



**THE MUNICIPAL LAW NEWSLETTER ©**  
of the **CITY SOLICITORS AND TOWN COUNSEL**  
**ASSOCIATION** the Bar Association of Massachusetts  
**Municipal Attorneys**

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**Letter from the President**

**Inside This Issue:**



Welcome to the Newsletter's second edition. The past few months have been busy ones for CSTCA. Jim Lampke, CSTCA's Executive Director, and the Executive Committee planned an amazing Annual Meeting that was held in New Bedford in October. The Meeting included remarks from Mayor Scott Lang and featured panels on collective bargaining of health care benefits and addressing nuisance properties. CSTCA was also honored that retired Supreme Court Justice John M. Greaney joined us for the weekend and presented on single justice practice. Other presentations included the annual Land Use Update, the Education Law Update and the Robert Smith Constitutional Law Lecture. If you missed the Annual Meeting, you missed a truly wonderful and informative weekend. It's always good to see colleagues and catch up with each other outside of the courtroom or business arena. If you've never attended an Annual Meeting, put it on your things-to-do list for next year!

It's hard to believe that we are already in the midst of the holiday season. I find this time of year to be particularly meaningful—not just because of the holidays, but because of the reflective nature of the season. As I reflect on my time thus far as President of CSTCA I am extremely grateful for the work of Jim Lampke and the Executive Board in planning fantastic programming this year and for their support of the Newsletter. I also remain inspired by CSTCA's membership---their commitment to their communities during these difficult economic times and their willingness to assist other members with advice and counsel.

On behalf of the Executive Board I wish you and your family a happy and healthy holiday season and hope to see you at a program in 2012.

Sincerely,

Stacey G. Bloom Esq.  
President

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**MUNICIPAL SPOTLIGHT ON:**

By: Peter Mello, Esq.



Nakisha Skinner,  
General Counsel, BPHC

1. In what city/town were you born?  
Boston.
2. Where did you attend college and law school?  
Suffolk University followed by Suffolk Law School.
3. What municipalities do you represent?  
Boston.
4. Has municipal law changed a lot since you began practicing? If so, how?  
I don't consider myself the traditional municipal lawyer since my client, the Boston Public Health Commission, is a quasi-state agency legally autonomous from its municipality, the city of Boston. I would imagine the legal issues I deal with are largely unique to municipal boards of health, which the Commission is, and not the municipality as a whole. I can tell you that if I were to transition to "municipal" law in the future, I will be thoroughly prepared from my experience reading about tax-foreclosed property, weak and strong fire chief statutes, and betterment agreements on the listserv over the years.
5. What is one of your proudest moments as a lawyer?  
I've had many rewarding moments as a lawyer, but my proudest moment relates to a trial I was second chairing about six or seven years ago. The first chair was a lawyer who had many more years at the bar than I, and I was thrilled when I learned I would be trying the case alongside her. There was this one witness my colleague didn't think was relevant to our defense. My repeated recommendations to contact the witness and produce her at trial were shunned. After our boss intervened, I was permitted to have at it. It turns out the witness was extremely valuable to the case and my direct examination sealed the win for our client – and the best part was my colleague admitting it!
6. What do you like to do outside of work?  
Spend quality time with my husband and two children. I also have 4-month-old twin nephews that are always a treat to hug and kiss.
7. What is one of the proudest moments outside of your career?  
I graduated from college, closed on my first home, married my high school sweetheart and completed a grueling first semester of law school all in the same year – quite the stretch of proudest personal moments!
8. If you were not a lawyer, what would you do for work?  
Legal advocacy was always my first calling, but perhaps I would try my hand at being an educator. As a young child, I would corral my siblings and cousins to play school and, of course, I was always the teacher. I had the chalkboard, extra copies of worksheets that I would bring home from real school, and an attendance and grade book.
9. When you are driving to court to argue an important motion, what might you be playing on the radio?  
Absolutely nothing! I'd still be practicing my argument – every bit of preparation counts -- and psyching myself up for a hell of a presentation.
10. What is your favorite book?  
I love reading and have read many books. I don't really have a favorite, but *To Kill A Mockingbird* by Harper Lee and *The Warmth of Other Suns* by Isabel Wilkerson are pretty high on my "most enjoyed" list.

## KNOW YOUR MUNICIPAL DEPARTMENTS, BOARDS AND COMMISSIONS

### A Focus Article on Historical Commissions

By: Peter Mello, Esq.

Although they are confused easily, historical commissions and historic district commissions are distinct statutory entities. If it has accepted G.L. c. 40, § 8D, a municipality may establish a historical commission “for the preservation, protection and development of the historical or archeological assets of such city or town.” G.L. c. 40, § 8D. In carrying out these objectives historical commissions fulfill a wide range of responsibilities, however, generally they lack concrete enforcement authority. *See, e.g., Lowell v. Marquis*, 2008 WL 921709, 4 (Mass.Land Ct., 2008).

In contrast, a historic district commission is established only as part of the creation of a historic district pursuant to an ordinance or bylaw adopted under G.L. c. 40C §§ 1-17 (the “Historic Districts Act”) or a special act authorizing the creation of a historic district. A municipality may create a historic district “to preserve distinctive characteristics of buildings and places, or their architecture.” 18A Massp.Prac. § 16.36 (Douglas A. Randall and Douglas E. Franklin). Once such a district is established, “buildings or structures [within the district] may not be constructed or altered in a manner that affects exterior architectural features without first submitting the proposed construction or alteration for review by the historic district commission.” *Id.*, citing 40C §§ 6, 10(a)-(c). Historic district commissions enjoy considerable discretion in conducting such review. 85 Mass. L. Rev. 113, 121, 125 (2001)(Jeffrey S. Wieand, Esq.) (“Massachusetts Historic District Commissions [are] among the most powerful and authoritative governmental bodies in the Commonwealth.”).

#### I. Principal Governing Statutes/Regulations:

- Historical Commissions: G.L. c. 40, § 8D (local option statute)
- Historic District Commissions: G.L. c. 40C, §§ 1-17 (the “Historic Districts Act”)

In addition, a local historic district may be created through a Special Act of the Legislature. In litigating cases involving such districts, it is worthwhile to note that “the case law under the Act is generally applicable by analogy

to the special statutes and vice versa.” 85 Mass. L. Rev. 113, 113-114(2001)(Jeffrey S. Wieand, Esq.) (“As the Supreme Judicial Court has stated, the special statutes can be read “in the light of” the Act. The result is a relatively uniform body of judicial precedent notwithstanding the plethora of governing statutes.”) (citations omitted).

#### II. Composition:

##### A. Historical Commissions

- Between 3-7 members. G.L. c. 40, § 8D.
- In cities the members are appointed by the mayor or city manager (subject to the provisions of the city charter). *Id.*
- In towns the members are appointed by the selectmen, except towns having a town manager form of government, in which case the town manager appoints the members, subject to the approval of the selectmen. *Id.*
- A historical commission “may appoint such clerks and other employees as it may from time to time require.” *Id.*

##### B. Historic District Commissions

- Between 3-7 members. G.L. c. 40C, § 4.
- Members are appointed in a city by the mayor, subject to confirmation by the city council, or in a town by the board of selectmen, and are selected from among nominees proposed by various interested parties described in G.L. c. 40C, § 4.
- Generally the membership must include “one or more residents of or owners of property in an historic district to be administered by the commission.” *Id.*
- Ordinances or by-laws adopted under G.L. c. 40C, § 4 “may provide for the appointment of alternate

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## KNOW YOUR MUNICIPAL DEPARTMENTS, BOARDS AND COMMISSIONS

### A Focus Article on Historical Commissions - cont. from p. 3

members not exceeding in number the principal members who need not be from nominees of organizations entitled to nominate members.” Id.

- A historic district commission “may, subject to appropriation, employ clerical and technical assistants or consultants.” G.L. c. 40C, § 10(h).

### III. Core Functions:

#### A. Historical Commissions

G.L. c. 40, § 8D authorizes historical commissions to undertake, among other tasks and functions, the following, see, e.g., 18 MAPRAC § 9.40 (Douglas A. Randall and Douglas E. Franklin):

- “Conduct researches for places of historic or archeological value . . . coordinate the activities of unofficial bodies organized for similar purposes, [and] advertise, prepare, print and distribute books, maps, charts, plans and pamphlets which it deems necessary for its work.” G.L. c. 40, § 8D.
- Recommend to the city council or selectmen, or to the Massachusetts Historical Commission (subject to the approval of the city council or selectmen), that certain places “be certified as an historical or archeological landmark.” Id.
- Hold hearings. Id.
- Enter into contracts for services or cooperative endeavors furthering the commission’s program. Id.
- Accept gifts, contributions and bequests of funds from individuals, foundations and from federal, state or other governmental bodies for the purpose of furthering the commission’s program. Id.
- Perform any and all acts which may be necessary or desirable to carry out the purposes of this section. Id.
- Acquire in the name of the city or town by gift, purchase, grant, bequest, devise, lease or otherwise the fee or lesser interest in real or personal property of significant historical value and may manage the same. Id.
- Under G.L. c. 44B, § 5(b)(1), a community preservation committee must consult with a historical commission in conducting a study of the needs, possibi-

ties and resources of the city or town regarding community preservation.

In addition, historical commissions are required to keep accurate records of their meetings and file annual reports which, in towns, are to be printed in the annual town report. G.L. c. 40, § 8D. Any information received by a local historical commission with respect to the location of sites and specimens (as those terms are defined in G.L. c. 9, § 26B) shall not be a public record. G.L. c. 40, § 8D.

#### B. Historic District Commissions

Among the primary functions of a historic district commission are to consider requests for a certificate of appropriateness, a certificate of non-applicability or a certificate of hardship with respect to the proposed construction or alteration of a building or structure within an historic district. G.L. c. 40C, § 6. Other notable requirements, functions and tasks of an historic district commission include the following:

- Must keep a permanent record of its resolutions, transactions, and determinations and of the vote of each member participating therein. G.L. c. 40C, § 10(e).
- May adopt and amend rules and regulations that are consistent with the Historic Districts Act. Id.
- Must file a copy of each of its certificates and determinations of disapproval with the city or town clerk and with the municipal department responsible for issuing building permits. G.L. c. 40C, § 10(f).
- May exercise “such other powers, authority and duties as may be delegated or assigned to it from time to time by vote of the city council or town meeting.” G.L. c. 40C, § 10(i).
- May incur expenses appropriate to the carrying on of its work, and may accept money gifts and expend the same for such purposes. G.L. c. 40C, § 10(h)
- May “administer on behalf of the city or town any properties or easements, restrictions or other interests in real property which the city or town may have or may accept as gifts or otherwise and which the city or town may designate the commission as the administrator thereof.” Id.

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## KNOW YOUR MUNICIPAL DEPARTMENTS, BOARDS AND COMMISSIONS

### A Focus Article on Historical Commissions - cont. from p. 4

#### IV. Prevalent Legal Concepts and Principles in Cases Involving Historical Commissions and Historic District Commissions:

##### Standing of Historical Commissions under G.L. c. 40, § 8D to Appeal Zoning Decisions as a “Municipal Board”

Whether a historical commission has standing to appeal a decision of a zoning board depends on whether the local zoning bylaw or ordinance affords the municipality’s historical commission any duties with respect to zoning regulation. For instance, in Lowell, supra, 2008 WL 921709 (Mass.Land Ct., 2008), the Land Court found that “The members of the Mendon Historic Commission, because they have no duties to perform in relation to the building code or zoning, fall outside the class of municipal officers who have the right to appeal and thus lack standing to appeal a board of appeal decision.” Lowell, supra, 2008 WL 921709, 4. By contrast, in Wakefield Historical Com’n v. Wakefield Zoning Bd. of Appeals, 2001 WL 992312, 2 (Mass.Super.,2001), the Superior Court concluded that the Wakefield Historical Commission did, indeed, “have duties with respect to zoning in Wakefield,” and therefore did have “standing as a municipal board under G.L. c. 40A, § 17.” Wakefield Historical Com’n, supra, 2001 WL 992312 (“Indeed, as this case illustrates, the Commission’s decisions regarding the designation of historical sites have a direct effect on zoning and building within the Town. The subject matter of this case is the Board’s decision to grant a variance to the by-law provision precluding construction of any component of the facility at issue if it takes place within 250 feet of the historical site. Thus, the Commission has standing as a municipal board under G.L. c. 40A, § 17”).

##### Limitations on Rights of Appeal

While a property owner can appeal an historic district commission’s determination regarding the “appropriateness of any alteration or construction of any building or structure that affects exterior features,” the Historic Districts Act does not provide a cause of action to appeal the designation of a historic district. Springfield Preservation Trust II, supra at 419 (“the Act gives municipalities unfettered discretion whether to establish a historic district and, if so, what lands, buildings, and structures to include in that district”).

#### Geographical Constitution of Historic Districts

Although an historic district may include “several abutting properties of similar historic value, in others it will involve only one structure.” Roman Catholic Bishop of Springfield v. City of Springfield, 760 F.Supp.2d 172, 195(D.Mass., 2011) (“there is nothing nefarious about a municipality’s decision to apply the Act to a single parcel of land. In doing so, the City has recognized that Plaintiff’s property contains unique characteristics that hold significant social and historical value.”)

##### Allegations that a District or Determination Constitutes a Taking

A “taking” requires facts upon which it could be found that “a plaintiff has been denied all economically viable use of the property” so that there “remains no permissible or beneficial use for that property.” City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 700, 704 (1999).

##### Exterior v. Interior Features

In addition to exterior features, an historic district commission “may consider interior window arrangements which are intended to be and are visible to the public.” Historic Dist. Commission of Chelmsford v. Kalos, 48 Mass.App.Ct. 919, 920 (2000).

##### Standard of Review

A “decision of [an historic district commission] cannot be disturbed ... ‘unless it is based on a legally untenable ground, or is unreasonable, whimsical, capricious or arbitrary.’ ” Warner v. Lexington Historic Districts Com’n, 64 Mass.App.Ct. 78, 82 (2005), citing Gumley v. Board of Selectmen of Nantucket, 371 Mass. 718 at 723.

A historic district commission decision may be annulled if: (1) the reasons given on the face of the decision are insufficient in law to warrant the commission’s decision, or (2) if the reasons given on the face of the decision are unwarranted by the evidence. Marr v. Back Bay Architectural Com’n, 23 Mass.App.Ct. 679, 683-84 (1987).

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## KNOW YOUR MUNICIPAL DEPARTMENTS, BOARDS AND COMMISSIONS

### A Focus Article on Historical Commissions - cont. from p. 5

The Appeals Court also has similarly characterized the standard with different words in finding that a historic district commission decision may be annulled if: (1) the decision is based on legally untenable grounds, or (2) the decision is "unreasonable, whimsical, capricious or arbitrary." Gumley v. Board of Selectmen of Nantucket, 371 Mass. 718, 724 (1977) citing MacGibbon v. Board of Appeals of Duxbury, 356 Mass. 635, 638-39 (1970).

"If the commission's decision appears to be based on a legally tenable ground, the court must then consider whether the reasons given are "warranted by the evidence" within the meaning of § 10." Marr, supra at 684 ("the inquiry is analogous to that in an appeal from a decision of a board of appeals on an application for a special permit when it is claimed that the decision was unreasonable, whimsical, capricious or arbitrary. The court is obliged to take evidence and make findings of fact on this branch of the inquiry. If the evidence before the court is sufficient to sustain the decision, the court can annul it only if persuaded by a fair preponderance of the evidence that the action of the commission was unreasonable, whimsical, capricious or arbitrary. In arriving at any such conclusion, the court must take care not to substitute its judgment for that of the commission.") (citations omitted); Warner, supra at 83.

While the applicable standards are analogous to those that govern zoning disputes, "the scope of review on an appeal to the Superior Court from a decision of [a] commission is not as extensive as that which applies in an appeal from a decision of a board of appeals under the Zoning Act." Marr, supra at 682-683.

The amount of weight to grant the various pieces of evidence before the Commission falls solely within the discretion of the Commission. Bagalay v. Avon Hill Neighborhood Conservation Dist. Commission, 2004 WL 3090705, 2 (Mass.Super., 2004).

"Whatever the difficulty of determining appropriateness, the courts have accorded substantial discretion to historic district commissions in granting and denying approvals," 85 Mass. L. Rev. 113, 121 (2001) (Jeffrey S. Wieand, Esq.) citing Harris v. Old King's Highway Regional Historic Dist. Com'n, 421 Mass. 612, 617 (1996) (finding that a "local committee possessed a substantial measure of discretion in deciding whether the plaintiff's applications for certificates of appropriateness were in congruity with the historic district."

## BY-LAWS AND ORDINANCES

By: Frank Wright, Esq.

Like many municipalities these days, the Town of Milford recently sought to address quality of life issues within its borders. At its October 24th Special Town Meeting it entertained two proposed new general by-laws - one to address blighted "nuisance" properties and the other to address noise.

### NUISANCE PROPERTIES

The first is an innovative so-called Nuisance By-Law. Town Counsel Gerry Moody, states it is "directed at strengthening [the Town of Milford's] position in relation to derelict and abandoned properties. We hope this will allow for more effective pressure to get properties cleaned up in supplementation of the limited scope of G.L. c. 139 and c. 143." The stated purpose of the by-law is to protect the ... citizens of Milford by preventing blight, protecting property values and neighborhood integrity, protecting Town resources, sanitary maintenance of all buildings and structures. Inadequately maintained residential or commercial/business buildings are at an in-

creased risk for fire, unlawful entry, or other public health and safety hazards."

The by-law defines "Nuisances Prohibited" as "any substantial interference with the common interest of the general public in the maintaining decent, safe, and sanitary structures that are not dilapidated, and neighborhoods, when such interference results from the hazardous or blighted condition of private property, land or buildings." Dilapidated is defined as "a condition of decay or partial ruin by reason of neglect, misuse, or deterioration." Nuisance includes "burned structures not ... habitable or usable; dilapidated (defined as 'a condition of decay or partial ruin by reason of neglect, misuse, or deterioration') real or personal property; dangerous or unsafe structures; overgrown vegetation which may harbor rats or usable; dilapidated

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**BY-LAWS AND ORDINANCES**

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(defined as 'a condition of decay or partial ruin by reason of neglect, misuse, or deterioration') real or personal property; dangerous or unsafe structures; overgrown vegetation which may harbor rats or vermin, conceal pools of stagnant water...; dead, decayed, diseased or hazardous trees, debris or trash; vehicles, machinery or mechanical equipment or parts thereof ... located on soil, grass or porous surfaces...; property...placed for collection as rubbish or refuse in violation of any rule or regulation of the Board of Health, or left in public view for more than three (3) days; [t]he exterior storage or accumulation of junk, trash, litter, bottles, cans, rubbish, or refuse of any kind, except for domestic refuse stored in such a manner as not to create a nuisance for a period not to exceed fifteen (15) days; storage upon property of building materials upon residential properties unless there is ... a valid building permit...."

The by-law would establish minimum adequate maintenance requirements for owners of vacant property, including securing the property, but specifically prohibits boarding up the property for more than 30 days after a break-in, rather owners must repair broken windows or doors within that time-frame, owners must also comply with all applicable codes, and cap off all utilities after 6 months.

While the Building Commissioner shall be the enforcing authority, he shall initially provide immediate notice that the property is to be brought into compliance, failing to do so shall result in the town seeking an injunction or order restraining further use of the property and continuing the violation. In addition whoever violates the by-law and fails to obey any order shall be liable to a fine of not more than \$300.00. Finally, the complainant shall be kept informed of all proceedings concerning enforcement and shall be heard. A decision that a property is not a nuisance is reviewable by the Town Administrator at the request of the interested party.

Gerry reports that "Town Meeting overwhelmingly approved the [this by-law]. The Town now awaits AG approval." Stay tuned.

**NOISE**

Milford, which has never had any controls on construction times or anything but a vague decibel specific zoning by-law looks to hold persons who create, assist, continue or all "any excessive, unnecessary, or unusually loud noise which either annoys, disturbs, injures, or endangers the reasonable quiet, comfort, repose, or the health or safety of others" within the town. In addition to the usual commercial activities like construction, earthmoving or heavy vehicles, jackhammers and power tools, this by-law addresses radios, phonographs,

musical instruments and television [Ed. note: I am not sure my teenage sons know what a phonograph is, but they both play drums and guitars, so may be happy not to live in Milford - sorry Gerry!], as well as shouting, whistling, hooting, singing [they could hear me in Milford?] or making loud noises on the public streets, in public places, between 11 PM and 7 AM or at any time or place to annoy others. It shall be unlawful to cause unnecessary noise in the operation of a motor vehicle, being noise plainly audible at a distance of 100 feet from the vehicle, including motorcycles [get that muffler fixed!]. Last but not least, animal noises which cause frequent or long continued noise that disturbs one's comfort and repose [again, they can hear me singing in Milford?].

Just so we know they are reasonable in Milford they have exempted emergency vehicles, highway and utility construction, public address amplifiers (non-commercial only though), agricultural, farm and forest related activities, and parades, public gatherings, sporting events so long as they are properly permitted (no flash mobs in Milford!)

As Gerry noted, "Hopefully, this will be another tool the police in the front lines can use to get immediate response." However, the Selectmen passed it over in October due to some constituent concerns. He expects they will bring it back in the Spring.

**PUBLIC DRUNKENNESS BY-LAW REJECTED BY A.G.**

The Foxborough Patch reports that the town's Board of Selectmen voted 4 to 1 not appeal to the Attorney's denial of the town's public drunkenness bylaw, which would have established fines for public drunkenness.

The Attorney General, who had previously rejected the by-law, cited a conflict between the proposed by-law and Section 8 of Chapter 1076 of the Acts of 1971, <http://archives.lib.state.ma.us/actsResolves/1971/1971acts1076.pdf>, the state law that decriminalized public drunkenness.

It was reported that the town will continue to work with Gillette Stadium to address the issue in other ways. Mansfield had approved a similar by-law last Summer in an effort to address issues at the Comcast Center - otherwise known as *Great Woods* to those of us over a certain age.

IF YOUR CITY OR TOWN HAS ENACTED AN INTERESTING ORDINANCE OR BY-LAW, PLEASE SEND IT ALONG TO [fwright@somervillema.gov](mailto:fwright@somervillema.gov).

## TOP TEN PROCUREMENT MISTAKES

By: Bryan LeBlanc, Esq.

1. “Oops, the governing body did not authorize this contract term.”

One of the most frustrating situations in which a public entity may find itself is in learning that its governing body did not authorize a four, five, or seven-year goods or services procurement contract. As practitioners fairly conversant with the Uniform Procurement Act, most of us realize that M.G.L. c. 30B, §12 specifically provides: “Unless authorized by majority vote, a procurement officer shall not award a contract for a term exceeding three years, including any renewal, extension or option. Such authorization may apply to a single contract or to any number of types of contracts, and may specify a uniform limit or different limits on the duration of any such contracts.” As the Inspector General has instructed, an affirmative vote of town meeting in a town or of the city council in a city in order to authorize a term greater than three (3) years. The Chapter 30B Manual, 2011 ed., p.19.

This statute has provided numerous examples of confusion. How many of us have had a procurement agent convey to us that “the Board of Selectmen voted to authorize a five-year contract, so we should be all set”? How many others have heard the self-reassuring misconceived notion by a Town official, “our initial term is three (3) years, so we automatically comply with M.G.L. c. 30B”? Finally, how many of us have heard the most offensive notion: “We’ve always done it this way. How could we be wrong now?”

To avoid all of these situations on this point of the “Top Ten Procurement Mistakes,” a wise practitioner should always pointedly inquire, very early in contract and procurement document analysis, regarding the intended term, including any options for renewal or extension, of any goods and services contract that is subject to M.G.L. c. 30B. If the term is greater than three (3), the need to press procurement officials for the source of any authorized extension to the statutory limits becomes immediate. If at all possible, ask to see a copy of the Town Meeting or City Council vote. Doing so will protect the municipality and will protect your integrity as you perform due diligence.

If you detect a pattern of a certain type of contract lasting more than three (3) years, as a practitioner, you may also wish to suggest a longer-term solution to your client.

Cities and towns may designate, by a categorical vote, a longer duration for certain types of contracts. This approach may help avoid the scenario when one of these longer term contracts “slides through the proverbial cracks” without an authorization vote. Your client can certainly avoid this “oops,” and you can assist them greatly in this regard!

2. “Oops. Perhaps this procurement should have been bid under M.G.L. c. 30, §39M.”

The scope of the Uniform Procurement Act, M.G.L. c. 30B, sweeps very broadly. It is not infinite, however. As certain other laws cover other procurement areas, such as public works construction, public building construction, and designer selection, it is critical to discern what is actually being procured. This initial step in reviewing procurements will help to fend off bid protests and injunctive proceedings in the Superior Court to prevent any contract awarded by your client public entities from proceeding.

As a practitioner, I am sure that you will sympathize with fictitious fellow counsel who was called upon to review a tree removal contract late one Friday afternoon. The bid documents indicate that the procurement was sought pursuant to M.G.L. c. 30B. Quickly, the fictitious fellow counsel realizes that the procurement, valued at \$35,000.00, should have been made pursuant to M.G.L. c. 30, §39M, since tree removal is a “public work.” Town of Wilbraham Tree Service, Protestor: Northern Tree Service, Inc. (A.G. Bid Protest Decision) (March 13, 2000). For the fictitious counsel, who has also been informed that the contract needs to be “approved as to form” as soon as possible, the task will be to explain how the procurement is required to be conducted anew – this time following the proper statutory requirements.

For all practitioners, the likelihood of this scenario could be avoided by reminding purchasing agents and procurement personnel that disturbance of the soil is likely to change the character of a procurement from purchasing goods or services to conducting a public works projects. Remember, if there is any ambiguity, purchasing agents and procurement personnel should consult with counsel. This may be time to raise a rather cliché, but true, notion; namely, an ounce of prevention is worth a pound of cure. Apologies to Mr. Benjamin Franklin, Esquire.

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## TOP TEN PROCUREMENT MISTAKES

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### 3. “Oops. I think I may have purchased too many goods.”

The Office of the Inspector General has reminded public entities that they should decide at the outset of the procurement process the exact nature and quantity of goods that they wish to purchase. By adequately computing the number of widgets that are needed, the public entity will be able to conduct its purchasing endeavors in a manner that honors the cardinal principles of public procurement law. These principles were articulated by the Supreme Judicial Court of the Commonwealth in 1975. As the Supreme Judicial Court held, a public entity should (1) procure whatever goods or services it desires in the fairest manner to all participating bidders and should (2) procure them at the lowest cost/best possible price. Interstate Engineering Corp. v. City of Fitchburg, 367 Mass. 751 (1975).

Often, quantitative predictions as to what the public entity will require are often erroneous. Procurement personnel may contact you, as counsel, asking whether they may adjust quantities *ex post facto* to compensate for such mistakes in their internal estimates. Fortunately, M.G.L. c. 30B, §13 allows for a public entity to increase the amount of goods being procured through a contract, provided, however, that four criteria are satisfied. First, unit prices need to remain the same or need to be reduced. Second, the procurement officer is required to determine in writing that the increase is needed to fulfill the needs of the municipality and that the increase is more economical than conducting a new procurement. Third, the parties are required to memorialize the increase in writing. Finally, the increase cannot exceed twenty-five percent of the contract amount. The Chapter 30B Manual, *supra*, p. 70. Gasoline, fuel oil, and road salt are not subject to this limitation.

It is important to advise public entity clients that this “twenty-five (25) percent rule” only works one way. This is to say that the statute only permits a public entity to increase the quantity of unit-price based goods being procured. It does not allow a decrease. Hence, if your client approaches you with a complaint that it purchased too many of a given item, you will be offering advice concerning a disposition of goods, and not a modification of the original transaction.

### 4. “Oops. I didn’t know that we couldn’t add a gymnasium to the school for which we sought construction bids after the procurement process took place.”

Fairness has been one of the cardinal principles of public

procurement since the Interstate case discussed above. Essentially, the bidding public has a right to know from the outset the contours of the actual procurement. While a public entity wants to reserve the right to remain flexible, especially in the context of a developing construction project, definitive specifications are necessary to preserve fairness to all participants in the process. The Appeals Court of the Commonwealth emphasized that changing the scope of a procurement *ex post facto* violates this principle of fairness. See Petricca Construction Co. v. Commonwealth, 37 Mass. App. Ct. 392 (1994).

As a practitioner, you may be surprised that a public school building committee could somehow “forget” to include a gymnasium in its initial plans. However, after the procurement process is completed, the gymnasium “mysteriously” appears in the specification drawings. Perhaps there is an explanation that new monies have been found. Perhaps there is an explanation that MSBA is requiring a gymnasium on site.

Regardless of the explanation, you will need to remind the public entity client of the holding in Petricca. While there are always *de minimis* cost overrun items in any public construction contract, inserting very large capital items (which may increase construction costs by double digits) certainly violate the spirit of fairness that the public construction bidding laws are designed to uphold. Ultimately, your goal, as counsel, is to remind your public entity clients to decide exactly what they want *before* entering into the procurement process fray. Apologies for the use of another adage, this time coming from the old English proverb: “Measure twice, cut once.”

### 5. “Oops. But I wanted to award two contracts from this procurement.”

Our discussion of fairness, above, also impresses upon awarding authorities to candidly inform potential bidders not only regarding the items to be procured, but also regarding the manner in which it will award a contract. For the practitioner who has been involved with procurement over time, you are almost certain to face a challenge to a procurement procedure in which the awarding authority did not adequately explain how it will award a contract in a given set of circumstances.

While it is rather obvious that the lowest responsive and

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## TOP TEN PROCUREMENT MISTAKES

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responsible (or eligible, depending on the verbiage of the statute) will be awarded a contract, you should also remember to advise awarding authorities that they should state how many contracts are to be awarded.

While it is rather obvious that the lowest responsive and responsible (or eligible, depending on the verbiage of the statute) will be awarded a contract, you should also remember to advise awarding authorities that they should state how many contracts are to be awarded. Additionally, if the awarding authority desires to use alternative bases to award a particular contract, it should so state in the procurement documents themselves. (Emphasis added.) Finally, the awarding authority should give, to the extent appropriate, a summary of the process to be followed. This is especially true in the case of a Request for Proposals issued pursuant to M.G.L. c. 30B, §6. If a review committee is to be used in deciding, for example, whether a given proposer is “highly advantageous,” “advantageous,” or “not advantageous,” the awarding authority should so state in the procurement documents themselves. (Emphasis added.)

As a general precept, the more candid that public entities can be, the better they will fare in any challenge issued. Transparency with the public is a virtue in public procurement. If your clients can remember one point at all times, they should recall and live by this golden rule.

6. “Oops. But the company I bought from is on the state bid list. Why was I sanctioned for not following M.G.L. c. 30B?”

Ordinarily, Chapter 30B applies to the procurement of all goods and services in the Commonwealth of Massachusetts. The General Court has carved out a notable list of exceptions, as we know, in M.G.L. c. 30B, §1. While there is no particular rhyme or reason as to why all of these exceptions were adopted, they represent the few times when public entities are not required to follow statutory procedures to the letter.

Cities and towns are permitted, however, to procure items from the so-called “State Bid List.” The Operational Services Division of the Commonwealth of Massachusetts routinely procures supplies and services for state agencies in a given quantity and for a given price. City and town personnel may then search the electronic, online COMPASS site for goods and services under contract with the Commonwealth and may make purchases of said goods and services therefrom for the prices stated.

For the practitioner, frustration occurs when a public entity

believes that it may purchase any item it desires from a given vendor, simply because the vendor has a contract with the Commonwealth. This misunderstanding should be dispelled, since the goods and services subject to local purchase are clearly defined by the state procurement itself. You will want to remind your public sector clients of this reality. You should also advise them to purchase only goods and services from live contracts, as contracts do tend to expire after a certain period of time.

7. “Oops. Someone not authorized conducted this procurement?”

Each public entity is required to designate a chief procurement officer in writing and to file this designation with the Commonwealth of Massachusetts Office of the Inspector General. From time to time, the Chief Procurement Officer may desire to delegate procurement duties to a subordinate or to a third party.

As a practitioner, you may receive questions from time to time regarding the specific procedure to be used in ensuring that this delegation is properly accomplished. You will want to advise your public sector clients that delegation should be made in writing, on Inspector General prescribed forms, and sent in to the Office of the Inspector General. The delegation may be one time, or it may be recurrent. Please understand, however, that any delegation will need to be followed in each case.

As counsel, you will want to inform your clients to review the delegations periodically to ensure that they are valid for one or more particular contracts or categories of contracts. Procurement officials need to understand that procurements sought by public officials lacking procurement authority will be subject to outright invalidation. Hence, this is a very important issue for public sector clients to take very seriously!

8. “Oops. I forgot to advertise this procurement in the Goods and Services Bulletin, or the newspaper.”

Each procurement has its own advertising rules. Specifically, advertising rules governing procurements for goods and services are found in M.G.L. c. 30B. Those governing the procurement of designer selection services are found in M.G.L. c. 7. Those governing public works construction are found in M.G.L. c. 30, §39M. Those governing public building construction are found in M.G.L. c. 149, §44J.

For a municipal procurement officer, knowing, for

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**TOP TEN PROCUREMENT MISTAKES** - cont. from p. 10

example, that the procurement of goods and services estimated to cost in excess of one hundred thousand dollars (\$100,000.00) requires publication in the Goods and Services Bulletin is key. Failure to advertise is fatal to a procurement. This truism requires very little additional explanation.

As a practitioner, you will want to review these procedures. Never be too embarrassed to refer back to the statutes themselves. Far too often, the language is confusing to remember in rote format. As you review the statutes, encourage your clients to do the same. Make advertising a part of a procurement review checklist. This will prevent many mishaps and, hopefully, the unnecessary invalidation of public contracts!

9. “Oops. I didn’t realize that it wasn’t an emergency!”

Emergencies do happen. As New Englanders, we face blizzards, hurricanes, and, yes, tornadoes! In extreme circumstances, cities and towns of the Commonwealth are forced to deviate from the public procurement laws to secure necessary goods and services. Plastic for blown-out windows, supplies for temporary shelters, and alternative public accommodations are often immediately necessary. The law provides a certain latitude for public procurement officials to deviate from usual advertising requirements.

As counsel, you will want to remind your public sector clients that they will want to comply as closely as possible with advertising requirements. Specifically, if it is possible to comply with some, but not all, advertising requirements, the public entity should still do so. Moreover, the public entity should procure only what it needs to “ride out the proverbial storm.” For example, if a school is destroyed, the public entity may procure stop gap facilities through a temporary lease. It is not likely that it will be able to procure building construction services for a whole new school, absent extreme legislative intervention.

Please also bear in mind that the Office of the Inspector General does not view self-created hardship as constituting an “emergency” situation. A public entity may not allow, for example, a public building to deteriorate to the point that the roof caves in and to claim a subsequent emergency. Under such cases, the “emergency” is not genuine. You will want to encourage all public sector clients to avoid self-created hardships whenever possible.

10. “Oops. You mean I was supposed to insist that all statutory requirements were followed?”

With respect to this final point, the law is quite clear. As was stated in Phipps Products Corp. v. MBTA, 387 Mass. 387

(1982), an awarding authority is required to disqualify a bidder that has deviated from a statutory requirement. Whether failing to submit a necessary bid bond under M.G.L. c. 30, §39M, whether deviating from the statutory bid form under M.G.L. c. 149, or whether failing to include a certificate of non-collusion, a bidder renders his submission failing. The awarding authority is powerless to accept the submission no matter how desirous such a prospect may be.

As a practitioner and as a drafter of documents, you will want to recall the holding of Phipps Products Corp. Be sure that you always include any statutory requisites! This will ensure that you, too, comply with the public procurement laws of the Commonwealth!

### **CSTCA ANNUAL WEEKEND NEW BEDFORD, MA**

By: Stacey G. Bloom, Esq.

CSTCA’s Annual Meeting was held in New Bedford on October 14-16th. CSTCA members were welcomed to New Bedford by Mayor Scott Lang who also spoke on collective bargaining issues facing municipalities. Other panels addressed nuisance properties, collective bargaining of health care issues, education law and single justice practice. Our stellar speakers included Supreme Judicial Court Justice (ret) John Greaney and Attorney Dan Crean who gave the Robert Smith Constitutional Law Lecture on the issues social media presents to municipalities.

Members also enjoyed New Bedford’s sites—with many members visiting the New Bedford Whaling Museum. New Bedford City Solicitor Irene Schall also hosted CSTCA members for an after dinner reception. CSTCA wishes to thank Irene Schall, our host City Solicitor for the hospitality the City of New Bedford offered our members.

### **UPCOMING CSTCA 2012 EVENTS**

**January 26, 2012** Program on Municipal Fees. Location: Hogan Center at Holy Cross College, Worcester.

**March 15, 2012** Program on Historic District Commissions. Location: John Adams Courthouse, Boston.

**April 26, 2011** Program will be a half day seminar focusing on Construction Law Updates for municipal projects. Location: Salvatore’s Restaurant, Lawrence.

**MUNICIPAL CASE LAW UPDATE**

By: Carol Hajjar McGravey, Esq.  
and  
Timothy Harrington, Esq.

**Killorin v. Zoning Board of Appeals of Andover, Appeals Court Docket No. 10-P-1655**

In a case of first impression, the Appeals Court, on October 14, 2011, decided the question whether the thirty year term limit on restrictions or conditions on real property in c. 184, §23 applies to conditions or restrictions set by a government agency as part of the permit granting process. Tom Urbelis, CSTCA Amicus Coordinator and Past President, represented the Zoning Board of Appeals of Andover in this case which arose from the denial by the ZBA of Killorin's requests to remove certain restrictions imposed by a 1940 decision of the Board granting a special permit. The 1940 decision allowed a parcel of land in a National Register Historic District to be subdivided into six lots, and permitted a former mansion on one of the lots to be converted to an eight unit apartment building, a use otherwise not permitted by the zoning by-law. The special permit was granted with the condition that "so long as said apartment house shall be maintained on said lot, [that lot] shall not be further subdivided and shall contain only the building being converted into an apartment house and no other buildings except an eight-stall garage along the rear boundary of said lot."

In 2007, and again in 2008, the owners of the lot were denied a modification of the 1940 special permit that would have allowed the lot to be further subdivided and built upon. The applicants appealed on the principal argument that the conditions in the 1940 permit are no longer enforceable due to the provisions of G.L. c. 184, §23, which limit conditions or restrictions on the title or use of real property to a term of thirty years. The Superior Court denied the appeal, and the Appeals Court affirmed, holding that the thirty year limit in G.L. c. 184, §23 does not apply to conditions or restrictions set by a government agency, in this case, a zoning board, as a condition of granting relief, which allowed an activity that would otherwise conflict with local zoning laws. The Appeals Court distinguished restrictions and conditions imposed by a zoning board as a condition to granting a special permit from restrictions held by a public body which are part of a voluntary agreement, and also interpreted the statutory language of G.L. c. 184, §23 to apply to restrictions created by deed, will, or other instruments of conveyance, not to conditions of a permit granted in accordance with municipal by-laws. Further appellate review has been denied.

**Spenninhauer v. Town of Barnstable, Massachusetts Appeals Court**

In a decision from August 2011, the Appeals Court invalidated a Barnstable parking ordinance because the ordinance qualified as a zoning regulation and was not a matter over which the town could exercise its valid police powers. Because the ordinance was not adopted pursuant to the zoning process under G.L. c. 40A, the court invalidated the ordinance and vacated the fine imposed upon the plaintiff.

Here are the facts. In 2006, after several public hearings, the Town of Barnstable adopted a "Comprehensive Occupancy" ordinance. In pertinent part, the ordinance limited the number of vehicles that a single family dwelling could have parked on the property overnight. Under the ordinance, the plaintiff was allowed three vehicles in his driveway. In June of 2007, the town received a complaint that the plaintiff had six vehicles on his property outside overnight. The town's director of public health issued a cease and desist order and a fine of \$100. The plaintiff eventually brought this action alleging that the ordinance was not valid. The Superior Court granted summary judgment to the town.

Among other arguments, the town argued the ordinance was related to public health based upon increased occupancy in single family residences. However, the Appeals Court noted that there was no sufficient public health rationale evidenced in the record.

Analysis: The Appeals Court noted there was a fine line between general ordinances that a town may promulgate pursuant to its police powers and zoning regulations. The court reviewed an SJC decision to assist with its analysis. In Rayco Inv. Corp. v. Raynham, 368 Mass. 385 (1975), the court reviewed an ordinance relating to the number of trailer park licenses in the town. Working with an incomplete record, the SJC noted the ordinance would be invalid if it was not adopted pursuant to the zoning regulation process via 40A. The court came to that conclusion because the town had previously regulated trailer parks through zoning regulations and not general ordinances.

Returning to Barnstable, the Appeals Court noted a similar history in regards to the town's parking regulations. The court found the town had "historically regulated off-street parking through its zoning bylaws, not its general ordinances or bylaws." Also, as noted above, the court found no evidence in the record to support any public health rationale for the ordinance.

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**MUNICIPAL CASE LAW UPDATE**

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Accordingly, because the town did not enact the ordinance as a zoning regulation, the ordinance was invalid. The court also vacated the fine imposed against the plaintiff.

The decision provides a lesson regarding the judiciary's stance on ordinances and general bylaws covering a subject matter that was previously regulated through a zoning measure(s). In addition, when promulgating health based ordinances, towns should endeavor to rely upon solid, "hard data" based evidence in support of the ordinance that will stand up to judicial review.

**Harron, et al. v. Town of Franklin, United States Court of Appeals, First Circuit, No. 10-1800**

Franklin Town Counsel Mark Cerel reports the recent case, Harron, et al. v. Town of Franklin, United States Court of Appeals, First Circuit, No. 10-1800, where the First Circuit upheld the District Court's dismissal of an unsuccessful alcohol license applicant's complaint against the Town of Franklin, its police chief and town administrator. The applicant opened for business and began serving liquor before receiving town approval of a license transfer. When the town decided not to grant the license upon the recommendation of the police chief, the business closed and the applicant filed suit. The substantive due process claims failed because the plaintiff did not demonstrate that the actions of the municipality and its officials were sufficiently egregious, or that they violated a recognized liberty or property interest. John Davis and Adam Simms of Pierce, Davis and Perritano represented the Town on the appeal.

**Connors v. Annino, Docket SJC-10813**

Another case of interest, Connors v. Annino, Docket SJC-10813, was decided by the SJC on October 26, 2011. Following the reasoning of the Appeals Court in Gallivan v. Zoning Bd. of Appeals of Wellesley, 71 Mass. App. Ct. 850 (2008), the Supreme Judicial Court held that where the aggrieved party had notice of the issuance of a building permit, he or she is required to appeal to the Zoning Board of Appeals under G.L. c. 40A, §§8 and 15 within thirty days of the issuance of the permit. If an aggrieved party fails to do so, a later appeal under G.L. c. 40A, §7 from a denial of a request for enforcement will not be an available remedy. Michelle Learned, Assistant City Solicitor, represented the Waltham Zoning Board.

**INTERESTING 2011 EMINENT DOMAIN CASES**

By: Franz Leponika, Esq.

Interest on an eminent domain damages award is a constitutional right, with the rate established by statute (1). In Massachusetts, G.L. c. 79, §37, calculates the statutory rate at an annual rate equal to the weekly average one-year constant maturity treasury yield, as published by the Board of Governors of the Federal Reserve System (2). What does this mean? It means the statutory rate ebbs and flows in concert with stormy economic seas.

The current economic downturn translates into low statutory interest rates on eminent domain damages awards. In turn, diligent attorneys have turned to constitutional arguments, in an effort, to bolster the potential interest return on damage awards. These arguments attack the statutory rate as falling so significantly below a constitutionally reasonable rate as to deny the plaintiff/landowner just compensation (3). A pair of 2011 cases lay out the rules for pursuing interest claims in eminent domain cases. Municipal counsel should heed these cases when faced with challenges to the statutory interest rate.

**From what date will interest begin to accrue on any potential award?**

As shown above, G.L. c. 79, §37, sets the statutory interest rate by pegging it to the weekly average one-year constant maturity treasury yield. However, a landowner may challenge the constitutional adequacy of the statutory rate (4). In order to do so the landowner must:

1. [R]ebut the presumption of reasonableness by showing that the statutory rate is "significantly or substantially" below the standard of constitutional reasonableness.
2. "If (and only if)" this threshold burden is met will the question of "what rate will represent just and reasonable compensation for the delay in payment" arise (5).

**FOOTNOTES**

1. The V and XIV Amendments to the Federal Constitution and Article X of the Massachusetts Declaration of Rights secure the right to interest as a component of just compensation. In the 19th century, Chief Justice Lemuel Shaw declared interest must compensate the landowner for the time between the taking of the land and the award of damages. Parks v. Boston, 32 Mass. 198, 15 Pick. 198, 208 (1834). Chief Justice Shaw reasoned that in a perfect world the government would pay damages contemporaneous with the taking, but such perfection in the world does not exist.

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## INTERESTING 2011 EMINENT DOMAIN CASES

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Footnotes Continued

As the world has grown ever more complex, the likelihood of such contemporaneity has arguably decreased.

2. G.L. c. 79, §37 states in pertinent part: “Where the period for which prejudgment interest is owed is not more than one year, such interest shall be calculated at an annual rate equal to the weekly average one-year constant maturity treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date on which the right to damages under this chapter vested. Where the period for which prejudgment interest is owed is more than one year, such interest for the first year shall be calculated in accordance with the preceding sentence, and such interest for each additional year shall be calculated on the principal amount due at an annual rate equal to the weekly average one-year constant maturity treasury yield, as published by the board of governors of the Federal Reserve System, for the calendar week preceding the beginning of each additional year. Post-judgment interest shall be calculated in the same manner as pre-judgment interest, but using, in the first year after judgment, the rate for the calendar week preceding the date on which judgment entered, and in any additional year, the rate for the calendar week preceding the beginning of such additional year.”

3. By way of example of how low the rates, the average statutory interest rate for week one of the years 2005-2011 was 2.35%. For a useful directory of the pertinent interest rates, see <http://www.utd.uscourts.gov/documents/judgpage.html>.

4. Central Water District Associates v. Meadow Lake Watershed District, 80 Mass. App. Ct., 468, Fn.13 (Vuono, J., 2011)(citing Verrochi v. Commonwealth, 394 Mass. 633, 639, 477 N.E.2d 366 (1985) for the proposition that the statutory rate sets the lowest possible reasonable constitutional interest rate).

5. Central Water, at 472.

Given the current low ebb of the statutory interest rate, landowners seeking to maximize interest awards are increasingly challenging the statutory rate as too low to provide just compensation. The first sign of attack is a challenge in the complaint.

In order to prevail on a challenge to the statutory rate, the landowner must prove the statutory rate provides less return

than a set of comparable low-risk securities. The Appeals Court recently suggested thirty-year Treasury bonds, five-year Treasury notes, six-month bankers' acceptances, and the prime rate should all be used as comparative rates when attempting to demonstrate the statutory rate is unreasonably low (6). The Appeals Court specifically held using “a single comparator, rather than a range or composite of interest rates based on different types of low-risk securities available . . . fails to adequately identify what constitutes a constitutionally reasonable rate (7).” Therefore, a rate argument based on a single comparative rate will not clear the first hurdle (8). Moreover, the Supreme Judicial Court has signaled the floating nature of the statutory rate buttresses the constitutional reasonableness of the rate (9). Attorneys are advised to utilize multiple variable market-driven rates to calculate interest.

If the landowner convinces the court the statutory rate is unreasonable, then the question of a constitutionally reasonable rate arises. It remains unclear whether this issue belongs before a judge as a question of law, or before a jury as a question of fact (10). Either way, a pleading on the matter, submitted to the court well in advance of trial, should argue the attorney’s strategic preference. No matter judge or jury, the parties will need to put on evidence at trial supporting their contention that a given rate would provide just compensation (11).

And, that in short, are the interesting developments in eminent domain case law for 2011.

6. Central Water at 473.

7. Central Water at 473 and Fn. 11.

8. Arguably, a taking authority could analyze all cases within the timeframe of its case and argue that if no court found the statutory rate constitutionally unreasonable for contemporary cases - then the statute cannot be unreasonable in his case.

9. Central Water at Fn. 8.

10. Central Water at Fn. 9.

11. Central Water also addressed the issue of compound interest. Id. at 473-474. The Appellate Court did not rule compound interest constitutionally mandated in all cases, but did assert where an “extended delay” exists between the time of the taking and payment, just compensation demands compound interest. Id.

## Review of "The Evolved Appellate Brief"

By: Jordan L. Shapiro, Esq.

Those of you who have attended our Annual Meetings have always enjoyed Justice Greaney's views on all subjects involving appellate work. Succinct and practical suggestions as to what appellate judges look for and expect in lawyer's briefs are difficult to find. A short article, written with candor, brevity, and clarity, with a checklist, is even more difficult to find.

The American Bar Association Section of Litigation (Fall 2010) edition was packed with thoughts and ideas as to what lawyers need to know about writing appellate briefs. Here is a checklist included within the article --you may agree or disagree with some of the suggestions, but they clearly indicate the way an appellate judge, reading a brief, may be thinking--:

1. Avoid use of references such as "appellant" and "appellee." Use Jones or Smith, because "the reader cannot be expected to remember a few pages into the brief that the appellant was plaintiff."
2. Do not overuse subheadings. "Weed out all but the necessary ones."
3. Limit the use of dates. When the reader sees a date, he or she assumes it is there for a reason. If there is no reason, omit the date. The date of an accident should be included, but other dates can probably be left out. The month and year are sufficient generally.

4. State the issues in full in the table of contents and before the statement of the case and facts. [We do that in Massachusetts anyhow. Ed.]
5. The traditional view is that quotations from cases should be avoided. However, two or three sentences quoted from an opinion can save time for the judge who may not trust what counsel says about the case. [Hmmm..... Ed.]
6. Never use words that any reader would have to look up in a dictionary. That includes a Latin term or a medical or scientific term.
7. Avoid string citations. No more than one case is necessary for universally accepted principles, such as the standard for granting a summary judgment.
8. Capitalize with care. Do not capitalize words that would not be capitalized in a book or an article.
9. Footnotes should be avoided. "Use a lead-in sentence for the footnote so that the reader knows whether he or she wants to look down... In a brief at the page limit, more than a few footnotes can indicate to the court an end-run around the page-limit rule."

The article concludes: "The most important thing about a brief is clarity. Remember, appellate judges are busy, usually over-worked, and almost certainly under-paid. Make their jobs easier and they may do the same for you."

## Third-Party Actions/Associational Standing Thompson v. North American Stainless, 131 S.Ct. 863 (2011)

By: Daniel Skrip, Esq.

Third-party retaliation claims emanate from claimants who suffered adverse employment actions (ostensibly) due to protected activity taken by another. Usually, there is a strong tie between the claimant and the person that engaged in the protected activity. In Massachusetts, there was a stark contrast in the acceptance of this so-called associational standing. In 1989, the Massachusetts Commission of Discrimination, the State's clearing house for employment discrimination claims, recognized standing for persons associated with a handicapped individual. See Dittbenner v. Hapco Auto Parts, 11 MDLR 1139 (1989). Practitioners used this doctrine with some success even though, as the

MCAD conceded, "Chapter 151B does not explicitly protect individuals who are associated with a handicapped individual ...." James and Camille Snelders v. Boston Housing Authority, 2001 WL 1805190 (Docket No. 98 BPH 1515) \*6 (December 31, 2001). No published MCAD decision in over nearly a decade after Snelders, however, followed that line of thought. The Supreme Court of Massachusetts never addressed the issue. And when the Superior Court of Massachusetts took up the issue in 2010, it was not shy in asserting its position on its way to allowing those defendants' summary judgment motion:

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**Third-Party Actions/Associational Standing**  
**Thompson v. North American Stainless, 131 S.Ct. 863 (2011)**

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Chapter 151B ... does not include a provision recognizing a plaintiff's right to pursue a claim based upon his or her association with a qualified individual. Moreover, the SJC has, in the past, clearly held that "[t]o show an 'unlawful practice,' the plaintiff must show discrimination 'because of his classification in one of the listed categories.'" Neither the MCAD, nor the court, can add a category for "associated persons" that the Legislature did not include in the statute. As [Complainant] Brelin-Penney is not a member of a category of protected persons under chapter 151B, she cannot assert a claim for alleged violation of that statute.

Brelin-Penney v. Encore Images, 27 Mass.L.Rptr. 254, 2010 WL 2636822 (June 1, 2010) (where wife tried to tie her MCAD claim to her husband's MCAD claim alleging he was victim of discrimination related to workers' compensation claim) (citations and footnotes omitted). Before this issue could be vetted through the Commonwealth's appellate courts, the Supreme Court of the United States took up the issue in Thompson v. North American Stainless, 131 S.Ct. 863 (2011).

In Thompson, Miriam Regalado filed a charge at the Equal Employment Opportunity Commission ("EEOC") alleging discrimination against her employer North American Stainless ("NAS"). Id. NAS also employed Eric Thompson, Ms. Regalado's fiancée. Three weeks after learning of Ms. Regalado's Charge, NAS fired Mr. Thompson. Mr. Thompson sued NAS under Title VII of the Civil Rights Act of 1964 claiming that NAS fired him in order to retaliate against Ms. Regalado for filing a discrimination charge. The United States District Court for the Eastern District of Kentucky granted summary judgment to NAS concluding that Title VII "does not permit third-party retaliation claims." 435 F. Supp. 2d 633, 639 (E.D. Ky. 2006). The Sixth Circuit Court of Appeals affirmed. Thompson, supra 567 F.3d 804 (6<sup>th</sup> Cir. 2009). The Supreme Court of the United States granted certiorari.

Title VII makes it unlawful employment practice "for an employer to discriminate against any of his employees ... because he has made a charge" under Title VII. 42 U.S.C. § 2000e-3(a). The statute permits "a person claiming to be aggrieved" to file an EEOC charge alleging that the employer committed an unlawful employment practice. It was undisputed that Ms. Regalado's EEOC charge was protected conduct under Title VII. And given the procedural posture of the appeal, the Supreme Court assumed that NAS fired Mr. Thompson in order to retaliate against Ms.

Regalado. Thompson, therefore, presented two questions: First, did NAS' firing of Mr. Thompson constitute unlawful retaliation? Second, if it did, does Title VII grant Mr. Thompson a cause of action?

In addressing the first question, the Supreme Court noted that Title VII prohibits discrimination on the basis of race, color, religion, sex, and national origin " 'with respect to ... compensation, terms, conditions, or privileges of employment,' " and discriminatory practices that would " 'deprive any individual of employment opportunities or otherwise adversely affect his status as an employee.' " 42 U.S.C. § 2000e-2(a). Title VII's antiretaliation provision, however, prohibits an employer from " 'discriminat[ing] against any of his employees' " for engaging in protected conduct, without specifying the employer acts that are prohibited. Based on this textual distinction and the antiretaliation provision's purpose, "the antiretaliation provision ... is not limited to discriminatory actions that affect the terms and conditions of employment," Burlington N. & S.F.R. Co. v. White, 548 U.S. 53, 64 (2006); rather, it prohibits any employer action that "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." Id. at 68.

It was "obvious" to the Supreme Court that a reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiancée would be fired. Thompson, 131 S.Ct. at 868. Indeed, NAS did not dispute that Mr. Thompson's firing meets the standard set forth in Burlington. NAS, however, warned that prohibiting reprisals against third-parties will lead to difficult line-drawing problems concerning the types of relationships entitled to protection (girlfriend, trusted co-worker, etc.). Applying the retaliation standard to third-party reprisals, NAS argued, would place the employer at risk any time it fires any employee who happens to have a connection to a different employee who filed an EEOC charge.

Despite "the force of [NAS] point, we do not think it justifies a categorical rule that third party reprisals do not violate Title VII," the Supreme Court held. Thompson, 131 S.Ct. at 868. Title VII's antiretaliation provision is worded broadly and "there is no textual basis for making an exception to it for third-party reprisals". Id. That said, the Court declined to identify a fixed class of relationships for which third-party reprisals are unlawful. The "significance of any given act of retaliation will often

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depend upon the particular circumstances,” the Court wrote quoting Burlington. *Id.* quoting Burlington, *supra* at 69.

To answer the second question - Does Title VII grant Mr. Thompson a cause of action? - the Court first turned to the statutory language: “a civil action may be brought ... by the person claiming to be aggrieved.” 42 U.S.C. § 2000e-5(f)(1). Then it looked to the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*, which authorizes suit to challenge a federal agency by any “person ... adversely affected or aggrieved ... within the meaning of a relevant statute.” § 702 (*emphasis added*). This language establishes a regime under which a plaintiff may not sue unless he “falls within the ‘zone of interests’ sought to be protected by the statutory provision whose violation forms the legal basis for his complaint.” Lujan v. National Wildlife Federation, 110 S.Ct. 3177 (1990). The “zone of interests” test denies a right of review “if the plaintiff’s interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.” Clarke v. Securities Industry Assn., 107 S.Ct. 750 (1987). The term “aggrieved” in Title VII, the Court held, incorporated this test and enables suit by any plaintiff with an interest “arguably [sought] to be protected by the statutes,” National Credit Union Admin. v. First Nat. Bank & Trust Co., 118 S.Ct. 927, while excluding plaintiffs who might technically be injured but whose interests are unrelated to Title VII’s statutory prohibitions.

Applying the test to Thompson, the Court concluded that Mr. Thompson fell within the zone of interests protected by Title VII as he was a NAS employee, and Title VII’s purpose is to protect employees from their employers’ unlawful actions. And, accepting the facts as alleged, injuring Mr. Thompson was NAS’ intended means of harming Ms. Regalado. In those circumstances, Mr. Thompson is “well within the zone of interests sought to be protected by Title VII” and, as such has standing to sue.

For Commonwealth municipalities confronted with third-party retaliation claims, applying Thompson could be troublesome. Not only does it give would-be plaintiffs an additional avenue of redress, but it forces municipalities to investigate, to some extent, the personal relationships of those on the brink of adverse employment actions. Such an investigations will lead to issue of privacy and disclosure that may provide its own host of problems.

**Governor Signs Casino Bill**

By: Matthew G. Feher, Esq.

On November 22, Governor Deval Patrick signed long-awaited legislation sanctioning as many as three resort style casinos and one slot parlor in the Commonwealth (becoming Chapter 194 of the Acts of 2011). Patrick has consistently labeled the proposal as a jobs measure and stated during the bill signing that “[b]ecause of initiatives like this one, Massachusetts continues to lead the nation out of this recession.”

Unlike last year’s compromise expanded gaming bill, Chapter 194 would not require that slot licenses be granted to the state’s racetracks and would set tight timeframes during which the Governor may enter into a compact with a federally recognized Indian tribe to conduct casino gaming. The new law would more formally involve “surrounding communities” in the siting process and ensure that a portion of all gross gaming revenues be allocated to cities and towns as “gaming local aid” and mitigation assistance to both host and surrounding municipalities.

For each resort-style casino, the license fee would be no less than \$85 million and the applicant would be required to make a capital investment of at least \$500 million. The state will receive 25 percent of gross gaming revenues from each resort casino. The slot facility can house no more than 1,250 slot machines and the license will cost no less than \$25 million. The holder of a slot license must make a capital contribution no at least \$125 million. The state is in line to receive 40 percent of gross slot gaming revenue, with an additional nine percent (9%) of revenues to be deposited into a new Race Horse Development Fund to promote live racing in the Commonwealth.

The new law vests much authority with a 5-member state Gaming Commission issue gaming licenses and regulate gaming activities. No more than one casino license can be granted in each of three defined geographical regions of the state – Southeastern Massachusetts, Metro-Boston/Worcester and Western Massachusetts.

To be eligible to obtain a gaming license, the law requires, among other things, that the applicant execute agreements with the host community, “surrounding communities” and any impacted live entertainment venues (including a community impact fee). In addition, the applicant must receive a certified and binding vote on a ballot question in the host municipality in favor of the gaming license.

The law authorizes the Governor to enter into a compact with a federally-recognized Indian tribe and if such a compact is entered into or approved by the Legislature prior to July 31, 2012, the Tribe is in line to receive the one license available in the Southeastern region. Only if the tribe has purchased, or entered into an agreement to purchase, a parcel of land and a referendum vote is scheduled in the host community may a federally recognized Indian tribe proceed to negotiate a compact with the state.

## QUINN BILL CASE ARGUED BEFORE THE SUPREME JUDICIAL COURT

By: Henry C. Luthin, Esq.

On November 8, 2011, the Supreme Judicial Court heard oral argument in Adams v. City of Boston, Docket No. SJC-10861. This matter arose when the legislature cut off funding for reimbursement to cities and towns for expenditures made under G.L. c. 41, § 108L, the Quinn Bill. The Quinn Bill is a local option law under which police officers who further their education in the field of police work receive a pay differential of 10%, 20% or 25% depending on the degree obtained. The accepting municipality initially makes the payment, but § 108L specifies that the city or town “shall be reimbursed by the Commonwealth for one half of the cost of such payments.”

In 2009, the General Court appropriated an amount such that the City of Boston was reimbursed an amount equaling 8.73% of its cost under the Quinn Bill, rather than the 50% set by § 108L. Under the terms of its collective bargaining agreements with the various police unions, in the event that the Commonwealth did not fully fund Quinn Bill reimbursements the City was obligated in the following year to pay qualified officers the City’s 50% obligation plus the percentage reimbursed by the Commonwealth the previous year. Therefore, in 2010, the amount received by qualified officers was 58.73% of the appropriate pay differential.

Three officers who were members of the unions representing patrolmen, superior officers and detectives brought suit on the grounds that under the plain language of § 108L the City

was obligated to pay the full amount of the differential, regardless of whether the Commonwealth reimbursed the City the full amount or something less. The City countered that the language of the collective bargaining agreement should control.

The City Solicitor and Town Counsel Association filed an amicus brief on behalf of Boston in the Adams case. Attorneys Laurence Donoghue, Philip Boyle, Peter Mee and Colin Boyle of the firm Morgan Brown & Joy authored and filed the brief on behalf of the Association. The brief made it clear that a decision adverse to the City of Boston would impact all municipalities, not only on the funding level but also on the ability to negotiate with labor unions.

As Mr. Donoghue put it: “It is important that the SJC have the input of the Association on the issues raised in Adams, since Association members are on the front-line in dealing with issues relating to the reduction in Quinn Bill funding. We wanted the Court to know how important it is to preserve the flexibility of cities and towns, and the labor unions representing police officers, to deal with an environment in which the funds promised by the state are simply not made available. If denied that flexibility, municipalities are going to have to look at more drastic ways to address the funding shortfall.”

## FIRST AMENDMENT

By: Gerry Moody, Esq.

In a First Amendment/zoning case of some significance the Superior Court just ruled in favor of the Town of Milford.

After having the case under advisement for some seven months Superior Court Judge Dennis Curran ruled in the Town’s favor on the validity of the Town of Milford’s Adult Entertainment Zoning By-Law and its application to a particular parcel of land in Milford. The dispute involved issues of interpretation of the Milford By-Law and the setback requirements from “sensitive uses” under that by-law. Very significant to the case the Milford Zoning Board of Appeals had denied a Special Permit under the version of the Milford Adult Entertainment Zoning as in effect in 1996, which by-law had a number of deficiencies. After the decision of the ZBA was made, and indeed after the filing of the appeal from that decision of the ZBA was made, and indeed after the filing of the appeal from that decision and the challenge to

the Town of Milford significantly amended its Adult Entertainment By-law in ways to strengthen it and assure its constitutional validity.

In a very significant aspect of the case the Superior Court ruled that it was in fact the 2008 by-law that applied to the Plaintiff’s land because of the particular provisions of the last sentence of the first paragraph of G.L. c. 40A, Section 6. There is also considerable analysis of the areas of the Town of Milford that the parties disputed over whether or not they were available as alternative sites for First Amendment uses.

The decision was rendered on November 23, 2011 and there is as yet no indication of whether or not there will be an appeal. The case is Route 16 Land development corp., et al vs. Bruce et al, Worcester CA No. 08-CV-0840D.

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