



Massachusetts Municipal Lawyers Association

MMLA MUNICIPAL MINUTE

VOLUME II, ISSUE 5 – MARCH 17, 2023

Greetings, and welcome to this issue of the MMLA Municipal Minute, our e-newsletter to you, our Massachusetts Municipal Lawyers Association (MMLA) membership. Make sure to click the hyperlinks below for more information about a particular topic or matter.

HAPPY ST. PATRICK'S DAY!

Upcoming Programs and Events:

- **Upcoming Programs:**
 - **MCLE Municipal Law 2023 Annual Conference – Next Wednesday, March 22, 2023** (9am-5pm, Virtual or Live at MCLE Conference Center, Ten Winter Place, Boston, MA). To register, visit the MCLE website, <http://www.mcle.org>.
Topics/panelists:
 - Open Meetings: Carrie Benedon, Esq., Office of the Attorney General, Commonwealth of Massachusetts, Boston
 - Public Records: Angela M. Puccini, Esq., Office of the Secretary of the Commonwealth, Public Records Division, Boston
 - Ethics and Conflicts of Interest: Eve M. Slattery, Esq., State Ethics Commission, Commonwealth of Massachusetts, Boston
 - Environmental Law Update: Gregor I. McGregor, Esq., McGregor Legere & Stevens, PC, Boston; Luke H. Legere, Esq., McGregor Legere & Stevens, PC, Boston
 - Resiliency, Climate Change, and Impacts on Massachusetts Land Use: Aladdine D. Joroff, Esq., City of Boston, Boston
 - Cannabis Update: Jonathan M. Silverstein, Esq., Blatman, Bobrowski, Haverty & Silverstein LLC, Concord; Nicole Costanzo, Esq., KP Law, PC, Boston
 - Employment Law Update: John J. Cloherty, III, Esq., Pierce, Davis & Perritano LLP, Boston; John J. Davis, Esq., Pierce, Davis & Perritano LLP, Boston

- Land Use and Zoning Update: Christopher L. Brown, Esq., Miyares and Harrington LLP , Wellesley; Christopher H. Heep, Esq., Miyares and Harrington LLP , Wellesley; Katherine D. Laughman, Esq., City of Waltham Law Department, Waltham
 - First Amendment, Public Forum, and Public Comment Period: Robert S. Arcangeli, Esq., City of Boston Law Department, Boston; Deanna Barkett Fitzgerald, Esq., Ropes & Gray LLP, Boston
- **Labor Law Program Part 2 - Employee Discipline** – April 4, 2023, 3-6:30pm, Mast Restaurant, 45 Province Street, Boston, MA (registration fee is \$35; free for law students and lawyers admitted to the bar for less than 5 years). An experienced panel of labor attorneys will present this second part of a two part series of a “nuts and bolts” programs on labor law. For this portion of our series, Kay Hodge and Melissa Murray will lead the presentation and discussion, sharing their extensive Labor Counsel experience in focusing on the various processes, concepts and considerations in disciplining public employees. Following the program there will be a networking event with light hors d'oeuvres available courtesy of MMLA, as well as a cash bar. Here are our panelists for the two part series:
- Christopher L. Brown, Esq., Miyares and Harrington LLP, Program Chair/Moderator
 - Katherine M. Feodoroff, Esq., Mead, Talerman & Costa LLC
 - Kay H. Hodge, Esq., Stoneman, Chandler & Miller LLP
 - Melissa R. Murray, Esq., Norris, Murray & Peloquin LLC
 - Sarah C. Spatafore, Esq., Murphy, Hesse, Toomey & Lehane LLP
- **Executive Board Meetings:** MMLA members are welcome to attend monthly Executive Board meetings, typically held on the second **Thursday** of each month. The next scheduled meeting is for April 13, 2023. To attend an Executive Board meeting, please contact MMLA Executive Director/Secretary-Treasurer James Lampke with a copy of any materials (james.lampke@lampkelaw.com).

If you are speaking at any upcoming programs or events, please let us know (massadmin@massmunilaw.org) so we can include it in an upcoming Municipal Minute.

Recent Decisions, Rulings, Cases, and Legislative Developments of Note:

- *Maguire v. Planning Board of Hamilton* (Appeals Court Rule 23.0 Decision, March 15, 2023): “Defendants Patricia and Nazir Shamsuddin appeal from a Land Court judgment invalidating defendant planning board of Hamilton's (board) approval of the Shamsuddins' proposed subdivision plan. Acting on cross motions for summary judgment, a Land Court judge concluded that the board exceeded its authority in approving the plan because the plan employed a private way in a manner that would overload the Shamsuddins' easement over the way. Agreeing with the judge's conclusion that, in the circumstances of this case, the proposed use of the easement as a subdivision

road would violate the bright-line rule reaffirmed in Taylor v. Martha's Vineyard Land Bank Comm'n, 475 Mass. 682, 686 (2016), we affirm ‘We have long held that a ‘right of way appurtenant to [a particular piece of] land . . . cannot be used by the owner of the dominant tenement to pass to or from other land adjacent to or beyond that to which the easement is appurtenant’ (footnote omitted). Taylor, 475 Mass. at 686, quoting Murphy v. Mart Realty of Brockton, Inc., 348 Mass. 675, 678-679 (1965). See Greene v. Canny, 137 Mass. 64, 68 (1884). Indeed, “[a]bsent . . . consent [from the owner of the servient estate], use of an easement to benefit property located beyond the dominant estate constitutes an over[load]ing of the easement’ (citation omitted).’ Taylor, *supra*, quoting McLaughlin v. Selectmen of Amherst, 422 Mass. 359, 364 (1996). ‘This limitation on the permissible use of easements is a bright-line ‘rule [meant to] avoid[] otherwise difficult litigation over the question whether increased use unreasonably increases the burden on the servient estate.’” Taylor, *supra* at 386, quoting Restatement (Third) of Property: Servitudes § 4.11 comment b (2000).”

- City of Chelsea v. New England Police Benevolent Association, Inc. (SJC, March 8, 2023): “After the New England Police Benevolent Association, Inc., Local 192 (NEPBA), replaced the International Brotherhood of Teamsters, Local 25 (Local 25), as the exclusive bargaining representative for the emergency dispatchers in the city of Chelsea (city), the NEPBA sought to arbitrate a grievance regarding the termination of a dispatcher that occurred following the change in union representation. The NEPBA and the city had not yet bargained to a new contract, but employees had been working pursuant to the terms and conditions of the city's prior collective bargaining agreement with Local 25, which contained an arbitration provision. The parties submitted to an arbitrator the question whether the dispute was arbitrable. The arbitrator ruled that it was. The city now appeals from a Superior Court order confirming the arbitrator's decision.

We determine that the dispute was arbitrable because (1) the dispute clearly would have been covered by the broad arbitration provision negotiated by the city and the prior union, if the contract with the city had remained in effect; (2) the arbitrator, acting within her authority, found that the contract was extended by the city according to the terms of the contract, and we defer to such contractual interpretation by the arbitrator; and (3) we conclude that the labor relations act entitles a successor union to ‘step[] into the shoes of its predecessor’ and enforce an arbitration provision in a collective bargaining agreement negotiated by its predecessor. See Watertown v. Watertown Mun. Employees Ass'n, 63 Mass. App. Ct. 285, 291 (2005).”

- Barron v. Kolenda (SJC, March 7, 2023): “After objecting to open meeting law violations and other municipal actions in a public comment session at a meeting of the board of selectmen of Southborough (board), the plaintiff Louise Barron was accused of violating the board's ‘public participation at public meetings’ policy (public comment policy or civility code) and eventually threatened with physical removal from the meeting. Thereafter, she and two other plaintiffs brought State constitutional challenges to the policy, claiming in particular that she had exercised her constitutionally protected right under art. 19 of the Massachusetts Declaration of Rights ‘to assemble, speak in a peaceable manner, and petition her town leaders for redress.’ In the plaintiffs’ request for

declaratory relief, seeking to have the public comment policy declared unconstitutional, they also used terminology associated with free speech claims brought under art. 16 of the Massachusetts Declaration of Rights, as amended by art. 77 of the Amendments to the Constitution, and the First Amendment to the United States Constitution, although they voluntarily withdrew their First 3 Amendment and other Federal claims, eliminating the Federal constitutional basis that had justified removal of the case from State to Federal court. Finally, Barron claims that the threat to remove her from the meeting for exercising her State constitutional rights violated the Massachusetts Civil Rights Act (MCRA), G. L. c. 12, §§ 11H-11I.

For the reasons set forth infra, we conclude that the public comment policy of the town of Southborough (town) violates rights protected by art. 19 and, to the extent it is argued, art. 16. Under both arts. 19 and 16, such civility restraints on the content of speech at a public comment session in a public meeting are forbidden. Although civility, of course, is to be encouraged, it cannot be required regarding the content of what may be said in a public comment session of a governmental meeting without violating both provisions of the Massachusetts Declaration of Rights, which provide for a robust protection of public criticism of governmental action and officials. What can be required is that the public comment session be conducted in an ‘orderly and peaceable’ manner, including designating when public comment shall be allowed in the governmental meeting, the time limits for each person speaking, and rules preventing speakers from disrupting others, and removing those speakers if they do. We have concluded that such time, place, and manner restrictions do not violate either the right to assembly under art. 19 or the right to free speech under art. 16. See Desrosiers v. Governor, 486 Mass. 369, 390- 391 (2020), cert. denied, 142 S. Ct. 83 (2021) (permitting time, place, and manner restrictions under art. 19); Mendoza v. Licensing Bd. of Fall River, 444 Mass. 188, 197-198 (2005) (discussing time, place, and manner restrictions under art. 16).

Furthermore, when Barron alleged that the chair threatened to have her physically removed from a public comment session of a public meeting after she criticized town officials about undisputed violations of the open meeting laws, she properly alleged that he threatened to interfere with her exercise of State constitutional rights protected by arts. 16 and 19 in violation of the MCRA. There is also no qualified immunity, as there is a clearly established State constitutional right under arts. 16 and 19 to object (and even to do so vigorously) to the violation of the law by government officials in a public comment session of a public meeting. We therefore reverse the Superior Court judgment entered in favor of board member Daniel L. Kolenda. We also direct the Superior Court to enter a judgment declaring the town's public comment policy unconstitutional in violation of arts. 19 and 16.”

- Reilly v. Town of Hopedale (Appeals Court, March 7, 2023): “These two cases stem from a dispute concerning chapter 61 forest land located in the town of Hopedale (town) that the Grafton & Upton Railroad (railroad) wishes, and already has begun, to develop over opposition by the town and certain of its residents. The first case (No. 22-P314) was filed in the Superior Court by a group of town residents (citizens) challenging a settlement agreement reached between the town, and the railroad, the owner of the land (the One

Hundred Forty Realty Trust [trust]), and the trustees of the trust (Jon Delli Priscoli and Michael Milanoski). The essential question raised in the appeal from the Superior Court case is whether the citizens have standing to pursue the declaratory relief they sought in count II of their complaint. As pertinent to this appeal, that count sought a declaration that the town's agreement, as part of the settlement, to waive its statutory option to purchase the forest land pursuant to G. L. c. 61, § 8, was invalid and unenforceable. We affirm the dismissal of Count II because, like the Superior Court judge, we conclude that the citizens do not have standing under either G. L. c. 40, § 53 (pertaining to citizen suits), or G. L. c. 231A (pertaining to declaratory actions) for the particular relief sought in count II.

The second case (No. 22-P-433) comes to us on appeal from the Land Court, where the citizens' motion to intervene in a suit brought by the town against the railroad and the trust was denied as moot. We conclude that the Land Court judge should not have denied the motion to intervene as moot, and accordingly we vacate that order and remand the matter to the Land Court to permit the Land Court judge to consider the motion to intervene on the merits, as well as the citizens' motion to join in the town's motion to vacate the stipulation of dismissal.”

- [*Morse v. Zoning Board of Appeals of Wellesley*](#) (Appeals Court Rule 23.0 Decision, March 7, 2023): “James Morse appeals from a Land Court judgment affirming on summary judgment the decision of the Zoning Board of Appeals of Wellesley (board) to grant site plan approval for a major construction project at a retail site, a use permitted as of right. The approval allows the operator of the site to raze a two-family home, expand a parking lot, and relocate one of the site's driveways. The plaintiff objects only to the portion of the plan that authorizes moving the entry to the site closer to his home. We affirm The plaintiff has not shown the board's conclusion to be legally untenable, unreasonable, arbitrary, or capricious. See *Wendy's*, 454 Mass. at 381-382. We discern no error in the decision granting summary judgment to the defendants.”

Career Opportunities and Other Information:

- The following career opportunity was posted on the MMLA website:
 - [Massachusetts Water Resources Authority \(MWRA\) – Senior Staff Counsel – Labor & Employment](#)
- The Office of the Attorney General issued this [Advisory Concerning Enforcement of the MBTA Communities Zoning Law](#).

The Municipal Minute welcomes your submissions, such as client advisories/alerts, notable decisions, promotions, achievements, and other content. To submit, please send an email to massmadmin@massmunilaw.org.

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