



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 MMLA Colleagues:

Wait, what? The Winter 2015 edition of the Massachusetts Municipal Law Quarterly? How can it be time for winter when, as I write this, not a flake of snow lies on the ground and today is touched by temperatures in the fifties? And yet, it is, after all, the second week of December, and we know better. And so we wait and we watch for winter.

But not your Association. Building on its August half-day program on “Municipal Development/Redevelopment: Opportunities and Pitfalls” held at the Publick House in Sturbridge, as well as its annual meeting and convention held in September at the Red Jacket Inn in South Yarmouth, the Massachusetts Municipal Lawyers Association has turned out two solid programs this fall. In late October, Bob Mangiaratti treated us to a fine presentation on grandfathering rights under M.G.L. c. 40, § 6 for pre-existing non-conforming uses and structures; his you-gotta-keep-it-handy chart synthesizing the welter of § 6 appellate cases was alone worth the price of admission. In early December, Christine Pulgini, chair of the Boston License Board, Sammy Nabulsi of the Boston Law Department, and Brian Kelly of Kopelman and Paige, updated us on liquor licensing issues and best practices before the ABCC. These programs typify the nuts-and-bolts approach the MMLA offers you to enhance your daily practice of municipal law.

And there is more to come around the bend in 2016. On January 22 and 23, the MMLA will be headlining three programs at the Massachusetts Municipal Association’s 2016 annual meeting at the Hynes Convention Center in Boston, namely: an update on what may by then be the new public record law (see below), an update of land use and zoning in Massachusetts, as well as an update on municipal law. On January 28, the MMLA will be hosting its program on the “Fair Housing Law and How It Affects Your Community - Are You Ready Legally?” at Holy Cross in Worcester. On March 16, the MMLA will be joining with MCLE to present the 2016 Municipal Law Conference at 10 Winter (there’s that word again) Place in Boston. Then on March 24, the MMLA will be presenting its program on “Home Rule Issues - Changes in Government and Home Rule Powers.”

And as if that array of upcoming programs were not enough to entice your mind away from waiting and watching for winter, consider that throughout the summer and fall, your Association, with the MMA, worked steadfastly with legislative leaders to address the concerns our cities and towns had with earlier versions of House Bill 3858, the proposed new public records law. The House voted to engross H. 3858 on November 18, just before formal session ended. The Senate will most likely take up the House-engrossed bill in January.

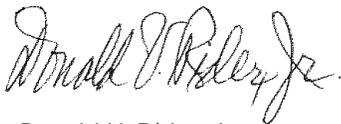
Inside this Issue

Letter from the President: Donald V. Rider, Jr.	1-2
Municipal Law Spotlight, Nancy Frankel Pelletier, Esq..	2-3
Public Records Bill Advances	3
A Primer on Administrative Search Warrants for Code Enforcement Purposes.....	3
A Review of “Learning Good Judgement”	6
Apps in the Hall: Counseling the Local Government Regulator in the On-demand Economy	7
Advertising	10
MMLA Quarterly Editorial Board	12
MMLA Website and Membership Information	13

Meanwhile in early December, the Baker administration introduced a municipal modernization bill, entitled “An Act to Modernize Municipal Finance and Government.” Per the administration’s press release, the bill “reflects the fact that expectations have changed concerning municipal government, ushering in significant improvements in professional management, and that advances in technology have profoundly changed the manner in which municipalities operate.” As with the proposed new public records law, the MMLA will be working with legislative leaders on the municipal modernization bill. By going to the front page of the Association’s website, you can quickly learn about these legislative developments affecting the cities and towns we serve.

Finally, speaking of service to our cities and towns, let us be reminded of the recent passings of two individuals who continue to affect the world of Massachusetts municipal law as we know and practice it today. An author of the Massachusetts Practice Series treatise *Municipal Law and Practice*, Doug Randall served in the early 1960s as president of the City Solicitors and Town Counsel Association, forerunner of the MMLA. That he was known as the “Dean of Municipal Law” perhaps says it all. In the late 1990s, Mike Curran likewise served as CSTCA President. His abiding interest in municipal organization, charters and constitutional home rule earned him the reputation as a “small time Thomas Jefferson.” Look for tributes to both Doug and Mike in the upcoming new edition of *Massachusetts Municipal Law*, co-edited by Bob Ritchie and Jim Lampke and to be published by MCLE in early 2016.

Sincerely,



Donald V. Rider, Jr.
President

MUNICIPAL SPOTLIGHT ON: Nancy Frankel Pelletier, Esq.

By: Peter Mello, Esq., Petrini & Associates, P.C.

1. **In what city/town were you born?**
Springfield, Massachusetts.
2. **Where did you attend college and law school?**
Boston College; The National Law Center George Washington University.
3. **What municipalities do you represent?**
I represent numerous municipalities through the Massachusetts Interlocal Insurance Association (MIIA). I have, also, acted as special counsel to a variety of municipalities, including Northampton, West Springfield and Westfield.
4. **Has municipal law changed a lot since you began practicing? If so, how?**
Interesting question. Yes and no. Some of the more archaic aspects of the law have not, but many areas relating to advancing technology have changed. Years



ago, cell towers were a big issue. Now, solar arrays, regulation of Uber, Airbnb, body cams, etc. are evolving topics.

5. **5. What is your favorite discipline within your municipal practice?**
I am a trial lawyer pure and simple.
6. **6. What is one of your proudest moments as a lawyer?**
I represented the most severely burned victim in a foundry explosion. Not my usual area of practice, to say the least. I was honored and humbled to represent this family and guide them through the complex legal maze they had never faced before.
7. **7. What is the most useful advice you could give regarding the practice of law?**
Be prepared and be honest. Your reputation will be the key to your success (or failure).
8. **8. Have you written or presented to professional groups regarding legal issues? What sorts of issues?**
Yes. I speak frequently on issues relating to the defense of municipalities, particularly in the context of 1983 claims. I recently spoke at the MMLA Annual Meeting on Municipal Trial practice, specifically on discovery and public records issues.

Continued onto page 3

9. What do you like to do outside of work?

Spend time with family (especially the four legged one).

10. When you are driving to court to argue an important motion, what might you be playing on the radio?

I'm partial to 70s music - The Stones, Allman Bros, etc., but have a pretty wide variety of music in my car. I'm still working on mastering iTunes.

- AG Enforcement. The bill enhances the Attorney General's enforcement powers over the law and requires that the courts assess penalties on municipalities if a judgment is reached.
- Records Access Officers. Each city or town will be required to appoint a Records Access Officer to assist in responding with requests and to otherwise comply with the law.
- Fees. The first two (2) hours of time associated with work performed to compile, segregate, redact and reproduce public records is exempt from assessable charges. Fee amounts that may be assessed have been capped.
- Use of Vendors. The bill would allow municipalities to use outside vendors to assist records access officers to comply with the law if staff lacks qualifications or technological capabilities and would require that the requestor reimburse the associated costs or forfeit the request.

PUBLIC RECORDS BILL ADVANCES

By: Matthew Feher, Esq., Burns and Levinson, LLP and Legislative Committee Chair, MMLA

Legislation making several amendments to the state's Public Records Law received initial approval by the House in November and is expected to be acted upon by the Senate when the branches return for formal business in January. That bill, H. 3858, is currently pending in Senate Ways and Means. The House-backed legislation reflects the efforts of the MMLA and MMA to improve prior versions particularly in the areas of compliance and enforcement. MMLA is currently working with Senate leaders as they craft their own version of the bill and recently met with representatives of the Senate President's office, Senate Ways and Means and others.

H. 3858 makes several changes from earlier version of the bill that were stalled throughout the summer and fall due to concerns raised by MMLA and others. A brief overview of the House approved bill's key provisions follow:

- Compliance Timing. H. 3858 only requires that a response be provided within ten (10) days from the receipt of a request and provides as many as seventy five (75) days to fully comply with the law. Moreover, a municipality may petition the Supervisor of Records for an extension given the nature of the request.
- Enforcement. Plaintiffs would have thirty (30) days to initiate an action for noncompliance or fees charged. The courts are not required to impose civil penalties and may only do so if the custodian acted "maliciously" or in "bad faith." Further, the courts are not required to award reasonable attorney's fees and are not required to order the waiver of any fees assessed by the municipality. Any such penalties are assessed on the public body, not the individual.

The MMLA will prepare a thorough overview of the new legislation once signed into law. Please visit the MMLA's website for real time updates as the bill progresses at www.massmunilaw.org.

A PRIMER ON ADMINISTRATIVE SEARCH WARRANTS FOR CODE ENFORCEMENT PURPOSES

By: Karis L. North, Murphy Hesse Toomey & Lehane, LLP

A. Introduction.

As a general rule, a search of private property without a valid search warrant is unreasonable, even in the context of code enforcement, and despite the language of various statutes and regulations which purport to give code enforcement officials the right to enter property for inspections. *Camara v. Municipal Court of San Francisco*, 387 U.S. 523, 529 (1967). This protection can become a burden to municipalities, when departments entrusted with code enforcement responsibilities find themselves needing in-depth inspections of properties or facilities and cannot get permission from the owner for entry.

Continued onto page 4

Recognizing that a search of physical conditions which do not comply with minimum regulatory standards is different than a search for the evidence of criminal action, both the U.S. Supreme Court in the Camara case, and the Massachusetts Supreme Judicial Court, in Commonwealth v. Frodyma, 386 Mass. 434 (1982), have articulated a lowered standard of proof by which a municipality may meet the probable cause requirements of the 4th Amendment, and obtain an administrative search warrant allowing entry on to private property.

B. Legal Standard for Granting an Administrative Search Warrant.

The Fourth Amendment to the Constitution of the United States protects private property owners from “unreasonable” searches or seizures of their property by government officials, and states:

The right of people to be secure on their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

U.S. Const. 4th A.¹

While the courts have distinguished between a search for code enforcement purposes and a search for evidence in a criminal proceeding, they have also required that a requires for entry on to property for code enforcement inspections require the review of probable cause by a neutral magistrate, in order to comply with the Fourth Amendment. Municipalities must still meet the “reasonableness” standard when applying for a search warrant to undertake a code violation inspection. Frodyma v. Commonwealth, 386 Mass. 434, 438 (1982). This standard requires that a municipal department or agency provide evidence of probable cause in support of its belief that a violation of the law has occurred, to justify the issuance of an administrative search warrant.

Administrative search warrants differ from criminal warrants in two ways: (1) there is a lower standard of proof to meet the probable cause standard; and, (2) in certain instances, probable cause can be met without any individualized suspicion, if the search is conducted according to a “reasonable legislative or administrative standard” derived from neutral sources. See Marshall v. Barlow’s, 436 U.S. 320 (1978); see also Frodyma, 386 Mass. at 441-442. With regards to building inspections particularly, this second difference means that building inspectors may get an administrative search warrant to enter private property without any specific knowledge concerning a particular building if they are entering pursuant to a neutral inspection system based on facts like the nature of the building, the passage of time, or the condition of the entire area. Commonwealth v. Accaputo, 380 Mass. 435 (1980) (citing Camara, 387 U.S. at 538). Therefore, if there is some sort of administrative plan that calls for regular inspections of particular buildings at certain times or on the occurrence of a particular event, that plan itself may be sufficient to establish probable cause. Frodyma, 386 Mass. at 442-443.

Probable cause for a code enforcement official’s individualized (i.e., non-routine/non-regular inspection) entry on to private property may be obtained by: (1) observations of the conditions of the property from the outside which tend to show possibility of a code violation; (2) statements from the owner or any inhabitants about problems or code violations; or (3) observations from customers or clients or employees about code violations.² Eisenberg v. Wall, 607 F. Supp. 2d 248 (D. Mass. 2009).

Examples of probable cause that have constituted sufficient observations to obtain an administrative search warrant include facts such as: (1) a car parked at the end of the driveway filled with rubbish emitting a foul odor; (2) old lawn furniture, scraps of furniture and metal piled high and blocking the driveway except for a narrow path to the garage; (3) overgrown landscaping that made the front door of the residence inaccessible; (4) a partially

Continued onto page 5

1. It is “well settled law” that the Fourth Amendment is enforceable against the states through the due process clause of the Fourteenth Amendment. Camara, 387 U.S. at 528 (citing Ker v. California, 374 U.S. 23 (1963)).
2. In contrast, in the criminal context, in a drug case, the SJC has found that affidavits to constitute probable cause “must provide a substantial basis for concluding that drugs will be found on the specified premises.” There must be specific information that draws a nexus between the drug selling activity and the building to establish probable cause to search the building. Just showing that the resident of the building is guilty or is believed to be guilty of a crime is not enough to show a sufficient connection between the residence and the crime, which warrants a search. Commonwealth v. Pina, 453 Mass. 438 (2009).

collapsed chimney; and (5) windows of the residence coated with ice. *Eisenberg*, 607 F. Supp. 2d. at 251. Other relevant information included the statement of building residents and admissions by a landlord concerning the property condition. *Id.*

C. Practical Considerations When Applying for an Administrative Search Warrant

Since probable cause must be demonstrated by observations which are set forth as “truthful statements in an affidavit,” the affidavit of the inspectional officer charged with the oversight of the code program at issue will be the principal piece of evidence in support of probable cause. *Eisenberg*, 607 F. Supp. 2d at 254. The affidavit should detail the regulatory scheme at issue, the standard for compliance, and specific facts and observations supporting the conclusion that a code violation is occurring. Supporting the affidavit with photographs taken from a sidewalk or a neighboring property (where permission to enter has been granted) is also useful, and helps flesh out the facts supporting probable cause for the magistrate.

Search warrants are available from a District Court magistrate. In filing an application for an administrative search warrant there is no separate form, you must use the general criminal search warrant form. The form requires the following information:

- (1) description of the violation;
- (2) description of the search requested;
 - a. be as specific as possible as to location, including whether the search includes the interior or exterior of the property and any accessory buildings or structures. Also indicate if you intend to take photographs, samples, remove any items, or collect any evidence other than detailed observations.
 - b. list the types of officials who will participate in the search, including police officers or other municipal officials and including counsel if necessary.
- (3) description of the location of the search; and,
- (4) description of who has control of or who occupies the property.

Also be prepared to request whether you can enter at night, enter without knocking, or whether you can search any persons present at the property. These requests are unlikely to be granted unless the affiant provides specific information and cause to support each such request.

When applying for the warrant, bring your affiant to the court with you. They will sign the application in person after being sworn by the magistrate, and they may also be questioned as to the facts set forth in the affidavit. If time allows, it is useful to inquire with the clerk’s office as to when a magistrate can be available to issue a warrant.

As with any other search warrant, an administrative search warrant must be executed and the return filed within 7 days from the issue date. Pre-planning concerning the execution “team,” the timing of when you want to execute the warrant, and preparing the detailed inspection notes that form the basis of the return is crucial in getting it all done in a timely manner.

The return is filed in the same court where the warrant was issued, with a magistrate. The return must list the date and time the warrant was executed and provide a detailed list of the observations made during the search. As with the warrant application, the list of observations should be drafted in the form of an affidavit. The official who applied for the warrant must sign the return in the presence of the issuing magistrate, after being sworn.

D. Conclusions.

With sufficient timing and planning, the administrative search warrant is a powerful tool for code enforcement officials. The lowered standard of probable cause to support an application for such a warrant can be satisfied by an official’s individualized concern about a particular property or facility, or a neutral inspection plan, in relation to the enforcement of public health, safety, and welfare regulatory schemes. The public need for effective enforcement of these regulations justifies these intrusions into private property and constitutes “reason” for such a search so that the Fourth Amendment requirements are met.

A REVIEW OF “LEARNING GOOD JUDGMENT”

*By: Jordan L. Shapiro, Esq.
Former City Solicitor, City of Malden and Past
President of the Municipal Lawyers Association*

This month’s review is of “Learning Good Judgment,” an essay appearing in *Litigation*, published by the Section of Litigation of the American Bar Association (Vol 42, No. 1, Fall 2015). It is thoughtful and detailed, concise and precise, and is authored by Robert Shapiro, a litigator in a large Chicago, IL law firm¹.

The author captures the unusual nature of litigation in the opening paragraph:

Litigation is a curious business, isn’t it?— a strange combination of past, present, and future. The immediate focus is on something that already happened. It will be adjudicated by current legal standards. But it depends decisively on predicting and controlling the future. A litigator must look ahead, and foretell and manage the ups and downs, the ins and outs, of the dispute— from the very first day the matter arises to the day when, one way or another, it is resolved, with a stake through its heart.

The author correctly states that the good lawyer needs to know what to do with the law and the factual record as the case moves along— a kind of “special foresight we call good judgment and it is always in demand.” The author, however, also correctly states the age old worry of young lawyers, namely, “the suspicion, even the worry, that they will never get it, no matter how hard they try.”

Of course, the author goes on to discuss exactly how young lawyers can obtain the good judgment that they fear they cannot acquire. Seeking out a good mentor to learn from is key for a young attorney, according to Shapiro. Finding a mentor is no guarantee to finding someone to teach you good judgment, because, as Shapiro notes, many seasoned litigators “seem rather clueless.” However, Shapiro points out that finding a

mentor that demonstrates three qualities, which are talent, experience, and natural gifts, is a good way to start, because “judgment is the right kind of perspective, not a set of principles, but an attitude.” And that part of good judgment is the constant recognition that no one’s judgment is “ever good enough.”

Shapiro also offers 12 guidelines in learning good judgment. Some of the more memorable and cogent guidelines are:

1. The “vision thing.” Shapiro correctly notes that, after a lawyer has learned the law and facts “judgment” then asks this question: “What problem are you trying to solve, and how might the be resolved?” Lawyers “who cannot see that forest through the trees, or perhaps who do not know the forest is even there, cannot make good judgments about what to do or when to do it or whether to do anything at all.” Shapiro goes on to state that a judgment enables the lawyer to correctly identify the issues and to manage them as well as manage the client’s expectations.
2. “Name that tune.” Shapiro believes that a case needs a memorable theme song like a melody that sticks in your head. Shapiro correctly notes that “a case without a theme is like a story without a moral or a point. Its bland, it’s boring, it’s forgettable.”
3. “Manage the future by looking backward.” Shapiro urges lawyers to look backward as a case develops to determine how the issues can best be resolved. A lawyer should continue to ask why certain courses are being pursued, “why take this deposition and what will this deposition do for the case? If the attorney cannot articulate a reason beyond “I think it will help,” it probably won’t.
4. “Patience isn’t a virtue; it’s a necessity.” The author reminds lawyers that that a lawsuit “has its own time and timing and you should endeavor to feel out what it is.” Shapiro also urges lawyers to “take things in stride. It is seldom that a single motion or deposition is the be all and end all. Judgment requires patience.”

Continued onto page 7

1. No relation to Jordan Shapiro, the author

Shapiro also includes some less helpful suggestions including euphemisms like working hard, never giving up, don't panic or gloat and consider all possibilities. The commentary in these sections is nothing more than the usual platitudes that are more suited for a self-help book than developing the good judgment of a lawyer.

Perhaps the author's least helpful section was "It's not a blunder; it's a trick." The author suggests that a lawyer should never assume the opposing counsel does not know what he or she is doing. Instead, the author suggests that if a lawyer believes opposing counsel has committed a blunder, it is not a blunder but a trick and cause for the lawyer to figure out what opposing counsel is doing. However, it is my experience that the opposite of this is true and often a blunder is simply a blunder! This does illustrate the importance of judgment and experience, because the more of both a lawyer has, the more able he or she is able to determine when opposing counsel has faltered.

The author concludes the article with tried and true recommendations for the development of good judgment. Lawyers should be courteous and honest and remain calm as anger interferes with judgment and rudeness begets rudeness. Shapiro's conclusion reminds lawyers that:

"If you think you have it all figured out, you don't. Recognize you never will. Judgment itself is an ever-evolving, never-certain sometime thing. Keep at it. Someday you may wake up and find you have it. For the moment anyway."

Shapiro's article did not cover any new ground and parts were of average value, but the article was entertaining and was a good refresher for experienced litigators, with a rarely seen focus on the development of good judgment.

APPS IN THE HALL: COUNSELING THE LOCAL GOVERNMENT REGULATOR IN THE ON-DEMAND ECONOMY¹

By: Catherine Lizotte, Senior Assistant Corporation Counsel, City of Boston Law Department

Start-ups and existing companies alike are developing innovative and technology-enabled ways to deliver services traditionally regulated by local government at breakneck speed. Whether their apps allow one to request on-demand valet service or trash pickup, to rent a home or to pay a parking meter, these companies are choosing two distinct paths to entering the market: assertively courting municipalities before they launch their businesses, in the hopes of garnering enough support to ward off heavy-handed regulation, or thrusting their services on the market and waiting for municipalities to react. With the wealth of commentary on the inherent tension between the disruption economy and existing regulatory schemes, and the highly publicized standoffs between local governments and sharing economy heavyweights Uber and Airbnb, it can be easy to portray municipalities as slow-moving and intractable, trying to stifle change by clinging to archaic regulatory powers. Yet at an increasing pace city halls are experimenting with new ways to improve the delivery of municipal services to constituents, either by tapping into the resources of the startup sector or by developing their own technology-enabled solutions.

The catch, of course, is that local governments may only act within the bounds of their legal authority--and as regulatory bodies, are charged with enforcing laws that have not caught up with current technologies. Or, even if they are not constrained legally, cities and towns may face pressure from industry incumbents to preserve traditional regulatory schemes. These realities place government counsel in the sometimes unenviable position of having to advise his or her client when the extent of the city's regulatory reach is simply unclear.

Continued onto page 8

1. This article previously appeared in the October/November 2015 edition of The Municipal Lawyer Magazine published by the International Municipal Lawyers Association (IMLA), and is republished by MMLA with the author's permission.

Whether a municipality's ultimate decision is to prohibit or allow a new technology or service, or to pursue its own innovation agenda, resolving the legal questions involved is a process fraught with ambiguities. As counsel navigating these murky waters, you can better define your analytical approach and give informed advice to your clients by considering the following recommendations:

Understand what your client is being asked to regulate before it does (or doesn't).

While determining what your client is attempting to regulate may seem like an obvious task, often the government's interest in regulating a new service is not immediately apparent. The use of online platforms to facilitate transactions ordinarily conducted between individuals in the context of a defined use or industry creates a wrinkle. As sites that enable peer-to-peer transactions may view themselves as information clearinghouses rather than industry players subject to traditional rules, it is necessary to ask yourself what service or use is actually being offered.

For example, cities that have sought to regulate sites like Airbnb have done so because they seek to regulate the uses of property that the short-term rental arrangements facilitated by Airbnb create. As the platform connecting the parties to the transaction, Airbnb, through its hosts, is subject to the local policy's restrictions. Other app-provided services, however, are more difficult to define. Sites like RelayRides and FlightCar, which connect car owners with prospective renters in an "online marketplace," may or may not qualify as car rental companies subject to local or state licenses and taxes. On-demand valet companies like Luxe and Zirx, whose employees service customers' valet and parking requests at any location, more closely resemble traditional valet providers that may require local licenses to operate. The difficulty for counsel in advising municipal regulators lies in differentiating between the use or service that is offered and the technology that enables it.

Whether your client ultimately decides to regulate or to refrain from regulating, either because the new technology does not constitute a use or service within its regulatory jurisdiction, because some other form of self-regulation inherent in the peer-to-peer model lessens the need for government oversight, or for some other non-legal (but equally valid) reason, a thoughtful consideration of the nature of the service that a new

technology facilitates and its ability to be regulated will provide you with a solid foundation for establishing a policy that will be defensible if you face a legal challenge down the road.

Determine the boundaries of your legal authority.

Once you decide that a new technology or service is subject to government regulation, you will need to determine whether it can be regulated locally or whether state or federal preemption concerns apply. Resolve these questions by examining state statutes that grant or prohibit local authority and by considering the expansiveness of your municipality's home rule powers.

Remember that multiple levels of regulation may coexist. As recently demonstrated by the wave of pending state bills that propose to regulate transportation network companies like Uber even in places where municipalities have passed similar laws, it is clear that legislators are seeking to bring statewide uniformity to rules governing those new services that operate across jurisdictional lines. Unless expressly prohibited from regulating--as in Wisconsin, where a newly enacted state law expressly prohibits local regulation of TNCs--municipalities can enact ordinances that share regulatory responsibilities with the state as long as they do not conflict with state laws. TNCs operating in Chicago, for example, must comply with both a city ordinance requiring a local license and imposing strict requirements concerning drivers, insurance, and vehicle inspections, and a state law which applies to TNCs throughout Illinois and imposes a similar but less comprehensive set of conditions.

As new technologies continue to be developed and introduced, multiple levels of government will likely continue to share regulatory responsibilities, as they establish ground rules for industries where existing laws fall short. With the introduction of Google's Self-Driving Car and the burgeoning autonomous vehicle industry, for instance, one can envision three levels of government regulation: federal safety standards for driverless cars, state laws governing vehicle operation and registration, and local laws governing their movement along city streets. However regulatory authority is delegated in your jurisdiction, considering each level of government's potential regulatory interest in a new technology or service will aid you in developing your own policy, especially if it involves multiple industries.

Continued onto page 9

Consider flexible but reasonable interpretations of existing law.

You will likely encounter a law that loosely governs the service you are seeking to regulate, but that was enacted by legislators who could not have anticipated the technological innovations that now facilitate those services. The dilemma lies in determining whether the law leaves room for flexible interpretation or whether you must start the legislative process from scratch. Most likely, the app or service that you are examining will operate in a legal gray area.

For instance, the “pop-up” transit company Bridj offers bus service in D.C. and Boston that operates along fixed stops, similar to the traditional “jitney” which often requires local government approval of a specific route. Bridj (which refers to itself as a “jitney-esque” service), however, operates along flexible routes, dictated by customers who use Bridj’s app to customize preferred start and end points. It is obviously impractical to require Bridj to obtain approval for each of its custom, changeable routes simply because the service it provides is governed by statutes designed for the streetcars of the 1900s. It would be similarly illogical, however, to take the position that Bridj is exempt from any regulation simply because its business model provides a new method of selecting routes. In this situation, you might take a hybrid approach, interpreting your existing law to require services like those offered by Bridj to obtain government approval to operate, while adopting a more flexible policy that allows for frequent route changes with periodic review.

If your relevant laws are broadly drafted, applying an existing regulatory scheme to a new technology may be an adequate solution, especially if enacting a new law is not palatable to your client. Of course, this approach only works with companies that don’t resist attempts to place them into a certain regulatory box. If their position is that they are not subject to any existing regulation, a longer-term legislative or policy solution may be necessary.

Anticipate the unanticipated legal challenges.

You will not be able to anticipate every ancillary effect of your proposed regulation or policy, whether legal or

not. Pay attention to what is occurring in other jurisdictions, and keep abreast of evolving policies and lawsuits to help you gauge the potential roadblocks to successful implementation. You may expect opposition from the long-standing industry incumbent that claims that the government has treated it differently from new industry players—or from the new startup that claims it is exempt from government regulation. Sometimes, however, the challenge will come in an unexpected form.

When, last fall, the online vacation rental marketplace HomeAway filed a suit against the city of San Francisco seeking to prevent the city from enforcing its newly-passed short-term rental ordinance, it did so not on the grounds that it was not subject to the city’s regulations, but because it claimed that the law’s requirement allowing only local residents to rent their properties burdened interstate commerce by excluding HomeAway’s customers who owned property outside of the city. While the court ultimately dismissed the suit after finding that HomeAway, as a mere hosting platform that does not participate in the rental transaction, lacked standing to bring claims on behalf of its customers, the case shows the difficulties involved in designing a regulation that is immune from legal challenge, even one by the industry that the regulation seeks to allow.

The development of new technologies will almost always outpace new laws that address them, and local government regulators will continually face uncertainty in their authority to deal with them. The answer, however, is neither to prohibit a new service outright nor to allow it to operate unchecked. Instead, deciphering the government’s regulatory authority over a new app or technology requires counsel to take a thoughtful and sometimes creative approach that takes into account existing law, the bounds of existing legal authority, and a host of political and practical considerations. While the larger question of whether government should take a more hands-off approach to regulation remains open, in the short term regulators can adopt policies that are flexible, that maintain industry equity, and that are legally sound.

BOURBEAU & ASSOCIATES, P.C.

Mark S. Bourbeau, Esq.

Our practice covers the entire legal arena, with a special emphasis on consultation, representation before administrative bodies, and litigation in all state and federal courts concerning eminent domain, land use/acquisition, environmental, development and other real property related matters. B&A has a wide range of experience in all types of eminent domain cases, having represented plaintiffs and defendants across the Commonwealth in hundreds of different types of cases, including those involving the Big Dig.

266 Beacon Street
Boston, MA 02116
Telephone: (617) 367-9695
Facsimile: (617) 367-9651
Website: www.bourbeaulaw.com

BRODY, HARDOON, PERKINS & KESTEN, LLP

We concentrate in: civil rights, employment discrimination claims and have represented over 100 Massachusetts cities and towns in litigation during the past 15 years. Available for consultation on a case by case basis.

699 Boylston Street
Boston, MA 02116
Telephone: (617) 880-7100
Facsimile: (617) 880-7171
Email: ljoyce@bhpklaw.com
Website: www.bhpklaw.com

**DEUTSCH, WILLIAMS, BROOKS, DeRENSIS
& HOLLAND, P.C.**

Paul R. DeRensis, Esq.

Providing comprehensive legal services to, municipalities and government entities, town counsel, on land use, environmental, litigation, labor, eminent domain, zoning, contracts, and public sector law.

One Design Center Place, Suite 600
Boston, MA 02110
Telephone: (617) 951-2300
Facsimile: (617) 951-2323
Email: pderensis@aol.com
Website: www.dwboston.com

EPSTEIN & AUGUST, LLP

Bill August, Esq. and Peter Epstein, Esq.

Representing cities and towns in cable television franchising and related regulatory matters, including: cable franchise renewals and franchising, negotiations strategy and counsel, franchise compliance, grants of location and right-of-way management, telecommunications planning, non-profit incorporation, governance and oversight. The firm's principals have represented more than 100 cities and towns in cable television and related regulatory matters.

101 Arch Street, 9th Floor
Boston, MA 02110
Telephone: (617) 951-9909
Facsimile: (617) 951-2717
Email: billaugustUSA@aol.com peter@epsteinandaugust.com

KOPELMAN AND PAIGE, P.C.

Leonard Kopelman, Esq.

A comprehensive statewide municipal law firm with the expertise and resources to efficiently and effectively assist you as Special Counsel in all areas of municipal law. Specializing in land use, affordable housing, real estate, labor and employment, environment, education, cable TV, and procurement. Trial experience in all courts and administrative agencies, extensive database of briefs and opinions, special counsel to over 100 municipalities.

101 Arch Street
Boston, MA 02110
Tel: (617) 654-1701 / Fax: 617-654-1735
Email: lkopelman@k-plaw.com
Website: www.k-plaw.com

LAW OFFICES OF LAMPKE & LAMPKE

James B. Lampke, Esq.

Certified as a Local Government Fellow under auspices of IMLA.

Over 30 years concentrating in municipal and public sector law.

Available to assist you or serve as Special Counsel when the need arises due to conflict situations, work load demands or other reasons. Also available as Independent Hearing Officer (c. 31, etc.), Internal Investigations - Harassment, Discrimination, Claims Against Employees, etc. adds credibility to process & removes appearance of politics. Provides Dispute Resolution, Mediation and Arbitration Services. Rates & services flexible for most situations.

115 North Street, Hingham, MA 02043
Telephone: (781) 749-9922 / Hull Residential: (781) 925-1587
Cell Phone: (617) 285-4561
Facsimile: (781) 749-9923
Email: jlampke@massmunilaw.org

MMLA thanks our advertisers for their support. If you would like to advertise in the Quarterly, please contact Jim Lampke.

**LOUISON, COSTELLO, CONDON & PFAFF, LLP
ATTORNEYS AT LAW**

Douglas Louison, Esq. and Patrick Costello, Esq.
Special counsel available to assist City Solicitors and Town Counsel in the defense of civil rights, discrimination and general liability claims; eminent domain, public construction, local taxation and tax title Land Court practice.

101 Summer Street, Fourth Floor
Boston, MA 02110

Telephone: (617) 439-0305

Facsimile: (617) 439-0325

Website: www.merricklc.com

McGREGOR & ASSOCIATES, P.C.**OVER 30 YEARS OF ENVIRONMENTAL LAW**

Gregor I. McGregor, Esq., Michael O'Neill, Esq.
Nathaniel Stevens, Esq., and Luke H. Legere, Esq.

Legal services for government, business, non-profit, and landowners in all aspects of environmental law, real estate, and related litigation, plus land use planning and strategic advice for complex transactions and controversies.

15 Court Square, Suite 50
Boston, MA 02108

Telephone: (617) 338-6464

Facsimile: (617) 338-0737

MURPHY, HESSE, TOOMEY & LEHANE, LLP

Providing comprehensive legal services to municipalities and school systems throughout the Commonwealth. Town counsel, education law, labor and employment, employee benefits, public sector law and health care law.

300 Crown Colony Drive, Suite 410
P.O. Box 9126

Quincy, MA 02169-9126

Tel: (617) 479-5000 / Fax: (617) 479-6469

Website: www.mhtl.com

MURPHY, LAMERE & MURPHY, P.C.

A comprehensive, full service law firm. Providing legal counsel in all areas of municipal, education, labor & employment law.

50 Braintree Hill Office Park,
Suite 202

Braintree, MA 02184

Tel: (781) 848-1850/ Fax: (781) 849-0749

Email: mmcnulty@mlmlawfirm.com

Website: mlmlawfirm.com

PETRINI & ASSOCIATES, P.C.

Petrini & Associates, P.C. offers special counsel services in all phases of public construction, including representation of cities and towns in construction litigation and advisement of municipalities in bidding, contract negotiation, project delivery and close-out. The firm also offers special counsel services to communities with Chapter 40B projects, including providing advice to boards conducting comprehensive permit reviews at the local level and bringing appeals before the Housing Appeals Committee.

372 Union Avenue

Framingham, MA 01702

Tel: (508) 665-4310/ Fax: 508-665-4313

Email: info@petrinilaw.com

Website: www.petrinilaw.com

**PIERCE, DAVIS & PERRITANO, LLP
COUNSELORS AT LAW**

John J. Davis, Esq.

The PD&P Municipal Liability and Civil Rights Practices Group specializes in the defense of municipalities, schools, municipal boards and departments and public officials in the courts of Massachusetts and Rhode Island, in the federal courts, and before state and federal administrative agencies.

90 Canal Street

Boston, MA 02114

Telephone: (617) 350-0950

Facsimile: (617) 350-7760

Email: jdavis@piercedavis.com

Website: www.piercedavis.com

ROBINSON DONOVAN, P.C.

A Comprehensive, Full Service Law Firm Providing Effective Legal Counsel In All Areas of law, including:

- Municipal
- Corporate & Business Counseling
- Commercial Real Estate
- Estate Planning & Administration
- Family
- Litigation
- Employment & Litigation

1500 Main Street, Suite 1600

P.O. Box 15609

Springfield, MA 01115

Telephone: (413) 732-2301

Facsimile: (413) 785-4658

Email: npelletier@robinsondonovan.com

Website: www.robinson-donovan.com

SHAPIRO & HENDER

Jordan L. Shapiro, Esq.

Personal attention and reasonable fees for jury and non-jury trials in all courts and administrative agencies. Jordan Shapiro is Past President of the CSTCA and Middlesex County Bar Association; 20-year City Solicitor and now Special Counsel for Malden; frequent Special Counsel, hearing officer and expert witness; co-author of Mass. Collection Law. David Shapiro is Assistant City Solicitor in Somerville. Danielle Hender was formerly with the Malden and Waltham Law Departments and State Ethics Commission.

105 Salem Street

P.O. Box 392

Malden, MA 02148

Telephone: (781) 324-5200

Facsimile: (781) 322-4712

Email: JSLAWMA@AOL.COM

Website: bankruptcy-collectionlaw.com

TARLOW, BREED, HART & RODGERS, P.C.

John D. Finnegan, Esq.

Representing municipalities in bankruptcy, tax title and property sales matters.

101 Huntington Avenue, 5th Floor

Prudential Center, Boston, MA 02199

Telephone: (617) 218-2000

Facsimile: (617) 261-7673

Email: jfinnegan@tbhr-law.com

Website: www.tbhr-law.com

WILLIAM H. SOLOMON, ATTORNEY AT LAW

William H. Solomon, Esq.

Cable Television and Telecommunications Comprehensive Legal Services including License Renewal and Negotiations. Working to provide a full range of legal services to municipalities in their capacity as local franchising authorities for cable television services and as managers of rights-of-way under the 1996 Telecommunications Act. Sensitive to the varying needs of cities and towns with respect to Cable License Renewal and affordable legal services. For additional information, or a copy of "Municipal Perspective - Negotiating a Cable Television License Renewal" contact Bill.

319 Main Street

Stoneham, MA 02180

Telephone: (781) 438-4543

MMLA General Contact Information and Quarterly Advertising

If you would like to contact MMLA or advertise in the Quarterly, please call or email Jim with your question or advertising information.

James B. Lampke, Esq.

MMLA Executive Director

115 North Street

Hingham, MA 02043

Telephone: (781)-749-9922

Facsimile: (781)-749-9923

Email: jlampke@massmunilaw.org

MMLA Quarterly Editorial Board

Stacey G. Bloom, Esq., Editor-in-Chief

Jordan L. Shapiro, Esq., Editor Emeritus

Angela D. Atchue, Esq., Managing Editor

Carol Hajjar McGravey, Esq.

Timothy J. Harrington, Esq.

Peter L. Mello, Esq.

Quarterly Information and Contributing an Article

For information about the Quarterly, or to contribute an article, please contact

Stacey G. Bloom, Esq. at

Staceygene@gmail.com or

Angela D. Atchue, Esq. at

Angela.Atchue@Boston.gov

MMLA thanks our advertisers for their support. If you would like to advertise in the Quarterly, please contact Jim Lampke.

MMLA Website and Membership

To access the latest information, updates, announcements and news please visit the MMLA's website massmunilaw.org. Additionally, MMLA members enjoy a **Members Only Section** and can view **The Municipal Law Quarterly**, along with **Upcoming** monthly meetings, programs and seminars. To join MMLA, go to massmunilaw.org and complete the **MMLA Membership Form** or call 781-749-9922 for more information.



The Leading ADR Provider in Massachusetts for Business & Real Estate-Related Disputes and proud supporter of the Boston Police Relief Association

DISPUTE RESOLUTION, INC.

50 Congress Street, Suite 600, Boston, MA 02109
www.reba.net " Tel: 617-854-7555 " adr@reba.net