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MMA ANNUAL CONFERENCE 2025

A Brief Review: Updates on Municipal Law

Presented by the Massachusetts Municipal Lawyers Association

CONNECT 351

Six Bros. Inc v. Brookline, 493 Mass 616

Issue: Was town bylaw, which effected an incremental prohibition on the sale of tobacco products in the town, preempted by state Tobacco Act, and did it violate the state constitution's equal protection provisions?

Principal Holding: The bylaw was not inconsistent, contrary, or conflicting with the statewide minimum age provision of 21 set out in the Tobacco Act and was not preempted by the Act's minimum wage provision. The bylaw was rationally related to furtherance of legitimate state interest regulating tobacco products and did not violate the equal protection guarantees of state constitution.

Rationale and key takeaway: A town exceeds its power to enact a bylaw only when that bylaw is *inconsistent with* state constitution or laws of Commonwealth. Such a sharp conflict would only exist where legislative intent to preclude local action is clearly stated or where the purpose of the statute cannot be achieved in the face of the local rule.

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Carroll v. Select Bd. Of Norwell, 493 Mass. 178

Issue: Was land held by the town for a specific purpose of providing affordable housing, and therefore required approval of a board in order to be diverted to an inconsistent use?

Principal Holding: The land was held by the town of a specific purpose.

Rationale and key takeaway: The land in question was held for the specific purpose of providing affordable housing even though the select board had rejected a developer's proposal to built it, since:

- Developer's proposal was rejected because of a condition unrelated to affordable housing

- Town meeting had resulted in a unanimous vote to make the land available for affordable housing

- Town hired engineering consultants to evaluate land for affordable housing

-Town expended considerable public funds to assess feasibility of affordable housing on land

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Bd. Of Selectmen of Pepperell v. Zoning Bd. Of Appeals of Pepperell, 104 Mass App Ct 82

Issue: Was soil reclamation project in which applicant proposed to deposit soils and materials on former gravel pit a commercial dumping ground under town bylaw?

Principal Holding: Use of soils containing de minimis solid waste did not transform quarry into prohibited commercial dumping ground.

Rationale and key takeaway: DEP's expected approval of composition of soils used to fill in soil reclamation project, pursuant to interim Department policy requiring that soil accepted by quarries for reclamation projects contain no more than de minimis quantities of solid waste, prevented such soils from constituting garbage or refuse within the meaning of the town zoning bylaw defining commercial dumping grounds, and thus such soils' use as fill did not transform quarry into commercial dumping ground.

Kearsarge Walpole LLC v. Zoning Bd. Of Appeals of Walpole, 10 Mass App Ct 1119

Issue: Was ZBA's denial of a building permit for large-scale solar array invalid because of c. 40A, s3?

Principal Holding: Under Tracer Lane II Realty, LLC v. Waltham, 489 Mass. 775, 781 (2022), the bylaw violates the statute.

Rationale and key takeaways:

- Zoning bylaw provided for two solar photovoltaic overlay districts (SPODs) accounting for about 2% of the town's total land area; parcel at issue was not in an SPOD.

- Town argued that because the bylaw did not explicitly prohibit or limit solar installations to a particular zone, up to 10% of town's land area could be used for solar.

- But outside SPOD, solar uses needed to obtain discretionary relief– exactly the kind of interference that the statute is intended to prevent.

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PJ Keating Co. v. Acushnet, 104 Mass App Ct 65

Issue: Was Town Board of Health's case and desist order against hot-mix asphalt plant supported by substantial evidence?

Principal Holding: The decision was supported by substantial evidence.

Rationale and key takeaways:

- The Board could reasonably infer that where the nuisance affected 21 houses on all three sides of the plant, the nuisance was widespread.

- The Board was entitled to credit certain scientists and not others.

- The Board could find a public nuisance without finding that the whole town was affected or that the odors were present 24 hours a day.

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Conservation Law Foundation v. Energy Facilities Siting Board, 494 Mass 594

Issue: Appeal of inaction of local boards to address permit application and authority of the Board to site a facility absent local action.

Principal Holding: The board ultimately concluded that the new evidence did not give cause to change prior findings on the same issue. Its decision in that regard was not an abuse of discretion, and substantial evidence supported the board's findings.

Collateral holdings & Rationale: The lack of a definition does not preclude a conclusion that the plain, unambiguous meaning of “energy benefits” includes energy reliability.

Given Eversource's diligent efforts to obtain approval from the two city agencies and the fact that neither agency had allowed the permit application before it to move forward by putting it on the agency's agenda, despite Eversource's good faith efforts to satisfy the agencies' demands at every turn, the evidence permitted the board to find undue delay of indefinite duration.

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Friedman v Div. of Admin. Law Appeals, 103 Mass App Ct 806, 231 NE3d 957 [2024])

Issue: Reasonableness of multiple public records requests that either did not adequately describe the record or placed obligations on the record custodian in excess of those required by the Act.

Principal Holding: Records custodian's obligation to produce records was not triggered by the request, because the request did not reasonably describe the records sought. The request did not include information sufficient to allow "a professional employee of the agency who was familiar with the subject area of the request to locate the record with a reasonable amount of effort".

Collateral holdings & Rationale: Under the circumstances, the bureau did not also need to state in its prelitigation response that the original request violated the reasonable description requirement.

It would not be possible to respond to this request, as the request does not make a reasonable effort to define or limit what records it seeks. The request thus falls into the category of a "[b]road, sweeping request[ ] lacking specificity."

Request five did not reasonably describe the records sought. The request sought "[a]ny and all raw data in any format" concerning twelve separate categories of information over a fourteen-year period.

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Mack v Dist. Attorney for the Bristol Dist., 494 Mass 1, 231 NE3d 934 [2024])

Issue: Application of privacy exemption post Police-Standards act, application of policy exemption and investigatory exemption in police misconduct cases.

Principal Holding: The Court rejected the district attorney's office assertion that unless an investigation ends in a finding that a law enforcement officer engaged in misconduct, the carveout to the privacy exemption does not apply. This contention of the district attorney's office finds no support in the language of the statute. That is, records that would otherwise fall within the privacy exemption but are “related to a law enforcement misconduct investigation” may not be withheld from disclosure under this exemption.

Collateral holdings & Rationale: Where the Court previously has stated that the investigatory exemption is aimed at “the encouragement of individual citizens to come forward and speak freely with police” they only have considered this factor for private individuals — not public officials performing duties in their official capacity.

Court agreed that the district attorney's office has not proven that the policy deliberation exemption applies to either the draft of the MSP homicide report or the room summary.

Despite the fact that the final DAO report was voluntarily released to the public does not mean that these sections of an earlier draft report are not protected work product.

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Mark v. Tisbury

Issues: Constructive discharge, defamation and whistleblower protection for public employee.

Principal Holding: Mark does not allege facts that plausibly show that her working conditions were so difficult or unpleasant that a reasonable person would feel the need to resign. Furthermore, the Meisner letters and consequential investigation constitute an isolated incident, which does not amount to a continuous pattern of adverse working conditions.

Collateral holdings & Rationale: Assuming without deciding that the town did commit a regulatory violation by rehiring Meisner when he had not completed the requisite training, the allegations in Mark's complaint do not plausibly suggest that a failure to use reasonable care in hiring Meisner was the proximate cause of any harm to her.

An employer has a conditional privilege to disclose defamatory information concerning an employee when the publication is reasonably necessary to serve the employer's legitimate interest in the fitness of an employee to perform his or her job.

Young v. Town of Lee, 103 Mass. App Ct. 1124

Issues: Authority of selectboard to enter into settlement agreement under bylaw permitting settlement of certain claims without town meeting approval.

Principal Holding: Court concludes that a town bylaw authorized the selectboard to approve the settlement agreement regarding PCBs and that the plaintiffs' claim that the selectboard abused its discretion was not properly before the court.

Collateral holdings & Rationale: Plain language of the bylaw, specifically its first sentence authorizes the selectboard to settle "any claim or suit to which the Town is a party which does not require payment by the Town of an amount in excess of $1,000". "The word 'any' is generally used in the sense of 'all' or 'every' and its meaning is most comprehensive"

The Statute of Frauds applies only to contracts which by their terms cannot be performed within the year. It does not apply to contracts which may be performed within, although they may also extend beyond, that period”.

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Federal Cases

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Cosenza v. City of Worcester 120 F. 4th 30

Principal Holding: Plaintiff Cosenza has not identified any record evidence that Worcester "had an express policy that caused its officers to fabricate or suppress evidence" or "fail[ed] to train its officers" in that regard.

Collateral holdings & Rationale: Typically, "[a] pattern of similar constitutional violations by untrained employees" is necessary to demonstrate deliberate indifference. It is clear there is no evidence of any such pattern, and Cosenza does not meaningfully pursue such a theory.

"Municipalities 'are responsible only for their own unconstitutional acts,' and 'are not vicariously liable. . . for the actions of their non-policymaking employees.'" Instead, a plaintiff "must prove that 'action pursuant to official municipal policy' caused their injury."

Berge v. School Committee of Gloucester
107 F. 4th 33

Issues: On a motion to dismiss a case does qualified immunity protect public officials who baselessly threatened a citizen-journalist with legal action if he did not remove a video on a matter of public concern that he made and posted on Facebook without breaking any law?

Principal Holding: Threatening Plaintiff with an obviously groundless legal action was a burden on Berge's First Amendment right to publish on a matter of public concern. The complaint plausibly alleges that the threat constituted First Amendment retaliation in violation of his clearly established right.

Collateral holdings & Rationale: On mootness: A defendant's voluntarily ending an unconstitutional practice may not moot a case if the plaintiff's alleged injury may happen again.

Qualified immunity shields the individual defendants unless Plaintiff pled facts — adopted as true — showing that (1) they violated a constitutional guarantee that (2) was not only established but "clearly established" when they acted.

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Jakuttis v. Town of Dracut 95 F. 4th 22

Issues: Whether supervisory officers are entitled to qualified immunity in federal suit alleging deprivation of rights and retaliation.

Principal Holding: Individual police officers were entitled to summary judgment based on qualified immunity on appellant's First Amendment § 1983 claim because the officers reasonably could have understood that appellant was reporting the corruption allegations to his supervisor as part of his official police duties.

Collateral holdings & Rationale: Chartrand's and Mellonakos's alleged conduct did not violate "clearly established" federal law as to a First Amendment retaliation claim, because a reasonable person in their situations would not have concluded that the constitutional question was placed beyond doubt.

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Satanic Temple Inc. v. City of Boston
111 F. 4th 156

Issues: Whether Boston's failure to invite TST to give an invocation before its City Council meeting violates the Establishment Clause of the First Amendment of the U.S. Constitution and the Free Exercise Clause of the Massachusetts Constitution.

Principal Holding: Plaintiff did not show that defendant's legislative prayer practice, either on its face or as applied, violated the Establishment Clause of the First Amendment to the U.S. Constitution and the Free Exercise Clause of the Massachusetts Constitution.

Collateral holdings & Rationale: Sectarian prayer violates the constitution only "[i]f the course and practice over time shows that their invocations denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion," because at that point, the invocation "fall[s] short of the desire to elevate the purpose of the occasion and to unite lawmakers in their common effort."

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Legislation

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Affordable Housing Act

ADUs. ADUs are now allowed “as of right” in single-family residentially zoned districts.

Zoning appeals under G.L. c. 40A, § 17. Courts may now require appellants of decisions to approve a special permit, variance, or site plan to post a $250,000 bond to secure the payment of costs and to indemnify and reimburse damages and expenses incurred in such an action. Appellants may be required to post such bonds even in the absence of bad faith or malice of a plaintiff.

Housing preference for veterans. Municipalities that have met certain inclusionary requirements may enter into agreements with residential developers to provide preferential housing to low- or moderate-income veterans for up to 10% of the affordable units in any particular development.

Merger doctrine. Adjacent lots under common ownership shall not be treated as a single lot for local zoning purposes, if the lots are of a certain size, located in a single-family residential district and, at the time of record or endorsement, conformed to certain then-existing dimensional requirements.

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MBTA Communities: Post-Milton

The SJC ruled as follows:

1. GL 40A, s. 3A is constitutional.
2. Guidelines are void because HLC did not follow the Administrative Procedures Act.
3. AG has the authority to enforce the statute and bring claims for injunctive relief.

Where does this leave the MBTA Communities Act?

1. The Act remains in full force and effect and every MBTA community must comply or may be subject to both the loss of state funding (per the Act) or enforcement by the Attorney General

2. On Jan. 14, HLC issued emergency regulations which will remain in effect for three months or until official regulations are promulgated, whichever comes first.
   - Emergency regulations are substantially the same as the Guidelines
   - Communities already in compliance do not need to take any action
   - Communities yet to come into compliance must now submit an action plan by February 13, 2025, and a district compliance application by July 14, 2025.

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Per- and Polyfluoroalkyl Substances

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Per- and Polyfluoroalkyl Substances (PFAs)

- PFAs are widely used, long lasting chemicals, whose components break down very slowly over time.
- They are persistent in the environment and found in the blood of people, animals, food products, air, water, wastewater, and soil.
- They are resistant to heat, water, and oil.
- There are thousands of PFAS chemicals, and they are found in many different consumer, commercial, and industrial products. This makes it challenging to study and assess the potential human health and environmental risks.

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United States Environmental Protection Agency

- January 2025 EPA released Draft Risk Assessment to Advance Scientific Understanding of PFOA and PFOS in Biosolids
- April 2024 announced its Final National Primary Drinking Water Regulation MCLs for 6 PFAS
- April 2024 finalized a rule designating PFOA and PFOS as hazardous substances under CERCLA
- April 2024 updated interim guidance on destruction and disposal of PFAS containing materials
- February 2024, Proposed change to RCRA, to list 9 PFAS as hazardous constituents in RCRA's Appendix VIII, 40 CFR Part 261 (EPA-HQ-OLEM-2023-0278)

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Massachusetts Department of Environmental Protection

- In 2020 MassDEP has established the maximum contaminant level (MCL) for PFAs that is safe for daily exposure, for a lifetime
  - 20 parts per trillion (ppt) for the sum of 6 PFAs in drinking water, including PFHxS, PFHpA, PFOA, PFOS, PFNA, PFDA
- However, because the USEPA updated the federal MCLs for 6 PFAs in April 2024 to more stringent standards, the MassDEP must meet those same standards within two years (with the possibility of up to an additional two year extension)
  - EPA final MCLs are 4 ppt for PFOA and PFOS and 10ppt for PFNA, PFHxS, and GenX. Lastly, if there is a mixture of 2 or more PFNA, PFHxS, GenX, PFBS the MCL is 1 (unitless) Hazard Index.

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Tax Title & Takings

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“The only legitimate interest of a town in seeking to foreclose rights of redemption is the collection of the taxes due on the property, together with other costs and interest.”

Town of Lynnfield v. Owners Unknown
397 Mass 470, 474 (1986)

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A little context to the “excess equity” issue:

- The 1915 Amendments to Chapter 60 transformed the nature of the Taking from ownership to a perfected security interest.
- Chapter 60, Section 77 transforms this perfected security interest into fee simple absolute upon the entry of the Decree of Foreclosure.

A little context to the “excess equity” issue:

- In Kelly v. City of Boston, 348 Mass. 385 (1965), the Supreme Judicial Court held that a property owner who had lost his property to a tax foreclosure was not entitled to recover any surplus value of the property in excess of the taxes, interest and costs owed.

So….how do we effectively collect Tax Title Post Chapter 140?

- The Best way is to prevent it from becoming Tax Title in the first place:
  - Affidavit of Address – Ch. 59, § 57D
  - Right of Offset – Ch. 60, § 93
  - Denial of Permits/Licenses – Ch. 40, § 57
  - Aggressive Pre-Taking Collection – Collect don’t just receive.

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Questions?

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