved by a building commissioner's determination approving a common driveway to be used as a permissible means of access to multiple ANR lots, and as an accessory use under the town of Seekonk's zoning by-law. The plaintiffs filed an appeal of that determination, but they did so on the 38<sup>th</sup> day after the date of the building commissioner's determination (issued on March 26). G.L. c. 40A, § 15 requires a 30-day appeal period to appeal such a determination. The lower court found that the plaintiffs had learned of the building commissioner's determination 19 days after it had been made, and, since the appeal was filed within 30 days of that actual knowledge date, the lower court therefore ruled that the plaintiffs' appeal under G.L. c. 40A, § 15 was timely. In fact, however, the plaintiffs had known for a month prior to the building commissioner's determination that she had been asked by the ANR recipient to make a zoning determination on the common driveway; and so the plaintiffs had been speaking with the

building commissioner on a fairly regular basis, until about 2 weeks (March 12) before she made her determination. According to the Appeals Court, this was adequate knowledge to put the plaintiffs to a duty of ongoing inquiry to check on the status of the building commissioner's determination. So, since the plaintiffs had failed to inquire during that approximate 2-week period (between March 12 and March 26), and since in any event the plaintiffs had actually learned of the determination 19 days after it had been issued but then failed to file the appeal within the 11 days they still had left, the Appeals Court ruled that the appeal was untimely and therefore deprived the lower court of jurisdiction to have entertained the appeal.

Robertson v. Tyler Court Limited Partnership, 2014 WL 585929 (Land Court 2014).

The plaintiffs timely filed a lawsuit against the Cambridge Planning Board which had granted special permits to build a large multi-family residential building, some townhouse units, and associated off-street parking spaces. The plaintiffs timely filed in court their appeal under G.L. c. 40A, § 17 within the 20-day period to appeal a special permit, but did not file notice of their appeal in the city clerk's office until early in the morning of the 21<sup>st</sup> day. The plaintiffs had sent an e-mail to the city clerk's office on the 20<sup>th</sup> day at 7:09 p.m. The city clerk testified that while she might have reviewed the headings of the e-mails in her iPad inbox during the evening of the 20<sup>th</sup> day, she did not recall seeing the content of the plaintiffs' e-mail during that evening but only the next morning. The Land Court followed the rule handed down by the Supreme Judicial Court that it is the state of the clerk's knowledge, not the physical location of an appellant's notice of appeal under G.L. c. 40A, § 17, which is determinative of timeliness. Characterizing the plaintiffs' argument that the city clerk may have been aware of their the-mail's contents – namely, that an appeal had been filed in court – as pure speculation, the Court dismissed the appeal.

#### **4. APPROVAL NOT REQUIRED / SUBDIVISION CONTROL LAW**

Georgetown Planning Board v. Georgetown Planning Board, 2014 WL 3555971 (Land Court 2014).

Where an ANR (Approval Not Required) plan had been constructively endorsed by the Georgetown Planning Board because it had failed to act within 21 days after the plan's submission to the Board, the Land Court would not allow the Board, joined by the town's building inspector, to seek to annul the constructive endorsement, even on the proffered grounds that the ANR lots lacked appropriate frontage. Under G.L. c. 41, § 81P, if a planning board fails to act on an ANR application in timely fashion, it "*shall* be deemed to have determined that approval under the subdivision control law is not required, and it *shall* forthwith make such endorsement on said plan, and on its failure to do so forthwith the city or town clerk *shall* issue a certificate to the same effect" (emphasis added). Per the Land Court, "to allow the board to appeal removes the 'shall' from the statute and guts the legislative intent to require prompt, final rulings on ANR requests." As to the building inspector, the zoning and planning boards are authorized to review his decisions, not vice-versa; the building inspector's role is nothing more than to evaluate building

permit applications for compliance with the requirements set forth in G.L. c. 41, § 81Y. Accordingly, the Court dismissed the complaint.

## 5. ARTICLE 97

Nabhan v. Town of Salisbury, 2014 WL 1569480 (Land Court 2014).

In 1903, the town of Salisbury deeded land to others but expressly reserved to itself and its successors “the right to use and to permit any person residing in said town to use, for purposes of travel only,” certain ways to the ocean. The Land Court viewed the easement as having been reserved in order to access the ocean via Salisbury Beach. The Court did not view the access easement as protected by Article 97, because it was not a conservation easement under G.L. c. 184, § 31; the 1903 access easement had neither been expressly taken or acquired, nor subsequently dedicated, for the conservation, development and utilization of the Beach. Rather, the fact that the access easement promoted access to the beach was merely an incidental result of the easement’s proximity to the Beach. Under Article 97 as recently interpreted by the Supreme Judicial Court in Mahajan v. Department of Environmental Protection, 464 Mass. 604 (201), the critical question is not whether the use of land incidentally serves purposes consistent with Article 97, nor whether the land displays some attributes of Article 97 land, but whether the land was taken for, or was subsequently designated for, the purposes protected by Article 97.

Nickolas, et al. v. City of Marlborough, 2014 WL 2465281 (Mass. Super. 2014).

In 1923, the city of Marlborough took land by eminent domain “for the purposes of a public playground or recreation center, as more particularly set forth in ... Section 14 of Chapter 45 of the General Laws of Massachusetts.” In 1924, Marlborough then built a playground on the land taken, and later that year changed the name of the playground to Ward Park. Over the years, some of Ward Park had been used to build a school and to build a road. In 2013, Plaintiff abutters sought to block the city from building a senior center with associated parking and grounds on roughly 2.2 acres of the 7.6-acre Ward Park, arguing in part that a two-thirds vote of each branch of the State Legislature was required under Article 97 of the Massachusetts Constitution before the city could proceed with its senior center plans. The Superior Court rejected the Article 97 argument, noting that Marlborough took and had subsequently held the land known as Ward Park for a broad range of purposes that would encompass the construction and operation of a senior center, which itself would offer to the city’s seniors recreational, social and educational opportunities – all of which are sanctioned by G.L. c. 45, § 14. The Superior Court opined in dicta that, had Marlborough taken the land in 1923 solely for playground purposes, such purposes would have been within the scope of Article 97, and thus the Court disagreed with the city’s argument that only unimproved parks and unimproved conservation lands fell within that scope.

## 6. CHARITABLE TAX EXEMPTIONS ON LAND

Community Involved in Sustaining Agriculture, Inc. v. Board of Assessors of Deerfield, 86 Mass. App. Ct. 1119 (2014)(unpublished).

The plaintiff appealed from a decision by the Appellate Tax Board denying its application for a charitable tax exemption under G.L. c. 59, § 5, Third. The ATB had denied the application on the ground that the plaintiff's dominant purpose was to benefit farmers, and any benefit derived by the public was thus incidental. In reversing the ATB's denial, the Supreme Judicial Court ruled that the plaintiff's programs benefited an indefinite number of people, many of whom were not members of the plaintiff's organization, and any benefit to farmers "is but the means adopted for this purpose." The SJC noted that the plaintiff distributed a free annual "locally grown farm products guide" to nearly 50,000 households, and helped vulnerable populations in the general public such as the elderly, low income citizens, school children, and urban residents to receive fresh local food that they would otherwise have difficulty obtaining. Moreover, the plaintiff's programs lessened the burdens of many government agencies "interested in food systems, nutrition, public health, agriculture, and local farmers."

New England Forestry Foundation v. Board of Assessors of Hawley, 468 Mass. 138 (2014).

The plaintiff was the record owner of a 120-acre parcel of forest land located in the town of Hawley ("the Hawley forest"). The plaintiff had applied to the defendant for a charitable tax exemption under G.L. c. 59, § 5, Third ("Clause Third"). After the plaintiff's application had been denied, the plaintiff applied to the Appellate Tax Board. The ATB denied the application on the ground that the plaintiff had failed to carry its burden to show that it occupied the land in Hawley for a charitable purpose within the meaning of Clause Third. In reversing the ATB's denial, the Supreme Judicial Court ruled that the plaintiff conducted its actual operation as a public charity in the sense that the plaintiff assisted in lessening the burdens of government, one of whose duties was the safeguarding of natural resources and basic environmental quality in the Commonwealth. Since the plaintiff's forest in Hawley was abutted on two sides by a State Forest, the plaintiff was helping to extend a block of forested land preserved by the State and was managing its private forest lands according to many of the same principles used by the Department of Conservation and Recreation for the management of its own public forest lands. Further, the SJC ruled that the plaintiff "occupies" the Hawley forest in furtherance of its charitable purposes. The plaintiff had taken steps to inform the public that the land was available for recreation, and it permitted the land's regular use by a snowmobiling club and kept the land open for hiking and hunting. The fact that the Hawley forest abuts the State forest, rather than the private property of organization insiders, also tended to show that the plaintiff occupied the land in furtherance of its charitable purposes, and not merely to create a buffer zone around private land.

## 7. SPOT ZONING

McLeod v. Town of Swampscott, 2014 WL 869538 (Land Court 2014).

The plaintiffs were residents who either abutted or lived near a 2.2 acre parcel owned by the town of Swampscott and which the town had re-zoned from single-family residence to the as-of-right allowance of a multi-story, 41-unit, market-rate apartment / condominium complex without any age, affordability or historic preservation restrictions. The plaintiff claimed that the re-zoning was spot zoning. Spot zoning is a singling out of one lot for different treatment from that accorded to similar surrounding land indistinguishable from it in character, all for the economic benefit of the owner of that lot. Here, according to the Land Court, the re-zoning was spot zoning because it was done solely for the economic benefit of the parcel's owner – namely, the town. The question for the Court thus became whether there is a municipal exception to spot zoning – that is, a different rule when the parcel owner is the municipality itself rather than a private party. Since zoning must be based on permissible land use planning objectives, but since the town merely sought to raise money from the sale for its general fund, the Court declared that the re-zoning was invalid.

## 8. STATE BUILDING CODE

Sheehan v. Weaver, 467 Mass. 734 (2014).

This case provides a revised interpretation of G.L. c. 143, § 51, and holds that the statute operates to impose upon a landowner, or other party, strict liability for all violations of the State Building Code, not just violations involving fire safety as Massachusetts law had previously held (overruling McAllister v. Boston Housing Authority, 429 Mass. 300, 304 n.5 (1999)). However, insofar as this statute pertains to buildings, the Supreme Judicial Court also held that the scope of § 51 would be limited to a structure designed and maintained for continuing public assembly. Thus, where a tenant brought suit against his landlords under § 51 for injuries sustained from his fall from an exterior second floor landing after the staircase landing guardrail he was leaning against broke, the landlords would be entitled to judgment notwithstanding the verdict, because the staircase and landing were located in the residential portion of the landlords' mixed use business-residential building and the residential portion was not used as a place for a large number of people to assemble.

## 9. ZONING INTERPRETATION

Pelullo v. Croft, 86 Mass. App. Ct. 908 (2014).

A plaintiff, abutting a lot for which an application had been filed for a building permit to construct a single family home in the town of Natick, appealed to the zoning board of appeals the building inspector's determination that the depth of an odd-shaped lot, such as the one in question, is determined by a diagonal measurement. While the Natick zoning by-laws did not define the term "lot depth," they did provide that undefined terms were to have their ordinarily accepted meanings or such as the context may imply. In affirming the lower court's granting of summary judgment to the plaintiff abutter, the Appeals Court noted that neither the building inspector nor the board had explained why

a diagonal measurement of lot depth was consistent with the ordinary meaning of that term, and that both had failed to offer any reasoned basis for measuring lot depth based on a diagonal line. Indeed, the Court ratified the lower court's finding that the lot was not, in fact, oddly shaped, but was more or less rectangular in shape. Given the more or less rectangular shape, the Appeals Court stated that the use of a diagonal line to measure the depth of a rectangular lot was contrary to the ordinary and accepted meaning of the term "lot depth."

## **10. ZONING PROCEDURAL REQUIREMENTS (FOR MUNICIPALITIES).**

Scheinman v. City of Northampton, 2014 WL 7506289 (Mass. Super. 2014).

The city of Northampton purported to create the Northampton Business Improvement District ("NBID"), pursuant to G.L. c. 40O. The plaintiffs, who owned property within the proposed NBID, sued the city and the Northampton Business Improvement District, Inc., claiming that the NBID was null and void because its creation violated G.L. c. 40O. Chapter 40O governs business improvement districts ("BIDs") which, when approved by a municipality's governing body, have broad and expansive powers to administer, manage and promote the BID's economic development. The Superior Court found that the city breached a duty under c. 40O it owed to the plaintiffs to have made two separate determinations as to whether the proposed NBID petition met the statutory criteria for establishing BIDs. First, the city clerk failed to make a determination, as required by G.L. c. 40O, § 4, as to whether the petition to establish the NBID contained the criteria required by § 4, including the signatures of the owners of at least 51% of the assessed valuation of all real property within the proposed BID and 60% of the real property owners within the proposed BID. Absent compliance with that statutory hurdle, the Superior Court ruled that the city council had no legal basis upon which to have held a subsequent public hearing on the petition – but the council did anyway. At that public hearing, the city council was to determine in part if the petition satisfied the purposes set forth and the establishment criteria of c. 40O and, if it appeared that the petition was not in conformity with the purposes and establishment criteria, the city council was required to dismiss the petition; this the council failed to do. In contrast, the Court found that at least 63 out of 305 signatures on the petition were illegible, that some of the legible signatures were not those of the property owners as required by c. 40O, and that some signatures did not identify any particular parcel within the proposed NBID.

## **H. OTHER GENERAL MUNICIPAL**

Easthampton Savings Bank v. Springfield, 2014 WL 7192460, SJC-11612 (Dec. 19, 2014).

This matter concerned questions certified to the SJC by the First Circuit Court of Appeals in a case concerning two local ordinances by the City of Springfield relating to foreclosures which were challenged by six banks. These ordinances are retroactive to apply to all mortgages that existed on the ordinances' December 13, 2011 effective date. The federal district court had granted summary judgment to the City, deciding that the City's ordinances were valid, and the banks appealed. Two issues were certified to the SJC by the First Circuit. First, whether the City's ordinances are preempted in whole or in part by Massachusetts state law. The SJC found that the mediation ordinance was

precluded by G.L. c. 244, the mortgage foreclosure statute, and that the foreclosure ordinance was preempted by G.L. c. 21E, the Oil and Hazardous Material Release Prevention Act, and G.L. c. 111, the State Sanitary Code. Second, whether the “Foreclosure Ordinance,” which requires the owner of a property in the foreclosure process to provide certain property maintenance and security and a \$10,000 cash bond to the City, violates the Massachusetts Constitution by imposing an unlawful tax. Construing the bond requirement as a requirement to pay a fee directly to the City in view of its holding on the first certified question, the SJC held that such a fee was a lawful fee employing the analysis under the Emerson College line of cases.

Garney v. Massachusetts Teachers Retirement System, 469 Mass. 384 (2014).

A former teacher sought review of decision of Massachusetts Teachers' Retirement System (MTRS) board finding that he had forfeited his retirement benefits due to his convictions for possession and purchase of child pornography. The District Court affirmed the forfeiture, then the Superior Court reversed that decision. The MTRS appealed and the Supreme Judicial Court transferred the case from the Appeals Court on its own motion. Although the SJC noted that teachers hold a position of “special public trust,” the Court held that there was no reference to public employment in the criminal statute under which Garney was convicted, no direct factual link between his conduct and his teaching position, and no violation of any identifiable law applicable to that position. The Court affirmed the Superior Court’s decision concluding that the forfeiture of Garney’s retirement benefits was not warranted.

DaRosa v. City of New Bedford, SJC-11759 (appeal pending).

This case is an appeal of a Superior Court discovery order in an environmental case requiring the City of New Bedford to produce certain materials to one of the third-party defendants in the case. Some of the documents which were the subject of the order were identified by the City in a privilege log. Other documents covered by the order were documents that were inadvertently produced by an engineering firm retained by the City. As part of its order, the lower court held that the work product privilege does not apply to in-house municipal counsel while noting it would apply to outside counsel retained by a municipality. The court also held that a report prepared by an environmental consultant for the city solicitor, even though it was intended to assist the city solicitor in advising the City as to potential litigation, “was not necessary to secure and facilitate the communication between the attorney and the client” and were therefore not protected by the attorney-client privilege. With respect to that report, the court further noted that “but for the public records law, said materials would clearly constitute attorney work product, and would be subject to a heightened standard for disclosure as codified in Mass. R. Civ. P. 26(b)(3).” The City appealed the order, and the SJC transferred the case from the Appeals Court. The Massachusetts Municipal Association, joined by the Massachusetts Municipal Lawyers Association, has submitted an amicus brief setting forth several arguments for reversal of the trial court’s order, including that (1) the work product of a municipal attorney should be exempt from mandatory disclosure under the public records law, either categorically or pursuant to the “deliberative process” exemption; (2) the public records law as interpreted by the Superior Court in this case violates Article 30 of the Massachusetts Declaration of Rights to the extent it mandates the disclosure of

documents protected by the work product doctrine and not otherwise subject to an exemption; and (3) documents exchanged between a municipal attorney and a litigation expert are protected as derivative attorney-client communications. The oral argument on the appeal took place on January 8, 2015.



### **III. PRESENTER BIOGRAPHIES**

CHRISTOPHER J. PETRINI is founding principal of Petrini & Associates, P.C., a municipal law firm in Framingham. Petrini & Associates is full Town Counsel to the towns of Framingham, Medway, Sherborn, Sudbury and West Brookfield, and special counsel to numerous municipalities and school districts throughout the commonwealth. Mr. Petrini's practice focuses on municipal law and public construction and litigation. Mr. Petrini is a Past President of the Massachusetts Municipal Lawyers Association and serves on its Executive Board. Mr. Petrini also is a Regional Vice President for the International Municipal Lawyers Association, representing the First Circuit. 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. Mr. Petrini has chaired or served as a panelist for a variety of continuing legal education seminars related to municipal law, public construction and employment law, and has authored or coauthored articles in professional journals in his areas of expertise.

DONALD V. RIDER, JR. currently serves as the city solicitor for the city of Marlborough, and as Vice President of the Massachusetts Municipal Lawyers Association. Mr. Rider previously served as the head of the civil litigation unit for the city of Worcester. He received his law degree from the University of Wisconsin Law School, a master's degree from Boston College in political science, and an undergraduate degree from Middlebury College in history. Mr. Rider has spoken at events hosted by the MMA, MCLE and MMLA, and has authored articles published by MCLE and the Massachusetts Bar Association.

*2015.01.20 MMA Municipal Law Update - 2015 Conference Presentation (FINAL) (2700-23)*