THE MUNICIPAL LAW NEWSLETTER ©

of the CITY SOLICITORS AND TOWN COUNSEL ASSOCIATION *the* Bar Association of Massachusetts Municipal Attorneys

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Spring 2012

Letter from the President

Welcome to the first Newsletter of 2012. I hope the beginning of this year has been a good one for everyone. The first part of 2012 has seen some new developments for CSTCA. As you know, the CSTCA ListServ is a fantastic benefit to the membership. Last year there were more than 2,000 questions and answers posted to the ListServ. In recent months, our ListServ provider, UMass, began developing technical difficulties which could not be resolved. As such, the decision was made to shift to a new ListServ provider, the Social Law Library. The new ListServ is up and running and the old ListServ deactivated. I want to thank former CSTCA President and web administrator, Bob Ritchie, for his tireless work on this project. While the change to the new ListServ seemed fairly seamless, the behind the scene efforts were monumental. Bob has been an invaluable resource to CSTCA in many areas--but none more than technological. I am forever grateful for his help and leadership in this area.

CSTCA also sponsored an extremely successful Municipal Law Conference at MCLE. More than 75 municipal law practitioners spent a day listening to the latest developments in municipal law--including hearing from Kay Hodge who successfully argued the recent Quinn Bill case for the City of Boston.

With the help of its Bylaw Committee, the Executive Board completed a comprehensive update of CSTCA's Bylaws. The Bylaws had not been comprehensively updated in more than five years, and the Executive Board made some much needed changes to them to allow for better governance. The amended Bylaws, along with the nominations for next year's officers and Executive Board, will be presented to the membership for a vote at the regular dinner meeting on April 26th. A copy of the proposed Amended Bylaws is on CSTCA's website. If you have any questions, please do not hesitate to contact me.

The Executive Committee, also, begun discussing a proposed name change of CSTCA to the Massachusetts Municipal Lawyers Association. The name change discussion arose out of a belief that a name change would more accurately reflect the membership of the Association. This discussion generated significant interest on the ListServ and the Executive Board continues to discuss this issue. I would like to stress that no decision has been made. Any proposed name change would require a vote of the membership. If you would like to weigh in on a name change, please do not hesitate to contact me.

Finally, if you have benefited from membership in CSTCA, encourage your municipal colleagues to join CSTCA. And, if you want to become more involved in CSTCA, let me know. There are opportunities to participate in subcommittees as well as work on or write for the Newsletter. CSTCA's strength is its members and I hope you will consider sharing your prodigious knowledge and expertise by attending or participating in a program or becoming more involved.

I hope to see you at a program in the near future.

Sincerely,

Stacey

Stacey G. Bloom Esq.
President

Inside This Issue:

* The Newsletter is a new publication for CSTCA and is founded upon 28 years and hundreds of editions of the Municipal Lawyers Exchange (also known in its electronic format as "e-MUNICIPAL LAWYERS EXCHANGe") by Editor Emeritus and past CSTCA President, Jordan Shapiro. The current form of the Newsletter is published quarterly and identified numerically by volume and date for reference and indexing purposes.

MUNICIPAL SPOTLIGHT ON:

By: Peter Mello, Esq.

Frank Wright

City Solicitor-Somerville

"Municipal law is like a box of chocolates, you never know what your going to get."

1. In what city/town were you born?
   Boston.

2. Where did you attend college and law school?
   University of Massachusetts at Amherst and Western New England College School of Law.

3. What municipalities do you represent?
   City of Somerville. I was fortunate to get my start in municipal law as a law clerk for Jordan Shapiro in the City of Malden's Law Department. I have had the great opportunity to consult with Jordan through the years, as well as work along side David Shapiro, Jordan's son, in Somerville for the past 12 years.

4. What is your favorite discipline within your municipal practice? Why?
   While not a discipline per se, I enjoy the unpredictability of municipal law. Each day I start with a plan as to what I want to accomplish and by 10 AM it is usually 'out the window' due to any number of unpredictable issues that arise and require law department attention.

5. If you had to analogize municipal law through some metaphor, what would it be?
   Municipal law is like a box of chocolates, you never know what you're going to get. Not original, but apt.

6. What is one of your proudest moments as a lawyer?
   When I was in private practice, parents of an 18-year-old daughter with a serious eating disorder came to me anxious to have their daughter remain hospitalized. She had been rushed to the hospital the night before for immediate medical attention, but she was refusing to accept additional treatment. A legal adult, she intended to sign herself out later that day. I quickly researched the issue and prepared necessary documentation and we rushed to Probate & Family Court. The clerk took the papers and told me there was no way the judge was going to grant my petition. After presenting the facts and law, the judge granted my petition. The young lady remained hospitalized and got the help she needed.

7. What do you like to do outside of work?
   In addition to spending time with friends and family, I am the immediate Past President of the Somerville Kiwanis Club. This is a group of wonderful people who enjoy getting together to assist the youth and elderly of Somerville, as well as to have fun. I am an active member of the Melrose YMCA. I, also, extend my involvement in municipal government by serving as an alderman in Melrose.

8. What was your favorite age? Why?
   College - I enjoyed meeting people from a variety of backgrounds, as well as, having a plethora of exciting new opportunities - academic, social, entertainment. While that still continues in many ways, it was all new to me back then, and so it was more exciting.

9. What is your favorite book?
   Looking for some light reading while in law school, I began reading Robert B. Parker's Boston-based, Spenser novels. I've enjoyed reading all of the Spenser novels, as well as, his Jesse Stone novels. Right now, I'm reading Malcolm Gladwell's, The Outliers, and Keith Richards autobiography, Life.

10. When you are driving to court to argue an important motion, what might you be playing on the radio?
    Most likely talk radio or NPR, if there was something worthwhile to listen to. Otherwise, classic rock or country, and occasionally alternative music. That said, I often surf the dial to the utter distraction of my wife!

KNOW YOUR MUNICIPAL DEPARTMENTS, BOARDS, COMMISSIONS AND COMMITTEES

A Focus Article on School Building Committees

By: Peter Mello, Esq.

KNOW YOUR MUNICIPAL DEPARTMENTS, BOARDS AND COMMISSIONS BUILDING COMMITTEES/SCHOOL BUILDING COMMITTEES

I. Principal Governing Statutes/Regulations:

A. School Building Committees

G.L. c. 71, § 16A (applicable to regional school district building committees)

G.L. c. 71, § 68

963 CMR 2.10(3)

B. Building Committees

Governed by local charters, bylaws/ordinances and regulations

II. Composition:

963 CMR 2.10(3) provides that school building committees required thereunder "shall be formed in accordance with the provisions of the Eligible Applicant's local charter and/or by-laws."

These regulations "recommend" that a "reasonable effort" be made to include one or more of the following individuals on the school building committee:

The local chief executive officer of the Eligible Applicant, or, in the case of a town whose local chief executive officer is a multiparty body, said body may elect one of its members to serve on the school building committee;

The town administrator, town manager, or city manager, where applicable;

At least one member of the school committee, as required by M.G.L. c. 71, § 68;

The superintendent of schools;

The local official responsible for building maintenance;

A representative of the office or body authorized by law to construct school buildings in that city, town or regional school district, or for that independent agricultural and technical school;

The school principal from the subject school;

A member who has knowledge of the educational mission and function of the facility;

A local budget official or member of the local finance committee; and

Members of the community with architecture, engineering and/or construction experience to provide advice regarding the effect of the proposed project on the community and to examine building design and construction in terms of its constructability.

G.L. c. 71, § 68 provides as follows:

Whenever a town shall undertake to provide a schoolhouse, the town shall appoint at least one

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KNOW YOUR MUNICIPAL DEPARTMENTS, BOARDS, COMMISSIONS AND COMMITTEES

A Focus Article on School Board Committees- cont. from p. 3

member of the school committee, or its designee, to serve on the agency, board or committee to which the planning and construction or other acquisition of such schoolhouse is delegated.

III. Core Functions:

Under 963 CMR 2.10(3) school building committees serve the following purposes:

Monitor the process of the application for project funding from the Massachusetts School Building Authority; and

Advise the eligible applicant (i.e., the municipality or school district applying for MSBA project funds) during the construction of an approved project;

Applicants for MSBA funding must submit for the MSBA's approval a written statement, in a format prescribed by the MSBA, "describing the composition of the school building committee and the role of the school building committee in monitoring the Application process and advising the Eligible Applicant during the construction of the Approved Project." The MSBA's approval of a school building committee's composition and role is based upon the following factors, among others:

The school building committee's past performance;

The building committee, whether temporary or permanent, or any other committee responsible for the oversight, management, or administration of the construction of public buildings;

The composition of the school building committee and qualifications of its individual members;

The powers and duties of the school building committee;

The school building committee's procedures for conducting its meetings; and

the extent to which there is representation of the municipal government, school district personnel with management, educational and maintenance expertise, and representation of members of the local community with design and construction experience.

963 CMR 2.10(3)(f) provides that chief executive officials or other designated officials of applicant cities, towns and school districts "shall not delegate their fiduciary responsibilities to the School Building Committee."

G.L. c. 71, § 16A expressly allows regional school district school committees to "appoint a school building committee which shall have such powers and duties relative to the construction, reconstruction, remodeling, repair, expansion or equipping of school buildings or facilities as the committee determines."

Other typical building committee functions include the following examples:

Evaluating and developing proposed project designs concepts, plans and specifications

Developing a project budget

Carrying out a designer selection process under G.L. c. 7, §§38A½-38O

Advertising and conducting public bidding

Selecting a general contractor

Overseeing construction

Rendering determinations regarding change order requests, etc.

REVIEW OF "INTERNET AND EMAIL EVIDENCE"

By: Jordan L. Shapiro, Esq.

I doubt that many of you subscribe to "The Practical Lawyer" magazine, published by American Law Institute-American Bar Association. The February, 2012 publication contained one of the finest articles I have seen covering introduction of Internet data into evidence. The article is entitled "Internet and Email Evidence" and is authored by Attorney Gregory Joseph of New York. The article generally deal with federal court rules, but certainly passed on priceless information for litigation involving these issues anywhere. For a copy of the full article, send me an email (jslawma@aol.com).

The 10 page article with double columns and well-footnoted (all of which I will omit in this review) began: "The explosive growth of the Internet, electronic mail, text messaging and social networks is raising a series of novel evidentiary issues." Then, as I quickly learned, there are primarily three forms of Internet data that can be entered into evidence, namely, (1) "data posted on the website by the owner of the site, or, in a social networking setting, the creator of a page on the site ('website data'); (2) data posted by others with the owner's or creator's consent (a chat room is a convenient example); (3) data posted by others without the owner's or creator's consent ('hacker' material)." The litigator's problem with this type of evidence, for authenticity purposes, is that, because Internet data is electronic, it can be manipulated and sometimes even intentionally distorted. The article suggests that courts routinely face proffers of data (text or images) claimed to have been drawn from websites. Yet, the evidence must be authenticated in all cases and, depending on the use for which the offer is made, hearsay concerns must be dealt with. So, how does a trial lawyer do this?

When dealing with authentication of website data, "the authentication standard is no different for website data or chat room evidence than for any other." The author says that three questions must be answered, explicitly or impliedly: (1) What was actually on the website; (2) Does the exhibit or testimony accurately reflect it; and (3) If so, is it attributable to the owner of the site? The testimony that is required to establish authenticity would be from any witness "that the witness typed in the URL associated with the website (usually prefaced with 'www'); that he or she logged on to the site and reviewed what was there; and that a printout or other exhibit fairly and accurately reflects what the witness saw." And, unless the opponent can raise a genuine issue as to its trustworthiness, testimony of this sort is "sufficient to satisfy Rule 901(a), presumptively authenticating the website data and shifting the burden of coming forward to the opponent of the evidence. It is reasonable to indulge a presumption that material on a website (other than chat room conversations) was placed there by the owner of the site.... The opponent of the evidence must, in fairness, be free to challenge that presumption by adducing facts showing that the proffered exhibit does not accurately reflect the contents of a website, or that those contents are not attributable to the owner of the site." In one case cited, the Court wrote: "Defendants have objected on the grounds that [counsel] has no personal knowledge of who maintains the website, who authored the documents, or the accuracy of their contents" and the objection was sustained.

In determining the trustworthiness of this type of evidence, courts look at "the totality of the circumstances" and consider: "the length of time the data was posted on the site; whether others report having seen it; whether it remains on the website for the court to verify; whether the data is of a type ordinarily posted on that website or websites of similar entities; whether the owner of the site has elsewhere published the same data, in whole or in part; whether the data has been republished by others who identify the source of the data as the website in question."

The article summarized most of the rules on self-authentication, which will not be reviewed here, except to point out what most litigators know: "Official publications" by government offices, under Rule 902(5) are self-authenticating; certain newspaper articles and periodicals, even including that those only appear on the web and not in hard copy, are also self-authenticating. The author next dedicated a few paragraphs to "judicial notice", under Federal rules of Evidence 201(b) and (d), requiring a court to take judicial notice of facts that are "not subject to reasonable dispute in that it is ....capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." The example provided was information taken from government and media websites.

I found the explanation of the introduction of "chat room evidence" most intriguing. "While it is reasonable to indulge a presumption that the contents of a website are fairly attributable to the site's owner, that does not apply to chat room evidence...By definition, chat room posting are made by third parties, not the owner of the site; and chat room participants usually use screen names rather than their real names." So, here is the list suggested for getting chat room evidence before the trier of fact: evidence that the individual used the screen name in question when participating in chat room conversations; evidence that, when a meeting with the person using the screen name was arranged, the individual in question showed up; evidence that the person using the screen

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REVIEW OF "INTERNET AND EMAIL EVIDENCE" - cont. from p. 5

name identified himself of herself as the individual (in chat room conversations or otherwise), especially if the identification is coupled with particularized information unique to the individual, such as a street address or email address; evidence that the individual had in his or her possession information given to the person using the screen name (such as contact information provided by the police in a sting operation); evidence from the hard drive of the individual's computer reflecting that a user of the computer used the screen name in question."

With respect to the dialog itself, a participant in the chat room conversation "may authenticate a transcript with testimony based on firsthand knowledge that the transcript fairly and accurately captures the chat." And, where an objection is based on the "best evidence" rule, one court overruled such an objection to the use of a computer printout because, under Rule 1001 (3) "an original is defined as including any computer printout or other readable output of data stored in a computer or similar device, which is shown to reflect the data accurately."

How about results generated by use of a "search engine?" The author covered that, as follows: "A witness would have to testify that the witness typed in the website address of the search engine; that he or she logged on to the site; the precise search run by the witness; that the witness reviewed the results of the search; and that a printout or other exhibit fairly and accurately reflects those results. The witness should be someone capable of further averring that he or she, or the witness's employer, uses the search engine in the ordinary course of business and that it produces accurate results. The testimony or certification should further reflect that the witness logged onto some of The websites identified by the search engine to demonstrate, as a circumstantial matter, that the particular search generated accurate results."

This fine article covered social networking evidence, hearsay issues ("it is sufficient for a witness with knowledge to attest to the fact that the witness logged onto the site and to describe what he or she saw. That obviates any hearsay issues as to the contents of the site"), business and public records, market reports and tables, admissions ("even if the owner of a website may not offer data from the site into evidence, because the proffer is hearsay when the owner attempts to do so, an opposing party is authorized to offer it as an admission of the owner"– and the "postings of a party in a chat room conversation constitute admissions and the non-party's half of the conversation is commonly offered not for the truth of the matter asserted (although it could be), but, rather, to provide context for the party's statements, which comprise admissions") and non-hearsay proffers ("not uncommonly, website data is not offered for the truth of the matters asserted but rather solely to show the fact that they were published on the web...").

As may be expected, the article concluded with a section entitled "Judicial Skepticism," which opined that "while there is no gainsaying a healthy judicial skepticism of any evidence that is subject to ready, and potentially undetectable, manipulation, there is much on the web that is not subject to serious dispute and which may be highly probative. To keep matters in perspective, there is very little in the way of traditional documentary or visual evidence that is not subject to manipulation and distortion. As with so many of the trial judge's duties, this is a matter that can only be resolved on a case-by-case basis."

"Part 2" of the above article, which will concentrate on "text messaging" will appear in the Summer 2012 issue of the Newsletter.

Quinn Bill Victory for Cities and Towns

By: Henry C. Luthin, Esq.

On March 7, 2012, the Supreme Judicial Court held that cities and towns are not liable for the state's share of Quinn Bill costs. This is a significant victory for cities and towns across the Commonwealth which have adopted the Quinn Bill, MGL c. 40, §108L.

Chapter 40, §108L provides that police officers receive a pay differential upon completion of a college degree. The differential is 10%, 20% or 25% depending on the degree obtained. The municipality pays the differential to the officers, and then "shall be reimbursed by the Commonwealth for one half of the cost of such payments." §108L.

Boston accepted the Quinn Bill in 1997. The collective bargaining agreements with each of the three police unions in Boston stated that in the event that the Commonwealth did not reimburse the City 50% of the costs of the differential, then in the next succeeding fiscal year, the City would pay 50% of the differential plus the percentage that the City was reimbursed by the state for the previous fiscal year. For example, if the Commonwealth reimbursed the state an amount equal to 10% of the costs rather than 50% of the costs, then the City in the next fiscal year would only be liable for its 50% share plus the 10% that had been reimbursed by the Commonwealth.

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Quinn Bill Victory for Cities and Towns

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Individual police officers who were members of each of the police unions filed suit against Boston claiming that the collective bargaining agreement provision conflicted with the terms of §108L. They argued that the reimbursement language in the statute required the city to pay 100% of the salary differential, regardless of whether the Commonwealth appropriated sufficient funds to reimburse the city for 50% of the cost. The plaintiffs further argued that because the collective bargaining agreements conflicted with the statute, and because 40:108L is not listed in MGL c. 150E, §7(d), the terms of the collective bargaining agreement do not prevail over the statutory language.

The Court held that the terms of the collective bargaining agreements do not conflict with the Quinn Bill. The legislature envisioned a system of shared funding. A municipality, the Court held, is required only to pay 50% of the costs set out by §108L plus any amounts reimbursed by the Commonwealth.

The case was briefed by Kay Hodge and John Simon, of the firm Stoneman, Chandler & Miller, and argued by Attorney Hodge. The City Solicitor and Town Counsel Association filed an amicus brief on behalf of Boston authored by Philip Boyle, Laurence Donoghue, Peter Mee and Colin Boyle of the firm Morgan Brown & Joy.

Municipal Case Law Update

By: Timothy J. Harrington, Esq.

SJC - Education Reform Act Trumps Previously Enacted Special Act Relating to Public Education

Town of Dartmouth v. Greater New Bedford Regional Vocational Technical High School District

The SJC recently held that the 1993 Education Reform Act's legislative scheme to apportion costs between municipalities trumped an earlier plan to share costs contained in the 1971 Special Act that created the Greater New Bedford Regional High School. The Legislature created the high school to serve the municipalities of New Bedford, Acushnet, Dartmouth, Fairhaven, Freetown, Lakeville, Mattapoisett and Rochester. In pertinent part, the Special Act mandated that the operating costs would be apportioned "on the basis of each municipality's respective pupil enrollment in the regional school district."

The Education Reform Act of 1993 created a new formula for determining municipalities' education costs. Essentially, the formula is wealth-based and requires more affluent communities to make higher contributions. The Act specifically stated, "Notwithstanding the provisions of any regional school district agreement, each member municipality shall increase its contribution to the regional district each fiscal year by the amount indicated in that district's share of the municipality's minimum regional contribution in that fiscal year." Under the Education Reform Act's formula for the years 2003 to 2008, Dartmouth and Fairhaven were required to pay $3 million more than they would have paid under the Special Act's funding scheme. Conversely, New Bedford was required to pay $7 million less under the Reform Act's scheme. In 2008, Dartmouth students accounted for ten percent of the student body, while the town's financial contributions accounted for twenty-nine percent of the school's budget.

Dartmouth and Fairhaven brought suit to challenge the Education Reform Act's funding obligations. In dismissing Dartmouth's and Fairhaven's claims, a Superior Court judge found the Reform Act was comprehensive legislation that implicitly overrode the funding scheme as contained in the prior Special Act.

The SJC agreed. While noting that repeal of a statute by implication is disfavored, comprehensive acts intended to cover an entire field will take precedence over prior statutes that conflict with the new law.

"The enactment of a statute which seems to have been intended to cover the whole subject to which it relates, impliedly repeals all existing statutes touching on the subject and supersedes the common law." Dartmouth, p. 4 (quoting, Doyle v. Kirby, 184 Mass. 409, 411-412 (1903)). The court noted that the Reform Act "radically restructured the funding of public education based on uniform criteria of need." The Act also rectified the problem of municipalities relying solely on local tax revenue as the funding source. Turning to the Special Act, the court held that the "funding obligation imposed on the member municipalities by the regional agreement, based upon each municipality's respective pupil enrollment, are wholly inconsistent with the public school funding obligations imposed by the Education Reform Act…and would frustrate the very purpose for which such comprehensive legislation was enacted."

After its review of the merits, the SJC also concluded Dartmouth and Fairhaven did not have standing to challenge the obligations imposed by an act of the state legislature. "[G]overnment entities lack standing to

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INSURANCE POLICIES AND ENDORSEMENTS TO CONSIDER FOR PUBLIC CONSTRUCTION PROJECTS

Christopher L. Brown, Esq.

An important part of planning for public construction projects is the evaluation and specification of insurance requirements that will be demanded of the contractors and consultants hired to perform the work. This is a process that generally should involve public owners working in consultation with experienced legal counsel and insurance professionals. Determining the size of limits or levels of coverage for a particular construction project involves a number of factors, including the likelihood of a loss for the project or type of work involved, the potential severity of such losses, the project's degree of exposure to the public, the financial strength of the contractor or consultant selected for the work, the relative cost of the project, and the number of firms that may be hired to perform services on any given project, such as subcontractors and sub-consultants.

What types of insurance coverage should owners insist upon in a construction project? What types of insurance coverage may be useful in particular projects? What are useful endorsements that owners should list in their insurance requirements? In this article I hope to provide some basic, ground level suggestions to our members. I plan to discuss the subject of insurance issues in the construction context in further detail at the CSTCA's upcoming April 26, 2012 meeting, where Christopher Petrini, Peter Mello and I will be updating the association on this and other significant issues in public construction law.

Most practitioners are likely aware of several basic policy types that appear in the vast majority of insurance provisions in construction contracts, including the workers compensation policy, which provides state-mandated benefits for injured workers, commercial general liability or "CGL" policies, which generally provide coverage for injuries and property damage arising out of operations at the site, and automobile liability policies, which provide coverage for bodily injury and property damage claims arising out of the use of the contractor's owned, "hired" or "non-owned" automobiles, or may provide "any auto" coverage to include employees' vehicles used for work, leased, rented or other borrowed vehicles. Other types of policies typically seen in insurance provisions are umbrella liability policies, which apply above automobile, CGL and employers liability coverage (under a workers compensation policy) to provide additional limits to pay for claims, and professional liability policies for projects where design professional services are procured. **FN 1**

Another type of policy that might be required on some types of projects is contractors' pollution liability coverage. This type of policy affords coverage for liability resulting from a release due to the contractor's operations. It is a policy that must be separately purchased by a contractor, but for design professionals, an equivalent endorsement can be added to a professional liability policy. It is important to specify the endorsement for design professionals on the project, because a professional liability policy's coverage may only provide pollution coverage arising from professional services only, which is far more limiting and may leave an uninsured gap in coverage. Contractors' pollution liability coverage applies to ALL operations of an insured, so when it is included as part of a consultant's professional liability insurance policy, the policy will cover pollution losses whether caused by the professional services of the consultant or by any other activity of the consultant.

Below is a discussion of some various aspects of coverage and endorsements for these and other types of insurance policies which may be appropriate depending upon the nature of the project and which owners may want to require in a project's insurance requirements.

I. CGL Policies

A. Completed Operations Coverage

For an additional charge, a CGL policy can be extended to include "completed operations" coverage. Most, if not all, contractors purchase such coverage as part of their CGL policy. Owners generally should insist that the contractor's CGL policy includes "completed operations" coverage. Completed operations coverage is critical in most construction defect cases. It provides coverage for claims that arise after the work has been completed so long as the claim arises during the policy period. If the damage occurs after that policy period, there still may be coverage under a later policy that also has completed operations coverage.

Often contract insurance requirements will require such coverage to be maintained for a certain number of years following substantial completion. For example, the 2007 AIA A201 General Conditions require the contractor to provide completed operations coverage until the expiration of the period for correction of work or for such other period for maintenance of completed operations coverage as specified in the contract documents.

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Insurance Policies and Endorsements to Consider for Public Construction Projects

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B. Additional Insured Endorsement

A key feature when hiring contractors and consultants is obtain additional insured status for the owner, making the owner an additional insured the policy and, in the case of a CGL policy, therefore providing coverage to the owner against third-party and injured worker claims for liability. Additional insured endorsements are also available under automobile liability and contractors' pollution liability policies. Since umbrella liability policies are generally intended to follow the terms of the primary policies beneath them (automobile, CGL and employers' liability coverage), additional insured status may automatically be granted on the umbrella policy if it exists on the primary policy.

It is important to review the actual policy or endorsement language providing the additional insured status, because additional insured endorsements, and the level of protection they actually provide an owner, can vary significantly from policy to policy. As noted above, in the CGL context, the owner who seeks an additional insured endorsement typically should want the contractor to have coverage for claims that arise during the project and for construction defect claims that arise after substantial completion. Not all additional insured endorsements provide both types of coverage. In fact, the actual coverage afforded under successive revisions of ISO CG 20 10, an industry standard form used by many insurers to provide additional insured status, has steadily been eroded.

C. General Aggregate Limits Applying "Per Project"

With this language in the policy or an endorsement, the aggregate limits on the CGL policy will apply to each project or job where the contractor is working. A "per project" aggregate betters protects the owner because the insurance available will not be eroded by claims arising from other activities of the contractor.

D. Waiver of Subrogation

A waiver of subrogation clause functions to prevent the insurer from seeking recovery from some other defined party for claims paid under the policy. By way of example, an employee of a subcontractor is injured in an accident on the project site and sues the general contractor. The contractor's insurer defends the case. The allegations suggest the owner may also be responsible for the conditions which led to the accident. A waiver of subrogation clause in favor of the owner will prevent the contractor's insurer from seeking recovery from the owner for any amounts paid on the injured worker's claim. Otherwise, the contractor's insurer may decide to assert third-party claims against the owner (ultimately to try to get the owner's insurance company to contribute towards resolving the claim). This type of clause avoids litigation expenses for the owner and the contractor by allocating the risk between insurers.

E. "Primary" & "Non-Contributory" Language

This type of language in a policy or endorsement helps discern, when multiple insurance policies providing coverage are available, which policy will pay the loss first. In the contractor's policy, language providing that the policy is "primary" and "non-contributory" with regard to other insurance available to the owner would mean the contractor's policy would pay losses first (up to the policy limits) and other insurance available to the owner (the owner's own CGL policy, for instance) would not be expected to contribute as well to the loss (until the contractor's policy limits are exhausted). Without this type of language in a policy or endorsement, the insurer for the contractor's CGL policy would have the right to insist that any insurance afforded to the owner must participating in paying the claim and legal fees associated with defending the claim.

F. Severability of Interests

This type of language in a policy or endorsement provides that, with the exception of how the limits of liability and deductible apply, the insurer must treat each named insured and additional insured on the policy as if they were the only insured on the policy. This feature prevents the insurer from subjecting the Owner's rights under an additional insured endorsement to the rights of the named insured on the policy.

II. Workers Compensation Policies

As with CGL policies, owners should consider requiring a waiver of subrogation clause or endorsement in the contractor's workers compensation policy. A second consideration is with regard to increasing the limits of liability for employers' liability coverage. There are two types of basic workers compensation coverage, and each of them plays an important role. Workers compensation coverage (appearing at Part One in most WC policies) provides payments to employees who suffer a work-related injury or occupational illness. There is no limitation of liability for this type of coverage. Employers' liability coverage protects the employer against lawsuits due to employment-related injuries or illnesses. The lawsuits can come from the employee, the employee's family members, relatives and third parties. Cont. onto p. 10

Insurance Policies and Endorsements to Consider for Public Construction Projects

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The employers' liability portion is usually offered under Part Two and provides additional coverage not included in Part One workers' compensation coverage. Increased limits of liability for this coverage, although a contractor will incur a higher premium to obtain this additional coverage, can help owners minimize the potential for litigation associated with injuries to workers on the job site.

III. Automobile Liability Policies

Endorsements that owners should consider relative to the contractor's automobile liability policies are endorsements (1) adding additional insured status for the owner and (2) waiving subrogation rights in favor of the owner. The function and effect of these endorsements are similar to the discussion above in the CGL policy context.

IV. Umbrella Liability Policies

Although it is possible that waiver of subrogation and additional insured endorsements in the underlying policies will extend to an umbrella liability policy, these are endorsements that owners should consider requiring in the contractor's umbrella liability policy, for the same reasons previously discussed.

V. Professional Liability Policies

As noted above, owners should specifically seek contractors' pollution liability from the consultant (as opposed to coverage for pollution claims arising from professional services) to provide broader coverage for pollution liability. There may be an increased premium (up to 10%) depending upon the consultant's environmental exposure. If the coverage is added by endorsement (as opposed to being included in the main policy), this will likely be the case. If this coverage is obtained, owners should also seek additional insured status under this coverage. While insurers typically will not agree to add owners as additional insureds under the professional liability coverage, they will agree to do so under the contractor's pollution liability coverage.

As with several of the other policies mentioned previously, another endorsement owners are wise to seek is a waiver of subrogation in favor of the owner. Many professional liability policies include waiver of subrogation clauses in the main policy.

VI. Contractor's Pollution Liability Policies

Endorsements that are a good idea for owners to pursue for some of the previous policies mentioned, such as additional insured status for the owner and waiver of subrogation for the owner, are also recommended for contractor's pollution liability policies.

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Municipal Case Law Update

-cont. from p. 8

challenge the 'acts of their creator state." The court also concluded the Home Rule Amendment did not provide the municipalities with any protection. The court noted the Home Rule Amendment "is to be construed narrowly and it does not preclude the Legislature from acting on matters of State, regional or general concern." The court found that public school education fell into that category of permissible legislative enactments.

For more recent and important municipal law cases, check out the **MuniLaw Case Reports** section of the **CSTCA website massmunilaw.org** under the **members only section**.

Amendments to CSTCA Bylaws

CSTCA's Executive Board announces that it is considering amendments to its Bylaws. The proposed Bylaw changes include amendments to the membership year, more defined duties for the Executive Director and synching the membership and fiscal years. The amendments will be considered at **CSTCA**'s April meeting. Have any questions? Please feel free to contact **CSTCA**'s Executive Director, Jim Lampke, at JLampke@massmunilaw.org or **CSTCA** President, Stacey Bloom, at staceygene@gmail.com.

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Insurance Policies and Endorsements to Consider for Public Construction Projects

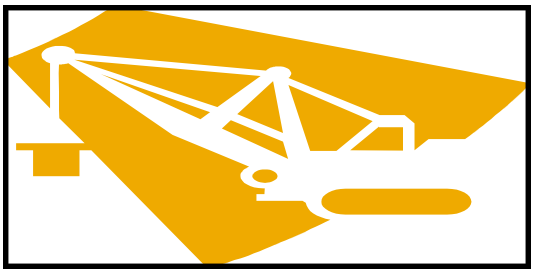
- cont. from p. 10

These types of policies can have coverage expanded for non-owned disposal sites and for arranger's liability. Both of these coverage endorsements will result in increased premium to the contractor.

Non-owned disposal sites coverage typically extends coverage to the contractor for waste it disposes at a legally qualified disposal site. This increased coverage would afford added protection to contractor and ultimately to an owner for its liability arising from the disposal of waste. Arranger's liability coverage extends coverage to the contractor for liability arising from arranging the disposal of waste, including signing of manifests.

VII. Builder's Risk Insurance

Builder's risk insurance provides insurance for the materials and equipment during construction which are to be permanently installed at the site from physical loss. An owner may consider this type of coverage if the materials and equipment are prone to loss caused by various perils, such as fire, wind, etc. Either the owner, or the contractor, under the owner's direction, may secure this type of insurance.



If the contractor is securing the builder's risk insurance in the contractor's name or if the contractor has a blanket builder's risk program that allows it to insure multiple projects that the contractor is performing, owners should be sure to request an additional insured endorsement on the builder's risk policy. Another common endorsement for builder's risk policies that owners should consider is a "soft costs" endorsement. Standard builder's risk insurance provides coverage only to repair or replace the physical loss to a project. In addition to paying to fix the damaged property, when there is a soft costs endorsement the insurer also pays the costs for loss of use as well as the costs for any project delay caused by the damage. Soft costs endorsements typically result in an increased premium to the policy holder (either the owner or the contractor).

VIII. Contractors Equipment and Installation Floaters

Two other types of coverage that owners should consider requiring from the contractor are contractors equipment floater coverage and contractors installation floater coverage. Many contractors may already have these types of coverage as part of a prudent risk management strategy.

Contractors equipment floater coverage provides coverage to the contractor for physical damage that might be caused during construction to any of the contractor's equipment. An owner may want the contractor to have this insurance protection to prevent delays in the project caused by physical damage.

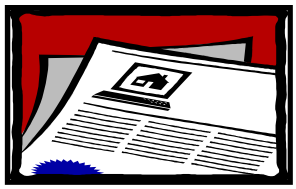
Contractors installation floater coverage, on the other hand, provides coverage to the contractor to property still owned by the contractor which may later be installed as a permanent part of the project. The benefit to an owner would be added protection that the contractor can replace the damaged materials in a timely manner so as not to cause an undue delay to the project.

Conclusion

When it comes to insurance, one thing should be clear – one size does not fit all. Not every policy or endorsement is necessary for every project, and some endorsements may involve additional cost to the contractor, costs which public owners typically should expect to be passed on in the form of higher project bids or costs. Basic familiarity with what risks insurance policies are generally written to cover, and what associated endorsements provide additional protections to the owner, is essential to advise our clients. The policies and endorsements discussed above are intended to be illustrative only, and not exhaustive. The unique nature of each project will likely require consideration of these and other types of insurance that will best protect the client's interest, in consultation with experienced insurance professionals and counsel.

FOOTNOTE

FN1. Professional liability insurance is required when public agencies are contracting for design services. See G.L. c. 7 § 38H.



ZONING AND ADULT ENTERTAINMENT REDUX

Route 16 Land Development vs. Bruce et al.
Worcester 08CV0840 November 23, 2011

By: Gerry Moody, Esq.

Judge Dennis J. Curran, sitting in the Worcester Superior Court, recently rendered a decision of some significance in relation to the often tortured confluence of First Amendment protected adult activity and zoning regulation. This decision was reported briefly in the previous issue of the Newsletter. However, the significance of the decision is such that further discussion may be useful to other communities facing the same kinds of dilemmas.

The background to the decision is that in 1996 Milford enacted a somewhat typical by-law providing for adult entertainment activity to be allowed by Special Permit in certain districts with setbacks from "sensitive uses," such as, residential districts, churches, schools, etc. The by-law was enacted without there being any pending threat of adult entertainment activity. In retrospect, the 1996 by-law may not have been as fully "supported" as one would want in light of later Federal Court decisions.

In early 2008, the owner/operator of an existing sports bar filed an application for a Special Permit seeking to provide adult entertainment, specifically to include nude dancing. the Zoning Board held a hearing and summarily found against the applicant for the stated reason of the failure of the applicant to comply with the required 400 foot separation from a residential district line. The applicant appealed to the Superior Court.

The plaintiff's appeal was brought under G.L. c.40, §17 from the decision of the Board and, also, sought declaratory relief under G.L. c.23IA looking to have the Milford Adult Entertainment By-Law declared unconstitutional, under both the Federal and State constitutions, on its face and as applied to the plaintiff's property.

Shortly after filing of the appeal, and while that appeal was still pending, Milford reviewed its Adult Entertainment By-Law in some detail and determined that it needed strengthening and improvement. Among the changes made were clarification of the methodology to be utilized to measure distances in relation to "sensitive uses." The measurement methodology, whether from building to property line, or property line to property line was at issue in the pending appeal. The amended By-Law was supported with detailed secondary effects studies, which were presented to the Planning Board together with significant testimony from the Chief of Police. These studies, and the focus of the By-Law upon secondary effects as opposed to protected activity, was properly referenced in the new legislative enactment. Very significantly, the amendments removed what had been arguably excessive discretion, which the plaintiffs in the underlying case asserted rendered the 1996 version unconstitutional. In due course, while the appeal was still pending, the 2008 by-law changes were approved by town meeting and by the Attorney General.

Like many Superior Court matters the appeal sat dormant in the system for a number of years. In that interim period, a decision was rendered by the Land Court (judge Piper) in the case of Ravech v. Town of Hanover, 2012 WL 58921, decided in January 2010. Ravech, also dealt with a situation where an original by-law version was challenged, together with later amendments to that by-law. In Ravech, the Court found that a 2001 by-law version did not satisfy constitutional standards. However, in the case of the 2002 version, Hanover had carried its burden of persuasion in demonstrating that the intent behind that by-law was to combat secondary effects. The Court, thus, ruled that this latter version was facially constitutional.

Nevertheless, the Land Court judge in Ravech ultimately found the by-law to be unconstitutional in its application because of what he found to be a failure of the Town to leave reasonable alternative avenues of communication after application of the standards within that by-law. In Ravech, the parties fought hard over how the by-law affected certain sites in the Town and whether or not those sites were available. The Ravech Court ultimately ruled, notwithstanding the vigorous assertions of the Town, that there were only some eight parcels among the many disputed which were in fact available for adult entertainment uses based upon the evidence. On that basis, the Court found the 2002 by-law to be unconstitutional. The Town of Hanover later determined not to appeal the decision.

Milford reviewed the Ravech case and the methodology used by counsel for Hanover in some detail. Having the advantage of seeing the perceived deficiencies that were found by the Land Court judge, Milford was able to buttress its presentation as to various parcels by actually presenting draft 81P Plans, and subdivision plans, which demonstrated how parcels could be divided and utilized. The ability to use the experience in the Ravech case enabled Milford to convince the Superior Court that some 31 significant parcels were fully available for adult use under both the 1996 and 2008 versions of Milord's by-law. On that basis, Judge Curran was able to find Milford had a potential availability of 31 sites. This amounted to 18.63% of the two commercial districts in which adult entertainment activity was allowed or 221.44 acres. The total acreage amounted to 2.31% of Milford's total area. The Court found that under all of the circumstances this "...area provides the plaintiffs reasonable alternative sites to which relocate their business in a mid-

Cont. onto p.13

ZONING AND ADULT ENTERTAINMENT REDUX—cont. from p.12

Route 16 Land Development vs. Bruce et al.
Worcester 08CV0840 November 23, 2011

size town with no other existing or proposed Adult Entertainment Establishments."

In addition to the issue of availability of reasonable alternative sites, the decision of judge Curran was very significant for its ruling as to the effect of G.L. c.40A, § 6 upon the issues. When the Complaint was originally filed by the plaintiffs, as stated previously, it was a 40A, § 17 appeal from the zoning decision with a 231A count seeking a declaration as to the constitutionality of the zoning by-law and its adult entertainment provisions as then in effect; i.e. the by-law as originally approved by Milford in 1996. As stated above, after filing of the Complaint, Milford amended its by-law to provide a greater degree of underlying support, greater clarity and removal of arguably excessive discretion.

During the course of the trial, the Town raised the issue of the applicability of the 2008 by-law revisions in response to evidentiary rulings sought by plaintiff's counsel looking to exclude evidence in relation to that by-law and any effects of its revisions. The plaintiff's position was, obviously, that in all respects its premises was in some fashion "grandfathered," since its application for a Special Permit, and indeed the decision of the Zoning Board which was under attack through the appeal, pre-dated the 2008 zoning changes.

Milford countered that because pf the last sentence of G.L. c.40A, § 6 the provisions of the by-law revisions applicable to adult entertainment as enacted in 2008 were fully applicable to the plaintiff's property and had to be considered in the course of the proceedings. That sentence, added in 1994 and amended in 1996 provides that:

> This section shall not apply to establishments which display live nudity for their patrons, as defined in Section nine A, adult bookstores, adult motion picture theaters, adult paraphernalia shops, adult video stores subject to the provisions of Section nine A.

In one of the many significant rulings in the case, Judge Curran found, based upon the above statute and applicable case law, that the lack of "grandfather" status for adult uses rendered the plaintiff's constitutional challenge to the 1996 by-law moot. The Court went onto hold almost for the same reasons, that the challenge under 40A, § 17 to the denial of the Special Permit was also moot. Judge Curran specifically relied upon the cases of D.H.L. Associates, Inc. v. O'Groman, 193 F.3 50 (1999) and the related case of D.H.L. Associates, Inc v. Board of Selectmen of Tyngsboro, 64 Mass. App. Ct. 254 (2005) rev. denied 445 Mass. 1104 (2005). The Superior Court Agreed with the Town's position that the above cases, together with others, affirmed the constitutional validity of the statutory provision denying "grandfather" status to uses offering live nudity.

The Court, also, had to address the specific question of grandfather status under a specific provision of the Milford Zoning By-Law. Based upon an analysis of the precise wording of that by-law provision, in combination with the cases supporting the non-grandfather status for adult uses, the Court concluded that the Milford By-Law did not provide greater protection. The effect of these rulings on the question of "grandfather" status and the plaintiff's proposed use was that the Court ruled that the required separation from a now occupied school, which had not been the subject of the grant of a building permit until after the Zoning Board decision (and even after the appeal to Superior Court by the plaintiff) could be validly applied to deny a Special Permit to the plaintiff's property under the terms of the 2008 by-law, which the Court found to be constitutionally valid.

An appeal has been filed in Route 16 Land Development, but the issues have not yet been framed. Among the issues undoubtedly to be raised and decided on appeal will be the questions surrounding the available, or limited, grandfather status for adult entertainment uses. There will also likely be consideration of questions of the adequacy of number and quality of sites which a Town must have available for location or relocation of adult uses. Judge Curran wrote a very comprehensive and well-reasoned decision. However, as with all First Amendment cases, and cases under the Massachusetts Declaration of Rights, there are complexities and nuances which can and will be the subject of extended opportunities for review. Stay tuned.

UPCOMING CSTCA MEETINGS

April 26, 2012 Program seminar on "Public Construction Projects-Avoiding Traps for the Unwary." Program time: 4:00pm—6:00pm. Dinner and Annual Business Meeting to follow with election of Executive Board and Officers for next year.
Location: Salvatore's Restaurant, Lawrence.

May 24, 2012 Separation of Powers in Municipal Government. Panelists and location TBA.

June, 2012 Lessons from a Crisis: Occupy Boston. Please join Bill Sinnott, Corp. Counsel, City of Boston, as he discusses how the City addressed the Occupy protestors from a legal perspective. Location/date TBA.

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