BRIEFS ON BRIEFS: UPDATES ON MUNICIPAL LAWS

MASSACHUSETTS MUNICIPAL ASSOCIATION 2024 ANNUAL CONFERENCE

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ZONING/DOVER AMENDMENT

- *Hume Lake Christian Camps, Inc. v. Planning Board of Monterey*, 492 Mass. 188 (2023)
  - A nonprofit Christian organization plaintiff wanted to build a recreational vehicle (RV) camp on its campground, to house families who attend camp sessions, and volunteers and seasonal staff who performed various duties at camp. The plaintiff was dedicated to Christianity, with a focus on providing Christianity-based programming for all ages.
  - The plaintiff operated a camping ministry. The campground provided chapel sessions, religious instruction, spiritual reflection opportunities, and secular recreational activities.
  - The proposed project was a 12-space camp for temporary travel trailers, motorhomes, tents, and seasonal staff housing trailers, separated from the rest of the campground, but within walking distance of the facilities.
  - The Monterey Planning Board denied a site plan review application for the RV camp, determining that it was not an exempt religious use protected by the Dover Amendment. Monterey's zoning bylaw required site plan review for any non-municipal educational use or religious use, only permitted uses as authorized, and prohibited the principal use of a trailer or mobile home park.

- *Hume Lake Christian Camps, Inc. v. Planning Board of Monterey* (continued):
  - The RV camp had a religiously significant goal as a primary or dominant purpose and therefore was protected by the Dover Amendment, which precludes local zoning bylaws/ordinances from prohibiting, regulating, or restricting the use of land or structures for religious purposes on land owned or leased by a religious sect or denomination or a nonprofit educational corporation (M.G.L. c. 40A, § 3).
  - The Planning Board did not dispute the Land Court's finding that the plaintiff was a religious organization subject to the Dover Amendment's protection.
  - The Supreme Judicial Court (SJC) was left to determine whether:
    - the **proposed** use had as a bona fide goal something that could be reasonably described as "religiously significant"; and
    - the primary or dominant purpose for the **proposed** use of land or structures was the religiously significant goal.

- *Hume Lake Christian Camps, Inc. v. Planning Board of Monterey* (continued):
  - The SJC's inquiry looked at the proposed use of the land or structure as a whole and recognized that religious purposes are broader than typical religious purposes. As a result, the focus should be on the entire RV camp as a single structure, not each individual use.
  - The proposed RV camp would facilitate the operation of and strengthen attendance at the camp, which had a mission of developing religious practice and spiritual growth.
    - The purpose of housing families served the plaintiff's religious mission by bolstering attendance at a proposed family camp program – providing lodging served a religious purpose by allowing families to attend a religious camp program.
    - The purpose of housing volunteers and seasonal staff served and advanced the plaintiff's religious mission by facilitating operating, maintaining, and improving the camp. Even though these individuals performed secular duties, housing them served a religiously significant goal.
    - It was immaterial why the plaintiff chose to house workers using RVs rather than permanent housing – the focus on housing workers furthered the plaintiff in carrying out its religious goals.

- *Hume Lake Christian Camps, Inc. v. Planning Board of Monterey* (continued):
  - The camp had a primary or dominant purpose to serve the plaintiff's evangelical mission, including cultivating religious experiences for believers and nonbelievers. This was reflected in programming and who could use the camp.
  - The focus is not confined to uses that are typical of or inherent to religious organizations. While recreational activities were offered, they existed to boost interest in the camp's religious offerings and to develop an environment to help individuals develop their faith.
  - While "nonbelievers" could attend camp programs, there was a purpose of proselytization.

ZONING/DOVER AMENDMENT (CONTINUED)

- *Martha's Vineyard Regional School District v. Oak Bluffs Planning Board*, 2023 WL 5704480 (Mass. Land Ct. Sept. 5, 2023)
  - The Martha's Vineyard Regional School District proposed an artificial turf playing field within the Water Resources Protection Overlay District (WRPOD) under the Oak Bluffs Zoning Bylaw. The ground water protection zoning bylaw prevented the use of land in the WRPOD if it threatened the water supply on Martha's Vineyard.
  - The Town of Oak Bluffs and its Planning Board opposed the project because of concerns that materials to build the playing field would contaminate the sole source aquifer serving Martha's Vineyard (*i.e.*, regulating open space to further the municipal goal of protecting drinking water).
  - The Planning Board denied a special permit, claiming that the denial was a permissible regulation of "open space" under the Dover Amendment.

- *Martha's Vineyard Regional School District v. Oak Bluffs Planning Board* (continued):
  - The Dover Amendment disallows local zoning bylaws from prohibiting, regulating, or restricting the use of land or structures for educational purposes, but permits reasonable regulations of open space (among other subjects).
  - The Zoning Act does not define "open space." However, after considering the language of the Dover Amendment (including the types of permissible subjects of regulation of educational uses), the Land Court concluded that, under the Dover Amendment, open space can only be used by a local zoning board as a **dimensional limitation** on an educational use.
  - The ground water protection zoning bylaw could allow the Planning Board to prevent an educational use that involves the generation, use, or storage of any toxic or hazardous materials in larger amounts than associated with a normal household h*owever, doing so was not a dimensional limitation on "open space" and violated the Dover Amendment when applied to the artificial turf field project.*

ZONING/DOVER AMENDMENT (CONTINUED)

- *Needham Enterprises, LLC v. Needham Planning Board*, 2023 WL 5216772 (Mass. Land Ct. Aug. 15, 2023)
  - The applicant challenged a special permit with conditions issued under a zoning provision that required a major project site plan review special permit for a proposed childcare facility. The applicant challenged application of the special permit process to the project and certain conditions imposed by the Needham Planning Board.
  - The 3rd paragraph of the Dover Amendment (M.G.L. c. 40A, § 3) prohibits a zoning bylaw from prohibiting or requiring a special permit "for the use of land or structures, or the expansion of existing structures, for the primary, accessory or incidental purpose of operating a childcare facility," although it allows reasonable regulations for certain matters.
  - Requiring the plaintiff to undergo the major site plan review special permit process violated the Dover Amendment's protection of childcare facilities.

- *Needham Enterprises, LLC v. Needham Planning Board* (continued):
  - The proposed facility met the reasonable regulations under the zoning bylaw, as permitted by the Dover Amendment (parking, area, frontage, setback, height, stories, lot coverage, and floor area ratio requirements).
  - The Planning Board couldn't impose requirements on the proposed childcare facility that differed from the dimensional requirements under the zoning bylaws reasonable regulations are those existing requirements set out in the zoning bylaws.
  - The challenged special permit conditions violated the Dover Amendment as they were outside the scope of permitted dimensional regulations. These included: capping the number of children and staff; requiring a police detail; requiring traffic studies; and imposing landscaping requirements. A front setback condition was impermissible because it conflicted with the zoning bylaw's regulation.
  - The Dover Amendment was applied to protect new structures for a childcare facility – the Land Court declined to follow an earlier decision that allowed a special permit requirement for a **new** childcare facility structure.

ZONING/DOVER AMENDMENT (CONTINUED)

- *NextSun Energy LLC v. Fernandes*, 2023 WL 3317259 (Mass. Land Ct. May 9, 2023)
  - An applicant and individual residents challenged various zoning decisions related to construction of a solar project on cranberry bogs in the Town of Norton.
  - The project included solar panels and a lithium-ion battery energy storage system (ESS).
  - The Land Court recognized that ancillary structures are included in the protection under the Dover Amendment for solar energy systems and structures that facilitate the collection of solar energy.

    The ESS stores power produced from the solar system and transfers it to the grid. Because of its role in collecting, storing, and distributing solar energy to the grid, the ESS was part of the project and protected by the Dover Amendment.

    The applicant challenged a condition prohibiting "perceptible" noise was invalid as lacking a measurable standard – although noise may fall within the scope of protecting the public health, safety, or welfare and serve as a topic for regulation under the Dover Amendment.

ZONING/MARIJUANA ESTABLISHMENTS

- *Genin v. Zurrin*, 2023 WL 3119631 (Mass. Land Ct. Apr. 27, 2023)
  - Dispute over whether a proposed marijuana cultivation operation was allowed in the Town of Egremont - Egremont adopted a general bylaw prohibiting marijuana cultivation.
  - The case followed a similar result as *Haven Center, Inc. v. Town of Bourne*, 490 Mass. 364 (2022), which upheld validity of a general bylaw banning recreational marijuana establishments:
    - Egremont did not historically regulate marijuana establishments by zoning bylaw.
    - A 16-month moratorium on recreational marijuana retail sales was not a comprehensive zoning scheme.
    - The general bylaw amendment outright banned marijuana cultivation and was silent on the use of land in Egremont for that purpose, the compatibility with nearby uses, and the community's character.
    - Egremont properly followed the procedure in M.G.L. c. 94G, § 3(e) to adopt the general bylaw prohibiting cultivation.
  - While a special permit was previously granted for a retail marijuana establishment, it was under a general zoning provision dealing with nonconforming uses and structures that applied to all zoning districts, and wasn't specific to marijuana establishments.

ZONING/MARIJUANA ESTABLISHMENTS

- *City of Malden v. Benevolent Botanicals*, 2023 WL 6890669 (Mass. Land Ct. Oct. 19, 2023)
  - A dispute over a proposal marijuana establishment (which requires a special permit in the City of Malden), where:
    - Malden contended that the applicant failed to properly file an application for a special permit, failed to properly comply with the Malden Zoning Ordinance, and M.G.L. c. 40A, § 9 (special permits), and was not entitled to constructive approval of a special permit application.
    - The applicant challenged the validity of the Malden Code's requirement that a special permit applicant must first obtain variances, sought a determination that the special permit requirements were met and the application was constructively approved, and argued Malden's application process was void for vagueness in violation of US and Massachusetts Constitutions.

- *City of Malden v. Benevolent Botanicals* (continued)
  - M.G.L. c. 40A, § 9 requires the special permit granting authority to hold a hearing within 65 days of an application's filing date and to make its decision within 90 days of the public hearing's date (unless extended), or else a constructive approval occurs. The Malden City Code followed this language, but required "proper filing" of the application before triggering the 65-day deadline.
  - The Land Court read all of Malden's zoning requirements applicable to marijuana establishments together and determined that a proper filing included the applicant obtaining a variance for the proposed location located within the residential buffer zone. A 14-foot variance from the 75-foot buffer zone requirement was required (and had been earlier denied by the Malden Board of Appeals). It declined to read the requirements in isolation. As a result:
    - The Malden Building Commissioner properly declined to forward the special permit application to the Malden City Council because it was incomplete (and notified the applicant as such).
    - The City Council was not required to take action on the application.
    - No constructive approval of the special permit application occurred.
    - The Malden City Code clearly laid out the process to acquire a marijuana special permit and the process was followed by the City and Building Commissioner, and therefore the process was not unconstitutionally vague.

ZONING

- *Lee v. Cai*, 102 Mass. App. Ct. 491 (2023)
  - Proposal to convert 2-unit townhouse into 5-unit building in Chinatown, reconfiguring existing units and adding 2 extra stories and a roof deck. The building was in the Chinatown zoning district and a groundwater conservation overlay district (GCOD).
  - GCOD was adopted following concerns about decreasing groundwater levels and related risks. The properties of the applicant and the abutter had settled in an uneven manner and were built on land that was once water but was filled.
  - The Appeals Court determined that the project required a conditional use permit because it involved an extension of a structure occupying more than 50 square feet of lot area. The more specific requirements applied where there was ambiguity as to what applied to the project.
  - The trial judge properly determined that the locus was not an appropriate site for the proposed project – the Boston Zoning Board of Appeals and the trial judge could consider the location of the project and its impacts on the neighborhood, including the probable impact of a 2-story vertical addition on the stability of the abutting property with which it shared a party wall.

ZONING (CONTINUED)

- *McLaughlin v. Zoning Board of Appeals of Duxbury*, 214 N.E.3d 1100 (Mass. App. Ct. 2023)
  - The Duxbury Zoning Board of Appeals (ZBA) denied a special permit application for a proposed residential pier over salt marsh to provide access to a river.
  - The Land Court annulled the only basis for the ZBA's denial because no rational view of the facts supported the ZBA's decision and it ordered issuance of the special permit.
  - The Appeals Court recognized that a court order (from judicial review) that required issuance of a permit is "exceedingly rare."
    - Here, an order compelling issuance of the special permit was unsupported because the special permit denial was based on an erroneous interpretation of zoning bylaws.
    - A remand to the ZBA was appropriate as the ZBA should have a chance to determine if reasonable conditions to a special permit could protect the interests targeted by the wetlands protection overlay zoning district in which the property was located.

ZONING (CONTINUED)

- *Musker v. Zoning Board of Appeals of Billerica*, 220 N.E.3d 1274 (Mass. App. Ct. 2023) (unpublished opinion under M.A.C. Rule 23.0)
  - A plaintiff (direct abutter) challenged the grant of dimensional variances to a developer to divide a property into 2 buildable lots.
  - Summary judgment was properly granted against the plaintiff, who was not a "person aggrieved" and lacked standing. The plaintiff failed to substantiate standing based on:
    - Water runoff – the developer showed the plaintiff's injury was unsupported or de minimis, and the plaintiff failed to provide credible evidence that the proposed buildings (rather than demolition of the previous structure) would increase water runoff to the plaintiff's property. The court could consider the developer's mitigation measures to determine standing.
    - Population density – the plaintiff only alleged speculative personal opinion, which was insufficient, and there was a significant distance from the new buildings to the plaintiff's home and property line.
    - Diminution in property value – the plaintiff failed to show a decrease in property value based on an increased risk of flooding, drainage, and excess water collection from the proposed buildings, as there was no showing that water runoff would increase to the plaintiff's property.

ENVIRONMENTAL

- *G. Mello Disposal, Corp. v. Bancroft*, 2023 WL 7277975 (Mass. Super. Ct. Nov. 3, 2023)
  - Judicial review of the denial of an order of conditions to build a new transfer station.
  - The Georgetown Conservation Commission denied a request to fill bordering vegetative wetlands (BVW) based on a lack of precedent for filling BVW in Georgetown, even though it met the performance standard under the Georgetown Wetlands Bylaw and Wetlands Regulations. The local provisions didn't authorize the Commission to refuse to issue an order of conditions on the basis that it never before permitted the filling of BVW for a private project (lack of precedent) – this was an unwritten standard external to the regulatory scheme and was arbitrary.
  - The Commission similarly relied on a lack of precedent for refusing an applicant to provide drainage calculations for the stormwater management plan – but this was also an unwritten standard without a basis in the Wetlands Regulations and improper.

ENVIRONMENTAL (CONTINUED)

- *Hill v. Conservation Commission of Falmouth*, 103 Mass. App. Ct. 1102 (2023) (unpublished opinion under M.A.C. Rule 23.0)
  - Judicial review from denial of an order of conditions to build a new walkway leading to an existing dock. A Falmouth Conservation Commission vote to grant the order of conditions failed and the Commission treated it as being considered denied; 2 days after the vote, the Commission issued a written decision (signed by a majority) explaining the reasons for denial.
  - The plaintiffs unsuccessfully argued that the proper procedure under the Falmouth Wetlands Bylaw and Falmouth Wetlands Regulations was to have a second vote specifically on the question of whether to deny the order of conditions.
  - Under the bylaw and regulations, the written denial was sufficient:
    - No second vote was necessary.
    - There was no requirement that drafting the written decision occur during the Commission's meeting.
    - There was no requirement that the Commission vote on the specific reasons for denial at the meeting.
    - The written decision was signed by more than half the members present at the public meeting as required.

ENVIRONMENTAL (CONTINUED)

- *Gobbi v. Town of Dedham*, 102 Mass. App. Ct. 1112 (2023) (unpublished opinion under M.A.C. Rule 23.0)
  - Judicial review of the denial of an after-the-fact application for a stormwater management permit. The Dedham Conservation Commission applied revised 2018 regulations that were adopted while the application was pending, rather than 2008 regulations that had been in effect.
  - The Appeals Court recognized that unless there's a vested rate, a change made in the law while a permit application is pending governs, rather than the law existing at the time of filing.
  - The plaintiff didn't have a vested right under the 2008 regulations:
    - The mere filing of the permit application didn't confer vested rights to the issuance of a permit. Before the 2018 regulations were adopted, 5 public hearings were held on the plaintiff's application and he had hadn't submitted an acceptable project plan.
    - The plaintiff failed to show **manifest injustice** requiring application of the 2008 regulations. The Commission had the authority under the authorizing bylaw to adopt and periodically amend the stormwater regulations – the plaintiff therefore couldn't expect that the project would be forever protected from regulatory changes, especially where he didn't submit his final project plan until 2 months after the 2018 regulations were adopted. The Commission also had asked the plaintiff to meet criteria under the 2018 regulations.

HEALTH

- *Perisho v. Board of Health of Stow*, 2023 WL 8610241 (Mass. App. Ct. Dec. 13, 2023)
  - Plaintiff abutters and near neighbors to a proposed 2-family affordable development sought judicial review of a Stow Board of Health decision that granted a septic system construction permit under Title 5.
  - The plaintiffs had standing to seek judicial review based on specific allegations of likely pollution of their private wells, supported by technical evidence from a qualified hydrologist.
  - The Board of Health was not required under Title 5 to apply a mass balance analysis to the proposed septic system because of the systems' gallons per day per acre design flow.
  - The Board of Health could make a credibility judgment over the plaintiffs' expert and weigh the credibility of witnesses and resolve factual disputes in the underlying proceeding. The Appeals Court recognized that the Board of Health's choice as to 2 fairly conflicting views by the applicant and plaintiffs should not be displaced.
  - Nothing in Title 5 prohibited a septic system from causing nitrogen levels to exceed the Massachusetts drinking water standard at an abutter's private well or to provide for revoking a system's construction permit on that basis.

HEALTH (CONTINUED)

- *MacDonald v. Kazokas*, 103 Mass. App. Ct. 1114 (2023) (unpublished opinion under M.A.C. Rule 23.0)
  - The plaintiff abutter challenged the Littleton Board of Health's decision to grant a permit and variance to construct a new septic system. Littleton had more stringent regulations than Title 5 – it prohibited a fill requirement for a septic system within 10 feet of a property line. The applicant originally obtained a septic permit and variance in 2014. In 2018, the applicant applied for and obtained a new septic permit and variance.
  - The Appeals Court held that it was not unreasonable for the Board of Health to suggest that the applicant was likely to qualify for a septic permit in 2018 given that she obtained one in 2014. Isolated comments – expressions of sympathy by the Board of Health about the applicant's situation – were immaterial.
  - The record supported the request for the variance as there were no feasible alternative locations for the septic system.
  - While granting a variance because one was granted before would be untenable (and negate the purpose of an expiration date required by state regulations), without a change in material facts or law, it was likely that the applicant would qualify for the new variance – and the Board of Health's acknowledgement of that situation didn't mean that the outcome was predetermined.

PUBLIC RECORDS

- *MassLandlords, Inc. v. Executive Office of Housing and Livable Communities*, 103 Mass. App. Ct. 1114 (Nov. 30, 2023) (unpublished opinion under Mass. App. Ct. Rule 23.0)
  - Lawsuit under the Public Records Law based on a request for street addresses of all applicants for certain rental assistance programs, including applicants with "timed out" (incomplete) applications. The lawsuit involved Exemption (c) ("materials or data relating to a specifically named individual, the disclosure of which may constitute an unwarranted invasion of personal privacy").
  - A privacy interest existed in the records because it would reveal the identities of persons who applied for rental/public assistance.
  - The requester failed to show a public interest in disclosing the tenants' addresses that substantially outweighed the privacy interests of rental assistance applicants. The requester claim a strong public interest in determining if the government agency disproportionately denied rental assistance to people of color.
  - However, when asserting a public interest that responsible public officials acted negligently or improperly in performing duties, more than a bare suspicion is required – it requires evidence that would support a reasonable person to conclude that alleged government impropriety may have existed.

- *MassLandlords, Inc. v. Executive Office of Housing and Livable Communities* (continued):
  - The requester's complaint lacked a plausible allegation that the government agency discriminated based on race or had practices with a disparate impact based on race.
  - It was insufficient that the requester "wish[ed] to learn" about whether alleged administrative failures in processing rental assistance applications caused evictions and disproportionately low acceptance rates for applicants of color.
  - The requester's complaint also involved the type of bare assertion and speculation that supported a public interest for disclosure, and the public interest was substantially outweighed by the rental assistance applicants' privacy interests.

ELECTIONS

- *Walters v. Boston City Council*, 2023 WL 3300466 (D. Mass. May 8, 2023)
  - Challenge to redistricting map that would have taken effect for the 2023 Boston municipal election. Redistricting was required to comply with the 1-person, 1-vote mandate of the 14th Amendment. The City Council moved 4 largely white high-voter turnout precincts to a different district and public housing units to another district.
  - The federal district court granted a preliminary injunction because the plaintiffs showed a likelihood of success that race played a predominant role in redrawing 2 districts in the enacted redistricting map. There was no showing that the map was narrowly tailored to achieve a compelling interest – which is required when race is a predominant factor in drawing district lines.
    - The redistricting map violated the Equal Protection Clause.
    - The City Council had a racial motivation to strengthen 1 district as an opportunity district (a district to provide minority voters with a chance to elect candidates of their choosing) and address concerns about "packing" in another district.

PUBLIC MEETINGS

- *Barron v. Kolenda*, 491 Mass. 408 (2023)
  - The plaintiff attended a Southborough Select Board meeting that discussed various topics, including a town budget that could result in increased property taxes, potentially elevating the town administrator position to a town manager, and past Open Meeting Law violations.
  - Before the public comment portion of the meeting, the acting Select Board chair paraphrased from the Select Board's "public participation at public meetings" policy. This included that "comments be short and to the point and remarks must be **respectful and courteous, free of rude, personal, or slanderous remarks** . . . ." (Emphasis added). The policy also prohibited inappropriate language and shouting.

- *Barron v. Kolenda* (continued):
  - The plaintiff stood at a podium with a sign stating "Stop Spending" on 1 side and "Stop Breaking Open Meeting Law" on the other. The plaintiff criticized the budget increases, expressed a position on the town manager/administrator issue, argued for a hiring freeze, and criticized the Select Board over the undisputed Open Meeting Law violations.
  - An exchange ensued between the plaintiff and the chair; the chair indicated that public comment was over and the plaintiff made comparisons between the chair and "Hitler." The chair moved into recess.
  - The chair then repeatedly yelled at the plaintiff "You're disgusting!" The chair also told the plaintiff she would be "escorted out" of the meeting if she did not leave, and the plaintiff left over concerned about the threat being carried out.

- *Barron v. Kolenda* (continued):
  - The public comment policy violated Article 19 of the Massachusetts Declaration of Rights, which creates a constitutional right "in an orderly and peaceable manner, to assemble to consult upon the common good; . . . and to request of the legislative body, by the way of addresses, petitions, or remonstrances, redress of the wrongs done them, and of the grievances they suffer." Article 19 broadly applies to citizens' interactions with government officials, including municipal officials.
  - Article 19 contemplates a politically active and engage populace, which may even be aggrieved and angry. It originated from fierce opposition to government authority and protected that opposition, even if "rude, personal, and disrespectful to public figures."
  - Article 19 permits "the fullest and freest discussion" of public matters as long as "the right is exercised in '**an orderly and peaceable manner**.'"
  - "Peaceable and orderly" is different than "respectful and courteous." Article 19 originated from the revolutionary period – a time when public assemblies were neither respectful nor courteous and instead were rude and personal.
  - There is a constitutional protection to fiercely criticize government action and actors, as long a sit occurs in a peaceable and orderly manner and follows any time, place, and manner restrictions.
  - The plaintiff was protected by Article 19: she assembled with others during the public comment session to ask for redress from the wrongs she claimed the Select Board committed and the grievances from town official actions, including noncompliance with the Open Meeting Law.
  - The Select Board violated Article 19 by controlling the content of the public comment – Article 19 protects "discourteous, rude, disrespectful, or personal speech about government officials and government actions."

- *Barron v. Kolenda* (continued)
  - The public comment policy violated Article 16 of the Massachusetts Declaration of Rights, which creates a right to free speech.
  - The most demanding standard applies to content-based restrictions on political speech: strict scrutiny, which requires the restriction to be narrowly tailored to achieve a compelling government interest.
  - The public comment policy regulated political speech because it regulated the public comment session of a municipal board meeting and was content-based because it looks at what a speaker said.
  - The Select Board could encourage, **but not require**, civility in political speech.
  - The public comment policy was impermissible viewpoint discrimination: it allowed speakers to confer praise but prohibited harsh criticism of government officials, by requiring speech to be respectful and courteous and free of rude remarks.
  - The public comment policy was so overbroad, vague, and capable of being manipulated on its face that it was struck down – it couldn't be salvaged or have the offending portions removed.

- *Barron v. Kolenda* (continued)
  - The plaintiff properly alleged a claim under the Massachusetts Civil Rights Act (MCRA).
    - The plaintiff exercised rights under Articles 16 and 19 to address the Select Board and complain about the Open Meeting Law violations, even by engaging in an exaggeration using the Hitler comparison.
    - The chair's response to tell the plaintiff to stop speaking, yelling at the plaintiff, and threatening to have the plaintiff removed from the meeting in response to her protected speech could violate MCRA.
  - The chair was not entitled to qualified immunity, which protects certain government officials who perform discretionary functions. The extent of the protected rights in the case were sufficiently clear and a reasonable public official would have understood the illegality of interfering with those rights.
  - A public body can have a public comment policy if it complies with "**time, place, and manner**" requirements, such as:
    - Requiring that the public comment session occur in an "orderly and peaceable" manner.
    - Designating when public comment is allowed to occur (for example, the beginning or end of the meeting).
    - Placing time limits on each speaker.
    - Adopting rules preventing speakers from disrupting others and removing disruptive speakers.

PUBLIC RECORDS

- *Gatehouse Media, LLC v. City of Worcester*, 102 Mass. App. Ct. 1107 (Mass. App. Ct. 2023) (unpublished opinion under M.A.C. Rule 23.0)
  - Gatehouse Media, LLC sought public records related to alleged misconduct by the City of Worcester's police officers.
  - Worcester produced the requested records after 3 years of litigation, including a trial. During the litigation, Gatehouse unsuccessfully filed a motion to expedite the proceedings.
  - Gatehouse sought attorney's fees and costs and was awarded $98,000 of its $214,000 request.
  - The Superior Court properly denied attorney's fees for the unsuccessful motion to expedite (which was filed near the start of the pandemic and with a trial date set months later).
  - Gatehouse could recover under the Public Records Law for reasonable time spent to prepare and defend a request for attorney's fees.
  - While the Superior Court applied a 50% reduction in compensable attorney time, the Appeals Court remanded the matter for reconsideration and recognizes the purposes behind the fee-shifting provisions under the Public Records Law.

LABOR AND EMPLOYMENT

- *Tetrault v. Board of Selectmen of Lynnfield*, 102 Mass. App. Ct. 330 (2023)
  - The plaintiff signed an employment contract to serve as Lynnfield Fire Chief. The contract included a provision that it could be terminated at the end of its term by either party with proper notice.
  - The Town of Lynnfield accepted the predecessor to M.G.L. c. 48, § 42, the strong chief statute; the statute limited a removal to "for cause" by the board of selectmen at any time after hearing. The strong chief's duties were codified in the Lynnfield Municipal Code.
  - The Lynnfield Town Charter permitted appointment of the fire chief for an indefinite term. It also allowed the Board of Selectmen to rescind any appointment to office for cause, with proper written notice (including reasons) and a right to be heard at a public hearing if requested.
  - The Lynnfield Personnel Bylaws gave the fire chief and other employees protections, including a proper written notice of the reasons for discharge, an explanation of the supporting evidence, and opportunity to rebut charges.
  - The Board of Selectmen gave the plaintiff notice of its intent "not to renew" his employment contract after his 5th year as fire chief (which followed a probationary period, initial 3-year term, and 2 1-year periods). The plaintiff did not receive any reason for the decision and was refused a hearing on the matter.

- *Tetrault v. Board of Selectmen of Lynnfield* (continued):
  - The strong fire chief statute requires a hearing and showing of cause when a fire chief is "**removed**," which usually means a forced dismissal or termination. Here, the plaintiff was not removed while the contract was in effect; instead, he received notice under the contract that it would not be renewed and was a natural end under the contract's terms.
  - The strong fire chief statute does not confer lifetime appointment, despite language authorizing a 3-year appointment in small towns.
  - The plaintiff was not entitled to a hearing or showing of cause under the strong fire chief statute as would be required if he was "removed."
  - The town charter and personnel bylaws did not confer lifetime tenure or prevent the Board of Selectmen from declining to renew the fire chief's contract.
  - The employment contract allowed either party to decline to renew it upon proper notice, and under M.G.L. c. 41, § 108O, the fire chief's employment contract prevailed over any conflicting provision of any local personnel bylaw, ordinance, rule, or regulation.
  - The board of selectmen did not "**rescind**" the plaintiff's appointment (town charter) or "**discharge**" the plaintiff (personnel bylaws).

LABOR AND EMPLOYMENT (CONTINUED)

- *Diaz v. City of Somerville*, 59 F.4th 24 (1st Cir. 2023)
  - Black-Hispanic police officer claimed wrongful discharge based on race in violation of Title VII of the Civil Rights Act of 1964 and M.G.L. c. 151B – the discharge followed the officer's off-duty altercation with a civilian and lying about the altercation during an internal investigation. The Civil Service Commission upheld the officer's termination, which the officer did not appeal.
  - The officer was precluded from relitigating, for his M.G.L. c. 151B claim, the issue of whether he had received disparate treatment compared to other similarly situated officers (the Civil Service Commission distinguished the comparators).
  - While the court could separately consider the Title VII claim, the proposed comparators did not show that the City of Somerville's reasons for discharging the officer were a pretext for race discrimination.

LABOR AND EMPLOYMENT (CONTINUED)

- *Owens v. City of Malden*, 85 F.4th 625 (1st Cir. 2023)
  - Malden police officers sued the City of Malden for deducting a 10% administrative fee from wages for police private (3rd party) detail work. The dispute derived from a dispute over a term in the collective bargaining agreement that set the hourly rate for police detail work.
  - While the Wage Act requires filing a pre-suit claim with the Attorney General, the litigation properly proceeded as the officers filed a claim before the federal district court entered final judgment.
  - The contract term governing detail compensation was unambiguous and entitled the officers to less than what they were actually paid.
  - There was no Wage Act violation because even after deducting 10% from the officers' rate, they were paid more for private details than the collective bargaining agreement required.

LABOR AND EMPLOYMENT (CONTINUED)

- *City of Chelsea v. New England Police Benevolent Association, Inc.*, 491 Mass. 426 (Mass. 2023)
  - This case involved the termination of a dispatcher that occurred after a change in union representation.
  - The dispute could be arbitrated because a broad arbitration provision negotiated between the City of Chelsea and a former union covered it and the arbitrator properly determined that the collective bargaining agreement had been extended.
  - Under the Labor Relations Act, the new union stepped into the former union's shoes and could enforce the arbitration provision in the collective bargaining agreement negotiated by the predecessor union. The change in union representation did not terminate the extension to the collective bargaining agreement.

TAX TITLE

- *Tyler v. Hennepin County*, 598 U.S. 631 (2023)
  - The property owner owed unpaid real estate taxes on a condo, along with interest and penalties, but Hennepin County, Minnesota took the condo and sold it for $25,000 **over** the property owner's tax debt, keeping the excess for itself – following a state tax title law similar in many respects to Massachusetts.
  - The Takings Clause of the 5th Amendment to the US Constitution applies to states under the 14th Amendment and requires that "private property [shall not] be taken for public use, without just compensation."
  - Hennepin County had the power to seize and sell the condo to recover unpaid property taxes, but keeping the excess violated the Takings Clause – a government cannot use the tax debt to take more property than was due.
  - The property owner is entitled to **just compensation** for the lost value of the property - which is the surplus **in excess of** the debt owed. The municipality cannot keep all of the money from a foreclosure sale, and this includes the property owner's equity in excess of the amount owed.

TAX TITLE (CONTINUED)

- Massachusetts Attorney General's Office Guidance About Tax Lien Foreclosures After the Supreme Court's Decision in Tyler v. Hennepin County
  - The Massachusetts Tax Lien Foreclosure Law (M.G.L. c. 60) is similar to parts of the Minnesota tax lien foreclosure law that were deemed unconstitutional.
  - In Massachusetts, an unpaid real estate tax or water/sewer bill can result in a lien and tax lien foreclosure to collect the unpaid taxes or bills (through a Land Court procedure). If the municipality forecloses, it can then keep the property or sell it.
  - The Attorney General's opinion is that Massachusetts municipalities and 3rd party purchasers of tax liens cannot take more property than is owed without giving a property owner **just compensation** – or else risk liability for an unconstitutional taking.
  - **Just compensation** may require the original property owner to receive any excess funds recovered or excess value from a tax lien foreclosure, over and above the tax liability and any associated costs, interest, and late fees.

PUBLIC LAND

- *Reilly v. Town of Hopedale*, 102 Mass. App. Ct. 367 (2023)
  - A railroad entered into a purchase and sale agreement to acquire land from a realty trust that was classified and taxed as forest land under M.G.L. c. 61 and additional non-forest land. The railroad intended to convert the forest land to another use, which was outside of M.G.L. c. 61.
  - A special town meeting voted to appropriate money to acquire the forest land by purchase or eminent domain and an additional amount to acquire the non-forest land.
  - Disputes unfolded with the original transaction and restructured transaction, and litigation ensued when the railroad began site work. The parties reached a settlement, which included among other items that Hopedale would purchase a portion of the forest and non-forest land (plus the cost of roll-back taxes), the railroad would donate non-forest land to Hopedale or its designee, remaining land would stay in the realty trust's ownership, and Hopedale would waive its option to purchase the property under M.G.L. c. 61 and eminent domain rights under M.G.L. c. 79.
  - The settlement resulted in a stipulation of dismissal filed in the lawsuit.

- *Reilly v. Town of Hopedale* (continued):
  - Citizens filed a lawsuit which, among other relief, sought to enjoin Hopedale from expending funds under the settlement agreement and a declaration that the settlement agreement was void and unenforceable.
  - The Superior Court determined that the board of selectmen exceeding its authority by unilaterally entering into the settlement agreement without town meeting approval of a reduced acquisition, although the agreement's terms were valid.
    - This prevented the settlement agreement from taking effect, unless town meeting approved the reduced acquisition.
    - This issue was not challenged on appeal.

- *Reilly v. Town of Hopedale* (continued):
  - The Appeals Court held that the citizens lacked standing under M.G.L. c. 40, § 53 (the 10-taxpayer statute) to pursue a claim declaring the settlement agreement void and unenforceable. The 10-taxpayer statute:
    - Applied to a claim involving the raising or expenditure of funds or the incurring of obligations by Hopedale.
    - Did not apply to a claim that: the waiver of the M.G.L. c. 61 option under the settlement agreement was void; that Hopedale had enforceable rights under M.G.L. c. 61; that the restructured transaction triggered Hopedale's option; that Hopedale should have the trust's land transferred to it; or that the railroad should be prevented from alienating or converting the forest land.
  - The citizens did not have a recognized interest under M.G.L. c. 40, § 53 or M.G.L. c. 61 that would give them standing to seek a declaratory judgment. Individual taxpayers without land subject to M.G.L. c. 61 have no rights to seek review. Any generalized interest in protecting the environment was insufficient to create standing for the citizens.
  - Hopedale's waiver of its M.G.L. c. 61 option was not an illegal assignment simply because it occurred under a settlement agreement – it was a **waiver of a right**, rather than a transfer of a right. Therefore, the citizens did not have standing to pursue a mandamus action.

PUBLIC LAND

- *Carroll v. Select Board of Norwell*, 2024 WL 56172 (Mass. Jan. 5, 2024)
  - Residents sued the Norwell Select Board to force a transfer of municipal land to the Norwell Conservation Commission. The land had been acquired via tax title, but no official instrument was recorded creating an express restriction.
    - The Land Court determined that the land at issue was designated for development of affordable housing and required a Select Board determination that it was no longer needed for that purpose before transferring the land.
    - Town Meeting authorized the transfer by a 2/3 vote.
    - A Select Board vote to transfer the land to the Conservation Commission failed.

- *Carroll v. Select Board of Norwell* (continued):
  - The case adopts the totality of the circumstances test to determine if land is held by a municipality for a specific municipal purpose under M.G.L. c. 40, § 15A, which prevents changing the use of the land unless:
    - The board or officer in charge of the land determines that it is no longer needed for that purpose.
    - The town, by a 2/3 vote, authorizes transferring the custody of the land.
  - An alternative to M.G.L. c. 40, § 15A is M.G.L. c. 40, § 3, which places property under the select board's control as part of the town's general corporate inventory. This doesn't require a determination that the land is no longer needed for the purpose, but this statute did not apply here.
  - The totality of the circumstances test requires review of all the circumstances to see if there is **a clear and unequivocal intent to dedicate land to the specific municipal purpose**.
  - Here, the SJC determined that Norwell took steps to dedicate the subject land for affordable housing. It included a town meeting vote to make the land available for affordable housing and exploration of using the land for that purpose and other actions by the Select Board through a municipal affordable housing trust.

TAXATION

- *Murrow v. Board of Assessors of Boston*, 102 Mass. App. Ct. 278 (2023)
  - This appeal involved taxation of an in gross parking easement – the taxpayer claimed that assessing a tax on parking easement owners in a condominium was double taxation by taxing the fee simple interest of the condominium owned by the unit owners and the taxpayer's easement interest in a parking space on the same land.
  - The condominium's developer reserved exclusive parking easements in gross under the master deed (which were not appurtenant to any condo unit) and then sold the taxpayer a perpetual and exclusive easement in gross to use a parking easement.
  - In 2019, for the 1st time, the City of Boston taxed the taxpayer's easement as a present interest in real estate.

- *Murrow v. Board of Assessors of Boston* (continued):
  - M.G.L. c. 59, § 11 permits the assessors to assess taxes on "any present interest in real estate to the owner of such interest on January 1."
  - An easement in gross for parking, that was reserved by the condominium declarant from the interests under a master deed was not considered part of the condominium's common areas and could be taxed as an interest separate from the units in the condo, even though the easement is a nonpossessory interest.
  - The taxpayer's parking easement was a present interest in real property. It could be used exclusively by the taxpayer as the taxpayer had the right to exclude others from the space, could collect rents for leasing the space, and could sell her interest in the space and keep the profits. The taxpayer had exclusive use of the parking space, which was perpetual and freely transferable.
  - No improper double taxation occurred as 2 separate interests in real property were taxed:
    - The condominium statute (M.G.L. c. 183A, § 14) allows condo unit owners to be taxes on their possessory interest in their respective units, including their proportional share of the condominium's common area as set out in the master deed.
    - M.G.L. c. 59, § 11 allowed parking easement owners to be taxed on their nonpossessory easement interest in their parking spaces.

TAXATION (CONTINUED)

- *Educational Divide Reform, Inc. v. City of Cambridge*, 102 Mass. App. Ct. 1111 (2023) (unpublished opinion under M.A.C. Rule 23.0)
  - The plaintiff had a lease with the Roman Catholic Archbishop of Boston to rent property, and the plaintiff was required to pay any property tax assessed to the church. The plaintiff and the church were both nonprofits.
  - The Cambridge Director of Assessing allegedly told the plaintiff and the church that an exemption from taxation didn't apply because the leased premises weren't used for church purposes. The plaintiff paid property taxes for 2018-2020, but then filed a property tax refund application and requested a denial determination letter, which the City of Cambridge refused.

- *Educational Divide Reform, Inc. v. City of Cambridge* (continued):
  - The plaintiff failed to exhaust administrative remedies because an appeal of a determination of tax-exempt eligibility requires the charitable organization to seek an abatement within 3 months of the determination, but this didn't occur (M.G.L. c. 59, § 59).
  - The plaintiff also failed to appeal the assessor's denial of abatements within 3 months of the time the abatement application was deemed denied (M.G.L. c. 59, § 64).
  - The failure to follow the statutory scheme for challenging the tax assessments prevented the plaintiff from suing in court.
  - Alternatively, claims were barred by the Tort Claims Act for immunities under Section 10(d) (a claim arising in respect of the assessment or collection of a tax), Section 10(a) (act or omission of a public employee exercising due care to carry out a statue or regulation of a public employer), and Section 10(c) (intentional torts).

FIREARMS

- *Dupras v. Deputy Chief of Police of Fall River*, 103 Mass. App. Ct. 1113 (2023) (unpublished opinion under M.A.C. Rule 23.0):
  - The Fall River Police Department suspended the plaintiff's license to carry (LTC) a firearm, holding he was an unsuitable person under M.G.L. c. 140, § 131(f).
  - The District Court affirmed the suspension because the plaintiff violated M.G.L. c. 140, § 131L by improperly storing firearms.
  - The plaintiff sought further review in the Superior Court, suing the Fall River Deputy Chief of Police and naming the Fall River District Court as a nominal party.
  - In the Superior Court case, the plaintiff challenged the constitutionality of M.G.L. c. 140, §§ 131 and 131L under the 2nd Amendment. The case was reported to the Appeals Court for review. The constitutional challenge was not initially raised in the Superior Court and became an issue later in the case.

- *Dupras v. Deputy Chief of Police of Fall River* (continued):
  - The Appeals Court declined to address the case because the Attorney General (AG) was not properly notified of the case, given separate court rules for the Superior Court and Appeals Court, both of which required special notice to the AG when a party challenges the constitutionality of a state statute. This special notice should give an option for the AG to intervene in the case.
    - The Administrative Office of the Trial Court was a nominal (named only) party to the Superior Court case, but took no active or further role in the case once it filed the District Court's record.
    - The AG should've been notified about the proceedings once the constitutionality of the firearms statutes became an issue. Once in the Appeals Court, notice should've occurred in writing or by electronic notice.
    - Mailing the AG a copy of a motion to file a supplemental brief didn't provide proper notice about the constitutional challenge.
  - The Appeals Court also declined to consider the appeal because it was broader than the limited review of the license decision in the District and Superior Courts, and constitutionality was not raised as an issue in the District Court proceeding.

TORTS

- *Paradis v. Frost*, 218 N.E.3d 664 (Mass. App. Ct. 2023)
  - A mother sued the Acton-Boxborough Regional School District and a social worker after her son's suicide, asserting negligence and wrongful death.
  - The Section 10(j) immunity under the Tort Claims Act (TCA) barred the claim. This immunity applies when a claim is based on an act/failure to act to prevent or diminish the harmful consequences of a condition or situation that the public employer (or person acting on behalf of the public employer) did not "originally cause."
    - Section 10(j) applied because the student's suicide resulted from his own state of mind, not the social worker's failures.
    - The school district had immunity for any failure to prevent or diminish the "harmful consequences" of the student's "condition or situation."

- *Paradis v. Frost*, (continued):
  - Section 10(j)(i) of the TCA limits immunity for "any claim based upon **explicit and specific assurances of safety or assistance** . . . **made to the direct victim or a member of his family or household** by a public employee, provided that the injury resulted **in part from reliance** on those assurances."
    - Assurances that the social worker made to the student's girlfriend did not trigger this exception because she was not a member of the student's household (she did not reside with the student).
  - Section 10(j)(2) of the TCA limits immunity for a claim based on the **intervention** of a public employee which causes injury to the victim or places the victim in a worse position than he was in before the intervention."
    - The social worker's assurances to the student's girlfriend that she would inform the student's parents about the student (and failure to do so) were not affirmative acts of intervention – they were negligent omissions.
  - Section 10(j)(4) of the TCA limits immunity for a claim involving **negligent medical or other therapeutic treatment** provided by a public employee to a patient.
    - The social worker's failure to inform others about concerns raised by the student's girlfriend involved nonmedical acts or omissions, which fell outside the exception.

TORTS (CONTINUED)

- *Mastrangelo v. City of Amesbury*, 102 Mass. App. Ct. 1115 (2023) (unpublished opinion under M.A.C. Rule 23.0)
  - The plaintiffs claimed that the former Amesbury mayor (in his individual capacity) intentionally interfered with their advantageous economic relationship with the Cannabis Control Commission. The claim was based on the mayor's decision to not enter into a host community agreement with a potential marijuana establishment and instead request that the establishment obtain a special permit, following local opposition to the plans, to obtain planning board review of the application.
  - The Appeals Court recognized that the former mayor was protected from liability under the **common-law immunity doctrine**: a public official who exercises judgment and discretion is not liable for negligence or other error when making an official decision if the public official acted in good faith, without malice, and without corruption.

LEGISLATIVE UPDATES

• MMLA Legislative Committee

- Prepares recommendations for legislation to be included as part of MMLA's legislative package, based upon MMLA Legislative Review Criteria
- Reviews bills that are brought to its attention, which are pending before the General Court and make recommendations to the Executive Board on whether to support, oppose, or take no position.

MMLA LEGISLATIVE REVIEW CRITERIA

- The criteria which the Legislative Committee and Executive Board consider in deciding whether to take a position on legislation include the following:
  - 1. Does the matter affect cities and towns generally?
  - 2. Have any other organizations, including those representing municipalities in the Commonwealth (such as the MMA) and other bar associations, taken a position on this proposed legislation and if so what position have they taken?
  - 3. Does the proposed legislation purport to solve a problem faced by municipalities, add to municipal costs, impact collective bargaining, affect public health, safety or welfare, or increase or decrease the flexibility municipalities have in dealing with local issues?
  - 4. Would the legislation have any unintended consequences for municipalities which the drafters of the proposed legislation have not foreseen?

MMLA'S
2023-24 LEGISLATIVE PACKAGE

1. Permanent option for remote public meetings: An Act to modernize municipal meetings, town meetings, and local elections (SD1059, HD911, SD1247)
2. Legal notices: An Act relative to legal advertisements in on-line only newspapers (HD109/SD953)
3. Chapter 30B procurement parity: An Act relative to Chapter 30B procurement (HD2918/SD1028)
4. Water/sewer infrastructure P3: Alternative delivery of infrastructure projects (SD122)
5. Local option civil penalty: An Act relative to the effective enforcement of municipal ordinances and by-laws (HD954/SD1229)

LEGISLATIVE ADVOCACY

Timeline:

- January 2022 – January 2024

2022

- March – Advocacy and work with DCHCD re. Guidelines for multi-family districts (submitted with MMA)
- July and August – Advocacy to Governor and Legislature re. Cannabis legislation; Advocacy to legislature re. Open meeting law provisions
- November – Letter to Governor re. H.5381, An Act Preserving Open Space in the Commonwealth (submitted with MMA)

2023

- March – Advocacy to Governor and Legislature re. Open meeting law
- April and September – Letters to Cannabis Control Commission
- July – Advocacy to Legislature re. Open Meeting Law
- October – Letter to House and Senate regarding HB.3555, An Act Relative to a Local Option for Associate Members of Planning Boards
- November – Letter to Lt. Governor Driscoll Regarding MMLA Legislative Priorities

OPEN MEETING LAW DEVELOPMENTS

March and July 2023: Correspondence to the Legislature and Governor

- Support permanent codification of remote options for municipal public bodies
- Support state grants to improve hybrid meeting technology
- Oppose legislation that would require all meetings of any public bodies to be provided in a hybrid format only
- Oppose fines to individual members of public bodies
- SD1059, HD911, SD1247

TAX TITLE ISSUES

- Pending Legislation

- HB2883 – An Act relative to the improvement in the process for collecting delinquent municipal property taxes
- HB 2907 - An act relative to providing better notices and protections in the process for collecting delinquent property taxes
- HB2937 - An Act relative to tax deeds and protecting equity for homeowners facing foreclosure
- SB921 - An Act protecting equity for homeowners facing foreclosure
- SB 1774 - An Act relative to the surplus from a tax title sale
- SB1876 - An Act protecting homeowners from unfair tax lien practices by cities and towns
- SB 1953 - An Act relative to force sale of property by tax lien

- Amicus Brief, Land Court, *Town of Tyngsborough v. Paula Recco (r*eference to SB 1953)

CANNABIS

- April 2023: Letter to Cannabis Control Commission Regarding Regulatory Review Pursuant to Chapter 180 of the Acts of 2022, An Act Relative to Equityin the Cannabis Industry
- September 2023: Letter to Cannabis Control Commission Commenting on 935 CMR 500.000 Adult Use of Marijuana Draft Regulations - Attached MMLA Edits to Draft Regulations (submitted jointly with the Massachusetts Municipal Association)

LAND USE

- Advocacy, support, guidance re. the Guidelines for Multi-Family Districts under Section 3A of the Zoning Act

- Advocacy re. HB3551, An Act to facilitate site plan review

- Advocacy re. HB.3555, An Act Relative to a Local Option for Associate Members of Planning Boards