THE MUNICIPAL LAW QUARTERLY©

Vol. V, Issue III

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 MMLA Colleagues:

Turning age 70 may have its downside, but don't tell that to the Massachusetts Municipal Lawyers Association. Named at birth the City Solicitors and Town Counsel Association, the MMLA has been alive and well since 1946. During its 7 decades of existence, the MMLA has been dedicated to a proposition: that we who practice municipal law can best serve our cities and towns when we provide quality educational opportunities, for ourselves and for the municipal officials we advise. With 70 years in the rearview mirror, we're getting the hang of it – but you be the judge.

Take, for instance, the 14th Annual Municipal Law Conference held on March 16. Co-sponsored by the MMLA and the Massachusetts Municipal Association, the Conference began with remarks from Senate President Stan Rosenberg on the partnership he sees evolving in Massachusetts between the State and our local governments. The day's offerings included environmental law, employment and labor law, public record law and open meeting law, the regulation of signs, recent major U.S. Supreme Court decisions, conflict of interest law, municipal finance law, drones and body cams, administrative appeals, and zoning and land use. Safe to say that more than one of these subject areas touches upon your practice of municipal law? Safe to say that you missed out on a lot – including Roger Randall's quietly touching remembrance of his recently deceased father, Doug Randall, who in the early 1960s served as CSTCA president – if you were not in attendance? Yes, and yes.

Or consider the MMLA's March 24 program on Home Rule and Charter Changes, held at the Aegean Restaurant in Framingham. There, Bob Ritchie, Marilyn Contreas (formerly of DHCD) and Peter Morin, Braintree Town Attorney, presented an outstanding program on such topics as how the Home Rule Amendment transferred from the State to cities and towns the power to change their form of municipal government. The evening included a discussion of various trends, including combining management positions with authority and responsibilities, consolidation of municipal departments, insulating the budget process from changes in administration and management, capital planning, and professionalization of municipal management.

Moving from winter into spring means, of course, that construction projects will be heating up in our cities and towns. And so, having heard your plaintive pleas to please take you to Funky Town, the MMLA has decided to do just that – at the MMLA's Sixth Annual Public Construction Update Conference at 3 p.m. on April 28 at CBS Scene/ Patriot Place in Foxborough. The Conference will focus on the construction of a new fire station in the imaginary village of Funky Town, where nothing ever could possibly go wrong. Spearheaded by Chris Petrini, the Conference will examine the roles played

Continued onto page 2

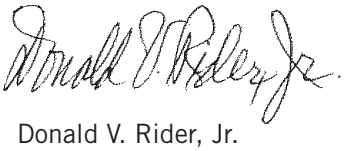
Inside this Issue

by various professionals in the evolution of a typical public construction project from design through project close-out, starting with pre-qualification, contract negotiations and bid protests, and continuing with contract administration, construction delay, mediation strategies, and best practices. The evening will conclude with the MMLA's annual business meeting and election.

Later in the spring, the MMLA will be presenting a May 19 program at the Westborough Chateau on the Community Preservation Act. And in the summer at the Publick House in Sturbridge, Mark Cerel and Kathleen Colleary will be co-hosting a panel on August 4 which will look at the lifecycle of a typical municipal finance year, including how our local legislative bodies approach, or should approach, municipal finance issues.

So, as you can see, the MMLA continues to do what it does best: providing quality educational opportunities for the Massachusetts municipal lawyer. Turns out that being a septuagenarian has its decided upside, too.

Sincerely,



Donald V. Rider, Jr.
President

MUNICIPAL SPOTLIGHT ON: John B. Barrett, Esq.

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

1. **In what city/town were you born?**
   I was born in Fitchburg, but grew up in Townsend.
2. **Where did you attend college and law school?**
   U-Mass Amherst and Suffolk University Law School.
3. **What municipalities do you represent?**
   None right now. Recently retired from the City of Fitchburg after 4 years as City Solicitor and 18 years as Assistant City Solicitor.
4. **What is your favorite city in the world outside of Massachusetts, and what could Massachusetts municipalities learn from that City?**
   I would have to say Paris, France. It isn't the city, per se, but its way of life, which seems to appreciate the joie de vivre.
5. **Did you practice law before the ubiquitous use of word processing, e-mail, and the internet? If so, is there any aspect of those days that you wish you could bring back?**
   I did practice law back in the Stone Age, also known as the IBM-Selectric Age. Having word processing definitely beats using carbon paper on the typewriter, but I would love to get rid of the cell phone and e-mail (except for contacting our members). All these devices have sped things up too much. I'd like to slow it down a tad.
6. **What is one of your proudest moments as a lawyer?**
   Being appointed City Solicitor of Fitchburg by Mayor Lisa Wong.
7. **What is the most useful advice you could give regarding the practice of law?**
   Always communicate. Make sure you understand your client or adversary and make sure they understand you.
8. **What do you like to do outside of work?**
   Getting together with family and friends, getting outdoors for camping, hiking and biking. Driving my Model-A Ford, being a Minuteman re-enactor, otherwise just living in the past.

Continued onto page 3

9. **If Hollywood realizes what it's missing and decides to produce a major motion picture about municipal government, who should play the municipal lawyer (explain your choice)?**
   If you mean one of our colleagues, I'd pick Jim Lampke, as he is the quintessential municipal lawyer. If you mean a Hollywood star, Harrison Ford because he won't be doing any more Star Wars movies and sometimes as a municipal lawyer, you need to be an Indiana Jones.
10. **When you are driving to court to argue an important motion, what might you be playing on the radio?**
    Jethro Tull or Beatles.

NEGOTIATION OF PUBLIC RECORD REFORM BILLS ONGOING

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

On March 2, 2016 House and Senate negotiators began working to iron-out differences between competing House and Senate public records law (PRL) reform packages. At its initial meeting, the conference committee opened deliberations to the public and indicated that they expect to maintain such transparency throughout the process. Six conferees were appointed by their respective branches as follows:

House Conferees

Rep. Peter Kocot, House Chair of the Joint Committee on State Administration (D-Northampton)

Rep. Steven Kulik, Vice-Chair of House Ways and Means (D-Worthington)

Rep. Mathew Muratore (R-Plymouth)

Senate Conferees

Sen. Joan Lovely, Senate Chair of the Joint Committee on State Administration (D-Salem)

Sen. Jason Lewis (D-Winchester)

Sen. Donald Humason (R-Westfield)

The conference committee met again on March 23, 2016 and heard from representatives from the Secretary of State's office and Attorney General's office. The conference committee is expected to hold regular weekly meetings. The current biannual legislative session ends July 31, 2016.

The House plan, H. 3858, was adopted unanimously just before winter recess in November 2015, and was developed in close consultation with MMLA and the Massachusetts Municipal Association. In January, the Senate unanimously passed its own version of reform legislation, S. 2127, which would establish tighter compliance timeframes, create the potential for greater litigation, and impose stricter limitations on records production fees than the House package.

Key House and Senate Differences

While both bills prevent municipalities from charging for the first two (2) hours of staff time spent producing records, the Senate bill caps the hourly amount charged thereafter. The Senate bill, also, preempts assessment of the fee altogether in the event that the record was not timely furnished, or a response was not timely provided to the requestor. Additionally, both House and Senate plans limit the fees to be charged for the production of black and white copies to five (5) cents per page (from 20 cents) and the actual cost of storage devices. In a related event, the state Division of Public Records promulgated emergency regulations on February 29, 2016, which immediately imposed these same copying and storage device fee limitations (see new 950 CMR 32.06). Interestingly, both bills and the regulations do not specify the amount to be charged for color copies.

Striking differences exist between the House and Senate plans as such relate to compliance and enforcement.

In relationship to the timeframes associated with compliance, the House bill provides the Records Access Officer ("RAO") up to 75 days to produce the public record in the event that the record cannot be produced within an initial 10 business day compliance period. In contrast, the Senate bill only provides up to 30 additional days if the record cannot be produced within an initial 15 calendar day compliance period, and only if the magnitude and difficulty of the request unduly burdens the municipality's other responsibilities.

Continued onto page 4

In the area of enforcement, the Senate will generally require the imposition of attorney's fees whenever a complainant obtains judicial relief. On the other hand, the House bill maintains judicial discretion in this regard. The Senate plan, also, would require a court to impose punitive damages if the city or town did not act in good faith in withholding a public record, or assessed an unreasonable fee. However, the House plan grants the courts complete discretion and, further, only allows for punitive damages if the municipality acted maliciously or in bad faith. Furthermore, the Senate plan allows a records requestor to seek direct judicial review in all circumstances without any time limit as to when an appeal must be filed in superior court. Whereas the House plan prescribes time limits to file an appeal and only grants judicial review under certain circumstances. Unlike the House bill, the Senate bill does not expressly provide the city or town a right to appeal the denial of a request to extend the time to respond.

Finally, both bills require that each municipal clerk be designated a RAO who shall be responsible for complying with the PRL by July 1, 2016. This date will likely have to be modified to contemplate timing of the enactment of the conference committee report.

This material is not an exhaustive treatment of the changes offered to the PRL found in both proposals and MMLA encourages you to review the full text of H. 3858 and S. 2127. Additionally, MMLA developed a comparative table, which provides a more thorough overview of the proposed changes each bill makes to the current PRL. Please visit MMLA's website for more information at **www.massmunilaw.org**.

Please contact the conferees to inform them of the impacts associated with the Senate bill (S. 2127), and to express your concerns. Your support of the House bill (H. 3858) is welcomed and appreciated as a balanced approach to strengthening the public records law.

EPA'S REVISED MUNICIPAL STORMWATER ("MS4") PERMIT IS COMING – IS YOUR MUNICIPALITY READY?

By: Rebekah Lacey, Esq., Miyares and Harrington LLP

You may be aware that the regional office of the U.S. Environmental Protection Agency (USEPA) is preparing to issue a revised version of a 2003 general permit that imposes requirements on many Massachusetts municipalities that discharge stormwater to surface waters. But are you ready to advise your municipality on the implications of the permit? This article will help get you up to speed on what you should know now. After the permit is issued, a follow-up article in a subsequent issue of the Quarterly will summarize the requirements of the new permit.

What is the MS4 permit?

The permit in question is formally known as the "National Pollutant Discharge Elimination System (NPDES) General Permit for Storm Water Discharges from Small Municipal Separate Storm Sewer Systems," originally issued by USEPA Region 1 on April 18, 2003 (effective May 1, 2003).[1] A municipal separate storm sewer system (MS4) is a "conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains)" that collects stormwater and discharges it to a surface water body.[2] When this article refers to the "2003 MS4 permit," it means the section of that general permit that applies to Massachusetts municipalities.

The regional office of the USEPA[3] is the permitting authority for discharges to Massachusetts surface waters that require permits under the federal Clean Water Act (CWA), known as NPDES permits. (Massachusetts, New Hampshire, and Idaho are the only states that have not obtained delegated authority to administer the NPDES program.)

Continued onto page 5

1. The 2003 MS4 permit is available at https://www3.epa.gov/region1/npdes/permits/permit_final_ms4.pdf.
2. 40 CFR § 122.26(b)(8).
3. USEPA Region 1, headquartered in Boston, covers the six New England states.

Although the CWA requires NPDES permits for all point source discharges to waters of the United States, discharges of stormwater (i.e. precipitation runoff) were initially excluded. However, in 1987, Congress amended the CWA to require implementation, in two phases, of a comprehensive national program for addressing stormwater discharges. In 1990, USEPA promulgated the Phase I regulations, addressing MS4s serving populations over 100,000 ("medium and large" MS4s). In 1999, USEPA promulgated the Phase II regulations, requiring permits for small MS4s (any MS4 serving a population less than 100,000) in "urbanized areas" as defined by the U.S. Census. In 2003, USEPA Region 1 issued a general permit covering all Phase II municipalities in Massachusetts and New Hampshire. Once that permit was issued, all Phase II municipalities were required to apply for coverage under it.

Which Massachusetts municipalities are subject to the MS4 permit?

The only Massachusetts municipalities governed by the Phase I stormwater regulations are Boston and Worcester. Phase II regulated over 250 communities based on urbanized areas from the 1990 and 2000 censuses;[4] a few additional communities will be included in the next permit, based on the 2010 census. Under the 2010 census, almost all of the eastern half of Massachusetts is considered an "urbanized area," along with a large area around Springfield and a small area around Pittsfield.[5]

What are the requirements of the current MS4 permit?

Although typical NPDES permits set numeric effluent limits that must be met at the point of discharge, the 2003 MS4 permit instead prescribed "minimum control measures," pollution prevention activities that municipalities were required to implement within five years to the "maximum extent practicable." The six minimum control measures are: (1) public education and outreach; (2) public involvement and participation; (3) illicit discharge detection and elimination; (4) construction site stormwater runoff control; (5) post-construction stormwater management in new development and redevelopment; and (6) pollution prevention and good housekeeping in municipal operations. Each minimum control measure includes specific activities that must be completed by municipalities.[6]

Although Massachusetts municipalities have taken many steps to comply with the 2003 permit, there are a few requirements that are still outstanding for a number of municipalities. It is anticipated that EPA may prioritize enforcement of these outstanding items in conjunction with the issuance of the revised permit. 2003 permit requirements that EPA is likely to focus on are:

- Mapping of all outfalls from which the MS4 discharges; and
- Adoption of regulatory mechanisms (e.g. ordinances or bylaws) to: prohibit non-stormwater discharges to the MS4; require sediment and erosion control at construction sites disturbing one acre or more; and require post-construction stormwater management for new development and redevelopment disturbing one acre or more.

The draft application form for coverage under the revised permit requires municipalities to state whether these requirements have been met.

What is the status of the revised MS4 permit, and what are the key changes anticipated?

The 2003 MS4 permit expired five years from its effective date, i.e. on May 1, 2008. However, the permit has been administratively continued until a revised permit is issued. USEPA Region 1 has issued successive drafts of a revised permit, most recently in 2014.[7] Many Massachusetts municipalities expressed concerns about the requirements of the 2014 draft permit; EPA has indicated that some of these concerns have been addressed, but it appears that the substance of the final permit will be fairly similar to the 2014 draft.

There are two major categories of changes from the 2003 MS4 permit to the 2014 draft permit. First, the requirements for the six minimum control measures are much more prescriptive; the permit mandates specific activities that must be conducted on a prescribed schedule. Second, the permit incorporates additional requirements for municipalities whose MS4s discharge to "impaired waters," with very specific requirements for impaired waters for which a "total maximum daily load" (TMDL) has been developed.

Continued onto page 6

4. See http://www.mass.gov/eea/agencies/massdep/water/wastewater/stormwater-ms4-communities.html.
5. See https://www3.epa.gov/region1/npdes/stormwater/ma.html.
6. See https://www3.epa.gov/region1/npdes/stormwater/ma/2014AppendixE-Printable.pdf.
7. The 2014 draft permit is available at https://www3.epa.gov/region1/npdes/stormwater/MS4_MA.html.

An "impaired water" is one that the Massachusetts Department of Environmental Protection has determined does not meet state water quality standards. The CWA requires that states develop lists of impaired waters every two years and submit them to USEPA for approval.[8] For all waters that are impaired by pollutants, states must determine the "total maximum daily load" ("TMDL") of each impairing pollutant that can be discharged to the water body without exceeding water quality standards. The TMDL allocates this load to the various sources of the pollutant to the water body; during the NPDES permitting process, the TMDL allocation is translated into specific permit limits for each point source discharger.

The 2014 draft revised permit includes specific requirements based on a number of TMDLs that have been approved, including for phosphorus in the Charles River, the Assabet River, and various lakes and ponds, as well as for bacteria in many rivers, streams, bays, and harbors.[9] Municipalities required to reduce phosphorus in their stormwater discharges must select a mix of non-structural controls (such as street sweeping, catch basin cleaning, and leaf litter collection) and structural controls (such as stormwater management structures that infiltrate stormwater into the ground) to meet a specified reduction goal. For example, Newton would be required to reduce its annual phosphorus loading to the Charles River by 2,100 pounds (52%). Municipalities required to reduce bacteria in their stormwater discharges must conduct public education regarding proper management of pet waste and prioritize illicit discharge detection and elimination in areas draining to the impaired water body.

How can the revised MS4 permit be appealed?

Under the Clean Water Act and USEPA regulations, general NPDES permits issued by USEPA are appealed directly to the federal Circuit Court of Appeals (unlike individual NPDES permits, which must first be appealed to USEPA's Environmental Appeals Board).[10] The appeal must be filed within 120 days of permit issuance. Note that USEPA's approval of a TMDL is itself a final agency action for which judicial review can be sought under the Administrative Procedure Act.[11]

Conclusion

The revised MS4 permit will include heightened requirements for municipal stormwater management and pollution prevention that will demand significant attention from, and expenditures by, regulated municipalities. Before the revised MS4 permit is issued, municipalities should ensure that they are in compliance with the key requirements of the 2003 MS4 permit. They should also determine the anticipated impact of the revised permit and begin to develop a plan for compliance. Also, any municipalities contemplating an appeal of the revised permit should be prepared for the relatively short window in which an appeal may be brought.

NEGOTIATING CLOUD CONTRACTS

By: Pia Owens, Assistant General Counsel, Massachusetts Office of Information Technology

Municipalities are increasingly seeking to stretch their scarce information technology resources by turning to the cloud. Cloud services give their users access to externally hosted software or other computing resources through a web browser.

Types of Cloud Services

Your municipality may already be using software as a service (SaaS). Webmail, invoicing and billing systems, and asset management systems are examples of software that can be provided using a SaaS model. SaaS is commonly adopted because it's a familiar model; the user experience remains mostly the same, except that the user visits a website instead of opening an application from the desktop.

Other types of cloud services are platform as a service (PaaS), which gives users access to development tools, operating systems, and databases; and infrastructure as a service (IaaS), which gives users access to hardware and networking resources.

Continued onto page 7

8. Massachusetts' recent lists are available at http://www.mass.gov/eea/agencies/massdep/water/watersheds/total-maximum-daily-loads-tmdls.html#2
9. See Appendix F of the 2014 draft permit.
10. 33 U.S.C.A. § 1369(1); 40 CFR § 124.19(o)(1).
11. *See, e.g., Am. Farm Bureau Fed'n v. U.S. E.P.A.,* 792 F.3d 281, 294 (3d Cir. 2015) *cert. denied,* No. 15-599, 2016 WL 763272 (U.S. Feb. 29, 2016).

These services can be provided in a "public cloud," which means the infrastructure is shared with the vendor's other customers; a "private cloud" dedicated to one customer; a "hybrid cloud," which uses both public and private cloud resources for different purposes; or a "community cloud" used for a group of customers with common needs. One example of a "community cloud" is a government cloud, which typically has a high level of security and is reserved for government customers.

Benefits of Cloud Services

A major benefit of cloud services is that a third party vendor owns the hardware and software and is responsible for maintenance, updates, and upgrades. The municipality does not need to invest in expensive infrastructure or have IT specialists on hand to keep the system running. However, some municipal IT capability is required to manage and administer the system, for example by keeping track of user accounts and communicating with the vendor about any technical issues.

Third party vendors may also have dedicated facilities and expertise beyond the capabilities of most municipalities. For example, if a municipality wanted a PCI-compliant payment service for residents to pay their tax bills online, this would be very difficult for the municipality to implement on its own. A SaaS vendor specializing in PCI compliance would be able to provide a secured data center and an established compliance program including appropriate certifications and regular third-party audits.

Risks of Cloud Services

The main drawback of cloud services is that you are relying on a third party to provide you with the quality of service and level of security and legal compliance that you need. This reliance carries with it a number of risks: what if the vendor goes out of business, suffers a data breach, or has poor compliance practices that may subject you to legal liability? What if the system is unavailable at key times, can't be made accessible to disabled users who need it to do their jobs, or just doesn't meet your needs?

There are two main ways to mitigate these risks. First, do some due diligence before entering into a cloud contract. Second, make sure your contract clearly spells out your needs and obligates the vendor to meet them.

Due Diligence

Before considering a cloud solution, do some internal due diligence. You should be able to answer the following questions:

- Why do I need this solution?
- Who will use this solution, and for what purpose?
- What type of data will be stored in the solution? How sensitive is the data? Are there any legal requirements that apply to the storage, transmission, or use of the data?
- Will I retain a separate copy of all data stored in the solution, or will the solution have the only copy of the data?
- Are there any legal or security requirements regarding who can access the system and how they can use it?
- What are my availability needs? What happens if the system is unavailable for a few minutes, an hour, a day, a week? Are there certain busy times during which it is crucial that the system be available?
- What are my support needs? Do I need to ask questions and report defects around the clock, or do I expect to have an occasional question during business hours?
- Will the system will be used by the public, or is there a possibility that a person with a visual or motor disability will need it to do their job? (If the answer to either question is yes, you will need to evaluate the accessibility of the solution before purchasing a subscription.)
- What will happen when the subscription is terminated? What will I need to do to transition to a new vendor or to handling the work in-house if necessary?

Once you have identified your business and legal requirements by answering the questions above, ask prospective vendors if their solutions are capable of meeting these requirements. Most vendors will be able to provide written documentation, such as: a Service Level Agreement addressing availability and support; a description of their security and compliance practices; a privacy policy describing how they are permitted to store and use your data; a VPAT (Voluntary Product Accessibility Template);

Continued onto page 8

a list of certifications if applicable; and, for solutions that store sensitive data, an audit report (which is generally redacted for security purposes and provided under an NDA). Other than the audit report, you should attach this documentation to your written contract with the vendor to ensure that you're getting a commitment rather than a sales document.

Contracting Issues

Your contract will typically consist of a Subscription Agreement (which may be entitled "SaaS Agreement," "License Agreement," or "Terms and Conditions") and a Service Level Agreement (SLA).

When reviewing a vendor's form Subscription Agreement and SLA, in addition to standard clauses like indemnification and choice of law, you should pay attention to the following key issues:

1. Due Diligence Answers. Use the questions above as a checklist. Make sure the contract accurately answers each question to your satisfaction.
2. Laws and Standards. The contract should list any specific laws and standards with which the vendor must comply. With regard to data security and privacy in particular, it's important to put the vendor on notice of its obligations by listing the types of protected data in the system and the applicable restrictions. For example, if the system stores personal information, the vendor will need to comply at a minimum with M.G.L. chapters 66A (Fair Information Practices Act), 93H (breach notification law), 93I (disposal and destruction of records). If you rely on an umbrella "comply with all applicable laws" provision, vendors may not know which laws apply.
3. Authorized Users and Uses. Look for definitions of authorized users and permitted uses, and make sure they accurately reflect your planned use of the service. It's common for a vendor's form documents to say that "Customer's employees" are permitted to use the service for "internal business purposes." But "employees" is too narrow if contractors, volunteers, service providers, or others will also be using the service, and "internal business purposes" may not cover a public-facing application.
4. Service Level Remedies. As noted above, the SLA should provide for an uptime percentage and support standards that meet your business needs. Some SLAs, however, allow the vendor to break these commitments without penalty. The SLA should contain remedies if the vendor does not meet its metrics, typically a monetary credit of a percentage of your monthly subscription fee, or a free extension of your subscription for a specified number of days.
5. Public Records and Access to Data. All cloud customers need to maintain access to their data during and after their subscription, but governmental entities have the additional obligations to respond in a timely manner to public records requests and to comply with records retention laws. In your cloud contract, make sure that you have full access to your data at all times and can export your data in a usable format when you need it.
6. Transition. After termination of your subscription, exporting your data at no cost should be a minimum requirement. For a complex system, consider also requiring the vendor to cooperate with you to create and carry out a written transition plan. You can pay the vendor at a time and materials rate on transition activities, or agree upon certain activities that will be included in your subscription cost.

Resources

For additional terms and guidance, you can find the following free resources online.

- Massachusetts Office of Information Technology standard cloud terms (intended to be attached to a vendor's standard terms): http://www.mass.gov/itdemployee/massit-template-resource-center.html
- Center for Digital Government Best Practice Guide for Cloud and As-A-Service Procurements: http://www.govtech.com/library/papers/Best-Practice-Guide-for-Cloud-and-As-A-Service-Procurements.html

All statements made in this article are made in the personal capacity of the author and do not reflect the views of the Baker/Polito administration.

A REVIEW OF "THE SEVEN DEADLY SINS OF MEDIATION"

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

The article "Seven Deadly Sins of Mediation" appears in the Litigation magazine of the American Bar Association, Vol. 42, No. 2, Winter 2016. While it's only six pages long, the article attracted my attention not only by its title but by its unusual content, which provided some outstanding insights into the art of mediation.

The article was authored by Joel Levine, a full time alternative dispute resolution practitioner based in Florida. He is not described as an attorney, so I assume he is not one. The article begins:"[A]fter mediating hundreds of cases in all different fields and parts of the country over 18 years, I've reached a few conclusions about mediation that might be helpful to trial lawyers and that I've boiled down to seven deadly sins. Just as avoiding religious sins may not guarantee a place in heaven, avoiding my mediation sins can't guarantee a favorable settlement, but they might at least lower the odds of self-inflicted wounds."

Levine writes that best results in mediations occur when mediation is conducted with private mediators chosen by the parties. Levine describes his style as a mediator as "rather intensely proactive a quality this author looks for when seeking a mediator, although perhaps hard to find in Massachusetts. Levine distinguishes court ordered settlement conferences from party requested private mediation. The article focuses on the latter situation.

Levine's seven deadly sins of mediation are:
First: Not preparing. Levines states that while approximately 85 percent of all cases settle in mediation, many attorneys who meticulously prepare for trial come relatively unprepared to mediations. Levine correctly observes that skimping on preparation for mediation can reduce the chances of settling a case.

Proper preparation includes providing the mediator with case law and statutes that refute the other sides theory of the case as well as providing the mediator emails, affidavits, deposition testimony and other concrete evidence that "the other side has more holes than Pebble Beach" Levine accurately states that "[M]ediation might be your last, best chance of producing a tolerable result, rethink the balance between using what you have at mediation and waiting to surprise the other side at trial." As such, an attorney must evaluate how much to disclose at mediation and how much to save for trial. "The trial may never happen anyway. The statistics say it probably won't."

Second: Choosing the wrong mediator. Everyone has a bad mediator story. Attorneys' complaints about mediators range from "[He] missed a critical point is she communicated our position incorrectly; He was too aggressive/passive/offensive/smarmy/sycophantic/distracted/unfocused/critical/uncritical/naive/accepting/argumentative/un-mediatorial/insulting/arrogant /inflexible." The style of mediators range from strongly proactive, evaluative, judgmental, and assertive to passively transformative– asking few questions and allowing the parties to lead in every aspect of the process. Additionally, some mediators have substantial legal experience while others don't. Attorneys need to evaluate what type of mediator is best for the specific case. Levine encourages attorneys to determine whether "you want someone who will battle with the other side, dissecting their weaknesses. Can you tolerate when the mediator exposes yours? Or do you want someone non-confrontational to calm the contentious waters?"

Levine volunteers that most attorneys tell him they prefer proactive and evaluative mediators rather than traditionalists whose passive goal is "to simply get people to talk to each other without interjecting themselves into the dialogue." He notes that that some mediators will try to pinpoint weaknesses in the case of the other side, but also expect that the mediator will do the same to your case. Levine goes on to state that "many proactive mediators know they're doing a good job when each side accuses them of favoring the other side." Sometimes mediators will express opinions about the likely outcome of a case, which many attorneys appreciate. Levine suggests that attorneys select a creative, proactive mediator who understands the mediation process and a track record of bringing people together in various settings. An experienced mediator who has mediated many cases is also of value.

Continued onto page 10

Third: Not preparing the mediator. Mediators influence the ultimate outcome of the mediation, although sometimes very subtly. The more the mediator understands an attorney, the case, and the weaknesses of the opposing side, the more persuasive the mediator can be in presenting the case to the opponent in the course of the mediation. Most mediators encourage you to speak to them in advance of the mediation. Mediation summaries or statements prepared for the mediator that not only persuasively present the facts and the law, but also discuss matters not obvious from the documents or pleadings are particularly helpful to the mediator. Levine suggests that the attorney allow these mediation statements—which are confidential to be used "in conversations with [the attorney's] adversary." Levine notes that "there's nothing wrong with influencing the mediator. After all, the mediator is, in a way, [the attorney's]spokesperson in the caucus room." Levine suggests that the attorney ask the mediator to present a proposal to resolve the case.

Fourth: Not preparing the client. Levine correctly notes that attorneys must prepare the client for the mediation. When the plaintiff demands $15 million and the other side offers $10,000, this is a shock to the unprepared client. Attorney must tell their clients that the mediator is likely to be critical of the client's case and make you're client comfortable with the mediation process, and insure they understand the role of the mediator.

Fifth: Not asking the mediator for help. Levine notes that "a good mediator can help restructure a severance or suggest payment terms for a buyout or escalators in a ground lease. Many mediators can make suggestions, based upon their prior experience, that can help settle a case, if the attorney asks Levine notes that asking for the mediator's assistance in front of your client should not be a source of embarrassment but strength:" ...you can score points with your client by letting them know that the reason you chose this mediator was because he has knowledge in this area and can help you frame proposals as well as evaluate whether the bad guys ideas are fair. It takes strength and confidence to ask for help, as most clients will appreciate. He who know all, knows nothing."

Sixth: Insulting everyone. Levine notes, correctly that there are an "infinite number of ways to be offensive" and that all of them can kill the mediation. A good attorney will acknowledge that both sides have merit and weaknesses and the goal of the mediation is to resolve the dispute. Attending a mediation in the spirit of productive resolution and conciliation should be an attorney's goal. It is important to to create a harmonious atmosphere with the attitude of 'solving a mutual problem to solve rather than 'your client is trying to screw me.'" Levine reminds attorneys that "mediation is not about you– it's about getting your client out of litigation with as fair a result as possible."

Seventh: Lack of clarity. Levine notes that good litigations make certain that there is perfect communication, first between them and their clients and then with the mediator. Attorneys should make sure that they inform the mediator if the settlement is subject to approval by a board, municipality, a commission or executive committee. Don't wait until the end to disclose that. The more complex the issues in the case, the more precise counsel and the mediator must be.

Levine concludes some believe the real seven deadly sins threaten the soul. In mediation, they will threaten what might be a valuable opportunity to resolve the case, to say nothing of saving time and legal fees. Because most of your cases will settle, "make the most of mediation by preparing diligently, choosing the right mediator, asking for help when appropriate, and being collegial and clear. Good, and maybe even divine, consequences will follow."

MUNICIPAL CASE LAW UPDATE

THAYER v. CITY OF WORCESTER, Federal District Court, November 9, 2015 (Hillman, J.)

By: Timothy J. Harrington, General Counsel, Boston Public Health Commission

Relying on Reed, Federal Court Strikes Down Worcester Ordinances Relating to Panhandling and Public Safety.

On November 9, 2015, Federal District Court Judge Timothy Hillman granted summary judgment to plaintiffs in a suit challenging the constitutionality of two Worcester Ordinances relating to panhandling and public safety. The City argued the main goal of the two related

Continued onto page 11

ordinances was public safety and that the ordinances were narrowly tailored to advance that goal. While the Court agreed the City's interest in public safety was compelling, it found the ordinances were too broad to survive review under varying levels of scrutiny.

A brief overview of the facts and procedural history follows. The City of Worcester adopted two ordinances in early 2013. Among other things, Ordinance 9-16 made it "unlawful for any person to beg, panhandle or solicit in an aggressive manner." And, Ordinance 13-77 prohibited any person from standing on, or walking on a traffic island, or roadway, except for lawfully crossing an intersection, or exiting a vehicle for some other lawful purpose. Three plaintiffs brought suit against Worcester in May of 2013. After Judge Hillman initially denied the plaintiff's motion for a preliminary injunction, the First Circuit, with some exceptions, affirmed the denial of the injunction. However, the United Supreme Court vacated the First Circuit's judgment in June of 2015. The Supreme Court took that action in light of its ruling in Reed v. Town of Gilbert, 576 U.S. ___ (2015). The matter was remanded to the District Court for consideration of the parties' dueling motions for summary judgment.

Standard of Constitutional Review. The Court's first task was to determine the level of scrutiny to be applied. "Content based laws – those that target speech based on its communicative content – are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." Thayer, quoting Reed, 573 U.S. ____. Another set of laws, while facially neutral, may also be deemed content related if those laws or ordinances are passed because of a disagreement with the type of message being conveyed. Id. Turning first to Ordinance 9-16, the Court found the panhandling ordinance was subject to strict scrutiny because such regulations are content based. The impetus for this conclusion was Reed's "mandate" that all such ordinances are content based. Typically, content based ordinances will be found invalid unless the court finds sufficient evidence that the government entity narrowly tailored the ordinance to advance the compelling state interest.

For Ordinance 13-77, regarding the prohibition against using traffic islands and medians, the court found that particular section was content neutral. It accordingly applied a lower level of review. "In order to pass constitutional muster, 'it must be narrowly tailored to serve the government's legitimate, content neutral interests, but need not be the least restrictive means of doing do.'" Thayer, quoting Ward. v. Rock Against Racism, 491 U.S. 781, 798-800 (1989).

Existence of a Compelling Government Interest. The Court reviewed the minutes of City Council meetings, the preambles to Ordinance 9-16, and other evidence submitted by Worcester to determine the motivating factor behind the ordinance. The Court observed that the City's "primary interest in enacting the ordinance was the safety and welfare of its citizens." There is no dispute the safety and convenience of the public is a compelling governmental interest. The Court cited to multiple cases holding that the "state has a strong interest in ensuring public safety and order, in promoting the free flow of traffic on public streets and sidewalks." Thayer, quoting Madsen v. Women's Health Center, 512 U.S. 753, 768 (1994).

Narrowly Tailored? Continuing to focus on Ordinance 9-16, the Court reviewed two recent decisions on the issue, McLaughlin v. Lowell, 2015 WL 6453144 (D. Mass 2015) and Brown v. City of Grand Junction, 2015 WL 5728755 (D. Col 2015). Both cases presented similar factual circumstances and in both cases, the Courts found that the ordinances were not narrowly tailored. The Courts struck down the various provisions because they were either duplicative of criminal statutes, or the prohibited speech did not pose threats to public safety. Based mainly on the existence of these prior decisions, the Court found that Ordinance 9-16 was unconstitutional in its entirety because "it is not the least restrictive means available to protect the public." The Court stated that municipalities do have concerns regarding panhandling and public safety. However, the Court noted that the ordinances dealing with those concerns must "restrict only that conduct which would constitute such a threat."

For Ordinance 13-77, the Court also found the provision prohibiting activity on median strips or islands was not narrowly tailored. In short, the provision was too broad geographically. While the Court agreed there are some islands at intersections where it may make sense to prohibit pedestrian activity, the blanket ban on all such places across the city went too far. The Court stated,

Continued onto page 12

"The City has not shown that it seriously undertook to address the problem with less intrusive tools readily available to it." The Court granted the plaintiffs' motion for summary judgment and found Ordinance 9-16 unconstitutional in its entirety. The Court, also, ruled that Ordinance 13-77's provision prohibiting pedestrian activity on islands and median strips was unconstitutional.

Municipalities have legitimate concerns over panhandling and the safety of residents, both for those in vehicles and, perhaps more importantly, for homeless residents. Personally, I walk through the notorious "Mass and Cass" intersection of Massachusetts Avenue and Melnea Cass on a daily basis. Statistically, it is one of the worst intersections in the state for motor vehicle and pedestrian incidents. The men and women who solicit money at that intersection often stay in the city's two homeless shelters located nearby. It concerns me each day when I see people attempting to dodge vehicles at that intersection, which often are traveling at speeds of 40 to 50 miles per hour on and off Route 93. While there is no room here for an exhaustive list of ideas and recommendations going forward, perhaps a set of criteria for the level of danger involved for medians or islands would be helpful to future ordinances

UPCOMING MUNICIPAL LAW PROGRAMS

MMLA's SIXTH ANNUAL PUBLIC CONSTRUCTION UPDATE CONFERENCE

Secrets of a Successful Public Construction Project: Working with Outside Professionals from Design through Project Close-Out

Thursday, April 28, 2016 at 3:00 p.m. • CBS Scene, Patriot Place, Foxboro, MA The program will be followed by dinner and MMLA's Annual Business Meeting. The registration fee includes program materials distributed at the conference. Register by contacting Jim Lampke at **jlampke@massmunilaw.org**; or by telephone (781) 749-9922 / facsimile (781) 749-9923.

Massachusetts Office of the Inspector General

Boards and Commissions: Responsibilities, Good Governance and What Members Need to Know

The Inspector General's Massachusetts Certified Public Purchasing Official (MCPPO) Program is offering this new one-day seminar, which includes fiduciary duties of board members, fraud prevention and detection, public records law, open meeting law, the ethics law, and general discussion. Register at **www.mass.gov/ig**

ANNOUNCEMENT

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.

101Arch 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.

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

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.