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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 – STATE AND FEDERAL

A. MARIJUANA AND HEMP

On September 24, 2019, the Cannabis Control Commission approved regulations ([935 CMR 500.000](#) and [501.000](#)) governing both adult and medical use of marijuana. On November 1, the Commission published the requisite notice, and the regulations took effect.

Here is a summary of the significant changes affecting municipalities:

- **Social Consumption Pilot Program**: The regulations create a Social Consumption Establishment Pilot Program for the adult use of marijuana. Simply stated, the program permits the issuance of licenses for on-premises consumption in up to 12 municipalities in the Commonwealth. Under the program, licenses are reserved for business controlled by Economic Empowerment Priority Applicants, Social Equity Program Participants, Microbusinesses or Craft Marijuana Cooperatives, for an initial period of two years. The Commission may extend the pilot program for an additional year if the goals of the exclusivity period are not met. While the revised regulations create the pilot program, a change in state law that allows cities and towns to authorize social consumption is required before any licenses may be issued.
- **Delivery**: A Delivery-Only license type will be offered for Economic Empowerment Applicants, Social Equity Program Participants, and Microbusinesses with a Delivery Endorsement from the Commission, for an initial period of two years. Adult use Delivery-Only businesses will be required to obtain marijuana and marijuana products from other licensed retailers, unless the license holder itself is a Microbusiness that grows or manufactures its own marijuana and marijuana products and holds a Delivery Endorsement issued by the Commission. Delivery for adult use cannabis consumers will be permitted in municipalities in which retail sales are permitted or delivery businesses are located, as well as in any city or town that notifies the Commission that it will allow delivery businesses to operate within its borders. Service will be prohibited from dormitories and other university housing, commercial hospitality operations including hotels and bed-and-breakfasts, and federally subsidized housing.

Municipalities that have prohibited retail establishments should review their ordinances or bylaws to determine whether delivery establishments are currently allowed. Based on the results of that review, there may be a need for amendments to such ordinances or bylaws to be adopted.

- **Energy and Environmental Standards**: To implement the state's energy and environmental standards for the cannabis industry, the new regulations include additional requirements

for waste disposal, air pollution, lighting power density and compliance documentation. The regulations apply to both adult and medical use programs.

- Public Health and Safety: Due, in part, to concerns over vaping, the new regulations require ingredients added to marijuana products to be disclosed on product labels. The regulations also permit the Commission to order the removal of products from licensees' shelves or prohibit the sales after an informal hearing process and Commission consideration. Further, the Commission incorporated additional regulatory requirements over the transportation of cash received by marijuana businesses.

As for hemp, it is regulated by the Department of Agricultural Resources (DAR), not the Cannabis Control Commission. DAR has issued a [Policy Statement Regarding the Sale of Hemp-Derived Products](#). It permits the licensed sale of these hemp-derived products:

- Hemp seed
- Hemp seed oil
- Hulled hemp
- Hemp seed powder
- Hemp protein
- Clothing
- Building material
- Items made from hemp fiber
- Flower/plant from a Massachusetts licensed Grower to a Massachusetts licensed Grower or Processor

The Policy Statement prohibits the sale of these hemp products:

- Any food product containing CBD
- Any product containing CBD derived from hemp that makes therapeutic/medicinal claims
- Any product that contains hemp as dietary supplement
- Animal feed that contains any hemp products
- Unprocessed or raw plant material, including the flower that is meant for end use by a consumer

DAR has also published answers to [Frequently Asked Questions](#) regarding which hemp-derived products may be sold wholesale in the Commonwealth and which cannot.

B. CHAPTER 73 OF THE ACTS OF 2019 – M.G.L. c.150E, §5

In response to *Janus v. American Federation of State, County and Municipal Employees, Council 31*, 138 S.Ct. 2448 (2018), the Supreme Court's decision striking down the collection of agency fees from non-union members, the Massachusetts Legislature revised [M.G.L. c.150E, §5](#) which became effective on September 19, 2019. The revised §5 provides the "exclusive representative" or union, with rights of access to municipal employees including:

- The right to meet with employees during the workday and on the employee's premises in order to investigate and discuss grievances and other work place related complaints;
- The right to conduct worksite meetings during lunch breaks and other non-work breaks and before and after the workday on the employer's premises;
- The right to meet newly hired employees, without charge to the pay or leave time of the employees, for not less than 30 minutes, not later than 10 calendar days after the date of hire during new employee orientations if any;

In addition, not less than 10 calendar days after the date of hire for all public bargaining unit employees, the employer shall provide the union with a spreadsheet, or other agreed upon format, providing the employee's name; title; job; worksite location; home address; work telephone number; home and personal cell numbers; date of hire; work email address; and personal email address. Providing the above information to the union does not make that information a public record, nor shall any emails between employees and their union representatives be public records.

The union has the right to use the public employer's email system to communicate with union members regarding union related issues including elections and social activities, as long as the use does not unreasonably burden the network capability of the system.

Collective bargaining agreements may provide greater rights than those provided in §5.

The failure of a public employer to comply with the provisions of §5 is a prohibited practice in violation of c.150E, §10(a)(5) (5), a "[refusal] to bargain collectively in good faith with the exclusive representative as required in section six."

C. FEDERAL REGULATORY CHANGES FOR PEG/CABLE FEES

You will recall that last year we discussed the Federal Communication Commission's Declaratory Ruling and Third Report and Order that severely restricted the authority of local governments to regulate Small Wireless Facilities. The FCC is now making changes to the regulatory authority of municipalities with its cable franchisees.

In its [Third Report and Order](https://docs.fcc.gov/public/attachments/FCC-19-80A1.pdf)¹ under the *Cable Communications Policy Act of 1984*, issued on August 2, 2019, the FCC made an important change to local fees collectible in return for the grant of a cable franchise. Section 622 of the Act, 47 U.S.C. § 542(b), imposes a cap on franchise fees set by local franchise authorities. That cap is 5% of the franchisee's Gross Annual Revenues. The new report and order for the first time includes, as part of the 5% cap, non-monetary contributions related to the provision of cable service as a condition or requirement of a local license. Non-monetary contributions include the costs of providing free or discounted cable service to public buildings; non-capital costs to support public, educational, or governmental access facilities; and

¹ <https://docs.fcc.gov/public/attachments/FCC-19-80A1.pdf>

costs attributable to the construction of institutional networks. In short, when this rule goes into effect (30 days after publication in the Federal Register), municipalities can expect their cash payments from cable franchisees to decrease.

Most communities have I-net, PEG channels and some discounted or free cable service to public buildings, including schools. Those contributions will now be included by the cable operators as a portion of their franchise fee payment. The in-kind contribution is valued at its fair market value, not the actual cost to the company, which is likely to result in higher valuations and a higher negative impact on municipal budgets. The new interpretation applies to both new and existing franchise arrangements, but only applies going forward so there is no risk that municipalities will be required to repay payments received before the rule change. Your community should begin its own identification of these types of in-kind contributions that it now receives to determine the potential financial effect of this new interpretation.

The FCC Order also includes a mixed-use rule: “A franchising authority may not regulate the provision of any services other than cable services offered over the cable system of a cable operator, with the exception of channel capacity on institutional networks.” Proposed 47 C.F.R. § 76.43. Again, since the Order applies to new and existing franchises, your municipality’s franchise agreement may be affected by this change.

D. COMMERCIAL DRIVERS LICENSES - [49 CFR Part 382 Subpart B](#)

Effective January 6, 2020, all employers including cities and towns, who employ individuals whose positions require them to have a Commercial Driver’s License (CDL) must enter any positive alcohol or drug test results, refusals, and actual knowledge of violations into the Federal Motor Carrier Safety Administration (FMCSA) Drug and Alcohol Clearinghouse. Also beginning January 6, 2020, employers or their designated third party administrator (TPA), were required to start conducting annual queries on current employees and full queries for prospective employees, whose position requires a CDL, to check if they are prohibited from performing safety-sensitive functions, such as operating commercial motor vehicles, due to an unresolved drug and alcohol program violation.

Attached to these materials as Appendix A is the Memorandum from the Woburn Director of Human Resources to DPW Employees, together with a Consent Form.

E. H.4263 “AN ACT TO PROMOTE HOUSING CHOICES”

This bill, which was resubmitted by Governor Baker, was voted out of the Housing Committee on December 24, 2019 with 20 other bills and is currently in Ways and Means. Passage is expected in the near future.

This Act proposes a number of amendments to M.G.L. c.40A, including §4A allowing Intermunicipal agreements for shared infrastructure improvements, municipal service costs and local tax revenue associated with the development of properties in contiguous communities. Section 1A provides consistent definition for the terms “Accessory dwelling units”; “As of right”, “lot”, “Mixed use development”, “Multi-family housing”, “Natural resource protection zoning” and “Open space residential development”. Perhaps most importantly, the bill proposes to delete the current §5 and insert 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 such as accessory dwelling units, open space residential development or mixed use development. It also proposed the amendment of §9 to allow the issuance of special permits allowing the reduction in the amount of parking required in certain dense developments as long as the public interest is served, and reduces the 2/3 supermajority to a simple majority for the issuance of special permits.

F. WETLANDS PROPOSED REGULATIONS

MassDEP is proposing revisions to the Wetlands Protection Regulations, 310 CMR 10.00. The changes include:

- The addition of a requirement that Conservation Commissions submit copies of Orders of Conditions to MassDEP either through eDEP or by certified mail, return receipt requested (not by regular mail or e-mail), and to applicants by certified mail, return receipt requested, so that there is proof of delivery;
- Clarification regarding abutter standing, providing that an abutter who receives notice of a proposed project does not automatically have standing to appeal orders regarding the project; and
- An update to 310 CMR 10.55(2)(c) to refer to the Massachusetts 2016 Wetland Plant List published by the U.S. Army Corps of Engineers.

Comments on the proposed revisions are due **January 30, 2020**. More information, including dates of public hearings, is available at <https://www.mass.gov/regulations/310-CMR-1000-wetlands-protection-act-regulations>.

II. SELECTED CASES.

A. ZONING AND LAND USE

[The McLean Hospital Corporation v. Town of Lincoln](#), 483 Mass. 215 (2019) – M.G.L. c.40A, §3 – Educational Purpose – “Dover Amendment”

At last year’s Municipal Law Update, we reported on this decision where a Land Court judge determined that a residential program “implementing a highly structured model of learning behavior through a specialized curriculum” was not an educational use within the meaning of M.G.L. c.40A, §3 commonly referred to as the “Dover Amendment” and therefore was not

exempt from zoning regulations. 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/by-laws may however, reasonably regulate land or structures with respect to the bulk and height of structures, yard size, setback, lot area and parking requirements.

The Supreme Judicial Court granted McLean’s application for direct appellate review, vacated the Land Court judge’s ruling, and remanded the matter to the Land Court for entry of judgment on McLean’s behalf.

At issue, was a program which taught skills targeting “emotional dysregulation”, caused in some patients by Borderline Personality Disorder, by using a “highly structured, nationally recognized, dialectical behavior therapy (DBT) approach”. In determining whether McLean’s program was protected by §3, the SJC applied a two-pronged test: first, the use must have a bona fide goal that can reasonably be described as “educationally significant” and second, the goal must be the “primary or dominant” purpose for which the land or structures will be used.” *McLean Hospital* at 220 citing *Regis College v. Weston*, 462 Mass. 280, 286 (2012).

Noting that “educational” has been given a “broad and comprehensive” interpretation for purposes of §3, the SJC determined that the program satisfied the educationally significant component because instilling “a basic understanding of how to cope with everyday problems and to maintain oneself in society is incontestably an education process” within the meaning of the Dover Amendment.” (emphasis original) *McLean Hospital* at 221.

As to whether the program was the primary or dominant purpose for use of the land and structure, the SJC rejected the argument that the presence of a psychiatrist on staff or the fact that residents took medication or had been psychiatric patients made it a medical and not an educational facility. “[C]ourts in the Commonwealth have concluded that “education” and “rehabilitation” . . . are not mutually exclusive.” *Id.* With this type of situation, separating “that which is educational from that which is therapeutic is ordinarily a rather futile exercise” and shifting the focus away from educational to “the type of student who is participating in the program, . . . should not be the foundation under the Dover Amendment”. *Id.* at 226.

Though McLean’s program allowed for individual therapy and skills taught by clinical professionals, those elements did not negate the fact that the predominant purpose of the program was educational.

Bellalta v. Zoning Board of Appeals of Brookline, 481 Mass. 372 (2019) – M.G.L. c.40A, §6 - extension/alteration of nonconforming structure – special permit only

Dealing once again with the “difficult and infelicitous” language of M.G.L. c.40A, §6, the Supreme Judicial Court clarified the protections §6 extending to legally pre-existing

nonconforming single and two-family dwellings when there is an alteration or extension of a nonconformity.

In this case, Brookline property owners wished to construct a dormer on the roof of their second floor condominium unit, adding 677 s.f. of living space resulting in an increase of the already nonconforming floor area ratio (FAR). The Board of Appeals granted a special permit after finding that the increased FAR would not be substantially more detrimental to the neighborhood than the preexisting use. Abutters appealed arguing that the alteration also required the issuance of a variance. The Land Court upheld the Board of Appeals' decision and the abutters appealed.

The SJC began its discussion by examining the fairly long line of cases which ruled that an alteration that intensifies an existing nonconformity in a one or two-family structure may be authorized if there is no substantial detriment to the neighborhood. This framework first requires the permit granting authority to identify in which respect(s) the structure doesn't conform to the existing zoning requirements, and to then determine if the proposed alteration or addition would intensify that nonconformity. If there is no intensification, the property owner is entitled as of right to the issuance of a permit.² If there is an intensification of the nonconformity, the alteration must be submitted to the Board of Appeals for a determination of whether the alteration would be substantially more detrimental to the neighborhood than that which currently exists.

The Brookline Board of Appeals determined that the proposed dormer would increase the existing FAR, but determined that the increase would not be substantially more detrimental. The Board did not determine whether or not the dormer would increase the "nonconforming nature" of the structure, a determination which the SJC described as "hardly self-evident". To this point, the SJC referenced its decision in *Bjorklund v. Zoning Bd. of Appeals of Norwell*, 450 Mass. 357 (2008) wherein it was stated that "small-scale alterations, extensions or structural changes to a preexisting house are illusory. . . Because of their small-scale nature, the improvements mentioned could not reasonably be found to increase the nonconforming nature of a structure." *Bjorklund*, 450 Mass. at 362-363.

In other words, the Board or building inspector, could have found that the dormer was a small-scale alteration that did not increase the nonconforming nature of the structure, and then issue a building permit as a matter of right. However, because the Board treated the increased FAR as an increase in the nonconforming nature, it proceeded to the next part of the analysis and determined that the increase was not substantially more detrimental to the neighborhood. Because the parties stipulated to the material facts, the SJC assumed without deciding, that the

² In f.n. 11 of the *Bellalta* decision, the SJC states that earlier cases use the term "special permit" rather loosely to describe the process by which one and two-family homeowners can proceed to modify or alter their nonconforming homes. The Court's use of 'permitting authority' is intended to encompass any process by which a city or town allows residents to proceed with home renovations.

dormer increased the nonconforming nature of the structure, and proceeded to whether a variance was required.

Responding to the argument that the dormer also required a variance, the SJC again examined prior decisions regarding the special protections afforded by c.40A, §6, and ruled that a variance is not required for one and two-family residential structures once a finding is made that there is no substantial detriment to the neighborhood as to the existing nonconformities.³

As for the plaintiffs' argument that the Brookline bylaw prohibits an increase in the FAR without both a special permit and variance, the SJC reminded us that §6 "creates a statutory requirement that 'sets the floor' throughout the Commonwealth for the appropriate protections from local zoning bylaws to be afforded properties and structures protected by [§6]. *Bellalta* at 386. Therefore, while zoning ordinances/bylaws can offer more generous protections, they cannot afford fewer protections to preexisting nonconforming structures or uses than those set out in §6.

Leonard v. Zoning Board of Appeals of Hanover, 96 Mass.App.Ct. 490 (2019) – protection of nonconforming uses and structures

Two months after the *Bellalta* decision, the Appeals Court also reminded us that for a nonconforming use to be protected by c.40A, §6, the use must have lawfully in existence prior to the ordinance/bylaw amendment which either prohibited, or further regulated, the use.

In this case, the Leonards began their florist business in 1993 with outside display racks offering goods for sale. Though the florist business was permitted in the business district, all goods and services were required to be located "within a structure" or "shielded from public view". Notwithstanding that the Leonards' outside display violated the zoning bylaw, no zoning enforcement was taken until December 3, 2013 when the building commissioner notified the Leonards that the outside display required a special permit.⁴ Rather than applying for a special permit the Leonards appealed the building commissioner's decision. Part of the Leonards' argument rested on the assertion that the metal racks upon which the goods were displayed were protected by the ten-year statute of limitations set out in c.40A, §7 (unless an action requiring the removal of a structure or structure occurs within 10 years from the date the structures were erected, the structures are deemed lawfully nonconforming and protected by §6).

Leaving aside for a moment the interpretation of whether the outside displays were allowed as part of a principal or permitted use to the zoning board, the Appeals Court upheld the zoning enforcement because the outside displays were prohibited by the zoning bylaw unless "specifically permitted" elsewhere in the bylaw. Regarding application of the 10-year statute of limitations, the Appeals Court stated that whether or not the metal racks met the definition of

³ The SJC also engaged in a lengthy discussion of the increased cost and difficulty imposed on one and two-family homeowners should they require both a special permit and a variance in these situations.

⁴ There were two other zoning enforcement issues in this case, one of which resulted from the Leonards erection of a barrier to address access issues with a neighboring restaurant.

structures, the items displayed thereon cannot be considered part of the structure. Nor can the structures even if protected as nonconforming, be used for the display of goods which is not similarly protected. An additional reminder that nonconforming uses and nonconforming structures are different concepts.

Fish v. Accidental Auto Body, Inc. 95 Mass. App. Ct. 355 (2019) – decision granting special permit vacated – air pollution – protection of health and welfare – burden of proof

After the issuance of a special permit to operate an auto body repair shop in Mashpee's economic development and industrial district, the plaintiffs/residential abutters, filed an appeal under c.40A, §17 citing concerns for air pollution and noise. At trial, the plaintiffs presented expert testimony on isocyanates, a compound found in the top coat applied when painting vehicles and the toxic risks caused by isocyanates if inhaled. There was also testimony that 2% of isocyanates escape into the air despite use the best available filter system. Though the defendant offered no testimony, expert or otherwise, the judge found that any escaping isocyanates would be rendered harmless before reaching the plaintiffs' property. In his findings, the trial judge said "it was prudent to rely on the regulatory process governing auto body repair shops (of the EPA and DEP) to ensure [the defendant's] shop will not significantly decrease air quality and thus will not adversely [affect] public health."

The Appeals Court vacated the special permit because the trial judge shifted the burden of proving that the special permit should not have been issued to the plaintiff/abutters. On appeal, "the burden is on the applicant seeking the special permit to demonstrate that the statutory prerequisites for the granting of a special permit have been met, and that the special permit was properly issued." *Fish* at 362 citing **Kirkwood v. Bd. of Appeals of Rockport**, 17 Mass.App.Ct. 423, 427 (1984).

The Mashpee zoning bylaw provides in part, that a special permit may be issued if the proposed use is consistent with state and town regulations and will not adversely affect the public health or safety or decrease air quality. As discussed above, the judge dismissed the testimony of the abutters' expert witness testimony because he could not testify to actual harm, notwithstanding that the defendant offered no testimony in support of the special permit. However once the plaintiffs' expert testified that the auto body repair shop would release harmful toxins into the air, it was the defendant's burden to offer evidence that those toxins would not adversely affect the public health and safety or decrease the air quality.

Murchison v. Zoning Bd. of Appeals of Sherborn, 96 Mass. App. Ct. 158 (2019) – presumption of standing in a zoning appeal – density/overcrowding

The Plaintiff as an abutter/party in interest under c.40A, §11 appealed the Zoning Board's decision upholding the issuance of a foundation building permit arguing that proposed construction on the lot across the street would not comply with the bylaw requirement for lot width at the front setback line. At trial, the property owners' rebutted the presumption of

standing (based upon the bylaw protections against overcrowding/density) by arguing that the neighborhood was already overcrowded, and that the addition of one house even if slightly closer, would cause no harm to the plaintiff. The plaintiff's claim was dismissed for lack of standing.⁵

On appeal, the Appeals Court noted that density or overcrowding of land "is an interest protected by [c.40A]" and that a plaintiff can "independently establish standing based on the impairment of an interest protected by [a town's] zoning bylaw.". *Murchison* at 161. The Appeals Court rejected the property owner's assertion that Sherborn's zoning bylaw doesn't regulate density ruling that the bylaw regulates overcrowding through its dimensional regulations requiring a minimum lot width which operate to maintain a distance between structures and limits the neighborhood's maximum density.

As for the plaintiff's particularized injury based upon density, the Appeals Court rejected the notion that the plaintiff must prove that the neighborhood was already overcrowded stating that "neither this court nor the Supreme Judicial Court has ever held that being in an already-overcrowded neighborhood is a prerequisite for a density-based harm sufficient to confer standing. Indeed, we have suggested the opposite." *Murchison* at 162-163.

In addition, the plaintiff's standing does not rely upon the ability to prove that the issuance of the building permit will violate the lot width requirement of the zoning bylaw, only that if the plaintiff is correct, the house will be constructed closer to their house than permitted by the zoning bylaw which is a particularized claim of harm. The Appeals Court also rejected the defendant's claim that there can be no overcrowding in a neighborhood of 3-acre lots stating that the issue is whether the house will be closer than allowed.

Finding the Land Court judge's ruling to be clear error, the matter was remanded for further proceedings.

Lazarek v. Bd. of Appeals of Manchester-by-the-Sea, 95 Mass. App. Ct. 1105 (2019) (Rule 1:28 decision) - Standing to appeal under c.40A, §17

In contrast to *Murchison* is this Appeals Court decision which affirmed the dismissal of the plaintiff's zoning appeal for lack of standing. Plaintiff sought zoning enforcement against the owner of property that was the former site of a WWII era military tower that was used for spotting enemy vessels. The tower had been resold a number of times and had undergone a number of renovations. The current owner made various improvements to the exterior and interior of the tower, and obtained a building permit to convert it into living space with 2-bedrooms, 2-bathrooms a bar and entertainment areas.

⁵ The Land Court did not reach the merits of the appeal which was whether the lot met the minimum 250' lot width requirements of the zoning bylaw.

The building commissioner declined plaintiff's request that the building permits be revoked and a cease and desist order issued. The plaintiff appealed to the Board of Appeals which upheld the building commissioner's decision. The plaintiff filed a second complaint when the property owner obtained a special permit to connect the tower to an existing residence and garage.

Standing to bring an appeal under §17, means that a plaintiff must prove that they are aggrieved by the decision they are appealing. Abutters who are "parties in interest" under c.40A, §11 are presumed to have standing, but that presumption can be rebutted "by coming forward with credible affirmative evidence that refutes the presumption, . . . [by] establishing that an abutter's allegations of harm are unfounded or de minimis, . . . or by showing that the plaintiff has no reasonable expectation of proving a cognizable harm." [*81 Spooner Rd., LLC v. Zoning Bd. of Appeals of Brookline*](#), 461 Mass. 692, 702 (2012). To be aggrieved pursuant to M.G.L. c.40A, §17, a plaintiff has to prove that the relief granted (special permit, variance, denial of zoning enforcement) infringes upon their legal right(s), and that such right is one that the zoning ordinance or bylaw is designed to protect. The aggrievement or harm must be more than speculative, e.g. there will be noise or there will be traffic. It must be specific to the plaintiff (rather than on the neighborhood generally) and measurable. If a plaintiff is an abutter with the presumption of standing, it is the defendant who must first provide evidence to rebut the presumption, but the plaintiff continues to bear the burden of proving standing.

The plaintiff here claimed he was aggrieved because the proposed use would infringe upon his privacy (his property could be seen from the tower into his yard), cause increased noise (from parties), and increased light. As to the purported harms, the Appeals Court stated that seeing into his yard was not a right protected by the zoning bylaw; the alleged increase in noise was speculative; and the proposed renovations did not involve any additional lighting that would emanate from the property.

[*Smyth v. Conservation Commission of Falmouth*](#), 94 Mass. App. Ct. 790 (2019) (review denied 482 Mass. 1102 (2019) – effect of wetland regulations – regulatory taking

In 2005, the plaintiff inherited land that her parents purchased in 1975 for \$49,000. The parents and plaintiff paid taxes on the land but never developed it until 2006-2008 when the plaintiff engaged professionals to prepare plans and applications for approvals towards constructing a house on the property. In 2012, a Notice of Intent was filed which sought a number of waivers from the local wetlands bylaw. The Commission denied the waiver requests and the plaintiff filed a complaint asserting among other claims, that the denial was a regulatory taking for which she deserved to be compensated under the Fifth Amendment of the U.S. Constitution, and Article 10 of the Massachusetts Declaration of Rights.

At trial, the plaintiff's appraiser testified that the property was worth \$700,000 if buildable, and \$60,000 if not buildable. The jury found that the wetland protection bylaw effected a regulatory taking of the property and awarded the plaintiff \$640,000, and the town appealed.⁶

In deciding whether the wetlands regulations were a regulatory scheme effecting a taking of land the Appeals Court applied a balancing test consisting of "relevant guideposts" including, the actual economic impact of the regulation to the plaintiff; the extent to which the regulation interfered with the plaintiff's "investment backed expectations"; and the character of the governmental action. See, *Smyth* at 797.

To the economic impact, the Appeals Court (based upon the evidence presented at trial) found that even if unbuildable, the property was worth more than what the parent paid for it in 1975, and it was not entirely without value as it could be used as a playground or park, and it would have value to abutters. The plaintiff's investment backed expectations were found to be negligible in that neither she nor her parents made any investment towards its development when it could have been built upon, and the taxes paid were based upon the undeveloped state of the land.

Most importantly, the Appeals Court ruled that the requisite governmental action, in the form of wetland regulations, did not effect a physical invasion of the property as other governmental takings often do because the regulations are of general applicability to all property in town with wetland resources, and are intended to protect coastal and wetland resources generally. Concluding that the regulations did not work a taking for which compensation was due, the Appeals Court reversed the judgments for the plaintiff, and entered judgment for the Conservation Commission.

Penn v. Town of Barnstable, 96 Mass. App. Ct. 205 (2019) – defeated bylaw cannot be reconsidered for two years – application of M.G.L. c.40A, §5, sixth para.

Chapter 40A, §5, sixth para. states that "[n]o proposed zoning ordinance or by-law which has been unfavorably acted upon by a city council or town meeting shall be considered by the city council or town meeting within two years after the date of such unfavorable action unless the adoption of such proposed ordinance or by-law is recommended in the final report of the planning board."

The plaintiff in this case challenged the Barnstable Town Council's (the legislative authority) adoption of the Hyannis Parking Overlay District zoning bylaw, authorizing the as-of-right operation of commercial parking lots, only 3 months after it had rejected a similar proposal. The Land Court determined that the rejected and adopted bylaws were "substantially the same" and

⁶ The Conservation Commission's appeal was based in part, upon the trial judge's ruling over the Commission's objection, that the question of whether a regulatory taking occurred must be submitted to a jury. The Appeals Court ruled that whether a regulatory taking occurred is a "wholly new" cause of action to which the right to a jury trial does not attach.

thus the §5, sixth para. applied to invalidate the bylaw. The Appeals Court agreed and affirmed the Land Court's decision.⁷

The Appeals Court's decision begins by discussing the purpose of the 2-year statutory bar stating that it provides the public with a "measure of finality to unfavorable action" so that "members of the public shall be able to ascertain the legislative status of a proposed change at all times, and to rely on unfavorable action as a complete defeat of the proposal". *Penn* at 210 citing [*Kitty v. Springfield*](#), 343 Mass. 321, 326 (1961) (the Supreme Judicial Court referred to the 2-year ban as barring "any new action of the same character").

Unable to find any reported decisions discussing what it means for bylaws to be "of the same character," the Appeals Court looked to cases decided in analogous contexts. The first line of cases discussed if and when a new notice, or another hearing, would be required under c.40A, §5 when proposed changes are made to zoning amendments under consideration. The answer to that question depends upon the degree of similarity between the original proposal and the language as amended, and whether those changes are "not of a fundamental character". *Penn* at 210-211 citing [*Burlington v. Dunn*](#), 318 Mass. 216, 218 (1945). The Appeals Court found this particular line of cases to be helpful to its discussion of the sixth para. of §5 as the purpose for notice is to inform the public of bylaw amendments which are being considered, and those which have been rejected.

The Appeals Court examined a second line of cases regarding initiative petitions under Article 48 of the Amendments to the Massachusetts Constitution which prohibits the submission of "substantially the same" petition as those that were qualified for submission in either of the two preceding biennial state elections". The Appeals Court found the case of [*Bogertman v. Attorney General*](#), 474 Mass. 607 (2016) particularly instructive because similar to §5, sixth para., the goal of Art. 48 is "to prevent the constant forcing of . . . questions which have been rejected." *Bogertman* at 620.

Based on its analysis, the Appeals Court concluded that proposed ordinances or bylaws are the same for purposes of c.40A, §5, sixth para. if "they share the same fundamental or essential character, with little substantive difference". As applied to the Hyannis Parking Overlay District, the Appeals Court ruled that the only differences between the rejected and adopted bylaws were two provisions that facilitated enforcement, but the fundamental and essential character of the bylaws were the same.

In addition, the Appeals Court rejected Barnstable's argument that the Court must defer to the Town Council's finding that the bylaws were not the same. The Appeals Court noted the distinctions between the 2-year bar on reconsideration of a rejected application for a variance or special permit under c.40A, §16, upon which the town was relying, and the 2-year prohibition of §5, sixth para. As to §16, the bar does not apply if the specific municipal permit granting

⁷ In accordance with §5, sixth para., the Planning Board recommended adoption of the subject bylaw.

authority finds “specific and material changes in the conditions upon which the previous unfavorable action was based, and describes such changes in the records of its proceedings.” M.G.L. c.40A, §16. “In contrast, G.L. c.40A, §5, sixth par., gives the municipal legislative body no role in deciding whether a proposed ordinance or bylaw is the same as one previously rejected. Ultimately, that is a question of law for the courts to decide.” *Penn* at 212. Leaving unanswered the question then of the import of the language of §5, sixth para., “unless the adoption of such proposed ordinance or by-law is recommended in the final report of the planning board.”

B. SUBDIVISION CONTROL LAW

Barry v. Planning Bd. of Belchertown, 96 Mass. App. Ct. 314 (2019) – ANR Plans – preclusive effect of prior court determination of public way

In order to support their current application for an ANR endorsement, the plaintiffs in this appeal attempted to use a 1987 court judgment which ruled that a portion of a way known as Munsell Street was public. Munsell Street existed on the ground since the 1800s. One portion had been formally accepted by the town and improved. The rest of Munsell Street was paved in some areas, gravel in others and was of varying widths, with some portions being non-passable. The plaintiff’s proposed ANR plan proposed two lots; Lot A fronting on the accepted portion of Munsell Street and Lot B on the unaccepted portion.

On the advice of town counsel, the Planning Board declined to endorse the plan because the portion of Munsell Street in front of Lot B was not accepted, and was not of adequate width grade or construction such that it provided access for new residential development. On appeal, the judge granted summary judgment to the plaintiff based upon the 1987 court judgment and ruled that the town was “collaterally estopped” from denying that Munsell Street was public.⁸

In the 1987 matter the judge ruled that a portion of Munsell Street was a public way under M.G.L. c.41, §81L(b), being a way “theretofore approved. . . [under] the subdivision control law.” That 1987 finding was erroneous however, because the plan upon which the judge relied was an ANR plan, not a subdivision plan. “[A]n ANR endorsement “is not regarded as an ‘approval’ as that term is used in the Subdivision Control Law.” *Barry* at 320. “[A] planning board ANR approval based upon [G.L. c.41, §81L(c)] that a way has “sufficient width, suitable grades and adequate construction” -- does not bind the town as to a subsequent ANR application involving the same way. . . . the condition of the way can change over time or across its length, and thus each effort to rely on [§81L(c)] for an ANR approval must be decided on the then-

⁸ “Collateral estoppel” is raised as a defense and seeks to prohibit a party from relitigating an issue adjudicated in a prior proceeding where the issue was identical to the current issue; the party against whom it is asserted was a party to, or was in privity with a party to the prior case; and a final judgment in the prior case was issued. Here, the plaintiff is attempting to use it offensively.

existing facts. *Barry* at 323 citing [*Goldman v. Planning Bd. of Burlington*](#), 347 Mass. 320, 324-325 (1964).

An “approved” way must actually be approved by the planning board under the subdivision control law. M.G.L. c.41, §§81M and 81O. Defined by §81L in the negative, an ANR plan is a plan which does not show a “subdivision” and a plan does not show a “subdivision” if after division, every proposed lot (1) has the required frontage (2) on a way that is certified by the city or town clerk as being maintained and used as a public way; or the way is “shown on a plan theretofore approved and endorsed in accordance with the subdivision control law”, or was in existence when the subdivision control law became effective having in the opinion of the planning board sufficient width, suitable grades and adequate construction to provide for vehicular traffic and for the installation of municipal services.

C. LAND COURT DECISIONS OF NOTE

[*Warden v. Bourne Zoning Board of Appeals*](#) 27 LCR 277 (2019) (18 MISC 000113) – no merger of lots separated by a private way

The doctrine of merger provides that undersized, adjoining lots are held in common ownership will be treated as a single, merged lot for zoning purposes if doing so would eliminate or minimize nonconformities.

In this case the plaintiff appealed from the building inspector’s, and then the Zoning Board’s decision, that her undersized lot had merged with another undersized lot across a private way. Going even further, the Zoning Board also determined that merger occurred by application of the derelict fee statute, M.G.L. c.183, §58, which provides that owners of real estate abutting a way—whether public or private—hold the fee interest to the centerline of the way.

The Land Court judge determined the Zoning Board’s decision to be erroneous and vacated its determination. Physical barriers such as roads or bodies of water prohibit lots from merging. Simply put, such barriers prohibit such lots from being used as a single lot.

[*Duggan v. Town of North Attleborough*](#), 27 LCR 483 (2019) (18 MISC 000007) – alteration of nonconforming office space – addition of massage therapist – definition of professional office

The Zoning Board in this case upheld the building inspector’s determination that leasing space in a nonconforming professional office building to a licensed massage therapist would expand the nonconformity and require a variance. The plaintiff, who owned and operated his law office in the building, appealed to the Land Court.

Judge Long disagreed with the building inspector that a licensed massage therapist was not a “professional” within the scope of the grandfathered protection and reversed and vacated the Board of Appeals’ decision. Absent a bylaw definition of “professional” to guide the analysis, the judge applied the usual rules of construction guided by accepted meanings in other legal

contexts and dictionaries, citing the SJC's definition in Framingham Clinic, Inc. v. Zoning Bd. of Appeals, 382 Mass. 283, 292 (1981), to wit, "a calling in which one professes to have acquired some special knowledge used by way either of instructing, guiding, or advising others, or of serving them in some art". Consulting a dictionary, the judge noted the definition of "Profession" as 'an occupation such as law that requires considerable training and specialized study' and "Professional" as "of, relating to, engaged in, or suitable for a profession: lawyers, doctors, and other professional people" . . . "conforming to the standards of a profession" . . . "a skilled practitioner; an expert."

Based on those definitions and after examining the training and licensing required, the judge ruled that a licensed massage therapist was indeed a professional whose office qualifies as a professional office. The judge also found that the building inspector and Board's reliance upon additional traffic and parking concerns to be "pretextual" stating that the addition of one therapist and a part time assistant working on one patient at a time would not increase traffic and parking needs.

Smith v. West Tisbury Zoning Board of Appeals 27 LCR 232 (2019) (18 MISC 000230) – merger of lots – husband and wife

Judge Vhay begins his decision by noting that "Coverture" or the doctrine of treating two people as one upon marriage, has been "ostensibly abolished". The plaintiff Michael Smith purchased Lot 68 which was improved by a single family home with his own funds. After marrying Judith Smith in 1985, the plaintiffs spent time at the property, but the wife never had a financial interest therein and in fact, they maintained separate finances. In 1986 Lot 68 became nonconforming due to a zoning amendment requiring 3-acres of land for single family homes.

In 1994, Judith Smith purchased Lot 69 with her own money. In 1997, Judith Smith became ill and died in 2000. Nothing had ever been done with Lot 69 which remained undeveloped and wooded and solely in Judith Smith's name. Lot 69 was her only estate asset. In 2014, Michael Smith sold Lot 68 and in 2017, applied for a building permit for Lot 69 which the building inspector denied because the owners of Lots 68 and 69 had married, and thus, the lots merged. Michael Smith appealed to the Board of Appeals which upheld the building inspector's decision.

In his decision, Judge Vhay noted that the appellate courts have extended the doctrine of merger, requiring adjacent lots in common ownership to be used as one lot in order to minimize nonconformities, in two ways. First, by applying merger to after acquired adjacent lots⁹ and second, to lots where there is "common control". In order to have common control over the land, the property owner must have it within his/her power to exercise control over the lots such that the adjoining land can be used to reduce nonconformities. Cases where common control has been found involve ownership of lots in a trust where there are sole beneficiaries, lots owned as

⁹ In the seminal merger case of *Preston v. Hull*, 51 Mass.App.Ct. 236 (2001), the lots were in common ownership at the time that the zoning bylaw was amended rendering the lots undersized.

tenants by the entirety or corporate ownership. Marriage however, does not itself provide proof common control of property.

D. SIGN BYLAWS AND ORDINANCES

Municipalities have struggled to conform their sign bylaws and ordinances with the requirements of the Constitution since the U.S. Supreme Court's 2015 decision in *Reed v. Town of Gilbert*¹⁰. Since *Reed*, the courts have been hostile to such regulations, finding them to be too broad, rather than "narrowly tailored to serve a compelling interest." In April 2019, the City of Holyoke executed a Consent Judgment and Permanent Injunction under which it was permanently enjoined from enforcing its zoning ordinance prohibiting temporary signs on property or motor vehicles. *Molloy v. City of Holyoke*, 3:18-CV-30182 (D. Mass. 2019) The American Civil Liberties Union Foundation of Massachusetts thereafter issued an [open letter](#)¹¹ to all cities and towns emphasizing that municipalities are extremely limited in enforcing sign bylaws that restrict or prohibit political signs on private property.

Any regulation that imposes differing restrictions on signs is likely to be struck as unconstitutional. But the Supreme Court held unanimously (pre-*Reed*) that governments can regulate signs (*City of LaDue v. Gilleo*, 512 U.S. 43, 58 (1994)) and a majority held that a government could regulate commercial speech differently from non-commercial speech (*Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507 (1981)). How much of this precedent remains after *Reed* is unknown. So what to do if a municipality does not want to throw in the towel on regulation of signs?

Regulate sign characteristics that affect public safety, such as size, illumination, movement, location, and height. Each of these characteristics could obstruct views or distract motorists. Courts generally have recognized community aesthetics to be an appropriate matter for regulation under a municipality's police powers, such that color or materials may be the subject of a sign ordinance or bylaw.

Your municipality may want to impose greater restrictions on signs in residential or pedestrian areas than on business or industrial zones. If so, be sure to ensure that there is a clear legislative record to support the distinction.

There is some thought that a sign regulation can regulate or even prohibit off-premises signs, that is, signs that advertise goods, products, or services that are not sold or manufactured on the property on which the signs are located. While it requires reading the content of the sign to determine if it is an off-premises sign, the concurring opinions in *Reed* would seem to permit this

¹⁰ https://www.supremecourt.gov/opinions/14pdf/13-502_9olb.pdf; 135 S. Ct. 2218 (2015)

¹¹ https://www.aclum.org/sites/default/files/20190423_open_letter_to_towns.pdf

limited amount of content-based regulation. Again, the legislative record in support of the distinction will be critical.

Another regulation that is content-based but likely to be permitted is regulation of government-required signs on private property. For example, most municipalities require that property owners post signs warning of dangers such as high voltage, identify the property address such as house numbers, or post NO TRESSPASSING signs. Since these signs are necessary to protect the public or the property owner or enhance emergency response, they should be eligible for differential dimensional or other limitations without running afoul of *Reed*.

May a municipality regulate temporary signs, even political signs? Political speech is afforded the highest degree of protection under the First and Fourteenth Amendments. Nonetheless, there is some suggestion that *Reed* would permit reasonable limits on the size, number, location, and duration of such signs. One suggested definition of a temporary sign is “a banner, pennant, poster, or advertising display constructed of paper, cloth, canvas, plastic sheet, cardboard, wallboard, plywood, or other like materials, and that appears to be intended or is determined by the enforcing authority to be displayed for a limited period of time, not permanently affixed to the ground or a structure.” The time limitation cannot be unreasonably short.

The parties agreed in the *Molloy v. Holyoke* case that the municipality cannot require that signs obtain a sign permit before erection. While some commentators opine that a municipality can require a sign permit, until the matter is settled by an appellate court, an ordinance or bylaw that requires pre-approval of signs is not recommended.

Sign regulation remains an area fraught with traps for the unwary. Signs themselves, however, can be a real source of annoyance to a neighborhood and complaints to local officials. Tread carefully!

E. LEGAL AUTHORITY TO ACT: TOWN MEETING VS. SELECT BOARD

There are times when citizens want to check a board’s authority by requiring that Town Meeting voters approve items that a state statute assigns to the authority of the board. Town Meeting voters tried to do just that in one town by adopting a Bylaw that would have required Town Meeting approval of any Host Community Agreement (HCA) for recreational marijuana. It also sought to void any previously signed HCA that did not comply with *M.G.L. c.94G*. On January 15, 2019, ([Case #9154](#)) the Attorney General’s Municipal Law Unit disapproved the Bylaw.

The Attorney General concluded that the proposed Bylaw interfered with the contracting authority of the Board of Selectmen, as the statute gives approval of HCAs to the municipality’s contracting authority and does not require Town Meeting approval. The statute, *M.G.L. c.94G*, §3, requires that a marijuana establishment or a medical marijuana treatment center execute an agreement with the host community. It does not specify the method of approval by the host community. The regulations, 935 CMR 501.101 (1)(a)(8) state that the applicant for a marijuana

establishment license must submit a certification “signed by the contracting authorities for the municipality....”

The Attorney General noted that negotiations over HCAs are protracted, conducted by representatives who have the authority to agree to terms. But there is no representative who can speak for Town Meeting and no method by which either party can know if the negotiated terms will be approved by Town Meeting. Since the negotiation of an HCA can be lengthy and complicated, potentially for naught, the requirement of Town Meeting approval was deemed to be an unreasonable risk to the prudent business person and thus barred by *M.G.L. c. 94G*, § 3 as unreasonably impracticable.

Moreover, since the statute and regulations are silent as to Town Meeting approval of HCAs and the regulations refer only to the community’s contracting authority, the Attorney General concluded that the Legislature intended that the Board of Selectmen in its capacity as the Chief Executive Office should exercise its traditional contracting role. By requiring Town Meeting approval of HCAs, the Attorney General concluded, the Bylaw text “usurps the authority of the Board of Selectmen” to enter into contracts on the Town’s behalf....”

F. ENFORCEMENT OF SPRINKLER STATUTE – ADA AND FAIR HOUSING

In *Summers v. City of Fitchburg* 940 F.3d 133 (1st Cir. 2019), the First Circuit Court of Appeals ruled that the requirement for installation of sprinklers does not violate the Americans with Disabilities Act (“ADA”) or Fair Housing Amendments Act (“FHAA”) when applied to sober houses.

This case arose out of Fitchburg’s enforcement of M.G.L. c.148, §26H requiring the installation of sprinkler systems in lodging and boarding houses occupied by six or more unrelated residents. The plaintiff and his nonprofit organization operate sober houses for recovering addicts. The complaint filed in federal court asserted claims including an allegation that Fitchburg failed to provide reasonable accommodations under the FHAA and ADA. The U.S. District Court granted Fitchburg’s motion for summary judgment and the plaintiffs appealed to the First Circuit.

The FHAA defines discrimination as “a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford {a handicapped individual} equal opportunity to use and enjoy a dwelling.” *Summers* at 139 citing 42 U.S.C. §3604(f)(3)(B). Reasonable accommodation claims require a showing of a qualifying handicap, a defendant’s knowledge of that handicap, a request for a specific accommodation that is reasonable and necessary for the individual to enjoy the particular housing, and the defendant’s refusal to make such accommodation.

The ADA requires that a public entity, “make reasonable modifications in policies, practices, or procedures when . . . necessary to avoid discrimination on the basis of disability, unless the

public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.” *Summers* at 139 citing 28 C.F.R. §35.130(b)(7)(i).

For purposes of discussing the claims, the court assumed that recovering addicts qualified as handicapped individuals.¹² Plaintiffs’ request for an accommodation was based solely upon the cost of installing sprinkler systems, which cost would require a raise in the prices charged to recovering addicts thus limiting the availability of treatment to only those who could afford it.

The First Circuit wasted no time in ruling that the plaintiffs’ failed to show that their request was reasonable. Discussing the requirements for such a showing including the benefits that would be afforded to the handicapped individual balanced against the burdens to the public entity for providing the accommodation, such as financial costs and impacts on the public, the First Circuit held that a reasonable accommodation “imposes no ‘fundamental alteration in the nature of the program’ or ‘undue financial and administrative burdens’ on the defendant. . . a plaintiff is not entitled to a waiver of a zoning or building-code rule if the waiver “is so ‘at odds with the purposes behind the rule that it would be a fundamental and unreasonable change.’” *Summers* at 140 (citations omitted). Whether the accommodation requested poses a threat to public safety also factors into whether the request is reasonable. A waiver of the requirement for the installation of sprinklers is at odds with the purpose of the rule, and poses a threat to public safety as well.

G. FILMING IN PUBLIC BUILDINGS

There is a well-established right, protected by the First Amendment, to film government officials engaged in their duties in a public place. *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011). Pursuant to that right, you may soon have visitors appear at your Town or City Hall, or perhaps your public library, and begin videotaping throughout the space.

The videographers call themselves “First Amendment Auditors.” They make and then post their videos on YouTube and seek to gain followers by recording confrontation that will get them views. Sometimes, if an arrest occurs, they will return with other “Auditor” groups with the hope of provoking more confrontations.

Courts generally recognize the ability of governments to regulate the time, place, and manner of constitutionally protected activity in traditional public fora and somewhat greater regulatory flexibility for designated or limited public fora. *E.g., Roman v. Trustees of Tufts College*, 461 Mass. 707, 714 (2012). With respect to time, there is not much doubt that governments can limit the hours during which a public building is open to the public. Nor is there much disagreement that only public places within government buildings can be accessed and videotaped. But it is not always easy to define what constitutes a public place for determining what level of regulation

¹² The FHAA uses the term “handicapped” while the ADA employs the term “disabled”. Throughout the case, the court used “handicapped” for consistency.

of public activity is permitted. There is not much case law on specific places within public buildings since most cases of videotaping involve police officers effectuating arrests, but a state trial court, in the course of dismissing a criminal charge against a photographer, accepted the hallway of a district court to be a public place. Finally, the right to regulate the manner of protected activity means that you may require that videotaping not interfere with the primary governmental nature and use of the building.

So what can you do? Ideally you would want a designated person to greet the Auditors as soon as staff becomes aware that they are on site. The staff person would then guide the videographers to the public areas of the building. Employees can be advised that, if they are uncomfortable being videotaped, they can leave their desks until the videographers move on. You can secure or post non-public areas so that members of the public are lawfully excluded.

In general, communities have had better luck dealing with these Auditors if they do so in a non-confrontational manner. You are less likely to have them return if they do not experience a dramatic exchange.

III. REGULATORY MATTERS

A. IGR'S OF NOTE

The Division of Local Services has issued two new Informational Guideline Releases, one on [Lease Purchase Finance Agreements](#)¹³ and one on [Other Post-employment Benefits Liability Trust Funds](#)¹⁴.

Lease Purchase Finance Agreements

Pursuant to G.L. c. 44, § 21C, a city, town, or water, sewer, or other improvement district may authorize a department to execute a lease purchase financing agreement to acquire equipment or improve a capital asset. The agreement must be recommended by the chief executive officer and approved by a two-thirds vote of the legislative body. The Act was adopted as part of the [Municipal Modernization Act of 2016](#)¹⁵. IGR No. 19-9 explains the requirements of the law, the procedures and treatment of lease purchase financing agreements. The agreement must be either for the acquisition of equipment that could be financed by the issuance of debt, or for the improvement of a capital asset that could be financed by the issuance of debt.

The vote of the legislative body should include the identity of the item to be acquired or improved, the maximum term of the agreement, and the authorized department. The IGR includes a sample legislative body authorization vote. The term of the agreement cannot exceed

¹³ <https://www.mass.gov/files/documents/2019/05/17/igr2019-9.pdf>

¹⁴ <https://www.mass.gov/files/documents/2019/06/10/igr2019-10.pdf>

¹⁵ <https://malegislature.gov/Laws/SessionLaws/Acts/2016/Chapter218>

the useful life of the equipment or capital asset improvement. The useful life is determined by the chief executive officer.

Lease purchase financing agreements must be authorized before their effective date. Once approved and the first fiscal year payments are appropriated, the agreement is a binding obligation for its entire term. The appropriation need not be separate but may be included in an annual operating or capital budget for the authorized department. After the first year, if the payment is not appropriated, the assessors must include the cost when setting the tax rate.

Regional school districts should follow G.L. c. 71, § 16(p) rather than G.L. c. 44, § 21C for lease purchases of equipment for educational purposes.

Other Post-Employment Benefits Liability Trust Fund

Another change enacted by the Municipal Modernization Act was to Other Post-employment Benefits Trust Funds (OPEB Fund). Your municipality may have already accepted G.L. c. 32B, § 20 to establish an OPEB Fund. Unlike most amendments to local acceptance statutes, if your municipality wishes to take advantage of the changes to the law, you must re-accept the statute. If not reaccepted, your Fund will continue to operate under its original terms.

The revised statute is accepted by vote of the legislative body for a city or town, by vote of the county commissioners for a county, by vote of the regional school committee for a regional school district, and by other by vote of the district meeting or other appropriating body. It is effective upon acceptance and cannot be revoked.

The governing body will approve a Declaration of Trust that identifies the Trustees, describes the duties and powers of the Trustees, and sets the custody and investment of the Trust funds. Appropriations into and out of the Trust can only be voted by the governing body. If a Declaration of Trust is not initially adopted, details such as the identity of the Trustees and investment parameters will need to be voted by the governing body. If no trustee is established by the governing body, the treasurer is the trustee. Sample votes are included in IGR 19-10, which describes in detail the changes to the law.

One change from the Municipal Modernization Act applies to *all* OPEB Trusts, whether subject to the pre-2016 law, post-2016 law, or to a special act. G.L. c. 32B, § 20A requires that when a governmental unit obtains an actuarial valuation report in accordance with GASB requirements, it must provide the report to the Public Employee Retirement Administration Commission (PERAC), which may require further information regarding liabilities or normal cost and benefit payments. A copy of the report must also be submitted to the Department of Revenue Bureau of Accounts.

B. OPEN MEETING LAW – M.G.L. c.30A §§18-25

Attorney General's Division of Open Government – OML Determinations and Declinations

Absent the issuance of any significant court cases addressing the Open Meeting Law (“OML”) in 2019, we took a look at a few of the determinations and declinations issued by the Division of Open Government in response to OML violation complaints during 2019. These decisions and more can be found at the Division of Open Government at www.mass.gov/ago.

The decisions below highlight the need to remain vigilant when complying with the various requirements of the OML.

OML 2019-14 – City of Fall River (various boards) – No Trespass Order

The complainant was issued a No Trespass Order that specifically included language stating that the Order “should not be interpreted or enforced to prevent [the] individual from attending scheduled and notice public meetings or hearings.” Notwithstanding that he didn’t attend any scheduled meetings or hearings, this individual filed an OML complaint alleging a lack of access. The AG declined to find a violation where the individual was told that he could attend, and where it was not a situation where he tried to attend and was denied.

Notably, the AG commended the City for drafting the No Trespass Order narrowly in order to avoid unnecessarily excluding the individual from posted meetings of public bodies.

OML 2019-67 – Boston Zoning Board of Appeal – Right to Video Meeting

The Complainant alleged that their right to video the Zoning Board’s public hearing was violated when the Chair stated that recording was “not authorized in this room”. M.G.L. c.30A, §20(f) provides that after notifying the Chair, audio and video recording is specifically authorized “subject to reasonable requirements of the chair as to the number, placement and operation of equipment so as not to interfere with the conduct of the meeting”. It was irrelevant that the meeting was also being livestreamed.

OML 2019-137 – Kingston Board of Selectmen – Inclusion of Items to be Discussed

The AG determined that the Kingston Board of Selectmen did not violate the OML when during its “Economic Development” discussion, as identified on the meeting notice, when the Town Administrator responded to requests that he make grant opportunities a top priority by stating that his office spends approximately 15-20 hours per week responding to public record requests and OML complaints and acknowledged that his time would be better spent working on grants. During this portion of the discussion the Complainant was identified as a repeat requestor, The

Complainant alleged an OML violation because this discussion was not included in the list of items to be discussed.

The AG stated that the Town Administrator's remarks "naturally flowed" from the Board's consideration of the Economic Development topic and the Town Administrator's ability to devote time to the grant process. The AG also stated that the OML "does not require a public body to anticipate the course of deliberation or the outcome of a discussion, only that it identify the anticipated discussion topic with sufficient specificity to reasonably advise the public of the issues to be discussed at the meeting".

OML 2019-140 – Malden City Council – Deliberation via Email

It was determined that the Malden City Council violated the OML when it deliberated outside of a public meeting via an email sent to a quorum of the Council regarding a matter it was considering. The email in question was sent by one member to the Assistant City Solicitor thanking him for work on an OML violation, and then making recommendations as to how such violations should be handled in the future because of harassing complaints. The email was copied to a quorum of the City Council.

In finding that a violation occurred, the AG stated that the OML defines deliberation as "an oral or written communication through any medium, including electronic mail, between or among a quorum of a public body on any public business within its jurisdiction". Responding to the Council's argument that the Councilor did not intend to deliberate, the AG stated "[t]he mere act of sending such a communication to a quorum of other members is itself a deliberation." No exceptions are carved out for the definition of "deliberation" for discussions that do not result in a decision or vote.

OML 2019-163 – Town of Acton (various boards) -

One individual filed 62 separate OML complaints against 14 public bodies within the Town of Acton. In examining the complaints, the AG determined that some violations occurred, others could be addressed with remedial action, and that others presented no OML violations.

This particular AG determination applied to the remaining 46 complaints alleging 144 violations, and discusses a host of obligations and best practices required to ensure compliance with the OML. The following is not intended to be an exhaustive list of OML requirements.

Deliberation

- Deliberation does not include the distribution of reports or documents to be discussed provided no opinion of a member is expressed.
- No exception for deliberations that do not result in a decision or vote.
- Expression by one member of his/her opinion is a deliberation even if no one responds. Hence the AG cautions on the use of social media and electronic communications.

- There can be a quorum of members present without triggering the OML, provided there is no deliberation. For instance, attending the meeting of another board.

Posting Notice

- Post Notice of meeting at least 48 hours prior to such meeting, excluding Saturdays, Sundays and legal holidays. G.L. c.30A, §20(b) with a copy of the notice to city or town clerk for posting in a manner conspicuously visible to the public at all hours. §20(c)
- Include date, time, place of meeting and topics which the chair reasonably anticipates will be discussed identified with sufficient specificity so as to reasonably advise public of the issues to be discussed. §20(b) and 940 CMR 29.03(2)(b)
- Do not discuss topics not reasonably anticipated by the chair 48 hours in advance. However, a meeting notice can be amended to include unanticipated topics and provide as much notice as possible. This notice must include the date and time of the original posting and the date and time the posting was revised.
- In preparing the notice the AG discourages the use of abbreviations or acronyms not widely understood by members of the public.
- Two or more boards may hold a joint meeting, but each board must comply with the notice requirements of §20.

Sufficiency of Meeting Minutes/Approving Minutes in a Timely Manner

- Accurate minutes of all meetings must be created and maintained, including executive sessions, including the date, time and place, members present and absent, a summary of the discussion on each topic and a list of the documents or exhibits received, and all actions taken including votes.
- Substantial compliance means that the minutes must contain enough detail and accuracy so that a member who did not attend the meeting will be able to read the minutes and have a complete understanding of the proceedings.
- AG encourages the inclusion of dissenting or minority opinions and opposing viewpoints when a significant debate occurs.
- Physical documents or exhibits must be attached to the minutes (or a link provided).
- Minutes must be approved in a timely fashion meaning, “within the next three public body meetings or within 30 days, whichever is later, unless the public body can show good cause for further delay.”
- Executive session minutes must be reviewed periodically to determine if purpose for the executive session has ended, and the minutes can be released. Approval of executive session minutes does not mean they can be released.

Executive Session

- Limited to the purposes set out in G.L. c.30A, §21(a).
- When convening to conduct collective bargaining or to discuss strategy with respect to collective bargaining or litigation the bargaining unit or the litigation must be identified in the motion if doing so will not compromise the lawful purpose for secrecy.

- When considering the negotiation of the sale or lease of real estate, the property must be identified in the motion unless doing so will have a detrimental effect on the negotiating position of the city. (§21(a)(6) or Purpose 6)
- The specific provision of any general or special law or federal grant-in-aid requirement must be cited in the motion. (§21(a)(7) or Purpose 7)
- Motion to go into executive session must be voted on by a roll call vote.
- Motion must state whether or not the public body will reconvene in open session.

Responding to Request for Open or Executive Session Meeting Minutes

- Open session minutes, whether approved or in draft form, are public records and must be produced within 10 days of request. If minutes are not yet in existence, there is still the requirement to respond with an explanation for why they are not produced.
- Must also respond to request for executive session minutes within 10 days. If minutes are ready for release, inform the requestor. If the public body has not reviewed the minutes to determine whether continued nondisclosure is required, the body must do so and release the minutes, if appropriate, no later than the next meeting or within 30 days, whichever is first. A response is still required notifying requestor that review will be made.
- Executive session minutes may be withheld “as long as publication may defeat the lawful purpose of the executive session but no longer.” (§22(f))
- A request for copies of meeting minutes triggers the OML, and the request must be included on the notice/agenda. Also, a public record request under the OML requires a response within 10 calendar days.

Responding to an Open Meeting Law Complaint

- Within 14 days of receipt of a complaint, the public body must review the complaint, take remedial action if appropriate, and send the AG a copy of the complaint with a description of the remedial action taken.
- Chair must distribute a copy of the complaint to all board members. The board meets to review the complaint, formulate a response, or meet to delegate that authority, and respond to the complaint with 14 business days.
- The public body must review the complaint before referring it to counsel.
- OML complaints may be reviewed in executive session. G.L. c.30A, §21(a)(1)

Accessibility of Meetings

- The venue for the meetings must be accessible, and remain accessible for the entire duration so that interested persons can be physically present. Individuals should be able to see and hear what is being discussed. Doors should not be locked.

OML 2019-166 – Concord Historical Commission – public participation not required

The OML does not require a public body to allow public participation, but rather provides that “[n]o person shall address a meeting of a public body without permission of the chair and all

persons shall, at the request of chair, be silent. G.L. c.30A, §20(f). Although the AG encourages the allowance of public participation, the OML is not violated if a board does not allow questions. Also, the OML is not violated if, as alleged, the chair acts unprofessionally or in an uncivil manner.

OML 2019-167 - Weston School Committee – notice must include executive session

It was determined that the OML was violated where the notice did not reference that the Committee would be going into executive session, and the executive session minutes were insufficiently detailed. In this case the executive session minutes simply stated, “discussed upcoming negotiations”; “review of negotiations”; “points and strategies discussed” without providing the requisite summary of the discussion.

Helpful Links: [Public Body Checklist – Executive Session](#)

[Public Body Checklist – Posting a Notice](#)

[Public Body Checklist – Creating and Approving Meeting Minutes](#)

C. CONFLICT OF INTEREST

[Advisory No. 19-01 – Gifts and Gratuities](#) - The State Ethics Commission issued this new advisory on December 18, 2019 to replace *Advisory 04-02: Gifts and Gratuities*. The Advisory “explains how the conflict of interest law, G.L. c. 268A, applies when a [state, municipal or county] is offered a gift, meal, entertainment, travel expenses, or other things of value”.

Absent an exemption under [930 CMR 5.08](#), public employees may not accept “things of value” worth \$50 or more because of their official position or because of any official action performed, or to be performed in the future. Gifts valued under \$50 may be accepted (unless they are bribes) however, in certain circumstances a disclosure may need to be filed to dispel the appearance of a conflict of interest under M.G.L. c.268A, §23. See, [930 CMR 5.07](#).

The advisory also provides a section on gifts from lobbyists and includes an extensive list of FAQs.

[Public Education Letter](#) - Secretary of State William Galvin

To ensure a prompt resolution without formal proceedings, but without necessarily admitting to the facts or legal conclusions made therein, Secretary Galvin agreed to the issuance of a public education letter (the “Letter”) by the State Ethics Commission (“Commission”) addressing the use of his position to engage in political activity in support of his 2018 reelection.

The basis for the Letter was the Secretary’s issuance of the “Information for Voters Booklet” (the “Booklet”) prior to the 2018 state election. The Booklet contains ballot related material and is mailed to all voters in the Commonwealth at their residential addresses; to municipal clerk’s offices; and is posted in all polling places. To ensure that the Booklet is delivered to voters in a

timely fashion, it is ordered before the exact number of ballot questions is known and generally contains more pages than are needed. The remaining blank pages are used to inform voters about other governmental services provided by the Secretary's office. This particular version of the Booklet contained information for individuals who may believe they were victims of fraud. The information had several prominent references to "Secretary Galvin's office" rather than simply the "Secretary's office" or "Securities Division". In fact, "Secretary Galvin's office" appeared twelve times on page 21 of the Booklet. The Secretary stated he did not review the Booklet before it was mailed to voters.

Also, the "Early Voting" and "Early Voting Here" signs distributed by the Secretary's office to cities and towns to be used to identify Early Voting places had the Secretary's full name with the title Secretary of the Commonwealth at the bottom. The Secretary's response was that using the signs was not mandatory and again, he did not review them before they were distributed.

The Commission found that the repeated use of the phrase "Secretary Galvin's office" in the Booklets provided him with a political benefit, and highlighted and personally credited him with the Securities Division's achievements in the area of fraud. Thus the Booklet provided him with "free positive publicity" in connection with the state election in which he was a candidate, which was an unwarranted privilege not available to any other candidate. The "Early Voting" signs gave the appearance of political campaign signs, another "substantially valuable unwarranted privilege".

APPENDIX A

MEMORANDUM

Date: November 19, 2019

To: DPW employees whose position requires a Commercial Driver's License (CDL)

From: Director of Human Resources

Subject: FMCSA Drug & Alcohol Clearinghouse

Beginning on January 6, 2020, employers will be required to report positive drug and alcohol results, refusals to take a drug or alcohol test, as well as actual knowledge of a violation to the (Federal Motor Carrier Safety Administration) FMCSA Drug and Alcohol Clearinghouse for employees whose position requires them to possess a Commercial Driver's License (CDL).

Also beginning January 6, 2020, employers or their designated third party administrator (TPA), will be required to conduct annual queries on current employees and full queries for prospective employees, whose position requires a CDL, to check if they are prohibited from performing safety-sensitive functions, such as operating commercial motor vehicles, due to an unresolved drug and alcohol program violation.

AllOne Health has been designated as our third party administrator (TPA) to conduct annual queries for all current DPW employees and full queries for prospective DPW employees, whose position requires a CDL. If records are found during the limited query, a full query will be conducted immediately. If the driver has a violation on record and no negative "Return to Duty" test result shows in the query, the driver will be removed from safety-sensitive functions, which will result in discipline, up to and including termination.

Employees do not have to register, however they must give consent for limited and full queries. If consent is refused, the query can't be conducted and the driver will be removed from safety-sensitive functions, which will result in discipline, up to and including termination.

Enclosed please find the "General Consent" form for limited queries of the FMCSA Drug and Alcohol Clearinghouse. Please print your name where indicated, include your CDL license number and expiration date at the bottom, sign, date and return to DPW Administrative Assistant, Teresa Cochran no later than December 13, 2019.

Director of Human Resources

Cc: Superintendent of Public Works



GENERAL CONSENT FORM

**LIMITED QUERIES OF FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION (FMCSA)
DRUG AND ALCOHOL CLEARINGHOUSE**

I, _____, hereby provide consent to AllOne Health, TPA for the
(Driver name)

City of Woburn, to conduct a limited query annually of the FMCSA Commercial Driver's License Drug and Alcohol Clearinghouse (Clearinghouse) to determine whether drug or alcohol violation information about me exists in the Clearinghouse that would prohibit me from performing safety-sensitive functions with the City of Woburn DPW. This consent shall be effective for the duration of my employment with the City of Woburn DPW unless specifically revoked in writing by me.

I understand that if the limited query conducted by AllOne Health indicates that drug or alcohol violation information about me exists in the Clearinghouse, FMCSA will not disclose that information to AllOne Health without first obtaining additional consent from me.

I further understand that if I refuse to provide consent for AllOne Health to conduct a limited query of the Clearinghouse, the City of Woburn DPW must prohibit me from performing safety sensitive functions, including driving a commercial motor vehicle, as required by FMCSA's drug and alcohol program regulations, which could result in discipline, up to and including termination.

Employee Signature

Date

CDL License # _____

License Expiration Date: _____