MASSACHUSETTS MUNICIPAL ASSOCIATION
MUNICIPAL LAW UPDATE

SELECTED STATUTES AND CASES FOR 2016

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I. SELECTED STATUTES.

A. MARIJUANA.

1. St. 2016, Chapter 334, "The Regulation and Taxation of Marijuana Act."

- Three (3) handouts are available today from the MMLA (Massachusetts Municipal Lawyers Association):
  - What Municipalities Need to Know (MMLA issue date 12.1.16);
  - A Summary for Municipal Counsel (MMLA issue date 12.1.16); and
  - Letter dated 12.1.16 from MMLA President Henry C. Luthin to Governor Baker, President Rosenberg, and Speaker DeLeo.

    - MMLA's letter expresses two (2) MMLA concerns re. local control of marijuana establishments:

      1. Mass. Gen. Laws c. 94G, § 3(a)(2): What is "a vote of the voters"? Is "a vote of the voters" in this marijuana context sufficient to adopt a town by-law or city ordinance? Or does "a vote of the voters" serve to authorize town meeting or a city council to adopt such a by-law or ordinance? Or is "a vote of the voters" necessary to affirm a by-law or ordinance approved at town meeting or by a city council?

> "A city or town may adopt ordinances and by-laws that impose reasonable safeguards on the operation of marijuana establishments, provided they are not unreasonably impracticable and are not in conflict with this chapter or with regulations made pursuant to this chapter and that:
> …
> (2) limit the number of marijuana establishments in the city or town, except that a city or town may only adopt an ordinance or by-law by **a vote of the voters** of that city or town if the ordinance or by-law:
> (i) prohibits the operation of 1 or more types of marijuana establishments within the city or town;
> (ii) limits the number of marijuana retailers to fewer than 20 per cent of the number of licenses issued within the city or town for the retail sale of alcoholic beverages not to be drunk on the premises where sold under chapter 138 of the General Laws; or
> (iii) limits the number of any type of marijuana establishment to fewer than the number of medical marijuana treatment centers registered to engage in the same type of activity in the city or town." (Emphasis supplied.)

      2. Mass. Gen. Laws c. 94G, § 3(b): If there is no ballot question as to consumption of marijuana and marijuana products on the premises where

sold, is the city or town "taken to have authorized" such on-premises marijuana consumption?

> "The city council of a city and the board of selectmen of a town shall, upon the filing with the city or town clerk of a petition (i) signed by not fewer than 10 per cent of the number of voters of such city or town voting at the state election preceding the filing of the petition and (ii) conforming to the provisions of the General Laws relating to initiative petitions at the municipal level, request that the question of whether to allow, in such city or town, the sale of marijuana and marijuana products for consumption on the premises where sold be submitted to the voters of such city or town at the next biennial state election. **If a majority of the votes cast in the city or town are not in favor of allowing the consumption of marijuana or marijuana products on the premises where sold, such city or town shall be taken to have not authorized the consumption of marijuana and marijuana products on the premises where sold."** (Emphasis supplied.)

2. St. 2016, Chapter 351, "An Act Further Regulating the Cultivation of Marijuana and Marihuana."

- Purpose "is to ensure the safe implementation of marijuana legalization, therefore it is hereby declared to be an emergency law, necessary for the immediate preservation of the public health."
- Effective 12.30.16.
- Extends, by 6 months, a total of 12 various dates which had been approved in the November ballot question.
- Mandates that, within 60 days (by 2.28.17), the Department of Public Health, in consultation with the executive offices of health and human services, administration and finance, and public health and safety, "enter into an agreement with a research entity to conduct a comprehensive baseline study of marijuana use in the commonwealth which shall include, but not be limited to, a survey of:
    - (i) patterns of use, methods of consumption and general perceptions of marijuana;
    - (ii) incidents of impaired driving and hospitalization related to marijuana use; and
    - (iii) economic and fiscal impacts for state and local governments, which shall include the impact of legalization on the production and distribution of marijuana in the illicit market as well as costs and benefits to state and local revenue."
- Further, the Department of Public Health "shall submit a report of its findings to the chairs of the senate and house committees on ways and means and the senate and house chairs of the joint committee on public health not later than July 1, 2018."

B. Municipal Modernization Act (Chapter 218 of the Acts of 2016).

- Pertinent Procurement Changes:
  - For public works projects (M.G.L. c. 30, § 39M):
    - Less than $10,000. Sound business practices.
    - $10,000 to $50,000 (new threshold): The awarding authority must request written responses from at least three (3) persons that customarily perform the work, following stated public notification procedures (public notification not required in certain circumstances involving blanket or statewide contract from Operational Services Division).
    - Over $50,000: Sealed bids.
  - For building construction projects (M.G.L. c. 149):
    - Less than $10,000: Sound business practices.
    - $10,000 to $50,000: The awarding authority must request written responses from at least three (3) persons that customarily perform the work.
    - Over $50,000 and up to $150,000: Sealed bids under M.G.L. c. 30, § 39M.
    - Over $150,000: Sealed bids using M.G.L. c. 149, §§ 44A-44J.
  - Chapter 30B:
    - For procurement of a supply or service between $10,000 and $50,000 (increased threshold and new procedure): Written quotations must be requested from at least three (3) persons that customarily provide the supply or service; certain public record requirements apply. A governmental body can alternatively use sealed bids.
    - For procurement of a supply or service over $50,000 (increased threshold): sealed bids or proposals.

- Rentals/Leases:
  - If a public body rents or leases a public building or property, or space in a public building or property (excluding buildings and properties under the control of the school committee), funds received from the rental or lease can be placed in a separate account of the municipal treasury.
  - The balance remaining in this separate account must be paid into the general fund at the end of the fiscal year, unless the municipality accepts the portion of M.G.L. c. 40, § 3 providing that the balance can remain in the account and be spent to upkeep and maintain any facility under the

control of the municipal board, committee or department head in control of the building or property.

- Joint Powers:
  - New M.G.L. c. 40, § 4A½ allows a governmental unit (including cities, towns, regional school districts, special purpose districts, and certain other agencies) to enter into a joint powers agreement with another governmental unit to jointly exercise their common powers and duties in a designated geographically-designated area. The joint powers agreement may be entered into by the chief executive officer or other authorized board, committee or officer; in a city, the joint powers agreement must be authorized by the city council, with the approval of the mayor, and in a town, it must be authorized by the board of selectmen.

- Stabilization Funds:
  - A municipality that accepts a new paragraph in M.G.L. c. 40, § 5B may dedicate, without further application, all, or at least 25%, of a specific fee, charge or certain other receipts to a stabilization fund established pursuant to M.G.L. c. 40, § 5B, as long as the receipts are not reserved by law for expenditure for a specific purpose.
  - A dedication vote, and a vote to terminate a dedication vote, both require a 2/3 vote of the legislative body. The vote to dedicate or rescind a dedication must occur in the fiscal year prior to when the dedication or termination of a dedication is to occur, and is effective for a minimum of three (3) fiscal years.

- Agriculture:
  - Under new M.G.L. c. 40, § 8L, municipalities can create municipal agricultural commissions in order to advance and develop local agricultural resources.
  - Municipal agricultural commissions are authorized to perform duties stated in M.G.L. c. 40, § 8L, including acquiring, maintaining, licensing and leasing land for agricultural purposes, and receiving grants, gifts, bequests and devises of money, personal property, and interests in real property.

- Special Education Funds:
  - With a majority vote of the school district and legislative body (or, in the case of a regional school district, by vote of the legislative bodies of a majority of the member communities), a special reserve fund can be

established (and funds can be appropriated or transferred to the reserve fund) to pay, without further appropriation, unanticipated or unbudgeted costs of special education, out-of-district tuition, or transportation.

- Workforce Housing Special Tax Assessment Plan:
    - New M.G.L. c. 40, § 60B allows for a city or town, acting through its town meeting, town council, or city council (with mayor approval as may be required) to adopt and implement a workforce housing special tax assessment plan, to promote and assist with the increased development of middle income housing.

- Payment of Bills, Drafts, Orders and Payrolls:
    - M.G.L. c. 41, § 52: A board of selectmen can designate an individual member to approve bills or payrolls. The designee must make a record of such actions available to the board of selectmen at the first meeting following the action. Each member of the board of selectmen remains responsible in the event of noncompliance.
    - M.G.L. c. 41, § 56: A board of selectmen, other boards, committees, and heads of departments with more than one (1) members authorized to spend money can designate a member to approve all bills, drafts, orders and payrolls, as long as at the first meeting after the action, a record of the actions is made available. Each member of the board remains responsible in the event of noncompliance.

- Special Injury Leave Indemnity Fund:
    - Cities, towns and districts can accept a new paragraph in M.G.L. c. 41, § 111F to create and appropriate funds to a special injury leave indemnity fund to pay injury leave compensation or medical bills incurred under M.G.L. c. 41, §§ 100 and 111F. Insurance proceeds and restitution monies can be deposited into the fund. Monies in the fund can be spent with the approval of the chief executive officer and without an appropriation vote.

- Lease Purchase Financing Agreements:
    - Under new M.G.L. c. 44, § 21C, a city, town or district, acting by a 2/3 vote of the legislative body, if recommended by the chief executive officer, can permit any department of the city, town or district to execute a lease purchase financing agreement to obtain equipment or improve a capital asset, for the duration of the useful life of the property.

- Final Judgments, Awards and Payments:
    - Payment of a final judgment, award, or payment directed or allowed by a state/federal court or adjudicatory agency can be made from available funds in the treasury, as long as there is certification from the city solicitor or town counsel that no appeal can or will occur and provided there is compliance with applicable provisions in the charter, ordinance or by-law.

- Revolving Funds:
    - Municipalities must establish revolving funds through by-law or ordinance – this is different than the prior version of M.G.L. c. 44, § 53E1/2, which provided that revolving funds were voted annually.
    - Annually, on or before July 1, the city or town must vote on the total amount that can be spent from each revolving fund; this limit can be increased during the fiscal year with the approval of the city council and mayor or the board of selectmen and finance committee.

- Consultant Fees:
    - There is an expansion to the permissible circumstances in which outside consultant fees can be required from an applicant. In particular, a municipality may also require the payment of outside consultant fees under M.G.L. c. 44, § 53G pursuant to rules adopted by any municipal permit or license granting officer or board when using authority conferred by a statute, ordinance or by-law.

- Performance of Obligations:
    - If there is a by-law, ordinance, rule, regulation or contract for depositing cash, bonds, negotiable securities, sureties, or other financial guarantees to ensure an applicant's performance of an obligation as a condition to a license, permit, approval, or other approval or authorization, the funds or security can be placed in a special account. The by-law, ordinance, rule or regulation must contain information required by new M.G.L. c. 44, § 53G1/2.

- Speed Limits:
    - If a municipality accepts new M.G.L. c. 90, § 17C, a city council, board of selectmen, park commissioners, traffic commission, or traffic director can establish a 25 mile per hour speed limit on any roads (excluding state highways) inside a "thickly settled" or business district.
    - If a municipality accepts new M.G.L. c. 90, §18B, a city council, board of selectmen, park commissioners, traffic commission, or traffic director can

create designated safety zones on, at or near any way in the municipality that is not a state highway, and the safety zones shall have a speed limit of 20 miles per hour. A safety zone can be established on a state highway with Department of Transportation approval.

C. Zoning Act Amendments.

- Section 7 – Enforcement (Chapter 184 of the Acts of 2016). A new provision was adopted for real property improved by the construction or alteration of at least one (1) structure:

    - If a structure or alteration has been in place for at least ten (10) years and no notice of an action, suit or proceeding of an alleged zoning violation has been recorded in the applicable registry of deeds or registry district (for registered land) within ten (10) years from the date the structure was constructed, then the structure is deemed, for zoning purposes, to be a legally non-conforming structure, entitled to the grandfathering protections under Section 6 of the Zoning Act and any local zoning provisions involving non-conforming structure.

    - This creation of grandfathering benefits applies whether or not the structure was built before or after the November 2, 2016 effective date of Chapter 184 of the Acts of 2016.

- Section 6 – Grandfathering (Chapter 219 of the Acts of 2016). Previously, zoning ordinances and bylaws were required to state that construction or operations under a building or special permit must comply with any future amendment of the ordinance or bylaw unless use or construction begins within a period of up to six (6) months following issuance of the permit and, if for construction, the construction is continued to finish as continuously and expeditiously as is reasonable. Under the legislation, this time period is increased from a maximum of (6) months to a maximum of twelve (12) months.

- Section 9 – Special Permits (Chapter 219 of the Acts of 2016). Previously, zoning ordinances and by-laws were to provide that a special permit could lapse within a certain period of time, but no more than two (2) years from the date of issuance (excluding an appeal), unless there is substantial use (except for good cause) or, for a permit for construction, if constructed has not started (except for good cause). As of August 10, 2016, this maximum two (2) year period has been enlarged to a maximum three (3) year period.

II. SELECTED CASES.

A. BIDDING / PROCUREMENT.

Quigley v. City of Newton, 90 Mass. App. Ct. 1121 (2016) (unpublished).

A ten-taxpayer suit challenged Newton's selection of a developer for a mixed-use redevelopment of a parking lot, as allegedly violative of Mass. Gen. Laws c. 30B, § 16 (the Uniform Procurement Act). The Appeals Court dismissed the case for lack of standing, as Newton was neither about to raise or to expend money for an illegal purpose.

Spartan Motors USA, Inc. v. Metropolitan Area Planning Council, 33 Mass. L. Rptr. 218 (Mass. Super. Ct. 2016).

In late 2015, MAPC issued an RFP to sell fire engines on behalf of various municipalities in Massachusetts. Though it submitted a timely response, Spartan Motors USA, Inc. delivered its technical and pricing proposals in the same box (at least according to MAPC). MAPC therefore rejected Spartan's bid as non-responsive and refused to consider it. Spartan asked MAPC to waive the minor informality, without success. Spartan then asked the Inspector General to advise MAPC to reinstate Spartan's bid, without success. Spartan then appealed to Court, which ruled that Mass. Gen. Laws c. 30B, § 5(f), which is incorporated into the competitive sealed proposal process under Mass. Gen. Laws c. 30B, § 6(f), mandates that MAPC must waive Spartan's minor informality and reinstate Spartan's bid, evaluate it, and inform Spartan of its decision by mid-February 2016 whether MAPC would be awarding a contract to Spartan. The Court observed that such an award, if MAPC so decided, would be in the public interest, as was the statutorily mandated waiving of the minor informality of 1 box instead of 2.

B. CIVIL RIGHTS.

1. Police.

Bazinet v. Thorpe, et al., 2016 WL 3149657 (D. Mass. 2016).

An arrestee and his wife alleged a due process violation under 42 U.S.C. § 1983 against members of the Paxton Police Department and the State Police for fabricating evidence against the husband in a police report, disseminating that report to the media, and procuring a coerced abuse prevention order, with both the report and the order leading to the husband's arrest. The police brought a motion for summary judgment, asserting they were entitled to qualified immunity on the § 1983 due process claim as well as a claim under the Massachusetts Civil Rights Act. Given the dispute of facts, which the District Court viewed in the light most favorable to the plaintiffs, the Court denied the qualified immunity defense. In addition, the Court denied the officers' motion for summary judgment on supervisory liability, intentional infliction of emotional distress, and defamation.

Merisier, et al. v. Ellender, Town of Mansfield, et al., 2016 WL 3676118 (D. Mass. 2016).

Mansfield police officers entered the plaintiff's home for purposes of placing him in the protective custody of his wife. While searches and seizures inside the home without a warrant are presumptively unreasonable, the police brought a motion for summary judgment contending that a warrantless entry may be permissible when there is compelling need for official action and no time to secure a warrant." They also relied on the Massachusetts protective custody statute, Mass. Gen. Laws c. 111B, § 8, asserting they were simply ensuring that the assertedly incapacitated plaintiff – "who admittedly had consumed alcohol, was belligerent at times with the officers, i.e., disorderly – as placed in the care of his wife." Due to the factual dispute as to whether the plaintiff was drunk, belligerent or disorderly, the District Court denied the officers' motion as to both the warrantless entry and the excessive force claims.

However, as to the plaintiffs' claim that Mansfield either had an improper policy or practice, or failed to discipline, train and supervise, the officers in question, the Court found there was no support in the record. Accordingly, the Court dismissed the claim against the town.

Niles v. Town of Wakefield, et al., 172 F. Supp. 3d 429 (D. Mass. 2016).

The Wakefield police at gunpoint, reacting to a radio report of an armed robbery at a Dunkin Donuts store but with no description of the alleged robber other than he was threatening to shoot people with his handgun, arrived on the scene and soon observed a 66-year-old black male walking on the street near the store. The police ordered the male to the ground, and frisked and handcuffed him. No weapons were found on his person. The police then brought to the site of an armed robbery. There he was identified as not having been involved in the robbery.

The police moved for summary judgment, first as to the unlawful search and seizure claim. The District Court found that "[m]erely seeing someone walking down the street in the location of a crime does not constitute an objectively reasonable, particularized basis for suspecting an individual of engaging in criminal activity." The Court likewise denied the officers' motion for summary judgment as to the excessive force claim. "Accepting the plaintiff's version of events as true, this 66 year old man was roughly tossed while on the ground by Officer Whaley, who put his full weight on Mr. Niles' back. Mr. Niles was then marched out of the store with his hands held together behind his head by the officer, causing him much pain, and was subsequently handcuffed despite the fact that he was complying with the officers' orders." Likewise, the officers' qualified immunity arguments were unavailing on both constitutional claims.

However, the Court granted Wakefield's motion for summary judgment under the Massachusetts Tort Claims Act. Mass. Gen. Laws c. 258, § 10(c) precludes public employer liability when it is based, as here, on claims that the public employee had committed the intentional torts of false imprisonment or assault and battery.

Roach v. Green, et al., 2016 WL 1254236 (D. Mass. 2016).

In the course of investigating a reported domestic disturbance, Framingham police officers entered into a struggle with an allegedly uncooperative plaintiff, which entailed the use of a Taser to subdue him. He sustained a torn rotator cuff. The officers moved for summary judgment on an excessive force claim. The Court denied the motion, observing that there were "legitimate disputes of fact about the degree of Roach's resistance to arrest, the level of his hostility and combativeness towards the officers, whether he presented an appreciable threat to the officers' safety or to others in the area, and whether the deployment of the Taser was appropriate under circumstances in which three officers confronted a single defendant." As to the officers' qualified immunity defense, the Court denied it, noting that the "constitutional right to be free from an unreasonable use of a Taser because of his failure to cooperate with the officers' investigation of a domestic disturbance complaint" had been established in the First Circuit since 2008.

Stamps v. Town of Framingham, 813 F.3d 27 (1st Cir. 2016).

This case involves the "shooting death of an innocent, elderly, African–American man, Eurie Stamps, Sr." He was shot by a Framingham police officer "during a SWAT team raid executing a search warrant for drugs and related paraphernalia belonging to two drug dealers with violent criminal histories thought to reside in the" decedent's family's home. While the other officers continued to search elsewhere in the apartment, the police officer in question was pointing at the elderly man a loaded, semi-automatic rifle, with the safety off and his finger on the trigger. According to the First Circuit Court of Appeals, "Stamps was fully complying with the orders he was given, was unarmed and flat on his stomach in the hallway, and constituted no threat. At some point, … [the police officer] unintentionally pulled the trigger of his rifle and shot Stamps."

The officer brought a motion for summary judgment, asserting he was entitled to qualified immunity as to the claim that he had violated the decedent's Fourth Amendment right to be free from the use of excessive force. In essence, he argued that the shooting itself was unintentional. The District Court denied the motion, and the First Circuit affirmed that denial, noting that "an officer can be held liable under the Fourth Amendment for an intentional but unreasonably dangerous seizure, even when the means employed to effectuate the seizure result—unintentionally—in someone's death."

2. Schools.

Doe v. Bradshaw, Town of Mashpee, et al., 2016 WL 4497061 (D. Mass. 2016).

A female student at Mashpee high school alleged that she was a victim of sexual abuse committed by 1 of the Mashpee School Department's employees. She alleged that Mashpee, the Mashpee School Committee, and various Mashpee school officials failed to protect her from the

employee, and that they then failed to provide her the special education services she needed as a result of the alleged abuse.

Focusing on the town, the claim is that it deprived the plaintiff of her due process and equal protection rights. The District Court stated that only the acts of the School Committee, as distinct from the acts of the high school's principal or assistant principal or even the district superintendent, could subject the town itself to § 1983 liability. This is because municipal liability under § 1983 can only be based on an unconstitutional custom or policy, and because, pursuant to Mass. Gen. Laws c. 71, § 37, only the school committee had final policymaking authority over educational policies.

In particular, the plaintiff pointed to a School Committee school handbook policy of internally investigating abuse reports through the school nurse who would be expected to convene a meeting of that school's investigating committee, which in turn would decide whether to drop the complaint or have the principal notify the state of the complaint. According to the plaintiff, this policy acted as a barrier to mandated § 51A abuse reporting and perhaps catching the sexually abusive school employee earlier. Here, earlier reports of the sexually abusive school employee were passed onto school officials for investigation. "The Committee then received reports on those investigations. Regardless of the quality of this oversight, it does not descend to the level of deliberate indifference to the potential for violations of students' rights to either bodily integrity or freedom from sexual harassment."

Doe v. Town of Wayland, 179 F. Supp. 3d 155 (D. Mass. 2016).

A Wayland public school student alleged he was the victim of sexual abuse committed by a student (Coe) in a program at Wayland high school that had been set up there by an educational collaborative (TEC)working for the town. The portion of the complaint directed against Wayland alleged that the town and had a custom or policy of encouraging students to form friendships with other students, even those posing safety risks, in order to increase the number of students enrolled in collaborative's programs. According to the Complaint, under the Wayland-TEC contract "if a particular student withdrew from TEC programming, Wayland would still owe TEC money for a portion of the un-provided services. … Wayland would also need to pay for a new placement, even if more expensive, for any student who left a TEC program. … If a certain amount of students withdrew from TEC's programming, Wayland would incur a higher rate for remaining students."

The District Court denied Wayland's motion to dismiss. According to the Court, while the complaint only alleged conduct pertaining to 1 particular friendship – between Coe and the Plaintiff's older brother (Philip), it also "alleges multiple instances of misconduct regarding that friendship. These include: staffers' encouragement of Coe and Philip to form a friendship with each other; staffers' advocating to … [the plaintiff's parents] at multiple meetings that Philip's friendship with Coe was beneficial to Philip—including via specific affirmative representations that Coe was 'a good kid' and 'good with kids'; continued encouragement of the Coe-Philip friendship, even after learning about Coe's abuse of … [a female student with a developmental disability]; and … [a school administrator]'s reference to Philip's friendship with Coe as a reason for … [the plaintiff's mother] to not remove Philip from … [TEC's program]. The Complaint

also contains numerous inappropriate omissions from Wayland and TEC staff—failure to exclude Coe from TEC's program]; failure to inform … [the plaintiff's parents] about Coe's past sexual abuse; failure to remove Coe from … [the TEC program] after he sexually abused … [the female student with a developmental disability; failure to inform … [that female student]'s parents about Coe's sexual abuse of … [her]; and failure to inform the Does about Coe's sexual abuse of… [her]—which, though not unconstitutional, offers factual support for an inference that socially engineering dangerous friendships was an official custom or policy" of Wayland. As the Court put it elsewhere in its opinion, "repeatedly prioritizing fiscal concerns over a known, not-insignificant risk of sexual abuse of a child shocks this Court's conscience."

Morgan v. Town of Lexington, et al., 823 F.3d 737 (1st Cir. 2016).

In this case, the District Court granted the municipal defendants' motion to dismiss the plaintiff's claim based on substantive due process under the Fourteenth Amendment, specifically, the right to be free from the abuse and injuries related to the bullying he allegedly endured at the hands of his fellow students. To prove such a claim, the plaintiff, a middle school student, needed to show that any violation of his protected right was caused by governmental conduct. Thus the plaintiff asserted the state-created danger theory, where a public official acts so as to create, or even markedly increase, a risk to an individual.

According to the plaintiff, the defendants and other school employees allegedly ignored the bullying he endured "and took affirmative steps to disregard Plaintiff's complaints and permit the ongoing sexual harassment and bullying," which "materially contributed to creating the specific condition or situation that caused" his injuries. These acts included the principal's " 'punishment' of not letting … [the plaintiff] run in the track meet because he delayed the investigation after … [an] incident; sending officers to … [the plaintiff]'s house; and a school official telling … [the plaintiff and his mother] at a meeting that there was not time to discuss specific incidents." According to the First Circuit Court of Appeals, "[t]hese acts certainly did not create a new danger … [or explain] how the acts caused … [the plaintiff] to be bullied or increased the risk to him. … These routine acts of school discipline, truancy enforcement, and administrator-parent conferences are not the vehicle for a substantive due process constitutional claim." Thus, the First Circuit affirmed the grant of the municipal defendants' motion to dismiss the substantive due process claim.

3. Airports.

Boston Executive Helicopters, LLC v. Maguire, Town of Norwood, et al., 2016 WL 3676120 (D. Mass. 2016).

A private air carrier operating as tenant at Norwood Municipal Airport wanted to expand its business in order to sell jet fuel. It alleged it was prevented from doing so by Norwood and a competing jet fuel seller already established at the Airport. The private air carrier brought suit, alleging that Norwood had violated its rights to procedural and substantive due process, equal protection, and the Massachusetts Civil Rights Act (MCRA).

Noting that the burden on a plaintiff to establish a violation of procedural due process "in a commercial land-use context is high," the District Court denied this claim because the carrier had an adequate post-deprivation remedy in the form of a certiorari appeal to the State courts.

As for the substantive due process claim which it dismissed, the Court once again noted that "[i]n matters of municipal governance, the First Circuit has set an extremely high threshold for substantive due process claims, leaving 'the door slightly ajar for federal relief [only] in truly horrendous situations.' … As a result, a claim will not lie for a 'run-of-the-mill dispute between a developer and a town official.' "

On the equal protection claim, the Court dismissed it and ruled that the plaintiff had failed "to identify a comparator or comparators similarly situated *in all relevant respects*. The 'similarly situated' requirement must be enforced with particular rigor in the land-use context because ... (land use) decisions will often, perhaps almost always, treat one landowner differently from another."

On the MCRA claim, the Court dismissed it and found that there was no evidence that the defendants had "done anything more than refuse to act affirmatively on … [the plaintiff]'s application for … [a fixed based operator] permit. 'Adverse administrative action, at least when not part of a scheme of harassment, does not amount to threats, intimidation or coercion.' "

The Court did allow 1 claim to go forward, namely, that the defendants had retaliated against the plaintiff carrier in order to punish it for the exercise of its First Amendment rights. Specifically, the carrier alleged: (1) that the Norwood Airport Commission (NAC) tabled consideration of its application for a fixed based operator permit in response to the plaintiff's filing of a complaint with the FAA; "(2) that the NAC refused to issue the permit, in part, because … [the plaintiff] publicly litigated the dispute in the press; and (3) that the NAC denied hearings on … [the plaintiff]'s application in retaliation for … [the plaintiff] filing a public records lawsuit."

C. EMPLOYMENT.

Brown v. Office of the Commissioner of Probation, 475 Mass. 675 (2016).

The doctrine of sovereign immunity bars a plaintiff, who is awarded punitive damages, costs and attorney's fees as part of a judgment under Mass. Gen. Laws c. 151B, § 9, from recovering post-judgment interest on those awards from a public employer.

Cherkaoui v. City of Quincy, 2016 WL 5796789 (D. Mass. 2016).

A former school teacher alleged she was forced to quit after having been discriminated and retaliated against because she is Muslim and suffers from ADHD. She alleges that the Quincy school district committed a number of acts which constituted adverse employment

actions, including suspending her for three days, and changing her teaching assignment such that she was required to learn new subject matter, handle a larger class size, and manage classrooms with students from different grades. Quincy then produced evidence that actions it took regarding the plaintiff were for nondiscriminatory, business reasons.

The burden then shifted back to the plaintiff to show that Quincy's nondiscriminatory, business reasons were merely pretextual. Thus, as to her claim for religious discrimination, she alleged that Quincy's actions began only after she started wearing a headscarf in 2009 – specifically, "by treating her discourteously, treating her differently than other similarly situated teachers, giving her inappropriate or impractical assignments, and failing to respond satisfactorily when she complained." According to the District Court, "[w]hile temporal proximity is certainly a factor courts consider in determining whether actions taken against a plaintiff were caused at least in part by a forbidden type of bias, it is not a 'determinative factor ... if there is additional evidence beyond temporal proximity' tending to show that the employer's conduct was not pretextual." Since Quincy had provided that additional evidence, the plaintiff failed to carry her burden, and the city's motion for summary judgment was granted.

Cristo v. Evangelidis, 90 Mass. App. Ct. 585 (2016).

The plaintiff was an employee of the Worcester County Sheriff's office. He reported to his superior various matters about his fellow workers performing political tasks while on the job. The plaintiff had learned about these matters in the course of performing his job duties, and those matters were directly related to his various duties as payroll director and his human resource responsibilities. The Appeals Court noted that the plaintiff reported his complaints only while on duty; that he did not share the contents of his complaints with anyone other than his immediate supervisor; and that he did not make use of any forum outside the Sheriff's office to make known his complaints. When the Sheriff terminated the plaintiff's employment, the plaintiff brought a claim under 42 U.S.C. § 1983 alleging that the termination was retaliation in violation of his First Amendment right to free speech. The superior court granted summary judgment to the plaintiff

The Appeals Court vacated the judgment in favor of the plaintiff. The Appeals Court deemed irrelevant the question whether the plaintiff's speech may have involved matters of public concern. According to the Court, "[u]nder governing Federal law, 'when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.' " Under federal law, "when an employee performs tasks that are part of his duties, the employee's supervisors have a right to review and evaluate his performance independent of judicial oversight. … On the other hand, when an employee 'speaks as a citizen addressing matters of public concern, the First Amendment requires a delicate balancing of the competing interests surrounding the speech and its consequences.' " Per the Appeals Court, this case involved the former, not the latter.

Fox v. Town of Framingham, et al., 2016 WL 4771057 (D. Mass. 2016).

The plaintiff was a social worker at Framingham high school. He alleged that he was forced to resign – constructively discharged – because he claimed it was impossible for him to stay in light of the school principal's "indifference toward the emotional development of the students at FHS and his disregard for the expertise of the social workers in the building. Drug involvement has proliferated …, binge drinking among teens and unwanted sexual incidences continue to put people at great risk, and the leadership has turned a blind eye toward the fraying social civility within the building." Framingham moved for summary judgment on the plaintiff's claim under 42 U.S.C. § 1983 alleging that the forced resignation was retaliation in violation of his First Amendment right to free speech.

The Court granted summary judgment against the plaintiff on the § 1983 claim. According to the District Court, the plaintiff "spoke as an employee of FHS and not as a private citizen. The undisputed facts establish that … [the plaintiff's] statements regarding the treatment of women, the sexual assault complaints and the related topics arose from special (in some cases confidential) knowledge he acquired in the course of his employment as a social worker at FHS." Further, the plaintiff "made his statements using his work email rather than private email accounts. He made other statements at work, during work meetings with other employees including supervisors, urging the school, in light of information he acquired in the performance of his duties, to take certain actions. The principal and other supervisors or mangers met with … [the plaintiff] in his capacity as an employee of the school. All of his statements were made up the chain of command while he was at work and would appear to an objective observer as official work statements." The Court observed that, "[w]hile sexual assault in our schools is an important public concern and while there may be a citizen analogue with respect to Fox's speech, the undisputed evidence demonstrates conclusively that in the circumstances of this case, … [the plaintiff] spoke in his role a social worker for FHS, and not as a private citizen" whose speech would have been protected by the First Amendment.

Heagney v. Wong, City of Fitchburg, et al., 2016 WL 2901731 (D. Mass. 2016).

A candidate for Fitchburg chief of police answered an employment application question that his only prior law enforcement employment, apart from the ATF, was with the town of Franklin, and that he had never been disciplined during his law enforcement career. However, an anonymous letter claimed he had also worked for the Attleboro and Falmouth Police Departments, "that he had disciplinary issues in his past," and that the plaintiff "had been brought up on charges of pistol-whipping in the past" but the case had been dismissed "when the victim refused to testify." When Fitchburg's mayor then withdrew the plaintiff's nomination, the plaintiff filed suit against the municipal defendants.

During the deposition of the plaintiff, he was asked about "underlying facts relating to criminal charges of which … [the plaintiff] was acquitted in 1989 and the records for which were sealed in approximately 2001." The plaintiff moved the District Court to impose a protective order prohibiting such questions. The Court denied his motion, noting that while his suit alleged an unlawful employment practice under Mass. Gen. Laws c. 151B, § 4(9) which makes it

unlawful "to request any information ... regarding: (i) an arrest, detention, or disposition regarding any violation of law in which no conviction resulted," his suit also alleged, and was primarily alleging, defamation. Thus, the deposition questions were not barred by the unlawful discrimination statute.

The Court also noted that the sealed record statute, Mass. Gen. Laws c. 276, 100A, does not serve to erase "the fact that a criminal case was instituted," but merely to ensure confidentiality. Since the plaintiff had put into his complaint the matter of the anonymous letter, the Court ruled he could not use the sealed record statute to protect him from questions about that letter and the underlying assault and battery the letter spoke of.

D. ENVIRONMENTAL.

Town of Princeton v. Monsanto Company, et al., 2016 WL 4250250 (D. Mass. 2016).

Princeton is the owner of the Thomas Prince School, an elementary school for approximately 380 students built in 1962. Princeton's complaint alleged that tests conducted at the Prince School in April 2011 detected PCBs at concentrations in excess of 50 parts per million in window caulking and glazing, which exceeded the PCB levels that the EPA had previously authorized.

Princeton's complaint against Monsanto alleged that from 1935 to 1978 Monsanto was the exclusive manufacturer of PCBs in the United States; that PCBs are odorless and tasteless man-made chemicals that have been used in a wide range of industrial applications; that between 1950 and 1978, products containing PCBs had been widely used in the construction and renovation of buildings, including school buildings, throughout the United States; that by the late 1960s, public researchers had begun questioning the safety of PCB, that, effective January 1, 1979, Congress banned most uses of PCBs and authorized the Environmental Protection Agency ("EPA") to apply restrictions to the usage of PCBs; that in 1996, the EPA concluded that PCBs are "probable human carcinogens;" and that on September 25, 2009, the EPA issued a press release "advising school administrators about the presence of PCBs in school buildings built between 1950 and 1978" and, for the first time, published public health levels for PCBs in school indoor air.

Monsanto and the other defendants moved to dismiss. The District Court denied the motion. It ruled that Monsanto had failed to demonstrate that the EPA's single press release on September 25, 2009, "broadly addressed to 'building owners and school administrators,' is sufficient on its own to provide, as a matter of law, adequate notice of a complex contamination issue of the sort presented here. Instead, sufficient notice has more typically been found where there was repeated coverage of the possibility of injury." Further, even if the single press release had been enough to place Princeton on notice of a complex contamination issue at the Prince School, the Court could not conclude "without further factual development that the content of the press release issued by the EPA was sufficiently specific to alert Princeton to 'both (its) injury and (the) likely cause." A tort claim accrues when a plaintiff has knowledge, both

only of its injury, but also of the likely cause of that injury or has sufficient facts available such that it reasonably should discover the probable causal relationship between its injury and the conduct of a defendant.

E. LABOR.

Chadwick v. Duxbury Public Schools, 475 Mass. 645 (2016).

The SJC declined to recognize a union member-union privilege.

Jones, et al. v. City of Boston, et al., 2016 WL 7451307 (1st Cir. 2016).

The 10 plaintiffs were 8 police officers, a police cadet, and a provisionally hired 911 operator who claimed they had suffered adverse employment actions at the hands of the Boston Police Department as the result of a racially discriminatory hair drug test. According to the First Circuit Court of Appeals, "from 1999 to 2006, the [Boston Police] Department administered a hair drug test to thousands of officers, cadets, and job applicants. The testing procedure called for the gathering of a hair sample, which was then 'washed' and analyzed for the presence of cocaine, marijuana, opiates, PCP, and amphetamines. Upon detecting cocaine in a hair sample, a licensed physician would determine whether legally administered medication could have caused the positive result. The individual who tested positive was also permitted to submit a second sample for a so-called 'safety-net' test. The results were negative for over 99% of the white individuals tested and over 98% of the black individuals tested." Since the 10 plaintiffs were among the fewer than two percent of black individuals who, however, did test positive for cocaine, 9 lost a job or job offer, and 1 received an unpaid suspension subject to participation in a drug rehabilitation and testing program.

The U.S. District Court had entered summary judgment in favor of the municipal defendants. The First Circuit vacated that judgment in part. The First Circuit found that "[a]lthough the drug test was indisputably job related and its use was consistent with business necessity, a reasonable factfinder could nevertheless conclude that the [Boston Police] Department refused to adopt an available alternative to the challenged hair testing program that would have met the Department's legitimate needs while having less of a disparate impact."

According to the First Circuit, the record contained sufficient evidence that would have allowed a reasonable factfinder to conclude that "hair testing plus a follow-up series of random urinalysis tests for those few officers who tested positive on the hair test would have been as accurate as the hair test alone at detecting the nonpresence of cocaine metabolites, while at the same time yielding a smaller share of false positives in a manner that would have reduced the disparate impact of the hair test." Further, there was evidence that the BPD had refused to adopt this alternative in 2003.

Lopez v. City of Lawrence, Mass., 823 F.3d 102 (1st Cir. 2016).

This is a case alleging disparate impact in the use of an examination for promotion for sergeant, which was developed by the Massachusetts Human Resources Division and used by various municipalities (such as the City of Boston) and state employers. The examination was developed in order to remove race and other improper considerations from public employment hiring. Allegations of disparate impact arose because the percentages of Black and Hispanic applications were significantly lower than the percentage of Caucasian applicants chosen. The examination consisted of a written component and an education and experience rating, and then a rank-order selection.

Following a bench trial, the federal district court concluded that the test had a disparate impact on promotions in the City of Boston, although the test was a proper selection tool for choosing sergeants on merit. Moreover, the federal district court concluded that the plaintiffs did not establish the existence of an alternative selection test, which would have been equally or more valid than the challenged examination, and which would have increased the percentage of Black and Hispanic officers selected.

A disparate impact claim involves three (3) questions: (1) whether there is "competent evidence" of a disparate impact on race; (2) if the disparate consequence job-related and in line with business necessity; and (3) if so, whether the employer has declined to use an alternative mechanism that is equal or more beneficial to the employer's legitimate business needs with a reduced disparate impact. A disparate impact claim is successful if the first question is a "yes," while the second question is a "no" or the third question is a "yes."

The City of Boston attempted to demonstrate that the examinations were valid by referencing "content validity" under the Uniform Guidelines on Employee Selection Procedures from the Equal Employment Opportunity Commission ("Guidelines"). The First Circuit held that the Guidelines were not inflexible, nor were they binding legal standards that have to be strictly applied in ascertaining whether the employer's business needs are met.

The First Circuit recognized that the written component of the examination did not evaluate certain skills and abilities necessary for the position, but any perceived gap was addressed, even if "minimally," through an education and experience portion of the examination. Also, the examination used job analyses that account for significant duties required to successful performance of the position, and there was evidence that individuals who performed higher on the examination were more likely to perform higher in the position.

The First Circuit referenced testimony generally demonstrating that using selection tools such as "hurdles," banding, oral interviews, assessment centers, and open-ended situational judgment questions involved less adverse impact than a multiple choice exam. However, in this case, the low number of vacant sergeant positions as compared to the number of applicants for the years in question made it unlikely that an alternative selection mechanism could have materially decreased the adverse impact. Because the federal district court applied the correct law and made no clear error in evaluating the expert evidence, its holding that the examination did not violate Title VII was upheld.

Plymouth Public Schools v. Education Association of Plymouth, et al., 89 Mass. App. Ct. 643 (2016).

Where the plaintiff had taken maternity leave during her first and fourth full years in her five years as a teacher at Plymouth North High School, an arbitrator and not an judge had the exclusive authority to determine whether had served for the 3 previous consecutive school years and thus had attained professional teacher status. The question could then be reached whether the plaintiff was contesting a mere non-renewal under Mass. Gen. Laws c. 71, § 41, or instead a dismissal under Mass. Gen. Laws c. 71, § 42.

Thompson, et al. v. Civil Service Commission, 90 Mass. App. Ct. 462 (2016).

Between 2001 and 2006, 10 officers of the Boston Police Department (including 6 who were plaintiffs in the Jones case above) submitted hair samples to the department that tested positive for cocaine. The 10 were terminated. After appealing their terminations to the Civil Service Commission, the terminations of 6 police officers were overturned, while the other 4 terminations were upheld. The Superior Court judge affirmed the Commission, except that the back pay and benefits awards for the 6 reinstated officers was reinstated to the date of each of their respective terminations instead of to the date the Commission hearings had commenced.

The Appeals Court reviewed the Commission's ruling and concluded that the Commission's decision had met the substantial evidence test (i.e., such evidence as a reasonable mind might accept as adequate to support a conclusion). The Court noted the Commission's finding "that the hair testing methodology was not sufficiently reliable to be the sole basis for an officer's termination, concluding that '(a) reported positive test result ... is not necessarily conclusive of ingestion.' " The Court then noted that "a divergent pattern{"pageset": "S99d2 of evidence emerged" in the Commission's decision "as to three factors: the level of cocaine present in the positive test, independent hair test results, and credibility."

Specifically, as to the 4 officers whose termination the Commission upheld, "each of their initial tests and each of their safety net retests were positive at levels well above the cutoff level," which represents "the minimum amount of a drug in a person's system required to trigger a positive test result for ingestion." Two of the 4 officers offered no independent hair testing following the initial positive test, "while a third prevaricated in his testimony on the issue, finally admitting that his independent hair test was positive. Lastly, as to each of the four officers, the commission found the testimony in support of their denials to lack credibility."

In contrast, each of the 6 officers whose terminations the Commission overturned had initial cocaine levels that were barely above the cutoff limit, and each presented evidence of negative independent hair tests. As to their credibility, the Commission found that the 6 officers "each presented a credible denial of drug use based on their testimony and any additional supporting evidence."

F. LAND USE / ZONING.

1. Accretion / Erosion.

Brown v. Kalicki, 90 Mass App. Ct. 534 (2016).

The plaintiffs owned registered land in the Town of Harwich, and their parcels extended from a private way to the shoreline of the Nantucket Sound. The plaintiffs' land was originally registered in the 1920s and 1930s; each certificate of title stated that, except for water lines, the property boundaries were as shown on Land Court registration plans. The Land Court registration plans identified "Nantucket Sound" as the southern boundary. Over the years, the shoreline changed and due to accretion (*i.e.,* soil deposits), the parcels included substantial amounts of previously submerged land.

The Massachusetts Appeals Court held that the accreted beachfront land was automatically registered. Because the land was registered, the interveners could not have a prescriptive easement to use the beach area on the plaintiffs' land. In other words, the interveners did not acquire an easement to cross over the accreted beachfront land.

The Massachusetts Appeals Court recognized that littoral (*i.e.,* shore) boundaries often change. As a result, it is rare that the actual boundaries precisely match what is shown on a registered property owner's certificate of title or Land Court plan. The consequence of not allowing automatic registration at the time the land is created – which was not the result reached here – is that the property owners would need to constantly amend their certificates of title to avoid a loss of property rights resulting from the adverse use of the land by others. Also, the waterfront boundary remained determined, and no amendment of the prior registrations was required, because Nantucket Sound continued to be a boundary.

The public retained its access and rights to the tidelands where they existed, and could fish, fowl or navigate in the tidelands as set by the Colonial Ordinance of 1641-1647. The Massachusetts Appeals Court concluded that the Commonwealth and the Town of Harwich, not the interveners, were charged with protecting public rights and were the only parties that could challenge the existence of rights in land that once was Commonwealth tidelands. However, the Commonwealth and the Town of Harwich had withdrawn their objections.

Town of Orleans v. Town of Eastham, No. 15 MISC 000275 KFS (Mass. Land Ct. Nov. 4, 2016).

In this case, the Town of Orleans requested that the Massachusetts Land Court determine the placement of a boundary line between itself and the adjacent Town of Eastham. This lawsuit was prompted by coastal erosion and accretion, which affected the original boundary line established by the Massachusetts Legislature. The Town of Eastham, however, contended that the Massachusetts Land Court did not have the power to modify the boundary lane, which was a

determinable fixed line, unaffected by coastal erosion and accretion. The Town of Eastham pointed to the boundary line as a fixed straight line created by the Massachusetts Legislature, which had been intact for over 200 years, unaffected by coastal erosion or accretion.

In 1796, the Massachusetts Legislature passed an act establishing the Town of Orleans, separating it from the Town of Eastham. This special act used a fixed line as the boundary between the towns. The boundary line was further described in a special act enacted by the Legislature in 1867, and subsequently located and defined in a 1907 atlas.

The Town of Orleans attempted to invoke the provisions of Massachusetts General Laws Chapter 42, Section 1, a statute that permits for boundaries in tide water to be modified from time to time to account for changes in the shore line. This statute allows the Legislature to change boundaries, and permits the Massachusetts Land Court to "define" boundary lines by decree. The Massachusetts Land Court held that the term "define" excluded the power to "change" boundary lines. Here, the Town of Orleans was not seeking to increase or decrease the original fixed boundary because of natural changes where the boundary line was "bordering on the sea." Rather, the Town of Orleans was attempting to redirect the fixed boundary line, resulting in a substantial change, and the provisions of Massachusetts General Laws Chapter 42, Section 1 did not confer authority upon the Massachusetts Land Court to act.

The Town of Orleans also attempted to invoke Massachusetts General Laws Chapter 42, Section 12, which allows the Massachusetts Land Court to "determine" a boundary line if "doubtful or in dispute." However, this boundary line was not doubtful or in dispute between the towns. Although a portion of the boundary line was located in tide water, the actual established boundary had a fixed placement, and had not changed or become doubtful due to altered landscape. The coastal changes that the Town of Orleans cited did not meet the standard of Massachusetts General Laws Chapter 42, Section 12; instead, the boundary line was determined, marked and identifiable, and had been for some time.

2. Article 97.

Smith v. City of Westfield, 90 Mass. App. Ct. 80 (2016), rev. granted 476 Mass. 1106 (2016).

Where Westfield approved and permitted construction of a school building on land formerly used as a playground without obtaining a 2/3 vote of each branch of the State legislature, there was no violation of Article 97. According to the Appeals Court, Westfield did not specifically designate, in a manner sufficient to invoke the protection of Article 97, "i.e., by deed or other recorded restriction on the land," the playground for Article 97 purposes" and the playground was not taken for those purposes. "Westfield's subsequent actions of passing an ordinance naming the playground and endorsing the { "pageset": "S084(open space and recreation plan in 2010 are insufficient to subject the playground to Article 97 protection."

But note that the case also contained a concurring opinion that, while the majority had correctly followed existing precedent, the SJC should revisit such precedent – and indeed the SJC has granted further review of the majority opinion in Smith. According to the concurrence,

"[t]he overriding point of art. 97 is to insulate dedicated parkland from short-term political pressures." Such pressures emanate from "public officials charged with building schools, roads, and other important public facilities [who] often seek to locate such facilities in existing parkland or similar land." Existing precedent "appear[s] to say that the only circumstance under which such land will be considered subject to art. 97 is where the restricted use has been recorded on the deed, e.g., through a conservation restriction." But "[n]othing in the language or purpose of art. 97 suggests that its application should turn on whether the underlying deed provides record notice that the land has been committed to an art. 97 use." "In fact, for the large subset of dedicated parkland that originally was acquired for non-art. 97 purposes, the rule established by ... [existing precedent] threatens to reduce art. 97 to near irrelevancy: its protections would apply only where the public entity had already taken steps" – by means of a deed or other recorded restriction on the land – "to ensure that those [art. 97] protections were not needed."

3. Conservation.

Nelson v. Conservation Commission of Wayland, 90 Mass. App. Ct. 133 (2016).

In this case, the plaintiff challenged a decision by the Wayland Conservation Commission that wetlands were located on his property. The definition followed from Wayland's wetlands and water resources protection by-law, which more broadly protected wetlands than under state law.

In upholding the underlying decision, the Massachusetts Appeals Court accorded deference to the Wayland Conservation Commission's reasonable interpretation of its own bylaw on the definition of a "wetland" and a catchall provision in that local definition. In turn, the Massachusetts Appeals Court affirmed the Wayland Conservation Commission's findings that the plaintiff's property met the definition of a "wetland" under the local by-law, as supported by substantial evidence.

4. Easements.

Baker v. Town of Plymouth, 2016 WL 2663045 (Mass. Land Ct. 2016).

The Land Court ruled that the plaintiff had an implied easement to cross Plymouth-owned land in order to reach the sea, but also ruled that Plymouth had the right to limit that easement by designating the path across its land which would constitute the path to the sea.

Taylor v. Martha's Vineyard Land Bank Commission, 475 Mass. 682 (2016).

The SJC rejected a fact-based test that would have inquired whether the use of an easement by an after-acquired parcel would place an additional burden on the servient estate and, if so, whether such additional use would unfairly burden the servient estate in a manner beyond

the scope of that intended in the original grant of the easement. Instead, the SJC preserved the existing test that when an appurtenant easement is conveyed to benefit a parcel of land, any land acquired thereafter which would seeks to benefit from that easement impermissibly overloads that easement.

5. Extension of Lawful Pre-Existing Non-Conforming Use.

Almeida v. Arruda and Westport ZBA, 89 Mass. App. Ct. 241 (2016).

The owners of a convenience store located in Westport on land that was zoned as residential, sought to add beer and wine sales. The convenience store operated as a lawful, preexisting nonconforming use pursuant to Mass. Gen. Laws c. 40A, § 6. The Westport ZBA granted to allow the beer and wine sales to be added to the store's preexisting nonconforming use because the beer and wine sales would not be substantially more detrimental to the neighborhood. The Superior Court affirmed the Westport ZBA. In affirming the Superior Court, the Appeals Court applied the 3-prong Powers / Chuckran test and ruled: 1) "that the proposed sale of beer and wine would occur in the same space as where other groceries and sundries are sold and (those sales) would integrate into the current operations of the store; 2) allocating 12% of the convenience store's space to allow for beer and wine sales was not an extraordinary or unreasonable change, nor would it change the fundamental nature of the convenience store; and 3) traffic and litter concerns would be present regardless of whether or not the convenience store were to sell beer and wine.

6. Housing Appeals Committee.

Eisai, Inc. v. Housing Appeals Committee, 89 Mass. App. Ct. 604 (2016).

In this case, the plaintiffs where the owners and lessors of neighboring properties, which challenged a decision by the HAC ordering the Andover Zoning Board of Appeals ("Andover ZBA") to issue a comprehensive permit for a proposed housing development. The Town of Andover's percentage of affordable housing was 9.3%, meaning that there was a rebuttable presumption under Chapter 40B that the local need for affordable housing outbalanced other local concerns. The Andover ZBA denied the proposed housing development, based on long-term municipal planning concerns. On appeal, the HAC overturned the Andover ZBA's denial decision.

The Massachusetts Appeals Court recognized that a developer appealing to the HAC can establish its *prima facie* case by demonstrating that its project satisfies federal or state statutes or regulations, or generally recognized "standards as to matters of health, safety, the environment, design, open space, or other matters of Local Concern." A developer's preliminary plans can satisfy this requirement. The Massachusetts Appeals Court deferred to the HAC, which heard from the parties' competing experts and concluded that the developer satisfied the *prima facie* case.

Because the developer satisfied the requirements of a *prima facie* case, the burden shifted to the Andover ZBA to demonstrate "first, that there is a valid health, safety, environmental, design, open space or other Local Concern which supports such denial, and then, that such Local Concern outweighs the Housing Need." The neighbors contended that adherence to the Town of Andover's master plan was "a compelling local concern" that outbalanced regional housing needs.

The Massachusetts Appeals Court upheld the use of a two (2) part test to evaluate the municipal planning defense. The first part of the test – whether the master plan is a "legitimate local concern" – requires affirmative answers for three questions: "(1) Is the plan bona fide?"; "2) Does the plan promote affordable housing?"; and "(3) Has the plan been implemented in the area of the site?" The second part of the test involves the weight accorded to the master plan as an issue of local concern. The Massachusetts Appeals Court upheld the use of a flexible four (4) factor test to address the issue of weight:

> "1. The extent to which the proposed housing is in conflict with or undermines the specific planning interest.
> 2. The importance of the specific planning interest, under the facts presented, measured, to the extent possible in quantitative terms . . . .
> 3. The quality . . . of the overall master plan (or other planning documents or efforts) and the extent to which it has been implemented. A very significant component of the master plan is the housing element of that plan (or any separate affordable housing plan). The housing element must not only promote affordable housing, but to be given significant weight, the Board must also show to what extent it is an effective planning tool . . . .
> 4. The amount [and type] of affordable housing that has resulted from affordable housing planning."

Applying the factors here, the HAC determined that the interests asserted by the Andover ZBA and the abutters were "relatively weak." Because the Town of Andover had not met the ten (10%) percent affordability threshold, the HAC was able to override reliance on the municipal planning defense and the Massachusetts Appeals Court deferred to the HAC's decision.

Finally, the Massachusetts Appeals Court address a remark by the HAC that the ten (10%) affordability threshold was "a minimum, and that well more than 10%" of a municipality's housing stuck must be low or moderate income. The Massachusetts Appeals Court recognized that the ten (10%) threshold was a statutory requirement and, if a municipality has met this minimum threshold, then the HAC was required to affirm a local zoning board of appeals decision.

Zoning Board of Appeals of Hanover v. Housing Appeals Committee, 90 Mass. App. Ct. 111 (2016).

In this case, the developer filed an application for a comprehensive permit under Massachusetts General Laws Chapter 40B, in order to construct a mixed-income housing project. The developer regarded the $38,000 filing fee – calculated at $250 per housing unit, for a 152-

unit complex – for a comprehensive permit application as unreasonable. Instead, the developer only paid $2,500, which it considered to be reasonable, and $6,000 for an initial consultant review deposit, with self-imposed conditions placed on the consultant review for the Hanover Zoning Board of Appeals ("Hanover ZBA"). The Hanover ZBA declined to accept the developer's October 22, 2009 comprehensive permit application until the required fee was paid; the developer then paid the fee "under protest" on or about December 3, 2009.

In the interim, on October 29, 2009, the Hanover ZBA approved a comprehensive permit for another affordable housing project, leading the Housing Appeals Committee ("HAC") to certify that its "Housing Production Plan" was in compliance. Because of this certification, the Hanover ZBA satisfied a regulatory safe harbor, allowing it to deny other comprehensive permit applications for two (2) years and rendering such denial decisions unreviewable by the HAC. The Hanover ZBA advised the developer that, based on the regulatory safe harbor, it retained the discretion to deny the comprehensive permit or impose conditions or requirements, which would be "Consistent with Local Needs" and unreviewable by the HAC.

The developer challenged the filing fee and invocation of the safe harbor to the HAC; the HAC determined that the $38,000 filing fee was reasonable, but it held that the Hanover ZBA could not invoke the safe harbor protection because the application should have been deemed filed as of October 22, 2009. The Hanover ZBA ultimately granted a comprehensive permit, although the developer challenged conditions included in the decision. While the developer's appeal of these conditions was pending, a change to the proposal involving more housing units resulted in a remand to the Hanover ZBA, which denied the proposed change. On appeal to the HAC, the HAC ordered the Hanover ZBA to issue the comprehensive permit for the larger project.

A central issue to this case was the date on which the developer's application was deemed submitted, because the regulatory safe harbor became effective after the developer submitted the initial application (with only a portion of the filing fee). For context, when a regulatory safe harbor exists, the HAC cannot order a local board of appeals to issue a comprehensive permit, nor can it modify or remove conditions attached to a comprehensive permit.

The Massachusetts Appeals Court held that the HAC's prior decision concerning when the application was filed violated the Department of Housing and Community Development's ("DHCD") regulations. To that end, a DHCD regulation identifies certain items that, when omitted from an application, do not automatically invalidate an application; the filing fee is not listed among such items and, instead, a different DHCD regulation allows a local zoning board of appeals to require payment of a reasonable filing fee with the application.

Also, DHCD's regulations do not state the effective date of an application to a local zoning board of appeals for a comprehensive permit, when unaccompanied by the full filing fee. Yet, an appeal to the HAC must be accompanied by the full filing fee and no appeal to the HAC is accepted for filing without the minimum fee. The Massachusetts Appeals Court held that it was arbitrary for the HAC to require payment in full of an application on appeal to the HAC, yet not allow a local zoning board of appeals to avail itself of the same standard.

The Massachusetts Appeals Court concluded that the filing fee was "not a minor detail" and related to defraying direct costs from review of a comprehensive permit application, which could be significant. Thus, a local zoning board of appeals is not required to consider a comprehensive permit application without the full filing fee. A developer that declines to pay the fee does so at its own peril, although a developer can file a motion or request with the local zoning board of appeals to reduce the filing fee. The safest course of action was identified as payment of the full filing fee, along with a request to the local board of appeals to reduce the filing fee.

Here, the Massachusetts Appeals Court held that the operative date of filing was December 9, 2009, when the full filing fee was paid, and not the original date of October 22, 2009, when only a partial payment was made. Therefore, the Hanover ZBA could consider the application with the benefit of the regulatory safe harbor in place– which existed as of October 29, 2009. The HAC's decision ordering a reversal of the denial decision was vacated and remanded back to the Hanover ZBA.

7. Mass. Gen. Laws c. 40A, § 3 (para. 4).

Brockton Fire Department, et al. v. St. Mary Broad Street, LLC, et al., 181 F. Supp. 3d 155 (D. Mass. 2016).

The Brockton Fire Department sought to enforce the State Sprinkler Law, Mass. Gen. Laws c. 148, § 26H, as against a sober home for recovering alcoholics and drug addicts, i.e., a group residence sheltering non-related individuals with disabilities. The District Court ruled that such enforcement was prohibited by Mass. Gen. Laws c. 40A, § 3 (para. 4), notwithstanding the Court's recognition of potentially tragic consequences in the event of an unsuppressed fire at the home.

8. Medical Marijuana Dispensary.

Little Children Schoolhouse, Inc. v. Town of Brookline Zoning Board of Appeals, No. 15 MISC 000518 KFS (Mass. Land Ct. Aug. 4, 2016).

The plaintiffs challenged a decision by the Brookline Zoning Board of Appeals to grant a special permit for a registered marijuana dispensary ("RMD"). By way of background, the Department of Public Health's ("DPH") siting regulation contains default siting/buffer zone requirements for RMDs. If a municipality does not have local siting/buffer zone requirements, no RMD can be located within a radius of 500 feet of a school, daycare center or any facility in which children commonly congregate, measured in a straight line from the closest point of the subject facility to the closest point of the RMD. The August 2015 guidance issued by DPH separately provides that municipalities can establish their own buffer zone requirements, or else the 500 foot default buffer zone stated in DPH's siting regulation applies.

In this case, the Brookline Zoning By-laws did not include facilities "in which children commonly congregate" as a siting requirement. Rather, the Brookline Zoning By-laws only contained a 500 foot buffer zone between RMDs and elementary and secondary schools and prohibited RMDs from being in the same building as a daycare center. As a result, the plaintiffs argued that the default 500 foot buffer zone requirement for facilities "in which children commonly congregate" under DPH's siting regulation applied.

The Massachusetts Land Court noted that schools and daycare centers are type of locations in which children commonly congregate, but were more limited than the locales identified in DPH's siting regulation, which also included the more general language of facilities in which children commonly congregate. Applying the rules of statutory interpretation, the Massachusetts Land Court determined that the omission of the phrase "any facility in which children commonly congregate" was intentional and therefore it would not add the missing language to the Brookline Zoning By-laws.

Additionally, the Massachusetts Land Court determined that, because the Brookline Zoning By-laws contained a buffer zone, the default 500 foot buffer zone for such facilities under DPH's siting regulation did not apply. Once a municipality adopts a buffer zone for the siting of RMDs in connection with child-centered facilities, the default buffer zone under DPH's siting regulation no longer applies. While a municipality is not required to adopt its own buffer zone requirements for child care facilities, once it does so, the default requirements in DPH's siting regulation no longer applies. The Massachusetts Land Court specifically credited the language of DPH's siting regulation, as informed by DPH's August 2015 guidance.

9. Private Restricted Landing Areas.

Hanlon v. Town of Sheffield, 89 Mass. App. Ct. 392 (2016).

Where Sheffield's zoning by-law purporting to regulate the use and operation of aircraft on an airport or restricted land area had not received prior approval from the Massachusetts Department of Transportation Aeronautics Division, the cease and desist order issued by the town's building commissioner, ordering the plaintiff to stop using a noncommercial private restricted landing area on property he owned, was declared null and void.

Roma v. Town of Rockport Zoning Board of Appeals, 2016 WL 6138651 (Mass. Land Ct. 2016).

The Rockport building inspector's order enjoining the plaintiff from landing his personal helicopter on his property, was annulled in light of Hanlon, where Rockport's zoning by-law, purporting to regulate the use and operation of aircraft on an airport or restricted land area, had not received prior approval from the Massachusetts Department of Transportation Aeronautics Division.

The Collings Foundation, et al. v. Town of Stow Zoning Board of Appeals, 2016 WL 6602046 (Mass. Land Ct. 2016).

The Stow building inspector's order that the plaintiffs cease and desist using their land as an airfield, including in connection with an aviation museum, was overturned, where Stow's zoning by-law, purporting to regulate the use and operation of aircraft on an airport or restricted land area, had not received prior approval from the Massachusetts Department of Transportation Aeronautics Division.

10. Standing.

Ellis, et al. v. Burlington Zoning Board of Appeals, Burlington Building Inspector, and Burlington Planning Board, 2016 WL 2986055 (Mass. Land Ct. 2016).

A developer had a building permit to construct a 170 room Residence Inn by Marriott at the 49.42 acre, multi-building New England Executive Park, just off Interstate 95/Route 128 in Burlington. The Marriott's guests were expected to be short-stay travelers who would be either conducting business at businesses in the Executive Park office buildings or visiting patients at the nearby Lahey Clinic. Burlington's zoning by-law allows "hotels" of this size to be built on this site as a matter of right, but prohibits "residence hotels." Burlington's building inspector ruled that the proposed Marriott was a "hotel" and issued the as-of-right building permit to the developer. His ruling was affirmed by the Burlington ZBA. Various individuals appealed the ZBA's decision. Those individuals were members of Burlington's planning board, advisory land use committee, and/or town meeting. They claimed standing on the basis of that membership.

However, the Land Court ruled that the individual plaintiffs could not act on behalf of their respective municipal bodies without formal vote to join a lawsuit and without proper authorization by the Burlington board of selectmen to be represented by counsel. Further, neither the planning board, the advisory land use committee, nor town meeting was a "municipal board" within the meaning of Mass. Gen. Laws c. 40A, § 17, as none of those bodies had duties to perform in regard to the building code or zoning. "The zoning determination of whether the Marriott was a 'hotel' or a 'residence hotel' was "solely for the building inspector, the zoning board of appeals, and ultimately (but only if challenged by a person or entity with standing to appeal) for" the Land Court. The Court dismissed the case for lack of standing.

Picard v. Zoning Board of Appeals of Westminster, 474 Mass. 570 (2016).

The issue in this case was whether a claimed injury to a private easement right was sufficient to confer standing on the plaintiff to challenge a zoning determination made by the Westminster zoning board of appeals that the defendant's property enjoyed grandfathered status under the town's zoning by-law. The plaintiff's land abutted the defendant's property, so the plaintiff was presumed to have standing. However, the plaintiff "did not claim that constructing a residence on the locus would be deleterious in any respect related to typical zoning concerns, for example, density, traffic, parking availability, or noise."

Instead, the plaintiff "claimed that the proposed construction would interfere with his use of the locus for access to the pond" via a private easement – specifically, "the proposed construction would interfere with his [easement] access to the pond and … would lead to conflict between people living on the locus and people trying to use the pond." The Superior Court had found that such alleged injuries to the plaintiff's private easement rights were not within the scope of zoning concern under Chapter 40A – and in any event the alleged injuries were speculative and unsubstantiated. The SJC affirmed the Superior Court's judgment dismissing the plaintiff's complaint for lack of standing.

11. Subject Matter Jurisdiction.

Skawski, et al. v. Greenfield Investors Property Development LLC, 473 Mass. 580 (2016).

In 2006, the Legislature enacted Mass. Gen. Laws c. 185, § 3A. Section 3A established the permit session of the Land Court department and provided that "[t]he permit session shall have original jurisdiction, concurrently with the superior court department," over civil actions adjudicating the grant or denial of permits for "the use or development of real property" where "the { "pageset": "S8815 underlying project or development involves either [twenty-five] or more dwelling units or the construction or alteration of 25,000 square feet or more of gross floor area."

In 2011, the defendant developer sought to build a retail development of not more than 135,000 square feet of commercial space in Greenfield. The Greenfield planning board granted a special permit in favor of the developer to construct the project subject to various conditions, and gave notice that any appeal was to be filed in accordance with Mass. Gen. laws c. 40A, § 17. Section 17 in turn provides that an appeal may be filed with to the Land Court, the Superior Court, the District Court, or the Housing Court. The plaintiff abutters filed a timely appeal in Housing Court.

Thus, the issue before the SJC was whether the Legislature, by enacting { "pageset": "S01b2 Mass. Gen. Laws c. 185, § 3A, "intended to grant exclusive subject matter jurisdiction to the permit session of the Land Court and to the Superior Court to hear this subset of major development permit appeals, or intended simply to create a permit session in the Land Court to hear these cases without eliminating the subject matter jurisdiction of the Housing Court to adjudicate this subset of appeals." Concluding that the Legislature intended the former, the SJC remanded the case back to the Housing Court, where the parties were to be given an opportunity to apply within 30 days to the Chief Justice of the Trial Court to have the case transferred either to the permit session of the Land Court or to the Superior Court.

Tusino v. Zoning Board of Appeals of Douglas, 90 Mass. App. Ct. 89 (2016).

Plaintiff appealed an order from the Douglas building commissioner to demolish Plaintiff's house and remove it. The appeal was filed in Uxbridge District Court. Summary

judgment entered against the Plaintiff and in favor of the abutter who had asked the Douglas building commissioner to issue the demolition and removal order. Plaintiff appealed the Uxbridge District Court's judgment directly to the Appeals Court, not to the Appellate Division of the District Court. The Appeals Court determined it did not have jurisdiction over the Plaintiff's appeal, in light of the 2004 creation of the one-trial system in Massachusetts, which granted equity jurisdiction to the district courts and Appellate Division. Further, since the plaintiff had filed his appeal in the Appeals Court beyond the time he had to so file in the Appellate Division, he was by now time-barred from bringing his appeal to the Appellate Division, rendering final the District Court's judgment affirming the Douglas building commissioner's demolition and removal order.

G. OPEN MEETING LAW.

Boelter v. Wayland Board of Selectmen, No. MICV201400591H, 33 Mass. L. Rptr. 405 (Mass. Super. Ct. June 29, 2016):

This case was prompted by registered voters alleging violations of the Open Meeting Law by the Wayland Board of Selectmen, by deliberating the professional competence of the Town Administrator via private emails, prior to an open meeting. The Massachusetts Superior Court rejected the argument that the case was moot because the Town Administrator was subsequently terminated. Instead, the Massachusetts Superior Court noted that the case presented "an issue of ongoing public importance," and the registered voters were entitled to a decision, even if the Wayland Board of Selectmen's action became moot – this had the petition to be repeated in a way that could evade review.

The Massachusetts Superior Court held that the Wayland Board of Selectmen had the burden to demonstrate that it was lawful to conduct public business in a private manner, but that it did not satisfy this burden. Specifically, the Open Meeting Law requires the deliberation of the professional competence of an individual in open session; members of a public body cannot express their opinions concerning professional competence via privately-communicated documents, even if discussed a subsequent public meeting. Here, the private discussions of opinions about the professional competence occurred, in violation of the Open Meeting Law.

Fairhaven Historical Commission (Massachusetts Attorney General, Division of Open Government, Opinion No. OML 2016-38).

In this case, the posted agenda identified the meeting location as "FAIRHAVEN FIRE STATION," but it did not include the street address of the meeting location. Additionally, the date of the meeting was identified as "December 2, 2016," even though the meeting was to be held on December 2, 2015. Also, prior to the meeting, a member of the email emailed the chair of the Fairhaven Historical Commission ("Commission"), requesting discussion on a sidewalk project; this project was not listed on the posted agenda as the Chair did not anticipate a substantive discussion by the Commission. When the meeting occurred, during the "Other new

business" item, three members of the public discussed the sidewalk project, and a discussion between the Commissioners and the public occurred.

The Division concluded that the posted meeting notice was deficient because it omitted the street address of the meeting location and contained an incorrect meeting date. Although it was noted that there was a single fire station in Fairhaven, the Division held that the street address should be included so that members of the public unfamiliar with the location of this fire station would know the exact meeting location and could attend. While the incorrect date was a typographical error, and it was unlikely that the public would be confused from the error, this nonetheless was a violation of the Open Meeting Law.

The Division held that discussion of the sidewalk project did not violate the Open Meeting Law, even though it was omitted from the meeting notice. To that end, the Division recognized that the Chair did not expect the Commission to discuss the sidewalk at least forty-eight (48) hours prior to the meeting; the only expectation was that a member of the public, not the Commission, wanted to discuss the issue, and the Commission only discussed the project after it was raised by three (3) attendees at the meeting.

Stoneham Board of Selectmen (Massachusetts Attorney General, Division of Open Government, Opinion No. OML 2016-62).

Section 22(c) of the Open Meeting Law requires a public body to establish and approve meeting minutes in a "timely manner." However, the Open Meeting Law does not define the phrase "timely manner." The Division recommends that minutes be approved at the next meeting of a public body, if possible. If a public body meets weekly or bi-monthly, a two (2) or three (3) month delay violates this requirement.

In this case, the Stoneham Board of Selectmen ("Board") met bi-monthly during the time period in question, including meetings on September 28, 2015 and October 6, 2015. At its December 15, 2015 meeting, the Board approved minutes from those meetings – although it held multiple meetings before approving the minutes. As a result, the Division concluded that the minutes were not approved in a "timely manner," notwithstanding issues with staff availability inhibiting the preparation and approval of the minutes.

Three Registered Voters v. Board of Selectmen of Lynnfield, 90 Mass. App. Ct. 15 (2016).

Three (3) registered voters in the Town of Lynnfield challenged the selection process for municipal officials, focusing specifically on the appointment of a new Town Administrator and alleging a violation of the Open Meeting Law. This case is notable as the first appellate decision involving the Open Meeting Law since it was amended in 2009.

As a starting point, the plaintiffs challenged the sufficiency of the meeting notice. Under Section 20(b) of the Open Meeting Law, public bodies must post a notice at least 48 hours prior

to a meeting that includes, among other information, a "listing of topics that the chair reasonably anticipates will be discussed at the meeting."

Here, the posted meeting notice stated "Update on town administrator search," yet the Lynnfield Board of Selectmen voted to appoint a new town administrator at the meeting. In reviewing the record, the Massachusetts Appeals Court concluded that, as of the time the meeting notice was prepared, it was not known that a hiring decision would occur at the meeting. Instead, the Lynnfield Board of Selectmen unexpectedly made the appointment decision at the meeting, after two (2) of the Selectmen agreed upon the same candidate, and it was agreed that further discussion was not required and there was a goal of expediting the selection process.

The plaintiffs challenged the handling of the Lynnfield Board of Selectmen's response to the Open Meeting Law Complaint that they initially served. As the Massachusetts Appeals Court concluded, the Open Meeting Law does not require a public body to discuss a response to a complaint. Here, it was permissible for the Town Counsel to respond to the complaint on behalf of the Lynnfield Board of Selectmen – it was noted that the Lynnfield Board of Selectmen should have voted to delegate the investigation and response to the complaint to, or authorized action by, the Town Counsel.

The Massachusetts Appeals Court also addressed the processed used to interview candidates, in which individual Selectmen interviewed each individual candidate. Following the interviews, the retiring Town Administrator had each Selectman ranked the candidates; the retiring Town Administrator did not disclose the rankings and the Selectmen did not discuss the candidates with each other or anyone who could convey their views to the other Selectmen. The Massachusetts Appeals Court noted that the individual Selectmen could conduct individual interviews in order to obtain information and form opinions on each candidate, for preparing to deliberate at a duly held open meeting – these interviews did not violate the Open Meeting Law.

Finally, the Massachusetts Appeals Court rejected a challenge to other appointments. While the Open Meeting Law is enforceable via lawsuit by three (3) registered voters, these individuals must be registered voters as of the time that the action being challenged occurred.

Weymouth Superintendent Search Commission (Massachusetts Attorney General, Division of Open Government, Opinion No. OML 2016-105).

By way of background, Section 21 of the Open Meeting Law limits executive session to one of ten enumerated purposes. In particular, Purpose 8 allows a public body to conduct an executive session "[t]o consider or interview applicants for employment or appointment by a preliminary screening committee if the chair declares that an open meeting will have a detrimental effect in obtaining qualified applicants; provided, however, that this clause shall not apply to any meeting, including meetings of a preliminary screening committee, to consider and interview applicants who have passed a prior preliminary screening." See M.G.L. c. 30A, § 21(a)(1)(8).

In this case, the Weymouth Superintendent Search Committee ("Committee") was created in order to interview and evaluate candidates for Superintendent. The Committee used Purpose 8 to devise questions for the candidates. Thereafter, the Committee met on multiple occasions, interviewing a total of five (5) candidates in executive session under Purpose 8. The Committee separately met, without the candidates, and voted to submit a single finalist to the School Committee.

As an initial matter, the Division of Open Government ("Division") held that the Committee improperly met in executive session to establish a uniform set of questions for each candidate. The Division recognized that the definition of "preliminary screening" – upon which Purpose 8 is dependent – was "the initial stage of screening applicants conducted by a committee or subcommittee of a public body solely for the purpose of providing to the public body a list of those applicants qualified for further consideration or interview." See M.G.L. c. 30A, § 18. In turn, Purpose 8 allows a preliminary screening committee to "consider" or "interview" candidates, and devising interview questions did not fall within the permissible scope of these executive session activities.

In other words, by creating pre-determined interview questions, the Committee neither conducted interviews nor did it consider applicants – which were the required activities under Purpose 8. While a preliminary search committee may prefer to establish a pre-determined set of interview questions without public scrutiny, it is not permitted to do so under Purpose 8 and instead such a discussion must occur in open session.

Moreover, the Committee violated the Open Meeting Law because it only forwarded a single candidate to the School Committee for consideration. To that end, the Division concluded that a preliminary screening committee is required to limit the field of candidates to at least two (2) individuals, for consideration by the parent public body. It was immaterial that the Committee reached a unanimous decision, or that the Committee determined that the proposed finalist was the best qualified. Rather, multiple finalists must be submitted for consideration by the parent public body, or else there is a risk that a preliminary screening committee could make a final hiring decision in executive session, subject to ratification by the parent public body.

The Division also recognized that a public body could use executive session to approve executive session minutes from a prior meeting, using one of two methods for doing so. First, a public body can notice and enter executive session using the original purpose of the prior executive session. Second, and alternatively, a public body can use Purpose 7 for executive session, to comply with Section 22(f) of the Open Meeting Law (which contemplates that "publication may defeat the lawful purposes of the executive session" and therefore that the contents of the executive session are to remain secret).

The Division further discussed the Committee's executive session minutes. The complainant sought executive session minutes, but a portion of those minutes were withheld. As the Division recognized, the purpose of a preliminary screening committee entering executive session could last longer than the preliminary screening, such as when the parent public body has not yet acted upon the recommended candidates and therefore the search process remains incomplete.

Finally, the Division concluded that the Committee properly amended its minutes to include sufficient details to inform the public as to what was discussed. The Division noted that the minutes should have include a description of the questions that the Committee asked and the answers provided from the applicants, so that the public could read the minutes and determine how the Committee rendered its decision. While the executive session minutes originally lacked such details, the Division recognized that the Committee took remedial action to address the deficiency.

H. RETIREMENT.

Retirement Board of Stoneham v. Contributory Retirement Appeal Board, 476 Mass. 130 (2016).

The Stoneham Retirement Board did not have the authority under Mass. Gen. Laws c. 32, § 3(1)(a)(i) to determine an employee's separation from service when that employee continued to work for the school department at reduced hours, though the Board did have the power in the first instance to determine the retirement membership eligibility of non-full-time employees.

I. TRUSTS.

DeGiacomo v. City of Quincy, 476 Mass. 38 (2016).

A 1972 decree that Quincy was authorized to execute a then-proposed lease of trust-owned property was res judicata as to a successor trustee who sought rescission of the lease as well as money damages and restitution.

Speakers' Biographies:

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 is the Immediate Past President of the MMLA.

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, Mendon, and Scituate, Airport Counsel to the Norwood Airport Commission, and District Counsel to the Hyannis Fire District. 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 Municipal Law, 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.

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HENRY C. LUTHIN is the current President of the Massachusetts Municipal Lawyers Association. He is First Assistant Corporation Counsel for the City of Boston, where he has oversight of the Government Services section of the Law Department. From 1990 to 2008, Mr. Luthin was General Counsel at the Boston Water and Sewer Commission. He was an Assistant Corporation Counsel for the City of Boston from 1985 to 1990. Mr. Luthin has spoken extensively on municipal law matters at seminars and conferences sponsored by the Massachusetts Municipal Lawyers Association and the International Municipal Lawyers Association. Mr. Luthin received a Bachelor of Arts degree from Boston College and a Juris Doctor degree from Rutgers University School of Law in Camden, New Jersey.