



Massachusetts Municipal Lawyers Association

MASSACHUSETTS MUNICIPAL ASSOCIATION

ANNUAL MEETING AND TRADE SHOW

JANUARY 18-19, 2019

HOT TOPICS IN MUNICIPAL LAW

**Selected Statutes and Cases
For 2018**

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This educational program is sponsored by the Massachusetts Municipal Lawyers Association, the leading bar association for Massachusetts lawyers representing local government.

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I. SELECTED STATUTES AND REGULATIONS

A. RECREATIONAL MARIJUANA

The Bureau of Municipal Finance Law has published [Local Finance Opinion 2018-03](#)¹ addressing the accounting treatment of local option excises on retail sales of marijuana for adult use, as well as impact fees and any other payments required or received from marijuana establishments and medical marijuana treatment centers pursuant to executed Host Community Agreements. Despite how a payment is characterized in such Agreements, the Bureau advises that such payments are not gifts, donations, or grants, and cannot be spent without appropriation.

In addition, the Cannabis Control Commission issued guidance to assist municipalities to create equitable cannabis policies to mirror the state’s Social Equity program established by the Commission. The Commission’s [Guidance on Equitable Cannabis Policies for Municipalities](#)² provides background on Adult Use marijuana law and outlines ways in which communities can further the state’s goal of ensuring meaningful participation in the cannabis industry by communities disproportionately affected by the enforcement of previous cannabis laws, small businesses, and companies led by people of color, women, veterans or farmers. Specifically, the guidance document addresses the following questions:

- *Are caps on licenses necessary?* While the Commission “respects the local control that is granted to municipalities” under the statutory scheme, the guidance encourages communities “to consider how cannabis commerce fits into their long-term municipal planning purposes” before limiting the use.
- *What license type will be allowed in the municipality?* The Commission also advises that communities consider what types of licenses may be suitable for their particular community. For example, if a community wants to promote small business, it may want to consider allowing microbusiness, craft cooperatives, or other small cultivators or manufacturers.
- *Should a local tax be authorized?* The Commission notes that a portion of the state cannabis tax revenue is earmarked for restorative justice, jail diversion, workforce development, industry specific technical assistance, and mentoring services, and encourages municipalities to consider also using the local tax or the Community Impact Fee collected under the Host Community Agreement (HCA) for similar local programs.

¹ https://www.mass.gov/files/documents/2018/09/25/LFO-2018-3_0.pdf

² <https://mass-cannabis-control.com/wp-content/uploads/2018/08/Municipal-Equity-Guidance-August-22.pdf>

- How should each license type be zoned? According to the Commission and the Cannabis Advisory Board, real estate acquisition is one of the primary hurdles for small business to break into the industry. Additionally, restrictive zoning often pushes cannabis businesses into small sections of a municipality, often areas with a vulnerable or low-income population. Thus, the Commission recommends zoning cannabis businesses based on the nature of their primary business operations.
- What process will prospective licensees need to follow, and what is the timeline for that process? The Commission recommends that municipalities prioritize review for economic empowerment applicants at the local level.

While *M.G.L. c.94G* does not require municipalities to adopt an equity program, the guidance document states that “[i]f there is evidence of discrimination or barriers to entry in the regulated marijuana industry, state law directs the Commission to take remedial measures to address those hurdles.”

Lastly, the guidance document notes that the Commission is collecting information relative to social consumption (on-premises consumption) and delivery licenses and hopes to have draft regulations prepared by February 2019. Communities should be on the lookout for these regulations. Communities should also be on the lookout for restrictions placed on the fees and other payments collected by municipalities under their Host Community Agreements. Just this month, the Commission submitted a report to ask the Legislature to give the Commission explicit authority to oversee the contracts, including specifying what the community impact fees may or may not include.

B. TAX EXEMPTIONS FOR VETERANS AND THEIR FAMILIES

On August 28, 2018, Governor Baker signed into law Chapter 218 of the Acts of 2018, [An Act Relative to Veterans Benefits, Rights, Appreciation, Validation and Enforcement](#)³, known as the *BRAVE Act*. In addition to providing new resources for veterans, the legislation creates or amends several local option provisions of *M.G.L. c.59, §5*, related to tax abatements and exemptions for veterans and their families. Of particular interest to municipalities, the *BRAVE Act*:

- Inserts into *M.G.L. c.59, §5*, a new Clause Seventeenth F. A municipality that accepts this clause may, in its discretion, annually increase abatements granted pursuant to Clauses Seventeenth, Seventeenth C, Seventeenth C½ or Seventeenth D, by an amount not to exceed the increase in cost of living as determined by the Consumer Price Index for such year.

³ <https://malegislature.gov/Laws/SessionLaws/Acts/2018/Chapter218>

- Inserts into *M.G.L. c.59, §5*, a new Clause Twenty-second G. Acceptance of this clause by a municipality would alter requirements regarding the nature of ownership interest an applicant must hold to apply for an exemption under provisions relating to veterans and surviving spouses of veterans. Under existing law, an applicant for an exemption of property held in trust must be both a trustee and a beneficiary of the trust. Acceptance of the new Clause Twenty-second G would change this rule to permit an exemption where the applicant is not a trustee but is domiciled at a property that is held by a trustee, conservator or other fiduciary for the benefit of the applicant.
- Inserts into *M.G.L. c.59, §5*, a new Clause Twenty-second H. Acceptance of this clause by a municipality creates a new real estate tax exemption to the full amount of the taxable valuation of real property of the surviving parents of a soldier who dies while on active duty or is missing in action and presumed dead.
- Amends *M.G.L. c.59, §5N*. The maximum amount by which a municipality may reduce a veteran’s real estate tax bill in exchange for volunteer services under *M.G.L. c.59, §5N*, has been increased from \$1,000 to \$1,500. If a municipality has accepted this statute by a vote that capped the limit at \$1,000, a second vote by Town Meeting is required to increase the cap to the new limit.

Each of these provisions may be accepted by a majority vote of the local legislative body and the provision of notice of such vote to the Department of Revenue, Division of Local Services.

C. SHORT-TERM RENTALS

On December 28, 2018, Governor Baker signed into law Chapter 337 of the Acts of 2018 (the “Act”) [An Act Regulating and Insuring Short-Term Rentals](#)⁴. The Act, which takes effect on July 1, 2019, amends M.G.L c. 64G to include definitions and provisions applicable to short-term rentals made through internet hosting platforms such as Airbnb.

The Act provides that the executive office of housing and economic development, in consultation with the executive office of technology services and security and the department of revenue, shall establish and maintain a registry for all short-term rental operators under *M.G.L. c. 64G* who file an application and are issued a certificate of registration in accordance with *M.G.L. c. 62, § 67*. Further, not later than September 30, 2019, “the executive office of housing and economic development shall promulgate regulations, in accordance with section 2 of chapter 30A, that are necessary to: (i) develop and implement a registry that is accessible and available to the public; and (ii) support the competitive operation of the traditional lodging industry, short-term rental industry and hosting platforms to operate competitively in the commonwealth. The

⁴ <https://malegislature.gov/Laws/SessionLaws/Acts/2018/Chapter337>

regulations shall require that a public hearing be held and that a small business impact statement be filed.”

New provisions of the Act which are of primary interest to cities and towns are:

The amendment of *M.G.L. c.64G* [Section 6 of the Act] to include §3 establishing a 5% state excise, and §3A authorizing cities and towns that accept the new statute by majority vote of the city council or town meeting, to impose a local excise of not more than 6% (Boston is allowed to charge an excise of 6.5%) “upon the transfer of occupancy of a room in a bed and breakfast establishment, hotel, lodging house, short-term rental or motel located within that city or town by an operator” No excise tax may be imposed on short-term rentals for fewer than 14 days in a calendar year if the operator has registered with the commissioner of revenue in accordance with *M.G.L. c. 62C*, §§ 5 and 67. Further, no excise may be charged if the daily rent is \$15.00 or less. The new provisions of *M.G.L. c. 64G* take effect 30 days after the city or town’s vote to accept the statute. Acceptance of §3A cannot be revoked and the local tax established, may not be amended more than once in a 12-month period.

Section 15 of the Act provides that cities or towns that accept *M.G.L. c. 64G*, § 3A before July 1, 2019 shall be deemed to have accepted *M.G.L. c. 64G*, § 3.

Under *M.G.L. c. 64G*, §§ 4-5 [Section 7 of the Act], the excise is to be paid by the occupant, collected by the operator, and stated and charged separately from the rent at the time of the short-term rental.

Notably, under the new *M.G.L. c. 64G*, § 3D [Section 6 of the Act], a city or town that accepts section 3A may, by a separate majority vote, impose upon an operator a community impact fee of not more than 3% of the total amount of rent for each short-term rental that is professionally managed. A city or town that votes to impose a community impact fee under subsection (a) of §3D may, by a separate additional majority vote, also impose the community impact fee upon each transfer of occupancy of a short- term rental unit located within a two-family or three-family dwelling that includes the operator’s primary residence.

All community impact fees collected under §3D(a) shall be paid monthly by the operator to the municipality, and the city or town shall dedicate not less than 35% of the community impact fees so collected to affordable housing or local infrastructure projects.

The new *M.G.L. c. 64G*, §14 [Section 8 of the Act] sets forth those matters which cities and towns may regulate by ordinance or bylaw including:

- regulating the existence or location of operators within the city or town, including regulating the class of operators and number of local licenses or permits issued to operators, and the number of days a person may operate and rent out an accommodation in a calendar year;

- require the licensing or registration of operators within the city or town however, a city or town may: (A) accept a state certificate of registration issued to an operator in accordance with c. 62C, §67 in lieu of requiring an operator to obtain a local license or registration; or (B) issue a provisional license or registration to permit an operator to offer accommodations on temporary or seasonal basis;
- require operators to demonstrate that any properties or premises controlled, occupied, operated, managed or used as accommodations subject to the excise are not subject to any outstanding building, electrical, plumbing, mechanical, fire, health, housing or zoning code enforcement, including any notices of violation, notices to cure, orders of abatement, cease and desist orders or correction notices;
- require properties or premises controlled, occupied, operated, managed or used by operators as an accommodation subject to the excise to undergo health and safety inspections; provided, however, that the cost of any inspection be borne by the operator, with the city or town to determine the frequency of any subsequent inspections;
- establish a civil penalty for violation of an ordinance or by-law enacted pursuant to this section; provided, however, that a city or town that suspends or terminates an operator's right to operate an accommodation for a violation of any ordinance or bylaw shall notify the commissioner of revenue of the suspension or termination; and
- establish a reasonable fee to cover the costs associated with the local administration and enforcement of regulating operators and accommodations.

Notwithstanding any ordinance or by-law adopted by a city or town pursuant to c. 64G, §14, an operator of a short-term rental shall post inside the short-term rental unit information regarding the location of any fire extinguishers, gas shut off valves, fire exits and fire alarms in the unit and building.

A city or town may publish a public registry of all short-term rental accommodations located within that city or town offered for rent by operators who are registered in accordance with c.62C, §67 with all relevant information as determined by the city or town including where the accommodation is located.

Section 9 of the Act amends *M.G.L. c.175*, by adding §4F with definitions for “hosting platform”, “operator” and “short-term rental”, and requiring that short-term rental operators carry liability insurance of not less than \$100,000 unless the rental is offered through a hosting platform that maintains equal or greater coverage. Operators shall notify their insurance carriers of their intent to offer insured premises as the location(s) of short-term rentals.

Section 10 of the Act creates “a commission to study the feasibility and potential for use of lodging units within the hospitality industry, including hotel, motel, bed and breakfast and short-term rentals, as resources to increase the availability of emergency shelter for individuals and families displaced during extreme weather events or other states of emergency declared by the governor. . . . The commission shall consist of: the director of the Massachusetts emergency management agency or a designee, who shall serve as chair; 2 members appointed by the Massachusetts Lodging Association, Inc.; 3 members appointed by the Massachusetts Municipal Association, Inc., 2 of whom shall have experience in local emergency planning and management and 1 of whom shall have experience in municipal licensure processes; and 3 members appointed by the governor, 1 of whom shall be a representative of the department of revenue, 1 of whom shall be a representative of a hosting platform, as defined in [M.G.L. c.64G, §1], and 1 of whom shall be a representative of a non-profit entity with experience in national-level emergency and relief.”

Sections 2, 6, 11 and 12 of the Act include provisions specific to communities on the Cape and Islands, authorizing the imposition of an additional 2.75% fee to be applied towards a newly created Cape Cod and Islands Water Protection Fund, to be overseen by a Management Board, from which member communities may withdraw funds to pay for water pollution abatement projects.

**We are grateful to Amanda Zuretti of Petrini & Associates, P.C. who permitted us to share (and revise slightly) her summary of Chapter 337 of the Acts of 2018.*

D. PREGNANT WORKERS FAIRNESS ACT

Chapter 54 of the Acts of 2017, [An Act Establishing the Massachusetts Pregnant Workers Fairness Act](#)⁵, became effective on April 1, 2018. This Act amends M.G.L. c.151B, §4 making it unlawful to discriminate against an employee if the employer denies an employee’s request for a “reasonable accommodation” for their pregnancy or condition related to the employee’s pregnancy including, but not limited to, lactation or the need to express breast milk for a nursing child if the employee requests such an accommodation. The employer may only deny the request if the employer can demonstrate that an accommodation would impose an undue hardship on the employer’s program, enterprise or business.

Cities and towns (and indeed all employers covered by M.G.L. c. 151B) were required to post notice of the Act on or before April 1, 2018. Below is the City of Woburn’s notice.

⁵ <https://malegislature.gov/Laws/SessionLaws/Acts/2017/Chapter54>

CITY OF WOBURN
Notice
PREGNANT WORKERS FAIRNESS ACT
Chapter 54 of the Acts of 2017
April 1, 2018

The Act, effective on April 1, 2018, amends *M.G.L. c.151B*, §4 and expressly prohibits employment discrimination on the basis of pregnancy and pregnancy-related conditions, such as lactation or the need to express breast milk for a nursing child; and describes employers' obligations to employees that are pregnant or lactating and the protections these employees are entitled to receive.

Under the Act:

- Upon request for an accommodation, the City will communicate with the employee in order to determine a reasonable accommodation for the pregnancy or pregnancy-related condition. This is called an "interactive process," and it will be done in good faith. A reasonable accommodation is a modification or adjustment that allows the employee or job applicant to perform the essential functions of the job while pregnant or experiencing a pregnancy-related condition, without undue hardship to the City;
- The City will accommodate conditions related to pregnancy, including post-pregnancy conditions such as the need to express breast milk for a nursing child, unless doing so would pose an undue hardship on the employer. "Undue hardship" means that providing the accommodation would cause the City significant difficulty or expense;
- The City will not require a pregnant employee to accept a particular accommodation, or to begin disability or parental leave if a reasonable accommodation would enable the employee to perform the essential functions of the job without undue hardship to the City;
- The City will not refuse to hire a pregnant job applicant or applicant with a pregnancy-related condition, because of the pregnancy or the pregnancy-related condition, if an applicant is capable of performing the essential functions of the position with a reasonable accommodation.
- The City will not deny an employment opportunity or take adverse action against an employee because of the employee's request for or use of a reasonable accommodation for a pregnancy or pregnancy-related condition.
- The City will not require medical documentation about the need for an accommodation if the accommodation requested is for: - (i) more frequent restroom, food or water breaks; (ii) seating; (iii) limits on lifting no more than 20 pounds; and (iv) private, non-bathroom space for expressing breast milk. The City may, however, request medical documentation for other accommodations.

E. EQUAL PAY ACT

Effective July 1, 2018, the Massachusetts Equal Pay Act, [M.G.L. c. 149 §105A](#)⁶, prohibits discrimination based on gender in the payment of wages. Employers may not pay an employee less than it pays an employee of a different gender performing comparable work. “Comparable work” is work that requires substantially similar skill, effort, and responsibility, and is performed under similar working conditions.

Differences in pay are allowed only under certain conditions such as:

- A seniority system (however, time spent on leave due to a pregnancy-related conditions and protected parental, family and medical leave, shall not reduce seniority);
- The geographic location of the jobs
- Production, sales, or revenue-based systems of pay
- Job-related differences in education, training, or experience
- A merit system
- Travel, if travel is required by the jobs

Employees’ salary histories are not a defense to claim of liability; and an intent to discriminate based on gender is not a requirement for a finding of liability under the law.

F. PROHIBITION ON THE USE OF TOBACCO – POLICE/FIRE

In 1988, Massachusetts became the first state to prohibit newly appointed members of police and fire departments from using tobacco on or off the job, and members caught using tobacco were subject to termination. The imposition of this prohibition was a negotiated condition for the enactment of the law making the presumption that heart and lung disease and certain cancers were work related.

Effective November 7, 2018, [Chapter 210 of the Acts of 2018](#)⁷ amended *M.G.L. c.41, §101A* and now requires that before discipline is imposed upon a member of a municipal fire or police department for using tobacco, members must be offered a smoking cessation program. Subsequent violations may be cause for termination.

G. EXPANSION OF PRESUMPTION – WORK RELATED CANCERS

⁶ <https://malegislature.gov/Laws/GeneralLaws/PartI/TitleXXI/Chapter149/Section105A>

⁷ <https://malegislature.gov/Laws/SessionLaws/Acts/2018/Chapter210>

[Chapter 148 of the Acts of 2018](#)⁸ amended *M.G.L.* c.32, §94B and c.41, §111F, by extending the presumption that certain cancer diagnoses (affecting the skin or central nervous system, lymphatic, digestive, hematological, urinary, skeletal, oral or prostate systems, lung or respiratory tract) arose in the line of duty for firefighters and certain other public safety officials who take leave for cancer diagnoses. The law mandates that leave is without loss of pay for the period of incapacity and until the employee either retires or is cleared by a physician. Section 94B requires that employees are entitled to the presumption as long as they took a physical examination prior to appointment which examination did not reveal a cancer diagnosis.

To be eligible for benefits under the laws, employees must have been serving in their positions for at least 5 years at the time that the medical condition is first discovered or should have been discovered.

H. HIGH SCHOOL VOTER CHALLENGE PROGRAM

Enacted by [Section 2 of Chapter 296 of the Acts of 2018](#),⁹ An Act to Promote and Enhance Civic Engagement, and effective February 9, 2019, *M.G.L.* c. 51, §26A authorizes the Secretary of the Commonwealth, in conjunction with the Commissioner and Departments of Elementary and Secondary Education to create a High School Voter Challenge Program, and to promulgate regulations to implement the program in participating high schools. The regulations must identify registration time periods that allow eligible students to participate in all municipal and state elections including primaries.

The Superintendents of participating school districts shall provide opportunities for outreach and for eligible students to register or pre-register at participating schools. An enrolled high school student may apply to serve as a voter outreach coordinator or be selected to serve as a voter outreach coordinator by a peer nomination process.

I. FEDERAL REGULATION (AND PREEMPTION) OF SMALL WIRELESS FACILITIES

[Declaratory Ruling and Third Report and Order](#)¹⁰ – issued by the Federal Communications Commission on September 27, 2018, interprets the federal Telecommunications Act, 47 U.S.C. §§253 and 332(c)(7) to limit significantly municipal regulation of cell towers and wireless facilities. It is **effective January 14, 2019**. The Ruling and Third Report and Order are lengthy, but here are the highlights for municipalities:

⁸ <https://malegislature.gov/Laws/SessionLaws/Acts/2018/Chapter148>

⁹ <https://malegislature.gov/Laws/SessionLaws/Acts/2018/Chapter296>

¹⁰ <https://docs.fcc.gov/public/attachments/FCC-18-133A1.pdf>

- *All* local government approvals for small wireless facilities (SWF) must be acted upon within the applicable shot clock deadline
 - This means zoning, wetlands, and even building permits
 - Shot clock deadlines are short. For example, there is a 60-day deadline from application to approval for collocation on existing *structures* (no longer just existing towers)
 - Time periods can be tolled by mutual agreement
 - May avoid the shot clock deadline if the application is incomplete and the applicant is notified shortly after filing
 - Applicant has 30 days to file suit on any decision or due to a failure to act
- Application fees are limited to reasonable *costs*, not reasonable compensation
 - Fees are presumed reasonable if up to \$500 for up to 5 SWFs
 - If your municipality wants to charge more, create your record but be aware that the SWF applicant will likely challenge it as unreasonable
 - The fee cap is for all local governmental approvals (Planning Board filing fee, conservation commission filing fee, building permit, etc.)
 - Fee applies to all SWF applications, not limited to SWFs located in the rights-of-way
- Recurring fees for use of the rights-of-way, municipal land, or to attach to a government-owned fixture or structure must be non-discriminatory and represent a reasonable approximation of reasonable costs specifically related to and caused by the deployment
 - Recurring fee is deemed reasonable if it does not exceed \$270/year per SWF
 - Gross revenue-based fees are not cost-based and therefore are preempted
- Agreements for annual payments to municipality that pre-exist this Order are not grandfathered, so the FCC can preempt them on a case-by-case basis. Expect existing agreements to be challenged.
- If the municipality wants to apply aesthetic standards to SWFs (and it should), the standards must be reasonable, “no more burdensome than those imposed on similar infrastructure,” “incorporate clearly-defined and ascertainable standards” and must be published before an application is received
 - Will apply to an application filed under the Order if the standards are published by **April 14, 2019**
 - The standards cannot require that all facilities be deployed underground
 - Unfortunately, there are not as yet model aesthetic standards
 - To get an idea of why your municipality needs aesthetic standards, see the various examples of SWFs at www.celltowerphotos.com

Tips for Municipalities

- Amend your application forms for SWFs to include at a minimum:

- A requirement that all other town permits (except for building permits) must be in hand before an application will be accepted as complete
- A requirement that the applicant specifically identify what statutory provision they are applying under so that you can identify which shot clock applies
- A requirement that the applicant state whether the application is under this Order, § 6409/Wireless Siting Order, or neither
 - If a § 6409 application, require submission of documentation as to why the project comes under that Section
- A requirement that construction drawings be included
- Do not accept emailed applications
- Revise fee schedules
 - Do not accept an application without the fee payment
- Require wet stamps and wet signatures on all drawings so as to avoid “cookie-cutter” plans
- Establish and publish aesthetic standards by policy or regulation, not in a bylaw or ordinance, and have the board delegate changes to the planning director
- Consider hiring an expert to do your cost studies to justify your fees; count everything
- If the SWF is placed on a building or facility that was financed with municipal bonds, check with bond counsel to see if private entity use of the facility causes the bond to be in default. Ditto with grant agreements
- If the approvals cannot be issued by the shot clock deadline, seek a tolling agreement
 - If that is not possible, deny without prejudice, compiling record of extenuating circumstances, actions taken within time allowed, identify public health, safety, and welfare reasons for failure to meet deadline.

J. PENDING LEGISLATION OF NOTE

H.4290 An [Act to Promote Housing Choices](#)¹¹ – submitted by Governor Baker in the last legislative year was intended to encourage housing production. This legislation is being resubmitted this year, and proposes the following:

- Amend *M.G.L. c. 40, §4A* to allow Intermunicipal agreements for the sharing of infrastructure improvements, municipal service costs and local tax revenue associated with the development of properties in contiguous communities.
- Amend *M.G.L. c. 40A, §1A* to define the terms “Accessory dwelling units”; “As of right”; “lot”; “Mixed use development”; “Multi-family housing”; “Natural resource protection zoning” and “Open space residential development” bringing consistency to the diverse definitions contained in local zoning ordinances or bylaws.

¹¹ <https://malegislature.gov/Bills/190/H4290>

- Amend *M.G.L. c. 40A, §1A* to include definitions for “TDR zoning” and “Transfer of development rights” which allowing the development rights granted for one parcel to be transferred to another parcel. The transfer of development rights is discussed in the current version of *c.40A, §9, ¶4* but no definition is provided.
- Amend *M.G.L. c. 40A*, by deleting the existing §5 and inserting a new §5 which retains the 2/3 “supermajority” requirement for the adoption or amendment of zoning ordinances/bylaws unless the amendment relates to as of right zoning uses including *inter alia*, accessory dwelling units, open space residential development or mixed use development, TDR zoning or natural resource protection zoning the passage of which will only require a majority vote.
- Amend *M.G.L. c. 40A, §9* to allow the issuance of special permits to allow a reduction in the amount of parking required in certain dense developments as long as the public interest is served.

II. SELECTED CASES.

A. ZONING AND LAND USE

[The McLean Hospital Corporation v. Town of Lincoln](#)¹², 26 LCR 540 (2018) -*M.G.L. c.40A, §3 – Educational Purpose – “Dover Amendment”*

Plaintiff, McLean Hospital, appealed from a decision of the Lincoln Board of Appeals overturning the Building Commissioner’s determination that a proposed use of the property (located in a residential district) for a residential program “implementing a highly structured model of learning behavior through a specialized curriculum” was an educational use within the meaning of *M.G.L. c.40A, §3* commonly referred to as the “Dover Amendment”. Section 3 mandates that “no zoning ordinance or by-law shall . . . prohibit, regulate or restrict the use of land or structures for religious purposes or for educational purposes on land owned or leased by . . . a nonprofit educational corporation . . .” Zoning ordinances and by-laws may however, reasonably regulate land or structures with respect to, *inter alia*, the bulk and height of structures, yard size, setback, lot area and parking.

The trial judge noted that Massachusetts courts have consistently recognized that the definition of “education” is both broad and comprehensive, and may be directed to “either the mental, moral or physical powers or abilities” but in the best sense, should apply to them all. The judge also noted that the educational purpose must be the primary or dominant purpose of the use, which is to be determined by examining all of the individual components of the program in the aggregate. Programs which teach life skills for independent living such as self-care, cooking and budgeting, vocational independent living skills or providing emotionally disturbed children

¹² <http://masscases.com/cases/land/2018/2018-16-000694-DECISION.html>

with psychiatric adjustment as well as basic studies such as math and science were determined to be “educational” purposes within the meaning of §3. Programs which are more medical in nature have been excluded from the definition, even where there is some educational component.

The program offered by the Plaintiff in this case, did not teach core life skills, but those skills which target “emotional dysregulation” caused by Borderline Personality Disorder and related mental health diagnoses toward a goal of self-management. Notwithstanding that the skills were offered through a well-structured program in a classroom setting did not transform what was essentially a therapeutic program into an educational one. Finding that the proposed use was not protected as an educational purpose, the judge affirmed the Board of Appeals’ decision.

The judge’s decision has been appealed ([2018-P-1636](#)¹³) but this case is noteworthy to remind municipal officials that in making the determination of what is, or is not, an educational purpose under *M.G.L. c. 40A, §3* requires a thorough understanding and analysis of all components of the proposed use to determine if education, regardless that it is presented in a nontraditional form, is the dominant or primary purpose.

**[Clear Channel Outdoor, Inc. v. Zoning Board of Appeals of Salisbury, et al](#)¹⁴,
___Mass.App.Ct. ___ (2018) – Regulation of Billboards – standing - special permit as
having both discretionary and objective components**

Competing billboard companies, Northvision, LLC (“Northvision”) and Clear Channel Outdoor, Inc. (“Clear Channel”) sought special permits from the Zoning Board of Appeals of Salisbury (“ZBA”). Located adjacent to a state highway and within 1,000 feet of each other, only one billboard could be permitted by the MassDOT Office of Outdoor Advertising (OOA). *See*, 700 CMR §3.17(5)(g) and (h) (Electronic signs or “billboards” cannot be within 1,000 feet of another off premise billboard on the same side of the traveled way, or on the opposite side of the traveled way, regardless of which way the sign is directed).

Displeased with this two-step regulatory framework for billboards and believing that the siting of billboards in Salisbury should be the sole province of the ZBA, two of the ZBA’s four members decided to frustrate the process and deprive the OOA of the opportunity to consider which billboard it would approve, by voting to deny Clear Channel’s application and approve Northvision’s application, because it was filed first. Clear Channel and the property owner, Checkpoint Charlie, LLC, filed an appeal seeking to overturn both the denial of their application, and the special permit granted to Northvision.

On appeal to the Superior Court, all parties agreed not only that both special permit applications met the criteria of the zoning bylaw, but that the two ZBA members voted to deny Clear Channel’s application on impermissible grounds. The court upheld the grant of special permit to

¹³ https://www.ma-appellatecourts.org/search_number.php?dno=2018-p-1636&get=Search

¹⁴ <https://www.mass.gov/files/documents/2018/12/18/17P1609.pdf>

Northvision, and overturned the denial of Clear Channel's application, and ordered the special permit to issue to Clear Channel. Issues arose regarding the court's refusal to allow evidence at trial regarding the thought processes of the two ZBA members. Northvision and Clear Channel sought further appellate relief.

Neither company fared well at the Appeals Court where both the lower court's order that a special permit be issued to Clear Channel and the ZBA's issuance of a special permit to Northvision, were annulled, and returned to the ZBA with direction that further proceedings be conducted in "such a manner as to not defeat the two-step, municipal-State process contemplated by the Legislature." In making its decision, the Appeals Court first held that Clear Channel did not have standing to appeal as an "aggrieved person" because its stated harm arose from impaired business competition, an economic consideration which is not an interest protected by zoning. However, property owner Checkpoint Charlie's presumption of standing based upon its right to use and enjoy its property in this case, by leasing it to a billboard company, was affirmed.

As for the two ZBA members and their admitted legally untenable behavior, the Appeals Court held that evidence of that behavior should have allowed not only on the issue of whether it constituted "arbitrary, capricious, or legally untenable" as to the denial of Clear Channel's special permit, but whether such behavior infected its decision regarding Northvision's special permit such that it too should be annulled.

On the latter issue the Appeals Court rejected the argument that the legally untenable behavior of the two ZBA members only affected or was applicable to the denial of Clear Channel's special permit application. "Even if the record reveals that a desired special permit could lawfully be granted by the board because the applicant's evidence satisfied the statutory and regulatory criteria, the board retains discretionary authority to deny the permit." [citations omitted] So even if Northvision met the criteria of the Bylaw, the ZBA was not required to grant the special permit, and therefore, the reasons for granting the special permit are relevant. "We cannot be certain on this record that the board's consideration of legally irrelevant factors did not infect its decision [to grant] Northvision's application."

[Roma, III, LTD. V. Board of Appeals of Rockport](#)¹⁵, 478 Mass. 580 (2018) – local regulation of private heliport – abrogation of *Hanlon v. Sheffield*, 89 Mass. App. Ct. 392 (2016).

In *Hanlon v. Town of Sheffield*¹⁶, the Massachusetts Appeals Court held that a town could not enforce a zoning by-law which prohibited a private landowner from constructing and using a

¹⁵ <https://www.massmunilaw.org/wp-content/uploads/2018/01/ROMA-vs.-BOARD-OF-APPEALS-OF-ROCKPORT.pdf>

¹⁶ <http://masscases.com/cases/land/2015/2015-12-461225-DECISION.html>

private noncommercial landing area, unless that by-law was approved by the Department of Transportation's Aeronautics Division (the "Division") under M.G.L. c.90, §39B. Absent the Division's approval, the by-law was without effect and unenforceable. See *Hanlon* 89 Mass. App. Ct. at 396-397.

In *Roma, III, LTD*, the SJC granted direct appellate review for an appeal from a Land Court ruling overturning the Rockport Board of Appeals' decision upholding zoning enforcement against a landowner's use of property for a private heliport. In granting the landowner's motion for summary judgment, the Land Court judge stated that he was constrained by the *Hanlon* decision, and that the town by-law could not be enforced because it had not been approved by the Division.

The SJC found the basis of the Appeals Court's decision in *Hanlon* to be flawed and went on to distinguish the regulation of the use and operation of aircraft which requires the Division's approval, from a city or town's zoning authority to regulate the use of land within its jurisdiction which might include, prohibiting the use of property for a private landing area. The SJC also rejected arguments that the zoning by-law was preempted by both federal and state laws restricting local action regulating the use and operation of aircraft stating that if the Legislature wished to preempt a city or town's zoning authority, it must do so with a "clearer indication of such intent."

[Bruno v. Zoning Board of Appeals of Tisbury](#)¹⁷, 93 Mass. App. Ct. 48 (2018) – c.40A, §7 statute of limitations for zoning enforcement, removal of structures – merger of ANR lots

This case turned on when the 10-year statute of limitations set out in M.G.L. c.40A, §7 begins to run for the commencement of enforcement of zoning violations to compel the removal, alteration or relocation of a structure.

The Brunos, husband and wife, sought and were denied zoning enforcement against their neighbors, the Goethals over the use of a former guest house. In 1978, the Goethals received a special permit to build a detached guest house on the same lot as their main house. In 2001, an Approval Not Required ("ANR") plan was approved creating Lot 1 (guest house) and Lot 2 (main house), but the Goethals retained ownership of both lots until August of 2005 when they sold Lot 2, retaining an easement to access the beach from Lot 1. The Goethals rented out the guest house seasonally and in 2010, without obtaining permits, they converted a television room in the guest house to a bedroom bringing the total bedrooms to five. Lots 1 and 2 were subject to the "Coastal District and Barrier Beach Regulations" ("Regulations") which limited dwellings to 3-bedrooms with a maximum occupancy of 5 persons. In September, 2013 the Brunos had had enough and sought zoning enforcement as to Lot 1 seeking the removal of the guest house, which the Tisbury zoning enforcement officer ("ZEO") denied based upon his determination that the provisions of c.40A, §7, establishing a 6-year statute of limitations for the *use* of property in

¹⁷ <https://law.justia.com/cases/massachusetts/court-of-appeals/2018/17-p-174.html>

violation of a zoning ordinance/bylaw, were applicable.. The ZBA upheld the ZEO's denial and the Brunos filed an appeal under c.40A, §17.

On appeal, a Land Court judge upheld the ZBA's decision, but concluded that the 10-year statute of limitations for *structures* was applicable in this case. The judge also determined that the zoning violation occurred, and hence the statute of limitations began to run, when the Goethals obtained the ANR endorsement creating Lots 1 and 2 in 2001 and not, when Lot 2 was conveyed in 2005. Thus the Brunos' 2013 zoning enforcement request was deemed time barred under the 10-year statute of limitations.

The Appeals Court disagreed and reversed the Land Court decision stating in part, “[z]oning violations created by ANR subdivisions, moreover, do not commence for enforcement purposes until the subsequent conveyance of a lot. Zoning violations arising from nonconformities may be stayed by the doctrine of merger, which treats adjacent lots currently in common ownership as a single lot for zoning purposes so as to minimize nonconformities.” *Bruno*, at 700 [citations omitted]. The Appeals Court noted rather than allowing a property owner to obtain an ANR endorsement and then wait 10 years to separate the lots thus avoiding zoning enforcement, their construction of §7 allows a municipality 10 years from the date of conveyance to enforce its zoning ordinance/bylaw.

Boston Redevelopment Authority d/b/a Boston Planning and Development Agency v. Boston Private Bank and Trust Company, et al, (Suffolk Superior Court, Business Litigation Division, November 6, 2018) 2018 WL 6933371 – standing to enforce an affordable housing restriction/covenant

The defendant Boston Private Bank and Trust (“Boston Private”) foreclosed on a condominium unit purchased under an affordable housing program administered by the Boston Redevelopment Authority’s (“BRA”). The unit was subject to an affordable housing covenant which gave the BRA the right to purchase the unit upon receipt of notice of an impending foreclosure (the “Covenant”). When the unit owner died and the estate defaulted on the mortgage, the BRA received notice of the foreclosure but opted not to purchase the unit.

Following a public auction and the winning bidder's default on the Memorandum of Sale, which was made subject to the Covenant, Boston Private deeded the unit to itself and terminated the Covenant. Boston Private then sold the unit to an individual who is alleged by the BRA to be a “straw” for the individual who defaulted after the auction (in an attempt to purchase the property free of the Covenant). The BRA filed suit to void the sale and reinstate the Covenant. Boston Private and others moved to dismiss the BRA's complaint alleging it lacked standing because it did not exercise its option to purchase the unit and so could not resurrect the Covenant.

Setting aside the legal maneuvering that ensued and continues to ensue in this case, it is notable that the court determined that the BRA had standing to challenge Boston Private's power of sale, by equating the Covenant held by the BRA to that of an encumbrance or lien on the unit, such

that as the mortgagee, Boston Private owed the BRA a duty of good faith and reasonable care in exercising the power of sale.

While this is not a final decision in this matter, the fact that the BRA is being allowed to challenge the elimination of the Covenant is important for municipalities and other agencies in providing at least an avenue to safeguarding their affordable housing inventories and in ensuring that such restrictions remain in full force and effect.

Dello Russo v. Arena, 16 MISC 000364, 26 LCR 12 (Jan. 5, 2018) – standing of local board to appeal zoning relief.

This case involves an attempt by the Medford City Council (“Council”) to appeal a decision of the Medford Zoning Board of Appeals (“Board”) to grant variances and site plan approval for the redevelopment of a 6.8 acres site in downtown Medford consisting of 3 new mixed-use buildings containing 490 residential units and 7,000 s.f. of commercial space (the “Project”). One of the Council’s bases for filing the appeal was the Board’s alleged violation of the Open Meeting Law, which the court dismissed for lack of jurisdiction.

The Council’s zoning appeal was also dismissed after the judge determined that it lacked standing to file a zoning appeal under c.40A, §17, which requires that a plaintiff be either a “person aggrieved” by the decision being appealed, or “municipal officers and boards.” Decisional law construes the latter category of plaintiff strictly and requires that the municipal official or board “have duties to perform in relation to the building code or zoning matters at issue “in the case. The Council argued it had standing to file the appeal because it was the legislative body charged with the enactment of the zoning ordinance, and as the special permit granting authority for some special permits, although none were needed for this Project.

In dismissing the Council’s zoning appeal, the Land Court judge rejected the notion that the Council had standing to appeal any zoning decision where it may have some duties related to zoning. Specifically, the Council argued that it had granted a special permit to a bank which would be relocated to a smaller space within the Project, and that the bank may need to amend its special permit. This argument failed in that whether or not the bank was relocated, the bank was not part of the Board’s decision.

Though this case has been appealed (2018-PR-0482), the case law relied upon by the Land Court judge consistently requires a specific, not general, relationship between the municipal officials or board and the decision it is attempting to challenge.

Walsh v. Town of Dennis Planning Board¹⁸, 16 MISC 000602, 26 LCR 89 (Feb. 16, 2018) – rebuttal of an abutter’s presumption of standing.

¹⁸ <http://masscases.com/cases/land/2018/2018-16-000602-DECISION.html>

Pursuant to M.G.L. c.40A, §17, an abutter challenging the grant of zoning relief is entitled to a presumption that they have standing to bring the appeal. This presumption of standing is however, rebuttable. In this case the abutter filed an appeal from the issuance of a special permit for the use of town land as the site of a group home for veterans (the “Home”) under a bylaw entitled “Provisions to Encourage the Development of Affordable Housing in Dennis” (the “Bylaw”). To encourage the development of affordable housing in various housing types and lot sizes, the Bylaw provided relaxed dimensional requirements and use restrictions.

The presumption of standing may be rebutted by a showing that the aggrievement claimed are not interests protected by the zoning ordinance or bylaw. Once rebutted, the plaintiff bears the burden of proving by direct facts, not speculative evidence, that they would suffer a particularized injury that is special and different from the concerns of the rest of the community. In other words, the plaintiff must show that they will in fact, suffer harm or damage if the Home is constructed.

The abutter’s claims were that the Home would adversely affect the value of his home, cause a loss of privacy, overcrowd the land, and create a risk of damage from flooding caused by drainage runoff from the Home onto his property. To rebut the plaintiff’s presumption of standing, the Town argued that the Bylaw provisions for the development of affordable housing do not protect any of the interests the plaintiff claims will be harmed by construction of the Home.

Burdo v. Zoning Board of Appeals of Chelmsford, 17-P-970, 94 Mass. App. Ct. 1109 (R. 1:28 decision, Nov. 15, 2018) – Standing to appeal/Merger of Lots

The plaintiff/abutters in this case successfully challenged the grant of a variance for the construction of a home on an adjacent lot which, the plaintiffs had argued, had merged with another of the defendants’ lots. Under the common law doctrine of merger, a lot held in separate ownership at the time of the adoption of an ordinance or bylaw that increased the required lot area and rendered the lot nonconforming, is entitled to grandfather protection under M.G.L. c.40A, §6, but loses that protection if it thereafter comes into common ownership with adjoining land.

In proving that they had standing to appeal the plaintiffs argued, and the judge so found, that they were aggrieved by the grant of the variances (setbacks and contiguous land requirement) because of the loss of privacy due to the construction of a home less than the required distance from their own home; the construction of a 6-foot retaining wall within 2-feet of the property line which required the removal of trees (the construction would cause a trespass onto the plaintiffs’ property); and the risk of fire caused by the removal of trees. The Appeals Court affirmed stating that the judge’s findings were supported by the record and the law.

The defendant’s defense of the merger claim was based upon the fact that the lots had been identified and assessed separately, and that the presence of wetlands including a stream, divided

the lots and precluded them from merging. That argument was rejected by both the judge and Appeals Court because separate deeds/identities for lots is not determinative on the issue of merger, and assessment histories while useful, are only some indication of the status of the properties. The Appeals Court also ruled that the wetlands did not defeat a claim that the lots had merged for purposes of minimizing or eliminating the need for a variance from the contiguous upland requirement of the zoning bylaw.

Compare the case of *Heavey v. Board of Appeals of Chatham*¹⁹, 58 Mass. App. Ct. 401 (2003), where lots were held to have not merged where there was actual separation of the lots by a body of water or lagoon.

D. M.G.L. c.258 – THE MASSACHUSETTS TORT CLAIMS ACT

Prior to filing suit to recover damages for a tort against a governmental entity, claimants must present a demand letter pursuant to *M.G.L. c.258, § 4*. If the presentment letter does not adequately describe the claims in the civil action complaint, the claims may be dismissed. A recent Supreme Judicial Court decision, however, puts governmental entities on notice that an affirmative defense based on an inadequate presentment letter must be pled with specificity and particularity or the defense will be deemed to be waived.

The plaintiff in *Theisz v. MBTA*²⁰ filed suit against a bus driver and the MBTA for assault (against the driver) and negligent hiring, training, and supervision, and vicarious liability (against the MBTA). However, his presentment letter to the MBTA put the Authority on notice only of the intentional tort claims. When Theisz filed suit for negligence and intentional torts, the Authority included as an affirmative defense that he “failed to make proper presentment of [his] claim.”

It was undisputed that the presentment letter was inadequate. The SJC, however, agreed with the trial court that the Authority had waived its affirmative defense because, in its answer to the plaintiff’s complaint, it failed to identify the manner in which the presentment was not proper. Mass. R. Civ. P. 9(c) states that when denying the performance of a condition precedent, “the denial of performance or occurrence shall be made specifically and with particularity.” The Authority could have, and should have, stated in its affirmative defense that the presentment was inadequate because it did not put the Authority on notice that the plaintiff was asserting negligence claims against it. The Court noted further that the Authority’s defense was waived even if there was no prejudice to the plaintiff.

¹⁹ <http://masscases.com/cases/app/58/58massappct401.html>

²⁰ <http://socialaw.com/services/slip-opinions/slip-opinion-details/matthew-theisz-vs.-massachusetts-bay-transportation-authority>

E. OPEN MEETING LAW

1. Executive Session

There were two recent cases that inform municipalities on how to conduct executive sessions for sensitive matters. In [*Boelter v. Board of Selectmen of Wayland*](#), 479 Mass. 233 (2018)²¹, the chairman of the Board of Selectmen circulated to board members the members' individual written evaluations of the performance of the town administrator as well as a composite evaluation created by the chairman. The written evaluations were made public after the open session meeting to discuss the evaluations. The Board's action was consistent with the advice of the Attorney General regarding what was permissible to circulate in advance of an open session.

The SJC held that the action violated the *Open Meeting Law*. The evaluations contained board member opinions and therefore constituted a deliberation outside of a posted meeting. It was irrelevant that no board member commented on the evaluations outside of an open session. The board should have made the evaluations public at the same time that they were circulated to the members.

Municipalities sometimes struggle with the requirement that subject matters be identified in the agenda while preserving legitimate confidentiality concerns regarding matters to be discussed in executive session. The Superior Court offers some relief in a case decided on December 14, 2017. The Board of Selectmen of the town of Hull entered into executive session for two matters: to discuss union bargaining and to discuss the threat of litigation over property damage claims. The agenda and the vote did not identify the union or the person threatening litigation. The local newspaper filed a complaint with the Attorney General. The Attorney General agreed that these were proper subjects for executive session and that the law permits withholding specific identifying information if doing so would harm the municipality's position. It concluded, however, that the town failed to justify withholding the specific identifying information in this case and ruled that the *Open Meeting Law* had been violated.

The Superior Court found that the Attorney General went too far in requiring evidence of a specific detrimental impact using specific details in order to justify withholding identifying information from the public. Similarly, the Attorney General went too far in discounting the potential harm to the town if the name of the claimant threatening litigation was made public when the town and its counsel stated that releasing the identity could encourage other claimants to come forward. The matter was remanded to the Attorney General for further consideration. [*Board of Selectmen of the Town of Hull v. Healey*](#), 34 Mass. L. Rptr. 521 (2017)²²

The Attorney General gave some practical guidance to municipalities regarding executive session and meeting minutes. It affirmed that to enter into executive session properly, the

²¹ <https://law.justia.com/cases/massachusetts/supreme-court/2018/sjc-12353.html>

²² <http://socialaw.com/services/slip-opinions/slip-opinion-details/board-of-selectmen-of-the-town-of-hull-the-town-manager-of-the-town-of-hull-vs.-maura-healey-attorney-general>

governmental body must (1) first convene in open session; (2) vote by roll call to enter into executive session; (3) the chair must state the purpose and make statements regarding detrimental effect if required by the specific purpose; and (4) the chair must announce whether the body will reconvene in open session. As for executive session minutes, they may be reviewed, edited, and approved during an open session and yet still remain protected from release until the purpose for withholding them expires. The minutes should record the Chair's statement prior to entering into executive session as well as the body's vote. In general, minutes should be in sufficient detail that a person who did not attend can obtain a clear understanding of what happened by reading the minutes. [OML 2018-73](#)²³

2. Disruptive Individuals

Municipal boards and committees may feel beleaguered by citizens who are thought to be abusing their right to petition the government and disrupting a meeting. Public speech at such meetings is limited at the government's peril. In *Spaulding v. Natick School Committee*, (Middlesex Super. Ct. November 21, 2018²⁴), individuals were prohibited from airing complaints about the school system and the impact on specific students. The school committee had adopted a "Public Speak" policy that permitted anyone to speak for a few minutes on a school-related topic. Shortly after the speaker started, the chairman cut the speakers off and even suspended a meeting, stating that the speech was in violation of the Public Speak policy. The speakers sued claiming the committee's action was a violation of Article 16 of the Massachusetts constitution and the First Amendment to the U.S. Constitution. The court considered the constitutionality of the policy under the "strict scrutiny" standard, given that it found the committee meeting to be a public forum and the policy to be a content-based governmental restriction on speech. The policy could properly limit the public comments to matters within the school committee's responsibilities. It could also prohibit threats, adjudicated defamatory comments, and obscenities. As applied to the speakers, however, the policy was invoked before the committee chairman could properly consider whether the speaker violated constitutional parameters of the policy or was unconstitutionally applied. Summary judgment was awarded to the plaintiffs and the policy was narrowed to constitutional parameters.

In another situation, the Attorney General opined that the South Essex Sewerage District (SESD) violated the law by holding meetings at a place one person could not enter. The SESD placed an employee on leave after it determined that he could be verbally or physically aggressive. It also issued a no trespass letter barring the employee from district property, including the space in which it held its open sessions. The employee asked to attend a posted meeting but was told that the prohibition remained in place and that if he appeared, he would be arrested. The Attorney General determined that the SESD violated the *Open Meeting Law* by prohibiting the employee's

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<https://massago.onbaseonline.com/Massago/1700PublicAccess2/PublicAccessProvider.ashx?action=ViewDocument&overlay=Print&overrideFormat=PDF>

²⁴ https://www.aclum.org/sites/default/files/20181128_natick_decision.pdf

attendance, concluding “[e]xclusion of individuals from an open meeting must be based on specific incidents of physical aggression, violence, actual threats of harm, or other conduct that could reasonably place Board members or attendees in imminent fear for his or her personal safety, and based on current information.” [OML 2018-77](#)²⁵

3. Social Media

Most municipalities now have sites on social media platforms and may permit public posting on such sites. One recent federal decision highlights potential pitfalls with this public access. In [Davison v. Randall](#), C.A. No. 17-2003 (4th Cir. January 7, 2019, amended January 9, 2019)²⁶, the chairman of the Loudoun County, VA, Board of Supervisors (the equivalent of a Board of Selectmen or City Council) administered “the Chair’s Facebook Page”. Members of the public could “like” or “follow” the page and post comments. The Chair removed a post by a member of the public that accused government officials of wrongdoing and for a short time blocked the citizen from posting to the Chair’s page. The citizen sued under the First and Fourteenth Amendments and the Virginia constitution.

The Fourth Circuit agreed with the district court that, notwithstanding the fact that the County had no responsibility for or control of the content of the Chair’s Facebook page, it was sufficiently associated with the governmental position that the Chair was acting under color of state law in its administration. The Fourth Circuit noted that neither the Supreme Court nor any Circuit has answered whether a governmental social media site is a public forum. It concluded that the intentional inclusion of a public comment section, the invitation for any county citizen to comment, and the solicitation of exchanges of views, supported the conclusion that the page is a public forum. The Chair’s actions amount to viewpoint discrimination, unconstitutional regardless whether the forum is a limited or traditional public forum. In finding the removal of the post and the short-term block to be unconstitutional, the Fourth Circuit followed the conclusion of the Southern District of New York when it held as unconstitutional President Trump’s block of commenters to his Twitter feed. [Knight First Amend. Inst. at Colum. Univ. v. Trump](#), 302 F. Supp. 3d 541 (S.D.N.Y. 2018)²⁷, *appeal docketed*, No. 18-1691 (2d Cir. Oct. 24, 2018).

F. LABOR/EMPLOYMENT

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<https://massago.onbaseonline.com/Massago/1700PublicAccess2/PublicAccessProvider.ashx?action=ViewDocument&overlay=Print&overrideFormat=PDF>

²⁶ <http://www.ca4.uscourts.gov/opinions/172002.P.pdf>

²⁷

<https://knightcolumbia.org/sites/default/files/content/Cases/Twitter/2018.05.23%20Order%20on%20motions%20for%20summary%20judgment.pdf>

[Janus v. American Federation of State, County, and Municipal Employees, Council 31](#), ___ U.S. ___, 138 S. Ct. 2448 (2018)²⁸

The Supreme Court, in a 5-4 decision, struck down the collection of agency fees from non-union members that supported union duties as a collective bargaining representative from which non-union members benefit. Much has been written about this decision. If you have not already ceased deducting agency fees from non-union members, you should do so immediately.

[Chapter 69 of the Acts of 2018 – An Act Relative to Criminal Justice Reform](#)²⁹

Sections 103 – 104 of Chapter 69 of the Acts of 2018, An Act Relative to Criminal Justice Reform, amended *M.G.L. c.151B*, §4(9) making the use of criminal offender record information (“CORI”) in the hiring process more restrictive. For criminal misdemeanor convictions, the “look back” period has been reduced from 5 years to 3 years, and employers may not ask about sealed or expunged records at all.

It remains legal to inquire about felony convictions which have been disposed of within the last 10 years, misdemeanor convictions with a disposition date (e.g. termination of probation) that occurred within the last 3 years, and pending criminal charges.

Please note however that a criminal record may not automatically disqualify the hiring of an applicant. The decision to not hire an individual should be based upon very specific reasons connected to the position for which the applicant applied including, the number and seriousness of the offense(s) charged, and whether the applicant has taken any steps towards rehabilitation. This is especially true in civil services cases involving the hiring of police and firefighters.

[Town of Framingham v. Framingham Police Officers Union](#)³⁰, 93 Mass. App. Ct. 537 (2018) –Chief’s right of assignment/exclusive managerial authority

The Framingham Police Officers Union filed a grievance against the Town and its Police Chief after an Officer in the Detective Division assigned to a DEA task force was reassigned back to the Patrol Division. The reassignment resulted in the loss of a stipend, overtime and flex time. Although the Chief stated that the re-assignment was intended to provide an opportunity for others in the department, it occurred after a string of incidents including an argument between the Officer and the Chief during which the Officer made various accusations of misconduct against the Chief and Deputy Chief, and after an investigation into the Officers claim that he had suffered retaliatory harassment. The Union filed a grievance on the Officer’s behalf.

²⁸ https://www.supremecourt.gov/opinions/17pdf/16-1466_2b3j.pdf

²⁹ <https://malegislature.gov/Laws/SessionLaws/Acts/2018/Chapter69>

³⁰ <https://www.massmunilaw.org/wp-content/uploads/2018/07/TOWN-OF-FRAMINGHAM-vs-FRAMINGHAM-POLICE-OFFICERS-UNION.pdf>

In response, the Town sought a preliminary injunction from the Superior Court asserting that the transfer and reassignment of the Officer was not subject to arbitration. The Superior court denied the injunction. The Appeals Court granted interlocutory relief and reversed the judge's decision entering an order allowing the preliminary injunction barring arbitration.

For a court to grant the motion for preliminary injunction, the Town is required to prove that it would likely be successful on the merits of the case, and that the relief requested would be in the public interest. A showing of irreparable harm is not required when the preliminary injunction is sought by a governmental entity. The Appeals Court held that “there are certain nondelegable rights of management, matters that are not mandatory subjects of collective bargaining . . . , that a municipality and its agents may not abandon by agreement, and that arbitration may not contravene” *Town of Framingham*, 93 Mass. App. Ct. at 543.

Absent express legislative language, a Chief has inherent managerial authority over employees where matters of public safety are concerned. Thus a Chief possesses the authority to assign his officers to particular duties, and doing so is a matter of public interest. This authority cannot be bargained away and is not a proper subject for arbitration.

[City of Pittsfield v. Local 447 International Brotherhood of Police Officers](#)³¹, 480 Mass. 634 (2018) – reinstatement of police officer – knowingly inaccurate and intentionally misleading statements

This case was an appeal from a Superior Court decision affirming an arbitrator's decision reinstating a police officer who was fired for conduct unbecoming, untruthfulness and falsifying records, all of which stemmed from an arrest of a woman for larceny. In an apparent attempt to hide the fact that he removed the woman from the police vehicle so that store security could photograph her, the Officer filed a police report indicating that he removed her from the vehicle for her own safety because she was “thrashing” in the backseat. The Officer was terminated.

The Union filed a grievance on the Officer's behalf, and after a hearing, the arbitrator found that the Officer's termination for misconduct was not supported by just cause, and issued an award ordering him to be reinstated. The City appealed the arbitrator's decision, but the Superior Court agreed with the arbitrator and affirmed the award. The Supreme Judicial Court (“SJC”) also affirmed rejecting the City's assertion that the arbitrator's award was against public policy because police officer's must be truthful at all times in order to maintain public confidence. The SJC reviewed the three-pronged analysis for determining if an arbitrator's award violates public policy: 1.) is the policy at issue well defined and dominant, ascertained from the laws and legal precedents; 2.) is the disfavored conduct integral to the performance of an individual's employment duties; and 3.) will the award violate that public policy.

³¹ <https://law.justia.com/cases/massachusetts/supreme-court/2018/sjc-12450.html>

Terminating police officers for lying is supported by public policy and meets the first two prongs of the analysis. As to the third prong however, the SJC stated it is not whether the employee's behavior violated public policy, but whether the arbitrator's award (reinstating the police officer) violates public policy. The City's argument relied upon M.G.L. c.268, §6A which makes it a crime for a police officer in their official capacity to make a false report on a material matter in asserting that the award was against public policy.

The arbitrator determined that the Officer's behavior did not rise to a level requiring termination attempting in his award, to distinguish between statements which are "intentionally misleading" but not "intentionally false". The SJC found such a distinction "elusive", but was cautious about overturning an arbitrator's award. Instead, the SJC reviewed §6A as well as §13B of c.268 which makes it a crime to mislead judges, prosecutors, etc. with the intent to impeded, obstruct, delay or harm a criminal investigation or civil proceeding and stated that while the Officer's statement regarding the woman he arrested was knowingly inaccurate and intentionally misleading, it had no effect on the woman's arrest and did nothing to impede or harm any investigation and therefore, did not rise to the level of a crime.

The SJC ended its decision by commenting on the difficulty police chiefs' face in making employment decisions specifically, in terminating a police officer which termination might very well be overturned by an arbitrator resulting in the expense of arbitration and litigation, the award of back pay and return of seniority rights, etc. However, where false statements or reports result in an unjust arrest or prosecution, or the violation of an individual's civil rights, an arbitration award finding no just cause would indeed violate public policy.

I. PROCUREMENT

Nearly all municipal procurement and construction contracts contain a "termination for convenience" clause that permits the city or town to terminate the contract "for its convenience" or "for any reason" and without any underlying cause. Such a provision allows the municipality to terminate a contract even where the contractor or vendor has complied with the terms of the contract and has committed no breach.

On May 2, 2018, in a landmark decision in *A.L. Prime Energy Consultant, Inc. v. Massachusetts Bay Transportation Authority*, 479 Mass. 419 (2018)³², the Massachusetts Supreme Judicial Court affirmed public entities' right to utilize such "termination for convenience" clauses to cancel procurement contracts, even when the public entity uses that provision solely to obtain a more favorable price. In a case of first impression, the Court elected not to follow federal

³² <https://law.justia.com/cases/massachusetts/supreme-court/2018/sjc-12370.html>

precedent that forbids a public entity from invoking a termination for convenience clause solely for that purpose.

Instead, the Court determined that public contracts in Massachusetts should be construed according to Massachusetts law. Accordingly, the Court applied the principle that “[w]hen contract language is unambiguous, it must be construed according to its plain meaning.” In the case of the MBTA contract, the court noted that the termination for convenience provision gave the MBTA the “sole discretion” to terminate the contract “for its convenience and/or for any reason.” Since the contract gave the MBTA broad discretion to terminate the contract for any reason it chose, the Court concluded, it could exercise that right to terminate to seek a better price.

The contract at issue in the MBTA case was a two-year contract with a prime fuel supplier. One year into the contract, the MBTA determined that it could achieve cost savings by switching to a contractor on a state bid list, so the MBTA terminated the contract with Prime Energy and awarded a new contract. The Court left for another day the issue of whether or not terminating a contract for convenience so that the governmental entity can rebid the contract to seek a better price violates public bidding laws.

It seems highly likely that such a scenario would indeed violate public bidding laws. We therefore caution against engaging in this practice without first consulting with municipal counsel.