



# MUNICIPAL LAW NEWSLETTER

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*"the regulations are a step backward and reduce the role and discretion of municipalities."*

## DHCD ISSUES CONTROVERSIAL NEW COMPREHENSIVE PERMIT REGULATIONS

In the face of widespread criticism that it is biased toward developers and indifferent to municipal concerns, the Department of Housing and Community Development ("DHCD") has issued new comprehensive permit regulations seen by many as exacerbating these problems. The new regulations are found at 760 CMR 56.01 et seq. and replace those previously found at 760 CMR 30.00, 760 CMR 31.00 and 760 CMR 45.00. The new regulations appear to further marginalize the role of cities and towns in producing affordable housing by consolidating decision making authority in DHCD and other state agencies. The regulations include the following provisions that impact the authority of municipalities over affordable housing production:

Section 56.03(2)(c) states that units become ineligible for inclusion on the Subsidized Housing Inventory ("SHI") until the issuance of the certificate of occupancy if

more than 18 months elapse after the issuance of the building permit.

Section 56.03(8) provides that a Zoning Board of Appeals ("ZBA") must notify the applicant and DHCD within 15 days of the opening of the ZBA's hearing that it can deny the application on grounds such as the satisfaction of the 10% affordable housing statutory minimum.

The applicant may then appeal this determination to the DHCD through an expedited review process in which the ZBA has the burden of proof.

Section 56.05(2)(a) states that an applicant is required to submit only preliminary plans to the ZBA and that the ZBA may require only sketches of site development plans and architectural drawings for projects of four or fewer units.

Section 56.05(3) states that the ZBA's hearing may not extend beyond 180 days from the date of opening, that the applicant is not required to provide the ZBA with the project

pro forma unless the applicant objects to potential conditions on economic grounds and that the ZBA cannot charge the applicant the cost of obtaining legal advice.



The former Chief Counsel of the DHCD has stated that Section 56.05 should be stricken entirely because DHCD does not have authority pursuant to Chapter 40B to regulate ZBAs. Also, Massachusetts Municipal Association Executive Director Geoffrey Beckwith has stated in a letter to DHCD that the regulations are "a step backward" and "reduce the role and discretion of municipalities while shielding underperforming subsidizing agencies from the type of scrutiny that the Commonwealth's Inspector General has concluded is much needed."

## APPELLATE TAX BOARD RULES POLES AND WIRES ON PUBLIC WAY ARE TAXABLE

The Appellate Tax Board has ruled that poles and wires erected upon public ways are taxable. In *Re Verizon New England, Inc.* ("Verizon"), Docket No. C273560 (March 3, 2008). In *Verizon*, the ATB held that Verizon is taxable on all of its poles and the wires thereon erected upon public ways and ruled that only those cities and towns that filed petitions under M.G.L. c.59, §39 may seek to establish that the value of Verizon's properties in their city or town was substantially higher than the value certified by the Commissioner of Revenue. The ATB also held that its decision applies to fiscal years 2003 through 2008, the years at issue in the appeals and cannot be applied only prospectively as Verizon had argued. The ATB will hold a hearing on the remaining issues in the appeals, including valuation and issue a final decision that likely will be subject to an appeal to the Appeals



Court. The Department of Revenue's Division of Local Services' Bulletin 2008-03B regarding the *Verizon* decision notes that the Department will implement the *Verizon* decision for FY 2009 and does not intend to appeal the decision in any subsequent proceedings. The Department also notes in the Bulletin that "because Verizon may ultimately appeal the ATB's rulings in this order, until any appeal process is complete or foreclosed, the Department will require as part of the tax rate setting process that cities and towns place sufficient amounts in their overlay accounts to cover any potential abatements or refunds that may result in the event the ATB's ruling is not upheld. This includes potential abatements or refunds to corporations subject to central valuation and if the assessors elect to implement the decision locally, to corporations valued locally."

## HOUSE BOND BILL SUMMARY (H. 4594)

On May 21, 2008, the House and Senate both enacted an Act Financing the Production and Preservation of Housing for Low and Moderate Income Residents that provides for \$1.275 billion in capital spending for affordable housing purposes. Highlights of this Act, informally called the Housing Bond Bill, include:

- \$500 million for public housing modernization and repair.
- \$220 million for the Affordable Housing Trust Fund administered by Mass-Housing for the creation and preservation of affordable housing.
- \$125 million for the Housing Stabilization Fund,

which provides to municipalities and other organizations deferred grants and loans for the purchase, preservation and rehabilitation of distressed properties, requires written permission by municipalities, and establishes a "weak market" program for creation of homes in areas with low rates of home ownership.

- \$100 million for the Capital Improvement and Preservation Fund for expiring use properties.
- \$75 million for the Housing Innovations Fund.
- \$55 million for the Community Action Development Grants for housing and urban renewal.
- \$50 million for the Home Modification Loan Program

- \$40 million for Facilities Consolidation Fund.
- \$30 million for Community-Based Housing for persons with disabilities.
- \$30 million for transit-oriented development within neighborhood commercial areas and "Main Street" areas.
- \$10 million (annually) extension and expansion of the Mass. Low Income Housing Tax Credit program, allowing for private investment in affordable housing programs.
- Classification by person/entities receiving funds must now properly classify employees and certify that such employees have proper medical benefits.

*"The Housing Bond Bill includes \$125 million for grants and loans to municipalities for the purchase, preservation and rehabilitation of distressed properties."*

## SJC CLARIFIES LAW REGULATING “MANSIONIZATION”

The Supreme Judicial Court has clarified the authority of local boards of appeal to regulate the construction of large homes on nonconforming lots known as “mansionization.” In *Bjorklund v. Zoning Board of Appeals of Norwell*, 450 Mass. 357 (2008), the SJC adopted the concurring opinion from its earlier split decision in *Bransford v. Zoning Board of Appeals of Edgartown* and upheld the local board’s decision that doubling the size of a single family residential structure on a lot that was nonconforming as to minimum lot area would increase the nonconforming nature of the structure and be substantially more detrimental to the neighborhood than the existing structure. The *Bjorklund* decision affirms the authority of boards of appeal to regulate the mansionization phenomenon under the so called second except clause of Massachusetts General Laws Chapter 40A, Section 6, pursuant to which single and two family residential structures may be altered or reconstructed as a matter of right if the alteration or reconstruction does not increase the nonconforming nature of the structure. The Court recognized the ability of

a property owner to alter or reconstruct a residence within the structure’s existing footprint and living area and labeled as “illusory” concerns over small-scale alterations, extensions, or structural changes to an otherwise conforming house on a lot nonconforming as



to minimum area. The Court stated that as a matter of law the following improvements to a house on such a lot would not constitute intensifications: the addition of a dormer; the addition, or enclosure, of a porch or sunroom; the addition of a one-story garage for no more than two motor vehicles; the conversion of a one-story garage for one motor vehicle to a one-story garage for two motor vehicles; and the addition of small-scale, proportional storage structures, such as sheds used to store gardening and lawn equipment, or sheds used to house swimming pool heaters and equipment.

*“The Court labeled as “illusory” concerns over small scale alterations, extensions or structural changes to an otherwise conforming house on a lot nonconforming as to minimum area.”*

## THE PERILS OF RESPONDING TO PUBLIC RECORDS REQUESTS

Public records requests are a routine part of the municipal law landscape and an often efficient and inexpensive source of information for interested citizens and aggressive commercial entities alike. However, when it comes to the costs and burdens on municipalities to respond to such requests, state law has not yet caught up with court rulings. In 2007, the Massachusetts Supreme Judicial Court at long last formally recognized that cities and towns need not sacrifice the integrity of their confidential communications with attorneys, when responding to requests to disclose public records. Agencies thus are entitled to withhold, or to produce with appropriate deletions, documents that contain substantive communications to and from their attorneys relevant to legal advice.

However, the Massachusetts Public Records Law and regulations do not yet

recognize that legal determination. Municipal bodies are entitled to demand advance payment of estimated costs to review and segregate records to avoid disclosing information that is statutorily exempt from disclosure under that law, such as human resource actions and pending policy deliberations. Yet, because attorney-client privileged information is not listed in the statute’s exemptions, parties that request public records may not agree to pay the often substantial costs to review and segregate, or redact, records to omit that information. In order to preserve privileged communications – and the disputed right to obtain reimbursement of the costs to accomplish that – municipalities must insist on the right of reimbursement in their initial 10-day responses to records requests and then exercise scrupulously their prerogative to review and redact records to excise all privileged communications.

## FARMER-WINERY POURING PERMITS

Many specialty wine retailers/wholesalers or "farmer-winereries" have approached local boards with requests for a specialized pouring permit, i.e., a license granted locally to allow for the on-premise tasting or "pouring" of



wine. This is in addition to the permission to sell wine, which is granted separately by the state. As a result, many local boards, in receipt of such requests, have asked for our guidance in connection with the process to be followed relative to their consideration of such requests, the applicable hearing requirements, the establishment of licensing fees, and whether such farmer-winereries are allowed to open to sell wine without local approval and prior to receiving a pouring license as long as these establishments do not "pour" wine.

You should be aware that prior to approaching the "local licensing authority," which is usually the board of selectmen, any farmer-winery seeking to not

only sell, but also "pour" wine must apply for and be issued a "Farmer-Winery License" directly from the Alcoholic Beverage Control Commission under M.G.L. c. 138, § 19B, which is a required prerequisite to the local granting of a license to sell wine for consumption on the premises.

Accordingly, and when statutorily authorized, the local board may entertain the granting of such a specialized "pouring permit" without any impact on population-based quotas.

The board has broad discretion to determine whether or not to issue a pouring license, i.e., whether the license would serve a "public need in such a manner as to protect the common good." In fact, the court recently defined "need" as including an assessment of public want and the appropriateness of a liquor license at a particular location. Donovan v. City of Woburn, 65 Mass. App. Ct. 375, 381 (2005). For example, the board could justifiably hesitate to authorize a license for a bar

across the street from a public school. Consideration of the number of existing dispensaries in a locality is also a proper concern, as are the views of the inhabitants of the locality in which a license is sought. Ballarin, Inc. v. Licensing Bd. of Boston, 49 Mass. App. Ct. 506, 511 (2000). In making its discretionary determination, the board may take into account a wide range of factors, such as traffic, noise, size, the sort of operation that carries the license, and the reputation of the applicant. Id.

In addition, local boards should be aware that there are no hearing requirements specific to farmer-winery pouring permits and therefore the process is the same as that required for the granting of all Section 12 licenses. The board may determine the amount of the license fee when originally issuing and upon each annual renewal of licenses issued under M.G.L. c. 138, § 12.

Finally, a Farmer-Winery License issued directly by the state allows that licensee to sell wine or winery products, without approval by the board.

*"A farmer-winery must be issued a permit directly from the ABCC before approaching the local licensing authority."*

## CONTINUING EDUCATION FOR CONSTRUCTION SUPERVISORS (H. 4344)

The House and Senate enacted an Act Requiring the Continuing Education of Construction Supervisors. Under this Act, a new 7-member Continuing Education Advisory Council will be created to establish rules and requirements for those persons licensed as construction supervisors. This Act will also enable builders and contractors to stay current on building code requirements and the latest and greatest construction methods and materials, as well as reducing construction by unqualified builders.



## DRINKING WATER GRANTS

The Massachusetts Department of Environmental Protection is now accepting applications for drinking water supply protection grants for fiscal 2009. Municipalities can receive these grants in connection with the acquisition of land for the protection of drinking-water supply and quality. These grants will defray up to 50 percent of the costs of such acquisitions and up to \$500,000.00 total. Applications for grants must be submitted by September 5, 2008. Grants will be awarded in November.



## MASS DEPARTMENT OF PUBLIC SAFETY PROMULGATES EXCAVATION AND TRENCH SAFETY REGULATIONS TO BE ENFORCED JANUARY 1, 2009

On November 2, 2007, the Department of Public Safety, in conjunction with the Division of Occupational Safety, promulgated regulations that establish reasonable standards to prevent unauthorized access to unattended trenches in the Commonwealth and protect public safety pursuant to M.G.L. c. 82A. Chapter 82A is sometimes referred to as "Jackie's Law" and was passed by the Legislature following the death of 4-year-old Jaclyn Moore, who was buried alive when an unattended trench that allegedly had not been shored up collapsed on her in a private backyard.

Three major components of the regulations, found at 520 CMR 14.00, are:

- The requirement that excavators obtain a permit prior to making any trench excavation;
  - Standards for securing an unattended trench; and
  - The authority of the Department to fine excavators for the failure to adhere to the regulations.
- The regulations are intended and written to provide protections for those individuals not actively working in or around a trench, but who are otherwise exposed to it.

Other highlights of the regulations are:

- The requirement that municipalities establish a local permitting authority to act as the permit-granting body for the city or town where trenches are created on municipally or privately-owned land. Municipalities may also choose to create a regionalized permitting authority. The regulations also require that state agencies designate a permitting authority to act as the permit-granting body for the state agency where trenches are cre-

ated on state-owned property or property the agency otherwise has an interest in, including, but not limited to an easement.

- The regulations allow the local permitting authority to charge a reasonable fee to cover the cost of reviewing and processing the permits.
- The requirement that unattended trenches (on public ways and at work sites other than a public way) be secured by covers or barriers, continuously monitored by an attendant, or backfilled to prevent unauthorized access by the general public. (Distinguishing between the general public and the individuals creating and working in the trench is important because the Division of Occupational Safety and the Occupational Safety and Health Administration ("OSHA") already administer laws relative to worker safety.)
- The regulations authorize the permitting authority, the Department Public Safety, or the Division of Occupational Safety to immediately shut down an unattended trench where a public safety threat is identified and prohibit reopening the trench until repairs and corrections are made and the site is reinspected.
- The regulations also authorize the Department to issue a fine not to exceed \$5000.00 for each violation of the regulations, in addition to the revocation or suspension of a permit after a hearing.

You should be aware that both these state agencies have delayed the enforcement of the regulations until January 1, 2009 to provide municipalities and excavators with the opportunity to become familiar with the regulations and take necessary steps to implement the required provisions.

*"The regulations require that municipalities establish a local permitting authority for permitting of trenches on municipally or privately owned land."*

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\*as listed in Massachusetts Lawyers Weekly.

## FIRM NEWS

Deutsch Williams has completed the move to its new offices on the sixth floor of the Boston Design Center in the up and coming Seaport District, which is also home to the John Joseph Moakley U.S. Courthouse, major Boston law firms and the Boston Convention Center. The Seaport District will also be the location of the largest new development project in Boston history, \$3.5 billion Seaport Square, a 23-acre mixed use development which will include 2,500 residential units, 1.4 million square feet of office and lab space, 1.25 million square feet of retail space and a 700-room hotel. Please come visit us the next time you are in the Boston area.