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formerly known as the City Solicitors and Town Counsel Association

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SUMMER

This is a publication of MMLA and is not intended as a legal advice, which requires consultation with an attorney.

LETTER FROM THE PRESIDENT

Dear MMLA Colleagues:

Readers of my President's letters (yes, both of you) may have noticed in them a certain recognition of the onward march of time, whether in terms of the passing of nature's seasons or the passing of our Association's past presidents. And this letter for the summer 2016 edition of the Massachusetts Municipal Law Quarterly will be no different.

It was early June when the Association, each one of us, lost Past President George E. Lane, Jr. He had only last year stepped down after a quarter-century as Town Solicitor for Weymouth, where he had practiced law for nearly a half-century. And it was just last August when I had the privilege of presenting him with the President's Award in honor of his municipal law work and his service to our Association. It is fair if not banal to say none of us at that award ceremony would have thought he had only ten more months to be among us, for us to enjoy his company, his wisdom, his cheerful kindness. George's passing joins those of Doug Randall and Mike Curran, who in the early 1960s and the late 1990s respectively served as president of the City Solicitors and Town Counsel Association, forerunner of the MMLA. We are diminished by our loss of these men, even as we nurture within us our memories of them.

This spring saw a number of very successful presentations by the Association, beginning with the Sixth Annual Public Construction Law Update Conference on April 28 at CBS Scene/Patriot Place in Foxborough. Spearheaded by Chris Petrini, the Conference examined the roles played by various professionals in the evolution of a typical public construction project, from design through project close-out. The Conference was well attended and much appreciated.

The April 28 Conference segued later that evening into the MMLA's annual business meeting and election. For those unable to attend and who otherwise may have not heard, we have elected Henry Luthin to be our President for the 2016-2017 fiscal year starting July 1; Angela Atchue to be our Vice President; and Jim Timmins and John Goldrosen to join our Executive Board. Our congratulations go out to each of them. Theirs will no doubt be a busy year, as we grapple, both as an Association and in our individual practices, with, among other things, Chapter 121 of the Acts of 2016, entitled "An Act to Improve Public Records," as well as with the ongoing legislative effort to reform zoning law in Massachusetts.

On May 19, the MMLA presented a program at the Westborough Chateau on the Community Preservation Act. DOR's Patricia Hunt and Kathleen Colleary, along with Mark Cerel, collaborated to provide a lucid and most informative explanation of the CPA.

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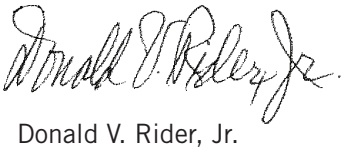
Inside this Issue

On August 4, Kathleen and Mark will again be collaborating, this time at the Publick House in Sturbridge as part of a panel which will analyze the lifecycle of a typical municipal finance year. The luncheon and half-day program will examine how our local legislative bodies approach, or should approach, municipal finance issues, including topics such as a municipal finance primer, the workings of a municipal finance committee, municipal process and procedure in a city form of government, and town meeting process and procedure. Four words to the wise: not to be missed.

Nor should you miss the MMLA's annual meeting and convention, to be held beside the balmy waters of Nantucket Sound, at the Red Jacket Inn in South Yarmouth on September 15-17. So, multi-task: soak up the late summer sun while you soak up what you need to know about the latest in municipal law.

As this letter draws to a close, so does my term as MMLA President. I can only express my gratitude to those members of the Association with whom I have had the honor and the pleasure of serving alongside. Thank you, one and all.

Sincerely,



Donald V. Rider, Jr.
President

MUNICIPAL SPOTLIGHT ON: Donna M. Brewer, Esq.

Miyares and Harrington, LLP

1. **In what city/town were you born?**
   Hartford, CT
2. **Where did you attend college and law school?**
   Middlebury College, VT and
   New York University School of Law
3. **What municipalities do you represent?**
   I am Town Counsel for Hamilton and support my partners who are Town Counsel for Wellesley, Reading, Hopkinton, Carlisle, Littleton, and Stockbridge.
4. **How has municipal government changed during your career?**
   I think it has become more professionalized. In the past, town counsel was a lawyer who lived in town who learned on the job. Today, municipalities are more likely to seek experienced municipal counsel through an RFP process. I am a relic of past practice.
5. **What is your favorite city in the world outside of Massachusetts, and what could Massachusetts municipalities learn from that City?**
   I need to go to more cities, but one I'd go back to tomorrow is Marrakesh. I can't think of anything we can learn from it, though, which may explain its charm.
6. **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?**
   As a technology dinosaur, I began practice in the days of telexes, cite checking using Shepherd's maroon volumes, and a typing pool. At one of my first depositions, the stenographer took the testimony by cursive shorthand. I love the technology, but it has made clients a tad impatient for answers.
7. **What is one of your proudest moments as a lawyer?**
   I was pleased as punch to win my first argument before the SJC. It was a case I should have won as the law was clearly in my clients' favor, but since I have lost unopposed motions for summary judgment, I take no victory for granted.

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8. **What do you like to do outside of work?**
   Few activities beat sitting in front of a fire in the winter with a good book and a glass of wine. This winter I completed my certification as an Open Water scuba diver, so I am looking forward to using that new skill. But if I had freedom from work, I would travel the world. Next year is Mt. Kilimanjaro and after that, Iran.

9. **When you are driving to court to argue a motion, what might you be playing on the radio?**
   No matter why I'm in the car, I usually listen to NPR so I can do the news quiz every Friday on slate.com and beat the guest editor. I rarely do.

10. **What is your favorite book?**
    I am a voracious reader, lately in a science fiction/fantasy phase, but probably the book I most often re-read is "Pride and Prejudice" by Jane Austen. From the opening line, you know you are in for a treat. Almost as good is my favorite movie, "The Princess Bride." Inconceivable, I know!

EPA'S REVISED MUNICIPAL STORMWATER ("MS4") PERMIT IS HERE

By: Rebekah Lacey, Miyares and Harrington LLP

An article in the last issue of the MMLA Quarterly provided some background on the anticipated reissuance of the U.S. Environmental Protection Agency (USEPA) General Permit for Stormwater Discharges from Small Municipal Separate Storm Sewer Systems in Massachusetts (known as the "MS4 permit"). USEPA and the Massachusetts Department of Environmental Protection (MassDEP) jointly issued the final permit on April 4; this article summarizes the requirements of the new permit.

Overview of the 2016 Permit

The 2016 Massachusetts MS4 permit is a more stringent version of a permit issued in 2003 that regulates stormwater discharges from municipalities in urbanized areas (most of eastern Massachusetts, as well as the areas around Springfield and Pittsfield). The new permit and associated documents are available at https://www3.epa.gov/region1/npdes/stormwater/MS4_MA.html.

The new permit does not take effect until July 1, 2017, so year one compliance costs can be addressed in the FY 2018 budgeting process. To obtain coverage under the new permit, regulated municipalities must file a "notice of intent" by September 29, 2017. As discussed in the previous article, the notice of intent form (Appendix E of the new permit) requires municipalities to certify that they are in compliance with certain key requirements of the 2003 permit; therefore, municipalities that have not completed those requirements should prioritize them for completion in FY 2017.

Under the 2003 MS4 permit, regulated municipalities are already required to implement six "minimum control measures" to prevent stormwater pollution and to take additional measures for discharges into water bodies that are not meeting state water quality standards. The 2016 permit will require municipalities to step up all of these activities, as summarized below.

Requirements of the 2016 Permit: Minimum Control Measures

Some of the key increased requirements for the six minimum control measures are as follows:

- ***Public Education:*** Municipalities now must distribute two educational messages over the five-year permit term to each of four specified audiences (residents, institutions/commercial facilities, developers, and industrial facilities), and then must measure the effectiveness of the messages.
- ***Public Involvement and Participation:*** The requirements have not changed significantly from the 2003 permit. Municipalities must still meet existing requirements to ensure that there is a high level of public involvement and participation in stormwater management decision-making.
- ***Illicit Discharge Detection and Elimination (IDDE):*** Municipalities must conduct dry weather screening of all outfalls, develop a more complete GIS-based map of the MS4, prepare a written IDDE program with catchments prioritized, and conduct systematic implementation of the program according to the prioritization.
- ***Construction Site Stormwater Runoff Control:*** The 2003 permit required municipalities to adopt a bylaw or ordinance requiring sediment and erosion control at construction sites disturbing one acre or more.

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The 2016 permit requires municipalities to develop written procedures for site inspection and enforcement of this bylaw or ordinance.

- ***Post-Construction Stormwater Management in New Development and Redevelopment:*** The 2003 permit required municipalities to adopt a bylaw or ordinance mandating post-construction stormwater management for new development and redevelopment disturbing one acre or more, but did not specify the stormwater management measures that municipalities should require. Many municipalities chose to reference the Massachusetts Stormwater Management Standards, a set of requirements developed by MassDEP. Under the 2016 permit, municipalities must go beyond the Massachusetts Stormwater Management Standards, requiring developments and redevelopments of one acre or more to retain the first inch or 0.8 inch (respectively) of runoff from impervious areas. Municipalities must also develop reports (1) assessing local requirements that affect the creation of impervious cover to determine whether design standards can be changed to support low-impact design options, and (2) evaluating local regulations to ascertain the feasibility of allowing green roofs, infiltration practices, and water harvesting devices where site conditions permit.
- ***Pollution Prevention and Good Housekeeping in Municipal Operations:*** Municipalities must: (1) inventory and develop written operation and maintenance procedures for parks and open space (including addressing "waterfowl congregation areas"), facilities where pollutants are exposed to stormwater, and vehicles and equipment; (2) establish a program to maintain MS4 infrastructure, including catch basin cleaning and street sweeping; and (3) develop and implement a Stormwater Pollution Prevention Plan for all maintenance garages, public works yards, transfer stations, and other waste handling facilities.

Requirements of the 2016 Permit: Discharges to Impaired Waters

The 2016 permit also increases the requirements for municipalities whose MS4s discharge to "impaired waters." The Clean Water Act requires that states develop lists of "impaired waters" (those that do not meet state water quality standards) and submit them to the EPA for approval. For all waters that are impaired by pollutants, states must determine the "total maximum daily load" (TMDL) of each impairing pollutant that can be discharged to the water body without exceeding water quality standards. The TMDL allocates this load to the various sources of the pollutant. The TMDL allocation is then translated into specific permit limits for each point source discharger.

The 2016 Massachusetts MS4 permit includes (in Appendix F) specific requirements based on a number of TMDLs that have been approved, including for phosphorus in the Charles River, the Assabet River and various lakes and ponds, and for bacteria in many rivers, streams, bays, and harbors. Cities and towns that discharge stormwater to the Charles River or to a lake or pond with a phosphorus TMDL must select a mix of non-structural controls (such as street sweeping, catch basin cleaning, and leaf litter collection) and structural controls (such as stormwater management structures that infiltrate stormwater into the ground) to meet a specified reduction goal. In contrast, certain other TMDLs are implemented with specified best management practices, rather than percentage load reductions. Discharges to impaired waters that do not have TMDLs (see Appendix H of the permit) are also generally addressed with best management practices.

In addition to the permit requirements regarding specific impaired waters, the permit contains a general requirement that no permitted discharge may "cause or contribute to" an exceedance of water quality standards. Between this provision and the more specific requirements, there are many opportunities for cities and towns to leave themselves open to citizen suits alleging permit violations from discharges to impaired waters. Therefore, municipalities discharging into impaired waters should pay close attention to their new stormwater pollutant reduction obligations.

The Role of Municipal Counsel

If your municipal clients do not plan to appeal the 2016 permit (following the procedure described in the last article), you may be inclined to file these two articles away and wait to be asked to assist when needed. This is a reasonable approach for municipalities that are already fully implementing the requirements of the 2003 permit and have a knowledgeable environmental consultant (or even in-house staff) poised to provide advice on compliance with the 2016 permit. But for municipalities

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that are still trying to catch up with the 2003 permit requirements, counsel should focus on permit noncompliance as a legal vulnerability for the municipality and help the municipality determine what steps are needed to achieve compliance and avoid enforcement. Also, counsel can help prevent or resolve disputes with residents as the municipality implements the required procedures to control pollutants entering the municipal storm drain system. Thus, there are situations in which reaching out to your clients now to offer assistance with the 2016 MS4 permit is warranted.

STRICTER PUBLIC RECORDS LAW SIGNED INTO LAW

By: Matthew G. Feher, Esq., Burns and Levinson, LLP

After a year of intense debate, legislation overhauling the state's public records law for first time in over 40 years was signed by Gov. Charlie Baker on June 3 (becoming Chapter 121 of the Acts of 2016, the "Act"). The provisions of the Act take effect on January 1, 2017, and the Secretary of State's office is expected to release new regulations sometime later this year.

Among other things, the Act sets new timeframes that must be complied with to produce public records, exempt certain time associated with fulfilling the request from reimbursement and allow requestors to appeal directly to the courts to compel compliance. The Act does not change any of the currently applicable exemptions to the definition of public record.

All municipalities would be required to designate a records access officer ("RAO") who shall be responsible, among other things, for timely fulfilling records requests and preparing guidelines that must be posted on the agency or municipal website before July 1, 2017.

Record requests must be made in writing and public records must generally be produced electronically.

Compliance Timeframes

The RAO must generally permit inspection or furnish a copy of the public record within ten (10) business days from the date the request was made. If the municipality cannot do so, the RAO must so inform the requester within the 10-day period and provide a thorough response that, among other things, identifies the records or categories of records withheld and the exemption relied upon, and a reasonable timeframe not to exceed 25 business days whereby a public record will be produced.

Within 20 business days from the request, or within 10 business days from a determination the Supervisor of Public Records ("Supervisor") that the record sought is a public record, the municipality may petition the Supervisor for a single 30-day extension of the time. The Supervisor has the discretion to grant an indefinite period of time or relieve the municipality from its obligation if the request is frivolous or harassing.

Fees

A RAO may assess a reasonable fee for producing a public record. Such fee cannot exceed the actual cost of producing the record and cannot exceed 5¢ per page for black and white copies or printouts. The Act exempts the first 2 hours of municipal employee time from reimbursement (this exemption does not apply to communities with a population under 20,000) and caps the hourly rate thereafter at $25. In either case, the full amount of employee time is reimbursable if such time is spent redacting or segregating records if required (not permitted) by law and if approved by the Supervisor. An agency or municipality may petition the Supervisor to exceed these limitations.

Enforcement

The prior law's enforcement provisions were changed drastically by the new Act. Most notably, a requester no longer has to exhaust administrative remedies before seeking judicial review. The Act allows a requestor to appeal directly to Superior Court. Moreover, the Attorney General may file a complaint at any time to enforce the law.

In the case of administrative review, the Supervisor must render its written determination within 10 business days of receipt of the petition and shall order timely and appropriate relief. An aggrieved requestor may obtain judicial review in the nature of certiorari.

In any judicial action, the courts shall have the authority to enjoin the agency or municipal action, determine the propriety of any agency or municipal action de novo, and inspect the public records *in camera* (unless such records are privileged as in the case of attorney-client privileged communications).

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If the requestor obtains judicial relief, the courts may award reasonable attorneys' fees and costs. There shall be a presumption in favor of awarding attorneys' fees and costs unless the municipality establishes that (1) the Supervisor found that it did not violate the law; (2) it reasonably relied in a published opinion of an appellate court of Attorney General opinion; (3) the request was intended to harass or intimidate; or (4) the request was made for a commercial purpose. The agency or municipality must waive any fees otherwise due to it for producing a record in the event the court award attorneys' fees and costs.

The court may also award punitive damages against the defendant agency or municipality in an amount of $1,000 to $5,000 if the requestor obtains judicial relief and has demonstrated that the agency or municipality "did not act in good faith"

MMLA Priorities

While the Act includes many of the Senate version's burdensome language, the compromise legislation does include several improvements advocated by MMLA including the requirement that requests be made in writing, the measurement of all timelines using business days, the exemption of smaller towns from the otherwise applicable fee reimbursement restrictions, the relief the Supervisor may grant if the request is frivolous or harassing and the maintenance of judicial discretion in the areas of attorneys' fees and damages.

While the MMLA favored the House language (particularly its emphasis on encouraging exhaustion of administrative remedies), the Act is a significant improvement over the Committee bill that was released last fall and up for quick action. If it was not for MMLA and MMA, the final package could have potentially been detrimental to local government and expose individuals to fines and penalties.

Burns & Levinson LLP, Massachusetts Municipal Association and MMLA will be co-sponsoring a forum on the new Act this fall. Please check www.massmunilaw.org for details.

WATCHING WETLANDS LIKE A *HAWKE*: Good News, U.S. Supreme Court Enables Challenges of Jurisdictional Determinations

By: Kirsten Yerger, Intern, Robinson & Cole LLP and Dwight Merriam, Esq. of Robinson & Cole, LLP

It is no easy task to identify what is and what is not a wetland.[1] The three-factor U.S. Army USACE of Engineers (USACE) and Environmental Protection Agency's (USEPA) test is hardly definitive: "Those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas."[2]

Municipal lawyers can very quickly find themselves up to their elbows in the jurisdictional muck when dragged into the wetlands delineation issues created not just by developers, but even by their own local governments making infrastructure and public facility improvements. No city or town solicitor wants to find their local government in the position of having violated federal law by damaging or destroying regulated wetlands. At the same time land is such a finite resource that solicitors want to help their communities make maximum use of it. Up until now, local governments were left in the intractable position of not being able to make timely challenges to disputes as to the limits of wetlands. But there is good news from the U.S. Supreme Court that benefits all of the stakeholders – developers, land owners, neighbors, advocacy groups, and of course state and local government.[3]

The Clean Water Act

The Clean Water Act (CWA) regulates specific land development by individuals, industrial and commercial facilities, and municipalities. Whether property can be

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Note: All the following references can be found at a single site: http://tinyurl.com/HawkesResources

1. Michael S. Klein, Michael W. Klemens & Dwight H. Merriam, *Where's Waldo? Finding Federal Wetlands After the Rapanos Decision,* 29 Zoning and Planning Report (2006)
2. http://tinyurl.com/hb59a5a
3. *United States Army Corps of Engineers v. Hawkes*, No. 15-290, (May 31, 2016) http://tinyurl.com/ACOEHawkes

developed at all often turns on regulation under CWA § 404 Dredge and Fill and consideration of whether there is a wetland.

The CWA regulates any "discharge" from a "point source" in to "waters of the United States;"[4] however, this standard is often met with much uncertainty. Over the years the USEPA and USACE have attempted to broaden the reach of the Clean Water Act, specifically the definition and application of the term "navigable waters." While there is not much argument over what are traditional navigable waters (TNWs), i.e. those that are navigable-in-fact, those waters that are non-TNW, such as wetlands, are often the subject of confusion for those planning development. Wetlands wonks will call that an understatement.

In 2004-2005 the USACE, along with the USEPA, created a standardized system to document jurisdiction determinations (hereafter JDs), to alleviate the question of whether a body of water is in fact navigable.[5] A JD is defined as a "determination that a wetland and/or waterbody is subject to regulatory jurisdiction under Section 404 of the Clean Water Act (33 U.S.C. 1344)."[6]

The question of whether or not a body of water is "navigable" and subject to regulation remained controversial up to, and after, the 2006 Supreme Court decision in *Rapanos v. U.S.* and *Carabell v. U.S. (Rapanos)*. Rapanos resulted in a plurality 4-1-4 opinion, establishing that non-TNWs and wetlands adjacent to non-TNWs are subject to CWA regulation if:

> (1) if the water body is relatively permanent, or if the water body is a wetland that directly abuts (e.g., the wetland is not separated from the tributary by uplands, a berm, dike, or similar feature) a relatively permanent water body (RPW), or (2) if a water body, in combination with all wetlands adjacent to that water body, has a *significant nexus* with TNWs. (*emphasis added*)[7]

The Hobson's Choice

After the decision in Rapanos the USEPA and the USACE prepared a memorandum, "Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States*",[8] in an attempt to provide guidance for identifying those waters which are categorically subject to regulation under the CWA, i.e. TNWs and waters adjacent to TNW, and those that require a case-by-case review and jurisdictional determination.

In addition to that Clean Water Act Jurisdiction memorandum, the USACE and USEPA are bound by the Memorandum of Agreement: Exemptions Under Section 404(F) of the Clean Water Act §VI–A (1989) (MOA). The MOA established that a JD is valid for five years.[9] In effect, the USACE and USEPA are barred, for five years, from bringing an action under the CWA with regard to an area that received a negative JD. In the classic what-the-government-gives-with-one-hand-it-takes-away-with-the-other, the MOA also effectively created a five year zone of potential liability for a positive JD. Applicants with a positive JD who believed the USACE or USEPA to be wrong had no real choices –they could abandon their projects, or go on with their work in the disputed areas risking major criminal and civil penalties, or subject themselves to the almost-always lengthy and expensive permitting process.[10]

SCOTUS Swoops In with Hawkes

While the JD, and the decision in *Rapanos*, may have removed some question of whether a body is or is not jurisdictional, before the recent Supreme Court decision in *United States Army Corps of Engineers v. Hawkes* the JD was not reviewable in court. Prior to *Hawkes*, the United States Court of Appeals for the Fifth Circuit in *Belle Co. v. U.S. Army Corps of Engineers,*[11] rejected the notion that a JD is reviewable in court under the Administrative Procedure Act, stating that a JD is not a final agency action. The Fifth Circuit held that a JD was not an action "by which rights or obligations have

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4. 33 U. S. C. §§1311(a), 1362(7), (12)
5. U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook http://tinyurl.com/jro663e
6. 33 CFR § 331.2
7. U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook http://tinyurl.com/jro663e; Dwight H. Merriam, *Up the Creek Without a Paddle: The U.S. Supreme Court Decides Little in Deciding Rapanos and Carabell*, 55 American Planning Association, Planning and Environmental Law 3 (2006)
8. http://tinyurl.com/RapanosJurisd
9. EPA, Memorandum of Agreement: Exemptions Under Section 404(F) of the Clean Water Act §VI–A (1989)
10. *United States Army Corps of Engineers v. Hawkes,* No. 15-290, 2016 U.S. LEXIS 3489 (May 31, 2016)
11. *Belle Co., L.L.C. v. United States Army Corps of Eng'rs,* 761 F.3d 383 (5th Cir. 2014) http://tinyurl.com/BelleCo

been determined, or from which legal consequences will flow,"[12] and therefore is not reviewable in court. However, a circuit split ensued when the Eight Circuit held that a JD is a final agency action and therefore reviewable in court reversing the District Court for the District of Minnesota in *Hawkes Co. v. United States Army Corps of Engineers.*[13]

In a unanimous 8-0 decision, the Supreme Court resolved the circuit split and determined that JDs are final decisions reviewable in Court. While the decision came with multiple concurring opinions, Chief Justice Roberts stated that a JD meets the two requirements set forth in Bennet v. Spear that the action is "the consummation of the agency's decisionmaking process" and also "one by which rights or obligations have been determined, or from which legal consequences will flow"[14] and is therefore a final agency action subject to judicial review.[15]

Ultimately the Court stated that a JD is the result of the USACE's decision making process on that question, and that the "definitive nature of approved JDs" as well as the applicable MOA gives rise to "direct and appreciable legal consequences." The Court also noted that there is no adequate alternative to APA review in court.[16] An open question is whether the USACE and USEPA might negate the Court's decision by issuing a new Memorandum of Agreement that steps back from such "direct and appreciable legal consequences" thereby making them in some way less definitive.

What's Sauce For The Goose Is Sauce For The Gander

Hawkes not only created a timelier path to a remedy for private landowners and developers, but also for municipal leaders who are equally exposed to potential CWA liability. It is important that municipalities understand the effect of *Hawkes* on both the land use approval process, as well as instances in which municipalities are applicants themselves.

Municipalities are the ultimate arbitrators of the land use application and approval process. A landowner who intends to develop in a wetland area is almost certain to face requirements under the CWA. Now, post-*Hawkes* where an applicant plans to develop, has received a positive JD, this JD may be reviewed in federal court without being forced into Procrustean Bed of the § 404 Dredge and Fill permitting process. This immediate challenge to the JD in many cases may expedite the l and use approval process by removing the need to obtain a permit or, just as importantly, by resolving the jurisdictional dispute and forcing a modification or abandonment of the development.

Likewise, municipalities often times are applicants themselves. When a municipality plans to build a new school, expand a police station, run a sewer line cross-country, or widen a local road, it must comply with the applicable federal statutes. If those improvements happen to fall within an area that may be subject to CWA regulation, the municipality may now find itself, just like any other developer, headed off to court to resolve a disagreement with the regulators over a positive JD. Hawkes is good for all concerned and it was a long time in coming. The net result should be more speed and certainty in development, less time and money spent in fighting over projects underway in disputed areas, and better protection for the valuable wetlands resources so critically important to sustainability.

MUNICIPAL CASE LAW UPDATE

SUZANNE PALITZ, TRUSTEE V. ZONING BOARD OF APPEALS OF TISBURY, ET AL. SJC-11678 – March 3, 2015

By: Carol Hajjar McGravey, Esq. Urbelis & Fieldsteel, LLP

In this case, the Supreme Judicial Court considered whether a division of land under G.L. c. 41, §81L (the "existing structures" exemption to the Subdivision Control Law) confers "grandfather" status on the structures on the lots, protecting them against new zoning nonconformities created by the division of the lots.

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12. *Belle Co.* at 9
13. *Hawkes Co. v. United States Army Corps of Eng'rs,* 782 F.3d 994 (8th Cir. 2015) http://tinyurl.com/Hawkes8thCir
14. *Hawkes at 5*
15. *Hawkes at 8*
16. *Hawkes at 8*

G.L. c. 41, §81L provides that a "[s]ubdivision" does not include "the division of a tract of land on which two or more buildings were standing when the subdivision control law went into effect in the city or town in which the land lies into separate lots on each of which one of the buildings remains standing."

The lot at issue in this case was created in 1994 and contains a structure built before both the Subdivision Control Law and the Zoning Act became effective in Tisbury. The plaintiff in this case was seeking a permit to demolish the existing structure and build a new one that was larger and taller.

When the lot was created by an ANR plan in 1994, it did not conform to minimum lot size or frontage requirements. The dwelling was also rendered nonconforming regarding its front and side setbacks. The owner at the time sought and obtained a variance in order to make the dwelling and lot lawful. The plaintiff acquired the lot in 2007, and later sought a building permit to tear down the house and construct a new one that would maintain the existing footprint, but be ten feet taller. The building inspector denied the permit, and the zoning board denied a variance. The plaintiff appealed, and the Land Court granted summary judgment in favor of the zoning board.

The Supreme Judicial Court took the case on direct appellate review and affirmed the judgment of the Land Court. In so doing, the SJC held that an ANR endorsement under the "existing structures" exemption allows an applicant to record a plan dividing the lots in question without Planning Board approval, but does not address whether the structures on the lots comply with zoning bylaws. The Court also held that the variance obtained when the lots were divided did not confer permanent "grandfathering" of the structure, so in order to demolish and re-build the house, a new or amended variance was needed.

Because an ANR endorsement does not render the resulting lots compliant with zoning, a landowner may seek a variance or seek grandfather status under G.L. c. 40A, §6, which allows grandfathered structures to be altered without a variance provided that "(1) the extensions or changes themselves comply with the ordinance or bylaw, and (2) the structures as extended or changed are found to be not substantially more detrimental to the neighborhood than the preexisting nonconforming structures." *Rockwood v. Snow Inn Corp*, 409 Mass. 361, 364 (1991)

In cases such as this one, where a new nonconformity is proposed, the Court held that a variance is required because the proposed reconstruction would have expanded the nonconformities permitted by the first variance. The Zoning Act's grandfather provisions do not incorporate the ANR provisions of the subdivision control law, The Court reasoned that the subdivision control law and the zoning laws are independent statutory schemes, and the fact that the zoning anomalies arose from the s. 81L subdivision exemption did not confer a permanent zoning exemption on the structures standing on the lots so divided. In order to secure lawful status for such a reconstruction, a variance is needed.

CASE SUMMARY

LOPEZ V. CITY OF LAWRENCE ET AL, — F.3d — (1st Cir. 2016).

By: Christopher J. Petrini, Esq. and Christopher L. Brown, Esq., Petrini & Associates, P.C.

Recently, the First Circuit Court of Appeals issued a significant decision in the area of disparate impact discrimination under Title VII. The Court affirmed the District Court judgment (O'Toole, J.) following an 18 day jury-waived trial, in favor of six Massachusetts cities and the MBTA, against a challenge by minority police officers to promotional examinations for police sergeant which were created and administered by the Commonwealth's Human Resources Division ("HRD") for the 2005-2008 time period. Notably, the First Circuit had issued a decision earlier in the case finding that HRD was not an employer under Title VII despite its central role in the challenged examinations, thus leaving the six municipal defendants and the MBTA to defend HRD's exam. See *Lopez v. Massachusetts*, 588 F.3d 69 (1st Cir. 2009).

The plaintiffs alleged that the promotional exams resulted in disparate impact to African-American and Hispanic officers, who the plaintiffs contended were not selected for promotion at as great a rate as non-minority officers. Boston was alone among the defendants in not disputing that the exam results had a sufficiently adverse impact on minority promotions to warrant an inference of disparate impact discrimination. At issue for the

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remaining defendants was whether the promotional statistics for the individual communities – based on promotional lists particular to each community – could be aggregated together to show disparate impact. Another issue was whether statistical hiring data of communities could be aggregated over multiple years, notwithstanding the existence of multiple civil service hiring lists, to prove disparate impact.

The 1st Circuit side-stepped the statistical aggregation issues by focusing its decision narrowly on the 2005 and 2008 Boston exams only, as this issue resolved the claims against all of the defendants. In a 2-1 decision, the majority held that while the exams did have a disparate impact on the promotion of minority candidates for police sergeant, the exams were valid selection tools that did not violate Title VII and the plaintiffs failed to prove there was an acceptable alternative available that would have had a lesser disparate impact while equally or better serving the business needs of the employer. Judge Torruella dissented in part, disagreeing that the challenged exams were valid under Title VII. On June 15, 2016, counsel for the officers filed a petition for rehearing en banc with the First Circuit. Given the high profile nature of this case, it is highly likely that if the petition is denied, an application for certiorari to the U.S. Supreme Court will be filed by the plaintiffs.

Further clouding the future is a pending lower court case in a separate USDC matter involving the police lieutenant promotional exam, *Smith v. City of Boston*, — F. Supp. 3d — (D. Mass. 2015). In that case, Judge Young ruled in favor of the plaintiff police officers in the liability phase of a bifurcated trial finding that the plaintiffs established a prima facie case of disparate impact under Title VII and that Boston failed to demonstrate that the examination at issue (the 2008 promotional exam) was job-related. The damages phase is ongoing and it appears from the online docket that the parties are engaging in ADR.

Although the issue of aggregation of data to evidence disparate impact discrimination was left unanswered by the 1st Circuit's decision in *Lopez*, the decision still represents a positive outcome for cities and town as it continues to give municipalities greater flexibility in hiring and does not subject one municipality to statistical aggregation of hiring data from other communities, or aggregation of data over multiple years within the same community, which were the central theories of Title VII disparate impact liability argued by the plaintiffs/appellants against the non-Boston defendants.

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The civil service system under which the exams were created, for all the criticism it endures, continues to be relied upon by approximately 162 cities and towns in Massachusetts, many without the resources to create and administer such exams themselves. The practical effect of a reversal or remand of the lower court's decision could have been deleterious to local governments, essentially vesting administrative and financial responsibility for remedying alleged disparate impact of the statewide examination on individual communities that did not create or administer the exam in the first place and are ill-equipped to craft an acceptable alternative.

UNSOCIAL MEDIA: STRATEGIES FOR ADDRESSING INAPPROPRIATE POSTS BY MUNICIPAL EMPLOYEES

By: Michael R. Bertoncini, Jackson Lewis P.C.

Widespread employee use of social media challenges municipal employers. A recent Pew Research Center study shows that 65 percent of American adults use social networking sites.[1] Many of these users are commenting about their workplaces – and they are not always flattering. In another survey, more than 70 percent of businesses reported disciplining employees for social media misuse.[2]

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1. *Social Media Use: 2005-2015,* Andrew Perrin, Pew Research Center (October 8, 2015), accessed online on June 13, 2016, at http://www.pewinternet.org/2015/10/08/social-networking-usage-2005-2015/.
2. *Social Media in the Workplace Around the World 3.0,* Proskauer Rose LLP (2013/14 Survey), accessed online on June 13, 2016, at http://www.proskauer.com/files/News/4b7b2510-9529-46ae-8832-1784ef8d2927/Presentation/NewsAttachment/a4678020-1e5e-4427-b157-245425d994d5/social-media-in-the-workplace-2014.pdf.

Employers hoping to curb employees who criticize them online or disclose sensitive information on social media sites must be aware of a developing body of law that often gives employees wide latitude in these activities. For example, the National Labor Relations Board has issued several decisions and guidance implying employee use of social media may be protected activity. This article discusses how the NLRB's approach to social media issues could be applied to municipal employers in Massachusetts.

Protected Concerted Activity

Section 2 of Chapter 150E of the Massachusetts General Laws protects a public employee's right to engage in concerted activity for the purpose of influencing collective bargaining and for other mutual aid or protection.[3] An employee engages in protected concerted activity within the meaning of Section 2 when he or she engages in activity protesting working conditions or speaks publicly about issues affecting employees' wages, hours, or terms and conditions of employment.[4]

To qualify for the protections of the law, the employee's activity must be for the purpose of collective bargaining or other mutual aid and protection rather than solely for himself or herself.[5] Even concerted activity can lose the protection of the statute if it is found to be unlawful, violent, a breach of contract, indefensibly disloyal to the employer, or disruptive of the employer's business.[6]

Similar protections are afforded to private sector employees under Section 7 of the National Labor Relations Act ("NLRA"). In recent years, the NLRB has issued guidance regarding employer social media policies and employer rights to discipline employees for using social media to criticize employers.[7] The NLRB also has issued several decisions finding employee statements on social media that are critical of the employee's employer are protected by the NLRA. Because the Massachusetts Labor Commission regularly looks to NLRB decisions when interpreting Chapter 150E, a review of recent NLRB decisions on employee use of social media may be instructive.[8]

Recent NLRB Decisions

In *Chipotle Servs., LLC,* 04-CA-147315 (March 16, 2016), an NLRB Administrative Law Judge ("ALJ") held the employer violated the NLRA when it asked an employee to delete his work-related tweets. The employee tweeted that employees had to work on snow days when other workers were off. The employee also engaged in an exchange over Twitter with a customer. The customer posted: "Free chipotle is the best thanks," and the employee responded "nothing is free, only cheap #labor. Crew members only make $8.50hr how much is that steak bowl really?" In another exchange, the employee responded to a customer's post with a comment that the employer charged for guacamole while another chain did not. When the employer asked the employee to delete the tweets, he agreed to do so. However, the ALJ found the employer violated the NLRA when it asked the employee to delete the tweets because the tweets concerned wages and work issues that were "truly group complaints," and posting them on Twitter "had the purpose of educating the public and creating sympathy for hourly workers in general and [employer's] workers in specific."

In another case involving online criticism of an employer, a federal appeals court affirmed the NLRB's finding that the employer violated the NLRA by discharging employees who complained on Facebook about their belief that the employer's tax withholding errors resulted in the employees paying extra taxes on their earnings.[9] The U.S. Court of Appeals for the Second Circuit, in New York, rejected the employer's argument that the Facebook postings were not protected by the NLRA because they included obscenities (e.g., one employee referred to a manager as an "asshole") and the employer's customers could have seen such statements. The Second Circuit found that accepting the employer's argument could result in a chilling effect of virtually all online employee speech. The Second Circuit affirmed the NLRB's reasoning that the Facebook comments were not so disloyal as to lose the protection of the NLRA since they "did not even mention [the employer's] products or services, much less disparage them." The Second Circuit also affirmed

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3. 40 *Andover School Committee,* MLC 1, 11 (2013), citing *Lenox Educ. Assoc. v. Labor Relations Comm.,* 393 Mass. 276, 281 (1984).
4. *Andover School Committee, supra,* citing *Town of Winchester,* 19 MLC 1591, 1597 (1992).
5. *See Arlington School Committee,* 38 MLC 298, 307 (2012).
6. *Andover School Committee, supra,* citing *Town of Bolton,* 32 MLC, 13, 18 (2005).
7. Memorandum OM 12-59; Memorandum OM 12-31; Memorandum OM 11-74.
8. *See Town of Plymouth*, 40 MLC 65, 68 (2013).
9. *Triple Play Sports Bar and Grille v. NLRB,* Civil Action No. 14-3284, 2015 U.S. App. LEXIS 18493 (2d Cir. Oct. 21, 2015) (unpublished).

the NLRB's determination that the employer's internet/blogging policy, which barred employees from engaging in "inappropriate discussions," was unlawfully overbroad and violated the NLRA.[10]

In another case involving an employer's social media policy, an NLRB ALJ held the employer violated the NLRA by maintaining several unlawful handbook policies.[11] One policy prohibited employees from engaging in "the spreading of malicious gossip or rumors" or "creating general discord." The ALJ found employees could view the prohibition on "discord" as barring them from engaging in lawful activity, such as complaining about working conditions. The employer's social media policy stated that "Social Media should never be used in a way that defames or disparages the Company," and employees were not permitted to mention the employer or anything about it on social media. The ALJ found that employees likely would read the social media policy as requiring them to refrain from engaging in protected concerted activity, such as lawfully discussing or disclosing information about their working conditions. This rendered the policy unlawful.

Practical Considerations for Addressing Social Media Issues

Municipal employers may consider the following when developing policies regarding employee use of social media:

- Include clear statements that postings containing confidential personnel or security information, as well as discriminatory statements or sexual innuendos regarding co-workers, management, consumers or vendors, will not be tolerated and will subject the individual to discipline.
- Make clear that policies apply to postings and blogging occurring at any time on any device.
- Include detailed explanations of what is considered "acceptable use."
- Distribute the policies to all employees with annual or more frequent reminders.
- Require employee acknowledgments of receipt of all of the above.
- Uniform policy enforcement, training and monitoring as appropriate.

In addition, when considering taking disciplinary action against an employee in connection with a social media posting, municipalities should evaluate the following:

- Does the posting seek to initiate, induce, or prepare for group action?
- Does the posting reference conversations with co-workers that occurred before postings were made so that the posting is a logical extension of those conversations?
- Does the posting seek to bring group complaints to the attention of management?
- Is the posting unlawful, violent, a breach of contract, indefensibly disloyal to the employer, or disruptive of the employer's business so as to lose the protection of the law?

There are few bright-line tests in this area, so municipalities should confer with experienced counsel before implementing social media policies or disciplining employees for misuse of social media.

10. This is an unpublished decision, and therefore does not have precedential authority in the Second Circuit. Following the decision, on October 23, 2015, the NLRB petitioned the Second Circuit to give the decision precedential authority because of its importance to employees' online speech rights. The Second Circuit denied the Board's application on October 28, 2015.
11. *Georgia Auto Pawn,* 10-CA-132943 (Oct. 21, 2015).

IN MEMORY OF AND A TRIBUTE TO OUR FRIEND AND COLLEAGUE

George E. "Skip" Lane, Jr., Esq.
June 5, 2016

Included herein are sentiments shared on the MMLA listserv with members as our community mourned George's passing and reflected upon his life and our invaluable experiences with him.

"George was Town Counsel and Town Solicitor of Weymouth for over 24 years. He was an active member of the Massachusetts Municipal Lawyers Association and past president of the MMLA. George was very experienced in the law, particularly local government law, and always willing to share his knowledge with us. He treasured the many friendships he had with us, and I know we all loved him and valued our association with him. George will be missed. May his memory be a blessing for his family and friends." — James Lampke, Esq.

"We have lost a dear friend, wise colleague, and generous soul." — Bob Ritchie, Esq.

"George was the crème de la crème...he will be missed by all who were blessed to have known him." — Matthew Feher, Esq.

"A gentleman and a mentor. Such a loss." — Stacey Bloom, Esq.

"The one attribute I most associate with George and will most remember him for was, simply, his cheerful kindness." — Don Rider, Esq.

"George was a wonderful colleague, mentor, and friend. His generosity of spirit, conviviality, good humor and wise insight will be missed." — Henry C. Luthin, Esq.

"George was generous with his time and talent. Never too busy to return a call. A true gentleman and a gentle man. I will miss him tremendously." — Debbie Phillips, Esq.

"George Lane will live on, provided we municipal lawyers embody his kindness, humor, collegiality, generosity, conviviality, civility, and knowledge and, by good example, pass these qualities on. He will be profoundly missed." — Charles J. Zaroulis, Esq.

"George was not only a top shelf municipal lawyer, but one of the truly good guys in life." — Gerry Moody, Esq.

"George was a wonderful human being and will be missed by so many who had the privilege to know him." — Tom Urbelis, Esq.

"George was a valuable resource, a mentor to others and a good friend. He will be sorely missed by the Town of Weymouth, the MMLA and those of us fortunate enough to share his company." — John Davis, Esq.

"A kind and warm hearted soul. It made my day whenever I saw him at any event. He was a true gentleman. I will miss him." — Jennifer Dopazo Gilbert, Esq.

"George was a friendly, kind man and will be missed by many." — Donna Brewer, Esq.

"Last summer, my family and I had a week's vacation at a Cape house on Trinity Cove Road, Dennis. On afternoon #1 we get a knock at the door and George is on our deck having heard a fellow solicitor was 'in the neighborhood.' He entertained me for over 2 hours notably mentioning many of you as cherished colleagues, and, did not fail to promote participation in the association." — Mike Smerczynski, Esq.

"George was so unassuming and with so much to give. It always began with a warm and sincere hello and asking how you were. Making you both feel and know that he cared both for you and what you had to say." — Bill Solomon, Esq.

"George has been a friend to all of us on the South Shore in particular." — Bob Galvin, Esq.

"...and a loss for us on the North Shore as well. George was always happy to help navigate me through this rookie year as town counsel for Nahant; we were just discussing procurement issues 2 weeks ago. He sounded great!" — Daniel Skrip, Esq.

Joining to honor "Skip and his friendship, loyalty and assistance to all of us in the profession." — Bob Troy, Esq.

"George will be missed for his knowledge, good humor, and friendliness to all." — John J. Goldrosen, Esq.

"George was a true gentleman and one of my favorite lawyers. He will be missed greatly." — Christopher Petrini, Esq.

Continued onto page 14

"What a loss to Weymouth, MA, MMLA and the law!" — Greg McGregor, Esq.

"George was bright, hardworking, and always fun to be with. We will all miss him." — Bob Mangiaratti, Esq.

"I, too, will miss George; he always went out of his way to exchange pleasantries including asking about my wife Phyllis. The highest tribute one could bestow upon George is that he was an 'old school' attorney: he respected fellow attorneys and practiced the professional courtesy and civility that used to be commonplace, but unfortunately is too often lacking in today's competitive environment. As another 'old warhorse' who recently passed, my boss and mentor George Howard taught me, you don't cheap shot a fellow attorney." — Mark Cerel, Esq.

"I will miss George very much; things won't be the same without him." — John B. Barrett, Esq.

"Wonderful person and lawyer." — David Houghton, Esq.

"It is with heavy hearts that George's family, friends and colleagues are remembering and honoring a noble, sagacious, jovial and kind-hearted man. George would greet us all with a welcome smile, which began in his bright, blue eyes, as he cheerfully said our names and warmly gave a hug or handshake. His humor, charm and intellect were not only admirable and endearing qualities, but also the reasons for several MMLA colleagues naming George as the Honorable Chair of MMLA's Social Committee last fall at the Annual Meeting. George truly lived life and enjoyed its greatest gifts - beginning with his loving family. Last summer, George received MMLA's prestigious President's Award for his innumerable contributions to municipal law and yeoman's work as Town Solicitor of Weymouth. Additionally, George was featured in the fall 2015 edition of the Massachusetts Municipal Law Quarterly for his extraordinary legal acumen and, therein, he imparted more words of wisdom. George will be missed by all, and forever remembered as the salt of the earth." — Angela Atchue, Esq.

"As fellow municipal lawyers, you knew George much better than I did. George's love of family, friends, and the Town of Weymouth, you have seen more often than me. You do not need me to tell you how much he enjoyed working with you. I could never replace him, fill his shoes, or take his place. Instead, I merely have the honor and privilege of following him in this role. We spoke, but not often enough. Just Friday, I thought of calling him about something on the Council's agenda tonight. But, I got caught up in too many other things and did not make that call. A reminder not to put off things you want to do.

As a most modest tribute, I shared your words with other town employees. You knew him in ways his clients did not. Your eloquence had to be shared with the hundreds of employees he loved working for.

Thank you." — Joe Callanan, Esq., Weymouth Town Solicitor

A note of appreciation from George's son appears below, and it is received and returned with gratitude.

Dear MMLA Members:

One of the easiest ways to learn is to listen. One of the easiest ways to convey one's feelings, thoughts, and sentiments is to put them on paper. My father, being less than computer-savvy shall we say, became an accomplished municipal attorney, in large part, due to the sharing of ideas among all of you in the association, at the expense of many trees that were taken down to print the wealth of information and spirit that has existed for decades among all of you.

There were very few things that George was more proud of than his relationships with the attorneys in MMLA. He often spoke of the various accomplishments by so many of you over the years. He was always excited to meet with, and offer up his assistance to, attorneys new to your group.

So many of you took the time to convey your thoughts and prayers. Very touching is an understatement. It probably need not be said, but if he were here today, his words about each and every one of you would echo your tributes to him.

My sincerest thanks to you all and thank you once again.

— George E. Lane III, Esq.

"What a wonderful tribute to George from his son. It is certainly the mark of a true gentleman that George took pleasure in the accomplishments of others. That was his way." — Michael C. Lehane, Esq.

UPCOMING MUNICIPAL LAW PROGRAMS

Overview: Annual Luncheon, Awards Ceremony and Half-Day Seminar

Date: August 4, 2016
Location: The Publick House in Sturbridge
Time: 11:30am – 6:00pm

Topic: "A Year in Municipal Government and Finance." The program will begin with an overview and then proceed chronologically addressing typical operational and budgeting issues as such arise, depending upon the form of local municipal government. In addition to the budget process, annual and special town meeting practice and procedure, as well as city equivalents will be addressed. Also, included is a case study of a typical building project, from planning and study through development and construction, from the standpoint of local authorizing legislation.

Co-Chairs: Mark Cerel, Esq. and Kathleen Colleary, Esq.

Overview: Annual Meeting and Conference

Dates: September 15-17, 2016
Location: Red Jacket Beach Resort and Inn, Yarmouth, MA

Topics: State and Federal Practice, Constitutional Law for the Municipal Attorney, Public Records Law and Legislative Updates, Environmental and Land Use Updates, Drones and much more! Don't miss this annual favorite where we gather to learn, exchange information and ideas, meet old friends and colleagues and make new introductions while enjoying the Cape. Check the MMLA website at www.massmunilaw.org for more information on registration and programs. Save the dates on your calendar now.

2016-2017 MEMBERSHIP AND DUES FORMS

Reminder: The 2016-2017 membership and dues forms were sent out via U.S. mail from the MMLA office to all enrolled members on record for 2015-2016. Please verify that you received your renewal form, and complete the same. If you did not, or if you know of someone who would like to join our Association, please contact Jim Lampke or Carol Muldoon at the MMLA office (781)-749-9922 or via email at jlampke@massmunilaw.org. Additionally, all persons receiving emails and participating on the MMLA listserv are to be current with their annual dues. Lastly, an added perk applies to those members who work in offices or firms with 12 or fewer attorneys, as renewal of their MMLA memberships automatically enrolls them as members with the Social Law Library in Boston, which includes parking discounts.

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