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SPRING

of Massachusetts Municipal Lawyers Association

formerly known as the City Solicitors and Town Counsel Association

This is a publication of MMLA and is not intended as a legal advice, which requires consultation with an attorney.

LETTER FROM THE PRESIDENT

Dear Fellow MMLA Members:

Welcome to the Spring Issue of *The Municipal Law Quarterly*. I'm sure that I am echoing the vast majority of our members when I say that I am happy to see this winter drawing to a close! Despite the challenging weather conditions, it has been an eventful couple of months for the Association. In addition to welcoming the Patriots home to another successful trip to the Superbowl, Boston hosted the ever-popular MMA Annual Meeting and Trade Show, which was held on January 23 and 24, 2015 at the Hynes Convention Center. On Saturday, January 24th MMLA Past President Chris Petini, MMLA current Vice President, Don Rider, Jr. and I participated in the 2015 Municipal Law Update program on behalf of MMLA. This year we were also joined by Kevin Manganaro of the Attorney General's Office Division of Open Government, who presented on recent developments in the Open Meeting Law. The event was well attended, despite (more) weather-related issues. MMLA looks forward to its continued participation in this program in the future.

The Association's January meeting was held on January 29th at the Stoneforge Tavern in Raynham and featured a presentation by Carol Kemp, Deputy General Counsel for DCAMM and Angela Atchue, Senior Legal Officer with the City of Boston Property and Construction Management Department. The program focused on Real Estate issues for municipal counsel and included an examination of State and Municipal examples of Procurement, Disposition, Due Diligence, Property Management and related Contractual Agreements. MMLA Executive Board Member Angela Atchue provided a review of municipal real estate acquisition and disposition processes, through a review of the process the City of Boston undertook in redeveloping and repurposing the Bruce C. Bolling Municipal Building. Attendees were taken through the appraisal, title exam, and survey processes for the project, as well as an explanation of the building manager services procurement (MGL c.30B, section 6) process for the management of the completed project.

The Association also held a combined February and March monthly meeting at the Hogan Center at Holy Cross College in Worcester on March 5, 2015. That program focused on Hike and Bike Trails, and included an analysis of the steps required to convert unused rail corridors to multi-use trails for active recreation and non-motorized transportation uses. The Town of Acton's Planning Director Roland Bartl and Stephen Anderson of Anderson & Kreiger explained the funding, planning, design, procurement and legal steps necessary to turn the Bruce Freeman Rail Trail Project into a reality. Attendees were also fortunate to learn about planning issues related to urban biking from Professional Engineer Bill DeSantis, the corporate leader of Vanasse Hangen Brustlin, Inc.'s (VHB) Bicycle/Pedestrian and Transportation Enhancement practice, and PE John Bechard, the Managing Director of VHB's Worcester office.

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Inside this Issue

Both the January and March meetings were extremely well attended. Again, thank you to all who helped make each of these programs a success. Your time and efforts are very much appreciated.

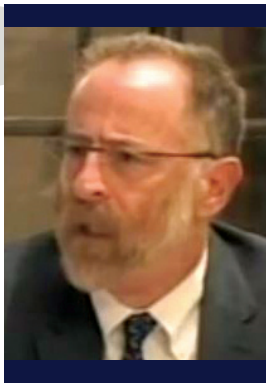
The Association's next program will be our annual Construction Law Seminar and combined Annual Meeting and Election of Officers and Directors. The meeting will be held at CBS Scene at Patriot Place in Foxborough. More details, including a list of the nominated Officers and Executive Board Members for the 2015-2016 membership year will follow shortly. I hope that you are able to attend. As always, the Association welcomes suggested topics for our monthly meetings, half- and full-day conferences. Please feel free to contact either me or any of the members of the Executive Board, in that regard.

Thank you for your attention. I look forward to seeing you at future events.

Very truly yours,

John D. Finnegan, President

MUNICIPAL SPOTLIGHT ON: Jonathan D. Witten, Esq.



By: Peter Mello, Esq., Petrini & Associates

1. **In what city/town were you born?**
   Chelsea, Massachusetts. And proud of it!

2. **Where did you attend college and law school?**
   Boston College (BA), Cornell University (Master of Regional Planning), Suffolk University, evenings (JD).

3. **What municipalities do you represent?**
   Stow and Marion as town counsel.

   Stoneham, Wareham, Middleborough, Wellesley, Marshfield, Hanover (currently) and Amesbury, Bourne, Gloucester, Grafton (previously), as special counsel.

4. **Has municipal law changed a lot since you began practicing? If so, how?**
   I don't believe that the practice of municipal law has changed much at all in the past 30 years. While the law in many areas is more complex, particularly administrative law practice, the basic principals governing representing public entities remains the same.

5. **What is your favorite discipline within your municipal practice? Why?**
   As a land use planner and former co-owner of an engineering firm working for federal environmental agencies, my favorite practice area has always been land use planning and the protection of land and resources from development. This is made particularly challenging in Massachusetts, given that the Commonwealth continues to reject any normative land use planning legislation and the Legislature continues to ignore the havoc caused by the Zoning Act, the Subdivision Control Law and the Comprehensive Permit statute upon the Commonwealth's cities and towns.

6. **If you had to analogize Massachusetts municipal land use law through some metaphor, what would it be?**
   Anarchy.

7. **What is one of your proudest moments as a lawyer?**
   First, establishing Huggins and Witten, LLC with my law partner, Barbara Huggins.

   Second, helping defeat ill-conceived development projects sponsored by petitioners who attempted to threaten or intimidate, municipalities, neighborhoods or abutting property owners.

8. **What is the most useful advice you could give regarding the practice of law?**
   We are taught and we teach, that lawyers can make the world a more equitable and better place to live.

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9. Have you written or presented to others regarding legal issues? What sorts of issues?
I have had the privilege of teaching land use planning, local government finance and natural resource policy at Tufts University for 28 years, land use law and American Indian Law at the Boston College Law School for 18 years, and this year, American Indian Law at the Boston University Law School. For over 15 years, I was a Reporter for Planning & Environmental Law (a publication of the American Planning Association). I have written articles and documents for the Boston College Environmental Affairs Law Review, the American Planning Association and the US Environmental Protection Agency. I am the author of Massachusetts Real Estate (formerly with Robert Marzelli, Esq.) and have authored various chapters and manuals for the Massachusetts Continuing Legal Education.

10. What is one of the proudest moments outside of your career?
The contributions, humanity and success of our son.

MUNICIPAL CASE LAW UPDATE

By: Carol Hajjar McGravey, Esq.
Urbelis & Fieldsteel, LLP

Suzanne Palitz, Trustee v. Zoning Board of Appeals of Tisbury, et al.

SJC-11678 – March 3, 2015

In this case, the Supreme Judicial Court considered whether a division of land under G.L. c. 41, §81L (the "existing structures" exemption to the Subdivision Control Law) confers "grandfather" status on the structures on the lots, protecting them against new zoning nonconformities created by the division of the lots.

G.L. c. 41, §81L provides that a "[s]ubdivision" does not include "the division of a tract of land on which two or more buildings were standing when the subdivision control law went into effect in the city or town in which the land lies into separate lots on each of which one of the buildings remains standing."

The lot at issue in this case was created in 1994 and contains a structure built before both the Subdivision Control Law and the Zoning Act became effective in Tisbury. The plaintiff in this case was seeking a permit to demolish the existing structure and build a new one that was larger and taller.

When the lot was created by an ANR plan in 1994, it did not conform to minimum lot size or frontage requirements. The dwelling was also rendered nonconforming regarding its front and side setbacks. The owner at the time sought and obtained a variance in order to make the dwelling and lot lawful. The plaintiff acquired the lot in 2007, and later sought a building permit to tear down the house and construct a new one that would maintain the existing footprint, but be ten feet taller. The building inspector denied the permit, and the zoning board denied a variance. The plaintiff appealed, and the Land Court granted summary judgment in favor of the zoning board.

The Supreme Judicial Court took the case on direct appellate review and affirmed the judgment of the Land Court. In so doing, the SJC held that an ANR endorsement under the "existing structures" exemption allows an applicant to record a plan dividing the lots in question without Planning Board approval, but does not address whether the structures on the lots comply with zoning bylaws. The Court also held that the variance obtained when the lots were divided did not confer permanent "grandfathering" of the structure, so in order to demolish and re-build the house, a new or amended variance was needed.

Because an ANR endorsement does not render the resulting lots compliant with zoning, a landowner may seek a variance or seek grandfather status under G.L. c. 40A, §6, which allows grandfathered structures to be altered without a variance provided that "(1) the extensions or changes themselves comply with the ordinance or bylaw, and (2) the structures as extended or changed are found to be not substantially more detrimental to the neighborhood than the preexisting nonconforming structures." Rockwood v. Snow Inn Corp, 409 Mass. 361, 364 (1991)

In cases such as this one, where a new nonconformity is proposed, the Court held that a variance is required because the proposed reconstruction would have expanded the nonconformities permitted by the first

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variance. The Zoning Act's grandfather provisions do not incorporate the ANR provisions of the subdivision control law, The Court reasoned that the subdivision control law and the zoning laws are independent statutory schemes, and the fact that the zoning anomalies arose from the s. 81L subdivision exemption did not confer a permanent zoning exemption on the structures standing on the lots so divided. In order to secure lawful status for such a reconstruction, a variance is needed.

By: Tim Harrington, Esq., General Counsel, Boston Public Health Commission

Celco Construction Corp v. Town of Avon, 87 Mass. App. Ct. 132

Massachusetts Appeals Court, March 2, 2015

The Massachusetts Appeals Court affirmed recently that construction contractors are entitled to equitable adjustments under G.L. c. 30, Section 39N only when there is a material difference in the actual condition or character of the subsurface area to be excavated, as opposed to a quantity in excess of the amount anticipated by the contractor.

In 2009, the Town of Avon solicited bids for installation of water mains and related roadway work. Celco Construction Corp. ("Celco"), along with thirteen other bidders, specified $0.01 per cubic yard for the excavation and disposal of rock from the site. The Town's bid documents informed the bidders the amount of rock to be removed, 1,000 cubic yards, was an estimated quantity and was used only for the purposes of comparing the bids. To cover a potential higher cost in removal, Celco increased its bid amounts for other work on the project. The parties entered into a written contract on April 6, 2009.

During the course of performance, Celco determined the amount of rock to be excavated would substantially exceed 1,000 cubic yards. In August of 2009, Celco requested an increase in the unit price to $220 per cubic yard, describing the additional rock as a change in the conditions depicted in the bid documents. Celco lowered its demand to $190 per cubic yard, but the Town wisely denied both requests. Celco ultimately removed 2,524 cubic yards of rock from the site.

Celco brought suit against the Town in Superior Court seeking the equitable adjustment pursuant to G.L. c. 30, Section 39N. The Superior Court granted summary judgment to the Town. Celco appealed.

G.L. Ch. 30, section 39N allows a contractor to request an adjustment to the contract price "if, during the progress of the work, the contractor or the awarding authority discovers that the actual subsurface or latent physical conditions encountered at the site differ substantially or materially from those shown on the plans or indicated in the contract documents." The Appeals Court held that an increase in the quantity of rock or fill alone does not qualify for an equitable adjustment. The Court noted the bid documents "expressly disclaimed" the accuracy of the estimate of rock to be removed. The 1,000 cubic yards figure was only inserted to allow for comparison of the bids.

Most importantly, the Court stated there was no evidence that "the nature of the rock itself, and the means and cost to remove it, differ in any way from what was anticipated in the contract documents…No equitable adjustment is warranted by reason of a variation in the estimated quantities, standing alone, as compared to a deviation in the condition or character of the physical condition." The Court noted that if Celco had submitted a proper bid for the excavation work, rather than the arbitrary $0.01, it would not have needed the adjustment. The Court confirmed the purpose of the statute is to protect contractors from unknown conditions in the subsurface area to be excavated. It was not designed to protect them from the "consequences of their decisions to bid a unit price for the performance of work that is wholly unrelated to their anticipated cost to perform the work."

Litigation regarding changes in the condition of subsurface areas is not uncommon. This case provides municipal counsel with solid support to deny those requests for adjustments based solely upon increased amounts of fill or other material to be excavated. The case also serves as a reminder that when amounts to be excavated are estimates only, the bid documents should expressly say so in bold and clear language.

SOLVING THE PUBLIC WORKS INFRASTRUCTURE FUNDING GAP: PUBLIC PRIVATE PARTNERSHIPS

By: Matthew G. Feher, Esq. and Anatoly M. Darov, P.E. Burns & Levinson LLP

The state's Water Infrastructure Finance Commission identified a funding gap of at least $39.4 billion over the next 20 years in order to meet the needs of our aging drinking, wastewater, and storm water infrastructure and concluded that traditional government funding sources are likely to decline over that same period of time. This grim assessment is not unusual amongst public officials as rising public infrastructure needs coupled with declining government resources is commonplace throughout the country. As such, public agencies have been looking to public-private partnerships, or P3s, as an alternative to traditional methods of financing and delivering public infrastructure projects. Providing cities and town with access to P3 project delivery may be a viable option—and one of a number of alternative solutions–to financing such projects aside from reliance on waning federal and state revenue sources.

In Massachusetts, cities and towns enjoy limited express authority to utilize alternative project delivery methods, but access to P3 procurement has been largely restricted. In 2004, Chapter 149A of the General Laws was enacted granting public awarding authorities the ability to procure public works projects using design-build in lieu of the traditional design-bid-build procurement method if the project's estimated construction cost was $5 million or greater and the Inspector General approved. Unfortunately, Chapter 149A's applicability is limited and does not permit the use of private equity or debt financing to address the need for new sources of project financing.

In order to use P3 structures, like design-build-operate-finance, cities and towns must receive special legislative approval. The Massachusetts legislature has routinely granted several of Massachusetts municipalities the ability to enter into a contract "for the lease, operation and maintenance, repair or replacement, financing, design, construction and installation of new facilities or systems and modifications to existing facilities, necessary to ensure adequate services" employing key elements of P3 deal structures and exempting the project from otherwise applicable public bidding and procurement laws (such as Chapter 7C, §§ 44-57; Chapter 149, §§44A-44J; Chapter 149A; and Chapter 30, §39). While the only viable solution for most municipal awarding authorities, this special act process requires the submission of a Home Rule petition and a vote by the Legislature thereby building into the public procurement process uncertainty and delay.

Legislative Solution

In 2009, Massachusetts joined 35 other states, including the Commonwealth of Puerto Rico, to authorize P3 project delivery; however, its applicability is limited to MassDOT for surface transportation projects. There remains no authority for cities and towns to use the P3 model to deliver municipal projects, including water and wastewater infrastructure. To that end, a coalition of municipal and water infrastructure trade groups support legislation included in the MMLA 2015/16 Legislative Package and filed by Senate Minority Leader Bruce Tarr (R-Gloucester) that expressly authorizes the use of P3 for water and wastewater infrastructure projects procured by any state and municipal awarding authorities, including state agencies and authorities, cities and towns, local redevelopment authorities, water districts, and other improvements districts (Senate Docket 1209; see related story in this edition of the MMLA Quarterly).

The types of P3 delivery methods contemplated by the legislation include long-term contract operations, design-build, design-build-operate, and design-build-operate-finance. P3 contracts are authorized for a term of 20 years and may be renewed for as long as 10 additional years. The bill authorizes unsolicited proposals from private vendors and prescribes a thorough process by which awarding authorities are to solicit and evaluate proposals, including determining whether a proposal presents the "best value" and is in the "best interest" of the public agency. The legislation prescribes certain minimum requirements and suggested business terms of a P3 contract and authorizes fee for service and the issuance of public debt and private equity project financing.

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Considerations for Structuring P3 Agreements

If broad public-private partnership authority is on the horizon for Massachusetts, what are the considerations for municipal stakeholders? Policy concerns stemming from the impacts of P3s on labor, and the public's hesitancy to privatize those aspects of our infrastructure that have traditionally been owned and operated by public entities, are complex issues that require strong leadership to address. It is also axiomatic that P3s that involve the use of public funds and relate to public assets must be undertaken pursuant to a broad array of federal, state and local laws and regulations. Public-private partnerships require a legal and regulatory framework that protects the private partner's financial investment and property rights while enabling commercial contracts to be legally enforced.

Consideration must be given to seven broad categories of risk common to P3 projects: (i) Design/Development Risk; (ii) Construction Risk; (iii) Revenue Risk; (iv) Financial Risk; (v) Unexpected Event Risk (including political/regulatory risk); (vi) Performance Risk; and (vii) Environmental Risk. A well-drafted set of legal documents that details the allocation of these risk factors and other contractual obligations amongst the parties in a clear and precise fashion is critical for the success of a public-private partnership. Because a P3 agreement must govern a relationship that may last over a period of decades and must contemplate numerous variables and details, the partnership agreement must have clear provisions that establish a framework for dealing with a full spectrum of risks and disputes in a cost-efficient and equitable manner.

Public-private partnerships represent an innovative and forward-thinking approach to financing and delivering certain types of infrastructure projects. Although complex and not suited for all project types, the experience of other states and municipalities demonstrates that P3s are viable and can play an important role in meeting the growing infrastructure investment needs of cities and towns.

A REVIEW OF "IS YOUR FACT WITNESSES A HYBRID?"

By: Jordan L. Shapiro, Esq.
Past President, CSTCA and
former City Solicitor, Malden

The full name of the article I will review for this edition is: "Is your fact witness a hybrid? What to do when your fact witness is also an expert." The article appeared in "Litigation News", the American Bar Association's magazine by the Section of Litigation, Volume 40, Number 2, Winter 2015, page 11.

I thought this was an important article to share with our members because frequently, when a municipal lawyer expects the witness in the case is only going to tell "the facts," suddenly the case turns on whether the witness has "an opinion" about the facts, and then has to be qualified as an expert before the evidence will come in.

The article focused on Federal Rules of Civil Procedure 26, which requires the discloser of the expert witnesses they intend to present a trial. But the question of who is an expert and how much must be disclosed is a crucial one since if the wrong choice of is made the penalties for a client can be steep.

We know that, for any expert witness who is "retained or specially employed to provide expert testimony," a written expert report must also be provided as part of the Rule 26 disclosures. The same requirement applies to any party's employee whose duties "regularly involved giving expert testimony." The expert report must comply with Rule 26(a)(2)(B) by including the witnesses' opinions; facts and date considered by the expert; any exhibits that will be used; and information about the expert's qualifications, participation in other cases, and compensation.[1]

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1. Massachusetts Rules of Civil Procedure include no automatic discovery obligation yet, and I don't expect any soon. Yet, our Rule 26 (4) says that expert discovery "may" be obtained through interrogatories by a party to any other party "to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion." Rule 26 (b)(4)(A)(i).

The author points out that, in 2010, with regard to the Federal Rules, "significant changes were made to Rule 26, including the addition of a provision requiring parties to provide summary disclosures for non-retained or hybrid experts. Specifically, Rule 26(a)(2)(C) states that the summary disclosures should include (a) the subject matter on which the witness is expected to present evidence und Federal Rules of Evidence 702, 703, or 705 (and (2) a summary of the facts and opinions to which the witness is expected to testify."

These obligations are "considerably less extensive" than an expert report. For example, such experts could include "physicians or other health care professionals and employees of a party who do not regularly provide expert testimony."

These summary disclosure requirements are intended to prevent surprise and undue advantage to one side. It is intended to promote transparency and give fair notice to parties. Prior to the amendment, the author wrote, "there was not a bright line test for which expert reports were required."

In *Burreson v. BASF Corp.*, (E.D. Cal., August. 22, 2014) LEXIS 117590, the plaintiff's Rule 26 disclosures specified that the 5 non-retained experts, including himself, had not prepared written reports and would not be paid for their testimony, but did not specify what the expert's opinions were. Because the plaintiff failed to disclose the opinions, the defendant moved to preclude their testimony pursuant to Rule 37. Rule 37(c)(1) provides that if a party does not provide sufficient Rule 26 disclosures, "the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial unless the failure was substantially justified or is harmless." the plaintiff responded that because his experts would not receive any compensation, they were not "retained" and thus reports were not required. The magistrate rejected the plaintiff's argument finding that Rule 26(a)(2)(B)'s written report requirement does not depend on whether the witness is paid. The key question was whether the expert developed the opinions for the litigation, not for some independent purpose. The magistrate also required the plaintiff to produce a summary of the opinions, rejecting the idea that only the subject matter need be disclosed for the 5 experts. The magistrate also rejected plaintiff's claim that the defendant had to serve discovery on the experts to gain information regarding their planned testimony. The burden of disclosure "falls on the proponent of the expert testimony." Thus, two of the plaintiff's experts were barred from testimony under Rule 37 in the cited case. Three others who had been deposed were allowed to testimony only as to their opinion testimony elicited during the depositions. But all of the experts could testify as fact witnesses.

In *Kondragunta v. Ace Doran Hauling & Rigging Co.,* (N.D. GA, March 20, 2014) LEXIS 39143, the district court found that, although the plaintiff provided his medical records to the defendants, this failed to satisfy the summary disclosure requirement. The expert medical disclosures must include information that summarizes the facts and opinions, as called for in Rule 26(a)(2)(c). "Dumping medical records on defense counsel" did not satisfy the rules summary disclosure requirement. However, in *Perdomo v. United States,* (E.D. LA, June 11, 2012) LEXIS 81017, the Court held that the rule's disclosure requirement "pertain solely to the opinions [or treating physicians] not contained in the medical records."

In *Burreson*, the court did not allow the plaintiff an opportunity to amend or cure his deficient expert disclosures. Apparently, the plaintiff did not show up to be heard. But exclusion of expert witnesses is not always automatic, the author noted. This court explained the factors that should be taken into consideration to determine whether the non-disclosure is substantially justified or harmless, as follows:

> (1) The surprise to the party against whom the witness was to have testified; (2) the ability of the party to cure that surprise; (3) the extent to which allowing the testimony would disrupt the trial; (4) the importance of the evidence; and (5) the non-disclosing party's explanation for its failure to disclose the evidence.

The author's practical suggestions at the end of the article are that attorneys "need to be in touch with their witnesses at the earliest stage possible so that they can determine what type of expert testimony they might want to present. This will help attorneys gauge whether it is necessary to provide written expert reports as required by Rule 26(a)(2)(B) or summary disclosures as required by Rule 26(a)(2)(0C). You are not supposed to sandbag your opponent....the touchstone of Rule 26 is transparency.

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If attorneys decide that their fact witnesses may also qualify as non-retained experts, it is critical that they pay attention to Rule 26's summary disclosure requirements."

You also need to study the opponent's disclosures promptly and carefully, or "you could miss your opportunity to raise an appropriate challenge," the author warns.

MMLA PRIORITIES FOR THE NEW LEGISLATIVE SESSION

By: Matthew G. Feher, Esq.
MMLA Legislative Committee Chair
Associate, Burns & Levinson LLP

The start of the 2015-16 biannual legislative session coincides with a monumental transformation in the Beacon Hill political establishment that will set the course of the Commonwealth's agenda for at least the next four years. Most notably, the corner office is occupied again by a Weld-era Republican, Gov. Charlie Baker, who served as secretary of Health and Human Services and Administration and Finance under former Governors Bill Weld and Paul Cellucci and steered Harvard Pilgrim Health Care from the brink of financial collapse into one of the state's most profitable health insurance providers. His Lieutenant Governor, Karyn Polito, was a former member of the House and began her illustrious political career as a selectman in Shrewsbury. To demonstrate a strong partnership with local government, the Baker-Polito administration released $100 million in available local Chapter 90 road program funds only moments after being inaugurated. Since that time, the new administration held local aid harmless in addressing the state's current budget shortfall and significantly increased Unrestricted General Government Aid and Chapter 70 school aid as part of its first state budget blueprint (known as House 1).

In addition to the state's executive, the state Senate experienced robust change in its leadership structure as long-time local government advocate Sen. Stanley Rosenberg (D-Amherst) assumes the Presidency after serving for years as Senate President Pro Tempore during Therese Murray's leadership. Rosenberg served the Hampshire, Franklin and Worcester senate district since 1991. Notably, Senate President Rosenberg appointed the following as his top lieutenants: Sen. Harriette Chandler (D-Worcester) as Majority Leader, Marc Pacheco (D-Taunton) as his President Pro Tempore and Sen. Karen Spilka (D-Ashland) as Senate Ways and Means Chair. House leadership under Speaker Robert DeLeo (D-Winthrop) remains largely unchanged from last session and Rep. Ron Mariano (D-Quincy), Rep. Patricia Haddad (D-Somerset) and Rep. Brian Dempsey (D-Haverhill) will continue to serve as Majority Leader, Speaker Pro Tempore and House Ways and Means Chair, respectively.

The MMLA filed several pieces of legislation this session, in advance of January's bill filing deadline, which seek to improve critical local government legal policies. Specifically, the MMLA Executive Board unanimously approved the following legislative recommendations put forth by the Association's Legislative Committee for inclusion in its 2015-16 legislative package:

- **House Docket 3531, *An act relative to the open meeting law*** filed by State Administration and Regulatory Oversight House Chairman Peter Kocot (D-Northampton). This bill would make several necessary amendments to the state's Open Meeting Law, including: long-standing MMLA proposals to authorize public bodies to enter into executive session for attorney-client privileged communications and to negotiate non-labor contracts.
- **Senate Docket 1209, An act for legislation relative to providing for alternative delivery of infrastructure projects** filed by Senate Minority Leader Bruce Tarr (R-Gloucester) and written in part by the author of this article and his colleague, Anatoly M. Darov. The bill would create a new local option program for municipal and other public awarding authorities to use innovative public-private partnership project delivery methods, such as Design-Build-Operate and Design-Build-Operate-Finance, for water and wastewater infrastructure projects.
- **House Docket 887, *An act relative to benefits received by cities and towns prior to foreclosure of the rights of redemption under a tax title or taking*** filed by Rep. John Fernandes (D-Milford). This legislation was filed last session and would

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ensure that cities and towns are not liable for condominium fees between the time of tax taking and foreclosure unless the municipality is profiting from the transaction.

- **Senate Docket 1076,** ***An act for legislation to enforce municipal ordinances and bylaws*** filed by Sen. Jamie Eldridge (D-Acton). This refile was advanced to the House last session and would authorize the Superior Court or Land Court to assess a civil fine in an equity proceeding brought by a municipality in connection with the enforcement of its ordinances and by-laws.
- **Senate Docket 317,** ***An act for legislation to promote the planning and development of sustainable communities*** filed by Sen. Dan Wolf (D-Hyannis). This bill is a further revised version of previously filed legislation that makes comprehensive changes to both the state's zoning and subdivision control laws, all of which have been developed over the past two decades beginning with the work of the state's ad hoc Zoning Reform Working Group.
- **House Docket 2956,** ***An act relative to shared municipal legal representation*** filed by Rep. Denise Provost (D-Somerville). This legislation would enable two or more municipalities to utilize the same legal counsel and/or consultants to represent and serve them in any administrative, judicial or other proceeding in which they have a collective interest notwithstanding any provision of the state's conflict of interest law to the contrary.

Legislative committees will soon begin scheduling hearings on each of the thousands of bills filed. Once available, bill numbers, committee assignments and hearing dates associated with all of these MMLA legislative proposals will be posted on the MMLA website and will appear in a future edition of the MMLA Quarterly.

I encourage MMLA members to immediately contact their legislators and solicit their support of these critically important pieces of municipal legislation.

PART I[1] - REAL ESTATE TRANSACTIONS BY THE COMMONWEALTH THROUGH THE DIVISION OF CAPITAL ASSET MANAGEMENT AND MAINTENANCE (DCAMM)

By: Carol Kemp, Esq.
Deputy General Counsel, DCAMM

I. General: What does DCAMM do?

II. Some laws affecting DCAMM real estate transactions.

III. FAQs: DCAMM dispositions (sales, transfers and leases) of state real property

IV. FAQs: DCAMM acquisitions (purchases and leases) of real property

I. GENERAL: WHAT DOES DCAMM DO?

1. DCAMM does:

(i) Planning, design, construction, repair and maintenance of buildings for state agencies (courthouses, prisons, DYS centers, hospitals, community college buildings, state university & UMass buildings, state office buildings, data centers, call centers, military buildings, telecommunications towers, MEMA bunkers, environmental agency buildings, etc.); includes energy projects.

(ii) Real estate acquisition and disposition by purchase, sale, lease of commonwealth-owned real property (fee title, easements, restrictions, rights of reverter, etc.) used by state agencies;

(iii) Construction contractor certification & evaluation for public construction projects (municipalities are required use DCAMM-certified contractors and to send contractor evaluations to DCAMM);

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1. PART II of Real Estate Transactions will appear in the summer edition of the Quarterly.

(iv) Issuance to public agencies of emergency waivers from construction procurement requirements (vertical and horizontal construction: DCAMM has sole authority to waive procurement requirements);

(v) Receive required real estate transaction disclosure forms under M.G.L. c. 7C, s. 38 (formerly c. 7, s. 40J) concerning public agency transactions.

2. DCAMM does not do:

Design, construction and real estate transactions for Department of Transportation agencies (MHD, MBTA, etc.) and governmental "authorities" (e.g. Massport, MassDev, MWRA, UMBA, MSCBA).

II. MAJOR LAWS AFFECTING DCAMM REAL ESTATE TRANSACTIONS:

Law governing real property of the Commonwealth is a complicated patchwork of state constitutional provisions, general state laws, and numerous special acts, with changes over the centuries. Many of these laws conflict with each other. Issues have often been resolved via administrative agency practice. Some major laws:

1. **Article 97 of the Amendments to Massachusetts Constitution: requirement for specific legislative authorization.** *["The people shall have the right to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of their environment; and the protection of the people in their right to the conservation, development and utilization of the agricultural, mineral, forest, water, air and other natural resources is hereby declared to be a public purpose. . . . Lands and easements taken or acquired for such purposes shall not be used for other purposes or otherwise disposed of except by laws enacted by a two thirds vote, taken by yeas and nays, of each branch of the general court."]* Article 97 requires a special law that identifies the property, describes its current use, and contains a description of the new use or transfer that is being authorized. The legislation must also be passed by a 2/3 voice vote of the state legislature. See also EEOEEA "no net loss" policy.

2. **Prior Public Use Doctrine:** *"The rule that public lands devoted to one public use cannot be diverted to another inconsistent public use without plain and explicit legislation authorizing the diversion is now firmly established in our law. . . . "* Robbins v. Department of Public Works 335 Mass 328 (SJC 1969). The Prior Public Use Doctrine is a rule of legal interpretation created by the courts.

3. **General Laws governing DCAMM's real estate powers: M.G.L. c. 7C, s. 32 -- 38, 41.** See also **M.G.L. c. 7B** (Asset Management Board). Note: Part II of Real Estate Transactions will be published in the summer edition of the Quarterly. Therein, I outline the general DCAMM Chapter 7C procedures for disposing of state property when DCAMM has statutory authorization to do so.

4. **General Laws of each state agency that uses/ controls real estate.** These may or may not tell you what you need to know.

5. **"Special statutes" authorizing specific transactions and often exempting those transactions from provisions of M.G.L. c. 7C and other General Laws.**

6. **M.G.L. c. 79 (eminent domain).**

7. **M.G.L. c. 79A (relocation assistance law).** Applies to negotiated purchases as well as acquisitions by eminent domain.

8. **Executive Orders and agency regulations and administrative policies (e.g. EOEEA's "no net loss" policy).**

9. **Public design and construction services procurement laws.**

10. **Statutes transferring title to real property by operation of law without recorded deeds.** Example: M.G.L. c. 34, s. 6B. *"(d) All rights, title and interest in real property that were held by counties for county road purposes on the date that the county was abolished, in this chapter called county roads, are hereby transferred from the commonwealth as provided in this subsection. For any abolished county that has a successor council of governments,*

Continued onto page 11

rights, title and interest are hereby transferred to the successor council of governments. For any abolished county that has no successor council of governments title is hereby transferred to the respective towns in which the interests lie. . . . (e) In cases where it is unclear whether or not an interest in real estate was held for county road purposes on the date that a county was abolished, a written determination executed by the commissioner of capital asset management and maintenance shall settle the matter. The determination may be recorded in the appropriate registry of deeds and shall be final and binding on all parties."

11. **Statutes governing insurance.** M.G.L. c. 29, s. 30: *"No officer or board shall insure any property of the commonwealth without special authority of law."* This has been administratively construed to include title insurance.

III. FAQs: DCAMM DISPOSITIONS (SALES, TRANSFERS, AND LEASES) OF STATE REAL PROPERTY

1. **Who "owns" state real property?** [MGL c. 7C, s. 32] Real property that has been deeded to a state agency is deemed by law to be held in the name of the Commonwealth of Massachusetts, not the agency, regardless of what the grantee's name is on the most recent deed. While the Commonwealth "owns" or has title to state agency real estate, the various agencies have legal jurisdiction over their properties. *Note that there are now exceptions and gray areas.*

2. **What is the "no net loss" policy?** It is a policy of the EOEEA and its agencies to oppose sales or transfers of state Article 97 land for other than Article 97 purposes unless the using agency is given mitigation land of equal monetary and resource value to the land that is being transferred or sold, such there is "no net loss" of Article 97 land. The policy also addresses land of cities and towns.

3. **When can DCAMM convey state real property and what are the rules?** Note that DCAMM does not have a blanket authorization to sell or transfer state real property or to change the purpose for which it is held. A statute must be found that clearly authorizes the sale or transfer; there are many specific authorizations. When a law authorizes another state agency to dispose of its real estate, then DCAMM generally makes the disposition on behalf of that agency, using Chapter 7C procedures. (Part II of Real Estate Transactions will be published in the summer edition of the Quarterly. Therein, I outline the general DCAMM Chapter 7C procedures for disposing of state property when DCAMM has statutory authorization to do so.) Special laws often authorize DCAMM to dispose of state real property in a manner exempt from some of these procedures; these statutes may also impose other procedural requirements. DCAMM does have a general authorization, subject to certain approvals, to issue short term agreements to municipalities for use of property for a direct public use if it has been formally been declared surplus to state needs. [M.G.L. c. 7C, s. 33] Note: Lack of general power to convey easements *necessitates* DCAMM's attorneys to grant licenses to public utilities serving state buildings.

4. **Can DCAMM sell or lease a property at a price below its appraised fair market value?** Yes, unless this is prohibited by authorizing legislation, and provided that DCAMM publishes a justification for doing so. Land sold in a competitive process is sometimes sold for less than the appraised fair market value. Land sold to municipalities is usually required to be sold subject to a direct public use restriction and reverter and is appraised as restricted to particular town uses. This often results in a lower value than unrestricted fair market value. DCAMM is prohibited by law from leasing property to anyone for less than its maintenance costs where the state retains the responsibility for maintenance. [M.G.L. c. 7C, s. 36]

5. **When does DCAMM dispose of property by sale or lease without a competitive process?** Special statutes often authorize DCAMM to sell property to a named private person or municipality in a noncompetitive process.

Continued onto page 12

6. **Why does purchasing land from the state often cost more than it would cost to purchase from a private party?** Financial damages to the state are more than market value. Statutes authorizing the sale of state property to particular recipients usually require that the price must be the "full and fair market value" determined by an appraisal procured by DCAMM. This does not cover all of the financial damages to the state. Especially if it is Article 97 property, agency staff time and expenditures were required to purchase the property, staff time is required to sell it, and more staff time is required to replace it. Hence the buyer usually pays all transaction costs and sometimes the required consideration is an in-kind conveyance of real estate of greater value than the land being purchased. Sometimes the buyer is required to purchase the land for its full market value and also to provide environmental mitigation.

7. **Why do soil types matter on land that is not held by the state for farming purposes?** Executive Order 193 may require mitigation for conversion of farm-quality land to other uses even if it is not Article 97 land and even if it is not being farmed.

8. **Can people obtain ownership of state land via "adverse possession" for 20 years?** No. This applies for all Commonwealth land where the 20 year period was not completed prior to 1988. Also, no at an earlier date for certain lands. [M.G.L. c. 7C, s. 32]

IV. FAQs: DCAMM ACQUISITIONS (PURCHASES, LEASES) OF REAL PROPERTY

1. **How do DCAMM acquisitions of real property differ from dispositions?** In contrast to sales or transfers of state land, DCAMM generally does have the authority to buy or lease land and buildings from other parties without special statutes authorizing the purchases.

2. **What are the major ways that DCAMM acquires property?** Major ways to acquire real property include:

   a. **Gifts.** Gifts of land to the state generally can be accepted without many procedures (DCAMM checks to see if the "gift" is unacceptably polluted by hazardous materials or comes with other liabilities).

   b. **Competitive Purchases/Leases and Noncompetitive "Uniqueness" Purchases/ Leases.** Competitive purchases (and leases) are usually made via published Requests for Proposals in compliance with DCAMM's general laws. Noncompetitive purchases (and leases) may be made by DCAMM where the land needed by the state is unique due to its physical characteristics and location, provided that prior written justification is published and other procedures are followed.

   c. **Eminent Domain.** Few state agencies have general eminent domain powers, the major exceptions being DOT and EOEEA agencies. DCAMM does not have authority to take property by eminent domain unless: i) the agency for which it is acquiring the land has the power of eminent domain; or, ii) the power of eminent domain has been given to DCAMM in a special statute for a project or projects.

3. **Can DCAMM pay more than the appraised value for property?** Yes provided that DCAMM complies with the laws allowing DCAMM to do so, which include prior publication of an explanation before any binding agreement may be signed. DCAMM rarely pays more than the appraised fair market value for property that it purchases.

4. **How does the existence of tenants in a building affect purchase negotiations by DCAMM?** Before any public agency (including municipalities) acquires (or makes an offer to acquire) real property from another party, it must consider: i) the purchase price, transaction and mitigation costs, PLUS; ii) the cost of relocation assistance required to be made to any legal occupants of the property that will move as a result of the purchase, even if they are only month – to – month tenants. This requirement applies to negotiated purchases as well as eminent domain acquisitions.

PRACTICE GUIDE: MA ADMINISTRATIVE LAW AND PRACTICE

Legal publisher LexisNexis® has recently issued what promises to be an extremely helpful "desk reference" for attorneys practicing in the Administrative Law arena. The *"LexisNexis® Practice Guide: Massachusetts Administrative Law and Practice"*, 2014 Edition, combines extensive commentary from a variety of experienced practitioners, providing valuable insight into Massachusetts administrative practices and procedures. Co-general editors John R. Hitt and Michele E. Randazzo are joined by an impressive list of contributing authors, including several members of the Massachusetts Municipal Lawyers Association, a sitting Superior Court judge, and past and current Assistant Attorneys General, who, together, have compiled a comprehensive review of administrative law issues. The co-general editors would like to specially thank Judy Yogman, who served as Contributing Technical Editor, whose assistance was invaluable in the preparation of the Practice Guide.

A review of the Practice Guide reveals its depth of coverage. The contents include such topics as: judicial review of both administrative agency actions and decisions, including coverage of G.L. c. 30A appeals, as well as actions under G.L. c. 231A, G.L. c. 249, §4, and G.L. c. 249, §5; rulemaking by administrative agencies under the state Administrative Procedures Act; and chapters dedicated to both the Public Records Law and Open Meeting Law. Appealing an administrative agency decision to court, or defending an administrative decision in a court appeal? The Practice Guide provides detailed discussion of both procedural and substantive considerations, together with comprehensive summaries of helpful legal principles and standards of review. The Practice Guide also contains a chapter focused on where to find administrative agency materials, a useful tool for almost any municipal lawyer. Plans are underway for a CLE related to the Practice Guide's issuance, sponsored by the Social Law Library. Stay tuned for more details!

The Table of Contents is reprinted below, together with a listing of the authors who contributed to each Chapter. Copies of the Practice Guide are available for purchase on-line at http://www.lexisnexis.com/store/catalog/booktemplate/productdetail.jsp?pageName=relatedProducts&skuId=sku10480236&catId=1&prodId=prod21490323# .

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APPENDIX E CODE OF MASSACHUSETTS REGULATIONS, EXECUTIVE OFFICE FOR ADMINISTRATION AND FINANCE, 801 CMR §§ 101-104

APPENDIX F CODE OF MASSACHUSETTS REGULATIONS, OFFICE OF THE SECRETARY OF THE COMMONWEALTH, 950 CMR §§ 20.01-20.06

APPENDIX G MANUAL FOR CONDUCTING ADMINISTRATIVE ADJUDICATORY PROCEEDINGS, 2012 EDITION

APPENDIX H THE REGULATIONS MANUAL (2008)

APPENDIX I THE MASSACHUSETTS ADMINISTRATIVE PROCEDURE ACT, 37 B.U. L. REV. 70

RECENT MMLA EVENTS

On March 18th, MMLA and MCLE co-sponsored the **2015 Annual Municipal Law Conference** the MCLE's conference center in Boston. Over 100 lawyers, a majority of whom are lawyers whose practice is devoted to municipal law, at both the local and state level, attended the conference. As in the past, the program provided attendees with updates on changes in many areas of municipal law during the past year, and shared their views on the legal issues likely to be faced in the year ahead. A broad range of topics were covered: land use; labor and personnel; municipal finance; public construction; open meetings; public records; the new gun law; the false claim law; and more.

Boston Corporation Counsel, Gene O'Flaherty, gave the keynote presentation, with a most interesting account of how he was able to transition from a distinguished career in the Legislature to being the head of Boston's Law Department under Mayor Walsh. Mr. O'Flaherty noted the increasing close and mutually beneficial relationship between the City of Boston Law Department and MMLA.

UPCOMING MMLA PROGRAMS

April 16, 2015
Topic: MMLA 5th Annual Construction Seminar and Dinner Meeting

Location: CBS Scene Restaurant, 200 Patriot Place, Foxboro

Time: 3:00pm – 9:30pm (program runs 3:00pm to 6:15pm, followed by dinner and MMLA business mtg.)

Overview: Public Construction "Cross Training" by a panel of respected lawyers in the public construction field. The seminar is designed to inform and assist local officials as they prepare for the 2015 bidding and construction season. Topics include: Construction Procurement ABCs; House Doctor Services for Public Construction Projects; and A Decade of Reform- A Review of the Construction Reform Act of 2004

June 2015
Topic: TBD

Location: TBD

Time: TBD

UPCOMING LEGAL SEMINARS OF INTEREST TO MUNICIPAL LAWYERS

April 1, 2015
Topic: Workers' Compensation - MCLE Basics Plus

Location: MCLE Conference Center, Ten Winter Place, Boston

Time: 9am to 4pm

April 3, 2015
Topic: Blogging for Engagement: Marketing Advice for Solo and Small Firms

Location: MCLE Conference Center, Ten Winter Place, Boston

Time: 12pm – 1pm

April 9, 2015
Topic: Standard Form Construction Contracts (MCLE)

Location: MCLE Conference Center, Ten Winter Place, Boston

Time: 9:00am – 12:00pm

Overview: This program examines the differences and similarities between the "standard" contracting forms and the different methods of public procurement in the Commonwealth of Massachusetts. Understanding these differences helps you add significant value for your clients. The faculty focuses on Construction Management at Risk contracts under G.L. c.149A and the impact of Coghlin Electrical Contractors, Inc. v. Gilbane Building Company v. DCAMM, Supreme Judicial Court No. 11778.

April 14, 2015
Topic: Preventing and Litigating Wage and House Cases (MCLE)

Location: MCLE Conference Center, Ten Winter Place, Boston

Time: 2pm to 5pm

Continued onto page 15

April 24-27, 2015
Topic: IMLA's 2015 Mid-Year Seminar

Location: Washington, D.C.

Overview: A great time to visit the nation's capital and learn the latest on local government law.

Contact information: State Chair Jim Lampke at 781-749-9922, Regional VP Chris Petrini at 508-665-4310, or MMLA Liaison Bob Ritchie at 413-531-2431, IMLA at 202-466-5424 or www.imla.org.

May 8, 2015
Topic: 15th Annual School Law 2015 (MCLE)

Location: MCLE Conference Center, Ten Winter Place, Boston

Time: 9:30am to 4pm

May 19, 2015
Topic: Alcohol, Food and Entertainment Licensing and Liability Update 2015 (MCLE)

Location: MCLE Conference Center, Ten Winter Place, Boston

Time: 2pm to 5pm

May 20, 2015
Topic: Employment Law Spring Symposium 2015 (MCLE)

Location: MCLE Conference Center, Ten Winter Place, Boston

Time: 1pm to 5pm

June 3, 2015
Topic: School Law - MCLE Basics Plus

Location: MCLE Conference Center, Ten Winter Place, Boston

Time: 9:30am – 4:30pm

Overview: A practical foundation of the key topics in education law.

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