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LETTER FROM THE PRESIDENT

Dear Colleagues:

The MMLA Annual Meeting on Cape Cod, held Thursday afternoon, September 15 through Saturday morning, September 17, offered substantive panels on topics that we face every day, and some that we will be facing. Kathleen Colleary of DOR started off with a great synopsis of the new Municipal Modernization Act and its impacts on local communities. Greg McGregor and Luke Legere of McGregor and Legere gave a wonderful update on developments in environmental law over the past year. John Goldrosen, formerly of KP Law, and Kay Doyle of DPH offered insights into the ballot question which had not yet legalized recreational – or, if you prefer, commercial – marijuana. This gave us all a leg up on preparing for its passage on November 8.

On Friday, Marilyn Contreas, formerly of the Department of Housing and Community Development, spoke on the 50th anniversary of the Home Rule Amendment. Matt Feher of Burns & Levinson, Bob Ritchie, formerly with the AG and the Department of Agriculture, and Kevin Batt of Anderson & Krieger analyzed the newly enacted changes to the public records law and gave insights into implementation and best practices. This was followed by Barbara St. Andre of KP Law and Michael Murray of Goodwin Procter with updates on land use law and zoning law in the Commonwealth. Our keynote speaker was retired Judge Appeals Court Justice the Honorable Francis Fecteau. Judge Fecteau offered his reflections of his time on the bench, his thoughts on the nature of the law, and wise guidance for not only the practice of law, but for living a good life. The final panel of the day concerned what municipalities could do to regulate drones. David Mackey and Nina Makarious, both of Anderson & Krieger, former Secretary of Transportation John Cogliano, and William Gianetta of the FAA presented insights into appropriate regulation and the need for flexibility as technology advances.

Saturday concluded with three panels. A report analysis of the Flint Michigan drinking water crisis was presented by John Sullivan, Chief Engineer of the Boston Water and Sewer Commission, Steve Estes-Smargiassi of the Massachusetts Water Resources Authority, Raymond Jack, Director of Public Works for the Town of Falmouth, and Yvette DiPieza, Director of Drinking Water at the Department of Environmental Protection. This was a fascinating program impacting local responses that municipal lawyers need to know – and the panel did not have one lawyer on it! This was followed by Assistant Attorney General Monica Passeno who presented on the Abandoned Housing Initiative and Demolition Grant program. And last, but certainly not least, Professor Janice Griffith of Suffolk Law School presented on Airbnb – its impacts on communities and what cities and towns could do to regulate it.

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In addition to the panels there were wonderful opportunities to socialize. The Committee arranged for a sailboat excursion into the waters off the Cape on the private charter Black Cat sailboat. We had a wonderful dinner on Thursday and over coffee and desert did the Municipal Potpourri – which continued in the lounge for a couple of hours. Dinner on Friday was outside under a tent with the full Harvest Moon over Nantucket Sound. Good food, good company, good conversation – we could ask for little more.

The Annual Meeting was a tremendous success, and it would not have happened but for the hard work and creativity of the Committee – Angela Atchue, Kathleen Colleary, Margaret Hurley and Matthew Feher. Many thanks for a great meeting!

MMLA continues to offer tremendous programs. In October, our friend Dan Crean from the New Hampshire municipal bar offered a great program on social media and how cities and towns can make use of it. In December, Matt Feher moderated a well-attended program on MS4 (municipal separate storm sewer system) issues related to storm water discharge into the waters of the United States – something each city and town must deal with. Millie Garcia-Serrano, S.E. Regional Director, DEP and Frederick Civian, DEP's Stormwater Coordinator, presented on regulating the discharge of pollutants into bodies of water and Robert "Brutus" Cantoreggio, Director of Franklin's Public Works Department spoke of Franklin's creative ways of minimizing discharges in a cost-effective way. Tip gave an overview of the Clean Water Act, from its origins in the late 1940s to the present. MMLA can only present timely and informative programs if good people step up to the plate – and we very much appreciate the work of the speakers and the people who put the programs together. We are all better municipal lawyers as a result.

Finally, I would like to express our thanks for Chris Petrini of Petrini & Associates, who has just stepped down as chair of the Amicus Committee for the past few years. Chris has worked extraordinarily hard on the committee and as the author of many amicus briefs, notably in the past year in the case of Lopez v. City of Lawrence, involving a disparate impact attack on a civil service examination used for the promotion of police officers in various municipalities and agencies. Lawrence, Methuen, Lowell, Worcester, Boston, Springfield and the MBTA were all defendants in this case. The First Circuit upheld use of the exam in a decision in May. Thanks go to Chris and his firm for the brief, and to Chris for his leadership of the Committee. We are indeed fortunate that he remains a member. And congratulations to Patty Correa, Assistant Town Counsel for the Town of Brookline for succeeding to the chairmanship!

Stacey Bloom and Angela Atchue put out a Quarterly we can all be proud of. But the Quarterly cannot exist without good copy – and I encourage everybody to contribute an article on local law, whether it is legal analysis of a specific issue, a scholarly piece on either legislation or a case, an article dealing with legal history, or personal reflections on how you approach and what practice suggestions you have.

Sincerely,

Henry C. Luthin

MUNICIPAL SPOTLIGHT ON: Susan C. Murphy, Esq

Dain, Torpy, Le Ray, Wiest & Garner, P.C.

1. **In what city/town were you born?**
   I grew up in Commack, NY – in the middle to eastern end of Long Island.

2. **Where did you attend college and law school?**
   I attended the College of the Holy Cross and Fordham Law School.

3. **What municipalities do you represent?**
   My official title is Special Counsel to the Town of Hingham for Real Estate and Land Use Matters.

4. **Did you practice law before the ubiquitous use of word processing, e-mail and the internet? If so, is there any aspect of those days that you wish you could bring back?**
   There were some word processors at the secretarial stations when I started, but no email or internet. I remember a partner talking about getting AOL for his daughter at a department lunch one day and everyone else being clueless. Although it's hard to escape the emails these days, I wouldn't want to go back. Getting work done was cumbersome, we were in conference rooms sometimes for days to close a transaction and it was hard to work outside of the office without being worried about what you were missing. The biggest downside for municipal lawyers are town officials who are too fond of sending emails!

5. **What is the most useful advice you could give regarding the practice of law?**
   To enjoy practicing law for the long-haul, you have to genuinely enjoy and have a passion for what you do. There are so many areas of law and so many ways to practice that you have to search out the work you like best. I have a varied practice, but municipal law is so interesting because every week (and sometimes every day) there is a new issue to learn about. It does not get boring!

6. **Have you written or presented to professional groups regarding legal issues? What sorts of issues?**
   I am a guest instructor at a course at MIT Center for Real Estate. The year-long course takes the graduate students through a hypothetical development deal from site control through financing. Different attorneys are brought in for each topic to "represent" the students, who are divided into the two parties to each agreement. I teach at 3 classes (site control; public/private development agreements; and retail leases). The best one is the development agreement. The first night of the class is held at the Appeals Court and Justice Mark Green speaks about development agreement case law, including the Land Court decisions he wrote.

7. **What do you like to do outside of work?**
   I never seem to have enough time for all the things I'd love to do outside of work, but gardening and camping with my family are my escapes. I also love to go to the theater, especially musicals.

8. **If you were not a lawyer, what would you do for work?**
   I was a political science major and I am still a junkie. I am very interested in government, although I have a love/hate relationship with politics (especially the past year and a half). I think I would have gotten involved in government on some level.

9. **When you are driving to a public meeting or hearing that will be contentious or you have to present on a matter, what might you be playing on the radio?**
   I won't be listening to the radio. I'll be practicing my introduction out loud over and over again, because I'm always nervous the first minute or two, until I get going, and I hate stumbling at the beginning – one chance to make a good first impression.

10. **What is your favorite movie?**
    Apollo 13. There are a number of scenes in which the NASA team is given one problem after another and they do not give up until they have the solution. It's exactly how work and life problems should be approached.

TOP 15 CHANGES IN THE NEW MUNICIPAL MODERNIZATION BILL

By: Andrew Fowler, Esq. and Kevin Batt, Esq., Anderson & Kreiger, LLP

New Municipal Modernization law generally reduces red tape.

In what is largely a win for municipalities, the Legislature unanimously passed the Municipal Modernization Act on the last day of the 2015-2016 session. The Bill should improve municipal administration, mostly over financial matters, by reducing red tape and a number of obsolete laws.

Many of these changes went into effect in early November, but some apply retroactively, and some will be effective in January 2017.

Some high-profile proposed changes were not included in the final version of the Bill. Most notably, legislators dropped a liquor license provision that would have allowed municipalities, rather than the state, to set quotas on the number of bars and restaurants allowed to serve alcohol. That measure, as well as a comprehensive overhaul of the zoning code, may well reappear in next year's session.

Here are the most important takeaways for municipalities:

1. Rolling back DOR financial supervision. The Department of Revenue (DOR) is no longer required to audit county treasurers' accounts, or make unannounced annual visits county financial officers. In addition, it may no longer advise county commissioners or personnel boards on employment matters, or petition the court to remove neglectful treasurers from municipal office.

Every five years, rather than every three, DOR must review whether municipalities are assessing the full and fair value of their taxable property. But municipalities no longer need DOR concurrence to declare a building "abandoned" for tax purposes. Nor do municipalities need DOR authorization to assess taxes on real property whose present ownership is unknown.

Currently, municipalities need DOR's Director of Accounts approval to pay final court judgments greater than $10,000. Under the new law, they will be able to pay court judgments without appropriation, provided they have certification of municipal counsel.

The new law also makes clear municipalities may pay final judgments adjudicated by agencies, rather than courts.

2. Requiring municipal audits. The flip side of decreased DOR oversight is that municipalities must now commission periodic audits of their accounts using private accounting firms and DOR standards. Previously, towns and cities could ask DOR to conduct such audits, but were not required to do so.

3. Adjusting public procurement practices. The cost thresholds in the procurement laws have changed. For helpful reference, see the Massachusetts Office of the Inspector General's Procurement Charts at www.mass.gov/ig/publications/guides-advisories-other-publications/procurement-charts-november-7-2016.pdf.

For supplies and services contracts procured under G.L. c. 30B, the following schedule now applies:

A. Contracts for less than $10,000 may be awarded using sound business practices.

B. Contracts between $10,000 and $50,000 (formerly $35,000) may be awarded after soliciting three quotes.

C. Contracts for more than $50,000 shall be awarded in accordance with Chapter 30B's competitive bidding process.

For public construction (vertical) contracts:

A. Contracts for less than $10,000 may be awarded using sound business practices.

B. Contracts between $10,000 and $50,000 (formerly $25,000) may be awarded after soliciting written quotes.

C. Contracts between $50,000 and $150,000 (formerly $100,000) shall be awarded in accordance with the competitive bidding process set forth in Section 39M of Chapter 30.

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D. Contracts over $150,000 shall be awarded in accordance with the procedure set forth in G.L. c. 149, §§ 44A to 44H.

E. DCAMM Certification is required for general bidders when the work is estimated to cost more than $150,000 (formerly $100,000) and for filed sub-bidders when the work is estimated to cost more than $25,000 (formerly $20,000).

F. Filed sub-bidding is required when a certain class of work is estimated to cost more than $25,000 (formerly $20,000) on a construction contract estimated to cost more than $150,000 (formerly $100,000).

G. Payment and performance bonds are required at 100% when construction work is estimated to cost more than $150,000 (formerly $100,000).

H. Advertising in COMMBUYS, a newspaper, the Central Register, and a bulletin board for construction work estimated to cost more than $10,000. Also advertising on municipality's website for construction work estimated to cost between $10,000 and $50,000.

For public works (horizontal) projects:

A. Contracts for less than $10,000 may be awarded using sound business practices.

B. Contracts between $10,000 and $50,000 (formerly $25,000) may be awarded in accordance with the competitive bidding processes set forth in either G.L. c. 30, § 39M or G.L. c. 30B, § 5.

C. Contracts over $50,000 shall be awarded in accordance with G.L. c. 30, § 39M.

D. Advertising in COMMBUYS, a newspaper, the Central Register, and a bulletin board for construction work estimated to cost more than $10,000. Also advertising on the municipality's website for construction work estimated to cost between $10,000 and $50,000.

In addition, procurement officers must now publish invitations for bids on the COMMBUYS system administered by the state operational services division. And specifically as to vertical construction projects, municipalities may now enter into blanket contracts for vendors to perform multiple individual tasks of not more than $50,000 each.

4. Encouraging tax abatement agreements for affordable housing. Municipalities can adopt "workforce housing special tax assessment plans" (to be known as WH-STAs) to stimulate middle income housing development. The Bill authorizes municipalities to abate up to 75% of back real estate taxes or up to 100% of outstanding interest and costs for these and other affordable housing sites.

5. Strengthening emergency funding. Municipalities are no longer limited in the amount of tax revenues they may appropriate to "stabilization funds," which may have any lawful purpose. Moreover, they can appropriate particular revenue streams to these funds. Cities can now appropriate 5% (previously 3%) of tax revenues into a reserve fund for extraordinary or unforeseen expenditures.

In addition, municipal departments may now incur liabilities in excess of their appropriations when the Governor has declared a state of emergency, and not only upon a two-thirds vote of the municipality's governing body. Also, only chief administrative officer approval is needed to authorize snow removal spending in excess of available appropriations – perhaps in a nod to the winter of 2015.

6. Streamlining town disbursements.

Rents. Municipalities that rent out buildings (other than school buildings) may keep the revenue in revolving accounts and use the revenue to maintain that building without further appropriation, with the end-of-year balance paid into the general fund.

Year-end appropriation transfers. The Bill eliminates limits on year-end appropriation transfers.

Parking meters. Municipalities may purchase or install parking meters without further appropriation if it uses meter revenues to do so. In addition, municipalities may use such revenues to establish and fund new Parking Benefit Districts.

Revolving funds. The Bill simplifies the establishment of revolving funds (from which departmental expenditures can be made without further appropriation from fees, charges and other receipts of the department).

Under current law, a revolving fund must be re-established prior to each fiscal year by Town Meeting or City Council vote, including specifying programs, receipts, official(s) in charge of spending and total budget amount. Under the Bill, departmental revolving funds can be established through one-time enactment

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of a bylaw or ordinance, leaving only the total budget amount to annual re-authorization.

7. Addressing municipal debt. The Legislature has recast the menu of allowable borrowing purposes, as well as the maximum length of time the municipality may borrow for certain purposes. For example, municipalities may now borrow money for more than one year to pay a court judgment, if approved by the Municipal Finance Oversight Board.

In addition, a municipality's final payment to satisfy a bond must now be made by the end of the fiscal year in which the bond would otherwise be due. And treasurers no longer need to report to DOR when municipalities satisfy debts.

8. Funding and managing medical benefits. Municipalities can establish a Special Injury Leave Indemnity fund to pay for police and firefighter medical leave and expenses. Municipalities and other governmental bodies that adopt (or re-adopt) an "Other Post-Employment Benefits" (OPEB) fund – the assets of which cover solely pensioners' health benefits – may no longer employ an outside service to hold the monies in the fund, but must appoint an internal body to manage the fund. That internal body can be the treasurer, the retirement board, or a board of trustees. Also, the treasurer may now accept gifts, grants, and other contributions to the OPEB Fund, instead of solely appropriated funds.

9. Eliminating redundancy in financial staffing. Towns may now combine treasurer and tax collector positions into one appointed position. And Select Boards may designate one of their members to examine all bills and payrolls, and decide whether or not to pay.

10. Peer review consulting fees. Under current law, only certain local boards – zoning, planning, conservation and health – may charge applicants fees to compensate for the cost of using outside experts to help evaluate a proposal. The Bill expands this authorization to any municipal permitting board or official.

11. Special accounts to ensure performance. The Bill authorizes municipalities to create special funds in which to hold refundable financial security to ensure a permit or license holder performs its obligations.

12. New limits on property tax appeals. Taxpayers will now forfeit appeal rights to the Appellate Tax Board for failure to timely pay "preliminary" tax bills (issued in July/October). Under current law, appeal rights are forfeited only for failing to timely pay the final tax bill (usually issued in January and due in February/May). The Bill also clarifies that, for purposes of appeals, the tax payment receipt date is the postmark date.

13. Reduced taxes on agricultural/horticultural land siting renewable energy. Farmland throughout the state benefits from reduced taxes under G.L. c. 61A. Under the Bill, the favorable tax status may be retained although some of the land may be used for a renewable energy facility if energy is primarily used on site or adjoining property.

14. Double Utility Poles. Many municipalities have struggled to get telephone and electric utility companies to remove old poles from locations where new poles have been erected, in part because of insufficient coordination among utilities for movement of wires belonging to multiple utilities on the same poles. The Bill requires all utilities to jointly file a report of double pole removal efforts and contemplates that joint committees of the House and Senate will develop a fine structure to incentivize compliance with statutory requirements to timely remove double poles.

15. Greater control over speed limits. Without further authority from the state, municipalities may now establish 25 MPH speed limits for any town road in dense residential or business districts, and create 20 MPH safety zones.

In addition to these changes to the General Laws, the bill encourages municipalities to "regionalize." It does so by directing state agencies to favor applications for funding from municipalities that will partner to use funds.

For more information about the entire list of changes contained in this Bill, please see the Massachusetts Municipal Association's Section-by-Section summary of the bill at www.mma.org.

An earlier edition of this article was published on August 16, 2016 by Anderson & Kreiger, LLP and can be found at www.andersonkreiger.com.

MISUSE OF OFFICIAL POSITION AND THE CONFLICT OF INTEREST LAW

By: Deirdre Roney, General Counsel, State Ethics Commission

Any system of governmental ethics rules must include a prohibition against abuse of power. The Massachusetts conflict of interest law, G.L. c. 268A, deals with this subject in Section 23(b)(2), which, in broad terms, prohibits the misuse of official position. The Ethics Commission receives numerous complaints alleging misuse of official position each year, and it also receives numerous inquiries from public officials anxious not to misuse their position or even appear to have done so. Municipal counsel who wish to advise in this area of the law may find helpful several recent Commission advisories, and a recent Commission decision following an adjudicatory hearing, cited below.

Commission Advisory 14-1, available on the Commission's website at http://www.mass.gov/ethics/education-and-training-resources/educational-materials/advisories/advisory-14-1.html, explains how the conflict of interest law applies to situation in which a public official wishes to enter into any type of private dealing with persons who are either under the public official's authority, or are having dealings with the public official. Can a selectman offer to rent a house to the new town administrator? Can the superintendent of schools hire the high school carpentry instructor to build a deck on the superintendent's private residence? Would a municipal employee violate the law by eating at a restaurant that his agency inspects? Advisory 14-1 answers all these questions and more, with numerous specific examples of situations in which the Commission has either found a violation of the law, or has advised on how to avoid a violation of the law.

Commission Advisory 15-1, available on the Commission's website at http://www.mass.gov/ethics/education-and-training-resources/educational-materials/advisories/advisory-15-1.html, explains how the conflict of interest law applies to public employees seeking new employment. It is not uncommon for public employees to seek new employment in subject areas with which they are familiar from their public employment, and they may be looking for work from persons or entities with which they are simultaneously having dealings as public employees. Advisory 15-1 explains how a public employee in this situation should proceed to avoid misuse of official position.

The Commission's most recent public Enforcement case is its decision in the McGovern adjudicatory matter, http://www.mass.gov/ethics/opinions-and-rulings/enforcement-matters/enf-section-23/section-23-m-r/edward-mcgovern-decisionandorder.html. That case involved a police lieutenant who was found to have given different, preferential treatment to a police officer accused of drunk driving than would have been afforded to drunk driver who was not a police officer, in violation of the conflict of interest law.

The materials cited above will give a good understanding of how the Commission interprets the provisions of the conflict of interest law that prohibit the misuse of official position. Municipal counsel with further questions are encouraged to call the Commission's Legal Division, at (617) 371-9500, and ask to speak to the Attorney of the Day for prospective advice about particular situations.

MA SECRETARY OF STATE'S OFFICE PUBLISHES FINAL SET OF REGULATIONS GOVERNING THE NEW PUBLIC RECORDS LAW

On December 16, 2016, the Massachusetts Secretary of State's Office published its final set of regulations for the new public records law (Ch. 121 of the Acts of 2016), which was signed by Governor Baker in June and is in full effect on January 1, 2017. The regulations can be found at http://www.sec.state.ma.us/pre/prepdf/950-CMR-32-00-2017-Edition-final.pdf.

Chapter 121 of the Acts of 2016 provides new requirements, tighter time frames and lower fee structures for public records requests. It is imperative for local officials and municipal counsel to become familiarized with these changes. If your community has not yet appointed a records access officer (RAO) to respond to public record requests, time is of the essence, and educational opportunities abound in 2017. A not-to-miss program on January 21, 2017 is co-sponsored by the Massachusetts Municipal Lawyers Association (MMLA) and the Massa-

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chusetts Municipal Association (MMA) at the 38th MMA Annual Meeting and Trade Show. For more information, go to MMA's website www.mma.org and register for this comprehensive workshop providing an overview of the new regulations, effective implementation measures, best practices for local officials, and invaluable Q&A with your peers. In addition, MMLA is co-sponsoring the 15th Annual Municipal Law Conference on March 15, 2017 at the Massachusetts Continuing Legal Education (MCLE) Center, which will include programs on the recent changes to the Public Records Law and Open Meeting Law, amongst other dynamic, informative legal programs. For more information on the Conference, and to register for these programs go to www.mcle.org.

LEGALIZATION OF "RECREATIONAL" MARIJUANA: AN UPDATE ON THE MMLA RESPONSE

By: John Goldrosen, Esq.

In November 2016, Massachusetts voters approved Question 4, an initiative petition entitled, "The Regulation and Taxation of Marijuana Act" ("Act"). The Act adds several new provisions to the General Laws, related to the licensing and taxation of marijuana production and sales for non-medical purposes. (Although the Act has been popularly referred to as allowing "recreational" use of marijuana, the term "recreational" is not used in the Act.)

The Act establishes a Cannabis Control Commission ("CCC") to license and regulate "marijuana establishments" ("MEs"). Provisions related to marijuana sales and production, including the allowable scope of both state and municipal regulations, are included in a new Chapter 94G of the General Laws, entitled "Regulation of the Use and Distribution of Marijuana Not Medically Prescribed" ("Chapter 94G"). The Act also enacts a new Chapter 64N, which imposes a state excise tax of 3.75% on the sales of marijuana and marijuana products (other than medical marijuana), and allows municipalities, as a local option, to impose an additional local sales tax of up to 2%.

In response to the passage of the Act, the MMLA Executive Board established a working committee to review the Act's provisions, particularly Chapter 94G, and to prepare explanatory materials for our members and their municipal clients, as quickly as possible. Two "informational memos" on the Act were issued in early December 2016, entitled "A Summary For Municipal Counsel" and "What Municipalities Need to Know." These are available on the MMLA website, www.massmunilaw.org, and can be downloaded for your use and for distribution to municipal officials.

Municipal regulation of marijuana sales and production are addressed particularly in Chapter 94G, Section 3, which allows ordinances/bylaws that impose "reasonable safeguards" on the time, place, and manner of operation of an ME. However, Section 3 imposes several significant limits on the extent of municipal regulation:

First, a zoning ordinance or bylaw may not prohibit MEs in any "area" in which a medical marijuana treatment center ("MMTC") (i.e., a "registered marijuana dispensary" licensed by the Massachusetts Department of Public Health) "is registered to engage in the same type of activity." (The term "area" is undefined in Section 94G.)

Second, an ordinance/bylaw that limits the number of MEs in the municipality requires a "vote of the voters," if the ordinance/bylaw would:

(a) Prohibit one or more types of MEs;

(b) Limit the number of marijuana retailers to fewer than 20% of the number of licenses issued in the municipality for the retail sale of alcoholic beverages; or,

(c) Limit the number of MEs to fewer than the number of registered MMTCs registered to engage in the same type of activity in the municipality."

Chapter 94G does not specify the procedure to be followed to implement the requirement for a "vote of the voters" in a manner consistent with other statutory requirements and the provisions of municipal charters.

The lack of clarity in Chapter 94G, both as to procedure and substantive requirements, makes it difficult for municipal counsel to advise their clients on how to regulate or limit MEs in ways that are legally effective and that will not foster litigation against the municipality by either ME operators or opponents. Therefore, MMLA has taken steps to bring these issues to the attention of state officials, who had already indicated that some "fixes"

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may be considered early in the 2017 legislative session of the General Court to address other aspects of the Act (such as the appropriate level of taxation, the structure of the CCC, and the schedule for the issuance of state regulations and ME licensing).

On December 1, MMLA President Henry Luthin sent a letter to Governor Baker, Senate President Rosenberg and House Speaker DeLeo, in which he detailed the need for legislative clarification of the provisions relating to municipal controls. (The letter is posted on the MMLA website.) The MMLA letter pointed out the urgency of the need to clarify Section 94G quickly, given the impending schedule for town meetings and elections in the spring of 2017. MMLA is also working with the Massachusetts Municipal Association to develop suggested language for legislative amendments.

The MMLA Executive Board will keep you informed on the committee's efforts to work with state legislative and administrative officials to clarify the Act's requirements that are relevant to municipalities. In the meantime, please feel free to contact Jim Lampke or Henry Luthin with your comments and questions, and use the MMLA listserv as a way to communicate with other MMLA members.

MMLA 2017-18 LEGISLATIVE PRIORITIES

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

At its December 8, 2016 meeting, the MMLA Executive Board unanimously approved a package of legislation that establishes the Association's legislative agenda for the upcoming 2017-18 biannual legislative session, which begins in January. The package of legislative proposals were developed by the MMLA Legislative Committee and received unanimous approval. MMLA is currently working with legislative leaders to file the measures prior to the January 20, 2017 bill filing deadline. Once filed, MMLA will publish bill numbers, sponsors and committee assignments so that the full membership can reach out directly to their respective legislative delegations to voice support.

In brief, the MMLA 2017-18 Legislative Package consists of three (3) refiles and three (3) new files, and each is summarized below:

Refile Bills

(1) An act providing for alternative delivery of infrastructure projects

The bill would create a new local option program for municipal awarding authorities to use innovative public-private partnership (P3) project delivery methods, such as Design-Build-Operate and Design-Build-Operate-Finance, for water, wastewater and stormwater infrastructure projects.

(2) An act relative to authorizing governmental bodies and other approved parties to use shared legal representation and consultants in matters of common interest

This legislation would enable two or more municipalities to utilize the same legal counsel and/or consultants to represent and serve them in any administrative, judicial or other proceeding in which they have a collective interest notwithstanding any provision of the state's conflict of interest law to the contrary.

(3) An act relative to the effective enforcement of municipal ordinances and bylaws

The bill authorizes the Superior Court or Land Court to assess a civil fine and attorneys' fees in an equity proceeding brought by a municipality in connection with the enforcement of its ordinances and by-laws.

NEW FILES

(4) An act promoting the planning and development of sustainable communities

MMLA voted to approve the filing of legislation making several changes to the Zoning Act (G.L. c. 40A) and other land use laws, in conjunction with MMA and the Smart Growth Alliance. It is anticipated any legislation would capture certain proposals previously supported by MMLA, including but not limited to vested rights, site plan review, impact fees, ANR and inclusionary zoning.

(5) An act relative to public procurement

The bill would make a technical correction to dollar thresholds requiring payment and performance bonds for public construction projects in order to correlate with dollar adjustments recently made to the public bidding laws applicable to public works and building projects as part of the Municipal Modernization Act.

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(6) An act relative to interest assessed on certain judgments against a municipality

This legislation would modify various provisions of G.L. c. 231 in order to authorize courts to charge a floating and capped pre-judgment interest rate on judgments imposed against cities and towns in certain civil cases. Currently, courts do not have discretion to assess interest based on the floating capped interest rate, as such rate is only available to be applied to interest assessed on judgments against the Commonwealth.

Please contact me directly at mfeher@burnslev.com if you have questions regarding MMLA's legislative package, and if you are interested in serving on the MMLA Legislative Committee.

MUNICIPAL CASE LAW UPDATE

SJC DECLINES TO RECOGNIZE "UNION-MEMBER" PRIVILEGE: CHADWICK V. DUXBURY, 475 MASS. 645 (2016)

By: Amanda Zuretti, Esq, Petrini & Associates, P.C.

In Chadwick v. Duxbury Public Schools, 475 Mass. 645, 651 (2016), a case of first impression in Massachusetts, the Supreme Judicial Court declined to recognize a common law "union-member" privilege. The SJC further held that such a privilege is not implied within Chapter 150E, the State's public employee collective bargaining statute. The Massachusetts Municipal Law Association (MMLA), along with the Massachusetts Association of School Committees (MASC), submitted an amicus brief in this case and the position advocated by MMLA and MASC was adopted by the SJC.

Plaintiff, Nancy Chadwick, taught English at Duxbury High School from 2006 to 2015, serving as president of the Duxbury Teachers Association from 2010 to 2015. Ms. Chadwick was diagnosed with posttraumatic stress disorder (PTSD) in 1998. She successfully managed the symptoms of the disorder until 2009, when she experienced panic attacks, anxiety, hypervigilance, and disturbed sleep patterns, which she attributed to work conditions, including alleged bullying and harassment from her immediate supervisor.

In 2012, Ms. Chadwick's attorney notified Duxbury's school superintendent of her PTSD diagnosis and requested an accommodation in the form of a replacement supervisor. Following this request, the school superintendent assigned the assistant principal to conduct the plaintiff's performance evaluation, but did not relieve the Ms. Chadwick's direct supervisor from oversight of the English courses that the plaintiff taught. Between December 2013 and June 2014, performance issues continued, resulting in Ms. Chadwick's placement on a "directed growth plan." The plaintiff contended that the "directed growth plan" was "a disciplinary action that permitted the Duxbury public schools to dismiss [Ms. Chadwick] at the end of the 2014-2015 school year."

In December, 2014, Ms. Chadwick filed suit against the Duxbury Public Schools and three individuals, alleging discrimination and retaliation and seeking monetary damages. The defendants served document requests and interrogatories. The plaintiff objected to some of the discovery requests, asserting that a "union member-union" privilege existed to shield the discovery from production. A privilege log submitted at the defendants' request listed 92 emails between the plaintiff and representatives and members of the teachers' union that plaintiff contended was shielded from production under this "union-member" privilege.

The defendants sought to compel production of documents and responses to interrogatories, and the plaintiff responded with an opposition and cross-motion for protective order, which the Superior Court denied. The plaintiff then filed two petition for interlocutory review with the Single Justice. The Single Justice affirmed the Superior Court's order, but allowed the plaintiff to seek further appellate review. The SJC then transferred the case from the Appeals Court on its own motion.

The SJC began its analysis of the plaintiff's claim by reviewing the language of G.L. c. 150E. The Court then examined the decisions of the National Labor Relations Board, insofar as the National Labor Relations Act, 29 U.S.C. §§ 151 et. seq. (2012) contains provisions that are parallel to those in G.L.c. 150E. The SJC found particularly persuasive the decision of Cook Paint & Varnish Co. & Paintmakers & Allied Trades Local 754, 258 N.L.R.B. 1230, 1232 (1981), where the NLRB held that, while an employer impermissibly interferes

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with the employee's collective bargaining rights by demanding the substance of conversations during the grievance process, not all discussions between employees and stewards are confidential and protected by the NLRA, and that union stewards are not insulated from employer interrogation in all instances. Applying the rationale in Cook Paint, the SJC held that "[c]ivil lawsuits are beyond the zone of protection for union rights contemplated in G. L. c. 150E. Therefore, the plain and unambiguous language of § 10(a)(1) does not require that communications between union members and union representatives be protected from interference by an employer defending itself from an employee's civil action." Chadwick, 475 Mass. at 653.

The SJC then followed the majority of other jurisdictions in declining to find a common law union member-union privilege. The SJC acknowledged that Alaska had recognized a union-member privilege in Peterson v. State, 280 P.3d 559 (Alaska 2012) based on language in the State's Public Employment Relations Act, but that "[o]ther jurisdictions [e.g. New Hampshire and California] that have analyzed this issue have declined to judicially create privileges that would apply to matters outside of grievance proceedings or disciplinary investigations." Applying this precedent, the Court declined to fashion a common law "union member-union" privilege, explaining that "the Legislature is the more appropriate body to weigh policy considerations and the contours of any such privilege."

Chadwick resolves the previously open questions of whether a so-called "union-member" privilege exists outside of the collective bargaining context under G. L. c. 150E, § 10 (a) (1) and (2), and that no common law "union-member" privilege exists in Massachusetts. The next inquiry is whether the Massachusetts public employer lobby will present legislation to recognize a "union member-union privilege," and the scope and counters of any such privilege if it is proposed, enacted and signed into law.

Former MMLA President and Amicus Committee Member Christopher J. Petrini co-authored and filed the amicus brief with Attorney Steven Finnegan in support of the Duxbury Public Schools on behalf of MMLA and the MASC in this case.

THE TRINITY: CITY COUNCIL, SATAN, AND THE HOLY GHOST

By: Sammy Nabulsi, Assistant Corporation Counsel, City of Boston Law Department

Earlier this fall, a spotlight was cast on a 200-year-old tradition emulated in the City of Boston, but seen across the country in cities and towns, states, and the federal government. The tradition? Opening legislative sessions with prayer.

The Boston Chapter of the Satanic Temple sent letters to members of the Boston City Council, requesting that members of the Satanic Temple be permitted to deliver the opening prayer at an upcoming City Council hearing. The request was not denied. Instead, the City Council informed the Satanic Temple that the City Council's policy had been that each Councilor is permitted three invitations per legislative year to send various clergymen and clergywomen with a demonstrated commitment to community service to deliver an opening prayer. Under the policy, any member of the Council could invite the Satanic Temple, and, surely, they would be welcome. Unfortunately, it did not take long for the threat of suit to rear its ugly head in a published letter to *The Boston Globe*.[1]

Upon researching this matter, I dug up the seminal case on legislative prayer—the 1983 Supreme Court case, Marsh v. Chambers.[2] Not because I am some kind of avid reader of Establishment Clause jurisprudence, but because this case arises from a policy enacted in my home state of Nebraska, and the Plaintiff, Senator Ernest Chambers, was a familiar face when I interned for the legislature. "Ernie," as we could call him, would frequently (i.e. it seemed like every day) wear purple, crew-neck sweaters—because he thought neckties were for fools—and could occasionally be seen doing push-ups in chambers.

It was also in Marsh that the United States Supreme Court upheld the practice of opening legislative sessions with prayer. In Marsh, Senator Chambers challenged Nebraska's hiring of a paid, Judeo-Christian chaplain to

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1. Malcolm Jerry, *Satanic Temple Challenges City Council*, The Boston Globe (Oct. 18, 2016), https://www.bostonglobe.com/opinion/letters/2016/10/18/satanic-temple-challenges-city-council/Ob5qyipUbzVYSddngWpBkL/story.html.

2. 463 U.S. 783 (1983).

open each legislative day with prayer. The challenge was brought pursuant to the First Amendment's Establishment Clause.

The Establishment Clause provides, "Congress shall make no law respecting an establishment of religion." The Establishment Clause is said to have enshrined the principle that government shall not aid one religion, aid all religions, or prefer one religion or set of beliefs over another. In affirming the practice of legislative prayers, the Court did not subject the practice to the traditional three-step *Lemon* test.[3]

Instead, the Court's decision has been interpreted as having carved out from the Establishment Clause an exception for legislative invocations. The Court extracted from history an intent to preserve the tradition of legislative invocations notwithstanding the Establishment Clause. In mid-1789, both the U.S. House of Representatives and the U.S. Senate elected their first chaplains for the purpose of opening each legislative session with prayer, and on September 22, 1789, Congress enacted a statute to provide remuneration for such services. Significantly, three days later, on September 25, 1789, final agreement was reached on the language of the Bill of Rights before it was sent to the states for ratification, including the Establishment Clause.

The fact that a mere three days separated the introduction of the Establishment Clause and the enactment of a statute allowing compensation of chaplains opening legislative sessions with prayer was of utmost importance to the Court. This manifested intent by the drafters that such conduct could not have been an affront to the Establishment Clause. Its holding is best summarized in the following passage: "From colonial times to the founding of the Republic and ever since, the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom."[4]

More recently, the tradition of opening legislative sessions with prayer was reaffirmed in the 2014 Supreme Court case, Town of Greece v. Galloway.[5] In Town of Greece, the Plaintiffs did not oppose legislative invocations, but protested the frequency in which Christian ministers performed the invocations. As a result, the Plaintiffs sought injunctive relief to limit prayers to nonsectarian content. To the Court, the fact that the individuals performing the invocations had been largely Christian was not concerning.

Relying on Marsh, the Court noted in Town of Greece that legislative prayer that is religious in nature is compatible with the Establishment Clause because it is a symbolic expression of a "tolerable acknowledgement of beliefs widely held," and not a "treacherous step towards establishment of a state church."[6] The answer to a diversifying electorate is not limiting content so that it is nonsectarian or generic. Instead, the Court's prescription was to welcome ministers of many more creeds.

The Court's holding did not go much further than that. The policy of selecting ministers to perform invocations must be non-discriminatory. However, the Court stopped well short of a requirement to affirmatively search for non-Christian ministers to achieve some magic algorithm reflecting a proportional diversity of beliefs. The Court warned that such a requirement would turn legislatures into supervisors or censors of religious content, thereby further entangling government with religion.

In summary, a reading of Marsh and Town of Greece tell us that the practice of opening legislative sessions with prayer passes constitutional muster. But what happens when a request to perform an invocation is unsolicited? And to what extent is it defensible to say no? Marsh and Town of Greece do not answer this question directly, but each case does provide some indicia of how a court might rule.

First, prayers need not be areligious to survive Establishment Clause scrutiny. Prayer's compatibility with the Establishment Clause as a symbolic expression of widely held beliefs allowed Nebraska to employ a Judeo-Christian chaplain to regularly perform invocations for the Legislature, and prevented Greece, New York from having to reduce the number of invocations delivered by Christian ministers. The risk of religious entanglement is greater if legislatures are required to ascertain and invite a representation of every existing religious denomination or screen and regulate the content of prayers.

But there might still be room for denying an unsolicited invocation request. Marsh makes clear that while invocations are permissible expressions of traditional and widely

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3. See Lemon v. Kurtzman, 403 U.S. 602 (1971) (establishing three-part test for Establishment Clause claims: (1) whether the challenged practice has a secular legislative purpose; (2) whether its primary effect does not advance or inhibit religion; and (3) whether the practice fosters excessive government entanglement with religion).
4. Marsh, 463 U.S. at 786.
5. 134 S. Ct. 1811 (2014).
6. Town of Greece, 134 S. Ct. at 1818.

held beliefs, invocations become impermissible if they are used to proselytize one's own views or disparage the beliefs of others.

That brings us back to the Satanic Temple's request to perform an invocation before the Boston City Council. It is an open question whether a legislative body may deny an unsolicited invocation request on the basis that the government determines that a belief is not widely held; and, therefore, not consistent with the Establishment Clause's Marsh exception. However, a city council or other deliberative body could benefit from the Marsh decision's distinction of remarks meant to "proselytize or disparage."

In *The Boston Globe* letter, the Satanic Temple's Co-Founder stated, "[w]hile some may prefer that The Satanic Temple not deliver a prayer, this can be remedied legally by prohibiting prayer at government meetings. People are certainly free to pray pretty much everywhere else."[7] Furthermore, in an October 13, 2016, *Boston Herald* article, as a result of an interview with a representative of the Satanic Temple, the *Boston Herald* reported that the Satanic Temple's "end goal is to bring an end to religious invocations at City Council meetings entirely."8

An argument could be made that based on public statements made by the Satanic Temple, its effort to use an invocation to convince others that there is no place for prayer when opening legislative sessions is an attempt to proselytize its views. There is some precedence for this. In a Tenth Circuit case, Snyder v. Murray City Corporation[9], the Plaintiff challenged the Murray City Council's denial of his request to perform an "invocation," which, by his admission, would have been a soliloquy on why prayers should only be conducted in private and outside of legislative sessions. Relying on Marsh, the Tenth Circuit noted that a prayer falls outside the Marsh exception if "prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief."[10] In denying Plaintiff's claims, the Tenth Circuit held that the prayer seeking to convince the audience against legislative invocation is an example of proselytization.

It remains to be seen whether the Satanic Temple will contact other cities and towns that may partake in the tradition of legislative invocations. While I am unaware of the policies of other cities and towns or the likelihood of success of a lawsuit challenging invocation policies, this seems like a good time to brush up on Marsh, Town of Greece, and related cases.

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To register for a seminar, send an email request with a preferred date(s)/location(s) to Margaret J. Hurley, Director, AGO Municipal Law Unit, at margaret.hurley@state.ma.us.

7. See Jerry, supra.
8. Dan Atkinson, *Satanists fired up over City Council's invocation refusal*, Boston Herald (Oct. 13, 2016), http://www.bostonherald.com/news/local_coverage/2016/10/satanists_fired_up_over_city_council_s_invocation_refusal.
9. 159 F.3d 1227 (1998).
10. Murray, 159 F.3d at 1234.

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