



## MUNICIPAL LAW NEWSLETTER

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## LAND COURT RULES ON TOWN MANAGER'S AUTHORITY TO CONTROL MUNICIPAL LITIGATION

A Justice of the Land Court recently clarified the right of a Town Manager to control the prosecution, defense and settlement of lawsuits involving a municipality, even over the objection of another town board with an interest in the outcome.

In *Baker v. Town of Foxborough*, Land Court Misc. Case No. 370294 (KCL), a group of plaintiffs brought an action against the Town of Foxborough through both its Board of Selectmen and its Conservation Commission. The plaintiffs challenged the establishment of an off-leash "dog park" on land adjacent to plaintiffs' residences that is controlled by the Conservation Commission. The Land Court entered a preliminary injunction imposing certain limitations on the use of the park and scheduled the case for trial. Prior to the trial date, the Town, through its Town Manager, negotiated a settlement of the action. Under the terms of the settlement the Town agreed to close the dog park.

The Conservation Commission objected to the settlement and a group of taxpayers sought to intervene in the Land Court action to block the entry of a consent judgment closing the dog park, seeking an order requiring the Town defer to the position of the Conservation Commission. The Town, through its Town Manager, opposed the motion to intervene based on the Foxborough Town Manager Act, which gives the Town Manager authority to prosecute, defend or compromise litigation for or against the Town "in accordance with the guidance provided by the Board of Selectmen" as the Town Manager had done. The interveners challenged the settlement on the grounds that the land is under the control of the Conser-

vation Commission and, therefore, the case could not be settled without the assent of that board.

The Land Court subsequently rejected the interveners' motion, relying on the text of the Town Manager Act and noted that, while conservation commissions are provided with an extensive grant of authority under M.G.L. c. 40, § 8C, the authority to control litigation concerning conservation land, if granted by that statute, was removed to the Town Manager by Foxborough's Town Manager Act. Applying basic principles of statutory construction, the Land Court affirmed that the Act, passed in 2004, fully authorized the Town Manager and Board of Selectmen to take actions necessary to

compromise the litigation, even if those actions involved closing a facility on conservation land. The decision also noted that the Act contained certain reservations of authority to other Town boards, but none to the Conservation Commission.

We feel that that the Land Court decision clarifies the division of authority under town manager acts throughout

the Commonwealth. Where one of the purposes of such acts is to consolidate the authority to retain counsel and manage litigation in a single office - or a single office in consultation with a Board of Selectmen - the Land Court has left no doubt that the acts mean what they say. By squarely rejecting a challenge to that authority based upon the plain meaning of the statutes, the Land Court has provided a useful precedent in guiding municipalities and other courts in resolving future conflicts between town boards.

The matter is currently on appeal.



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## LOCAL ATTENTION TO ABANDONED AND DILAPIDATED BUILDINGS

As a direct result of the mortgage foreclosure crisis, many cities and towns across the nation have taken action to limit the impact of this situation upon their neighborhoods. The key concern for local governments is that properties involved in foreclosure proceedings are often left unattended, leaving municipalities responsible for securing buildings and residences by taking on tasks such as locking doors, boarding up windows, cutting grass and draining abandoned swimming pools. Because financial institutions are often large, multi-state corporations, it can be difficult, if not impossible for local officials to find a responsible party.

Last May, Mayor Thomas Menino signed into law an ordinance seeking to stop properties involved in foreclosure proceedings from turning into eyesores with the potential to adversely affect the economic stability of the surrounding community. The ordinance ("An Ordinance Regulating the Maintenance

of Vacant, Foreclosing Residential Properties") requires the registration of all owners of vacant and/or foreclosing residential properties in the City of Boston, including the owner's identity, and whether or not the property is vacant at the time of registration. If the property is vacant, the ordinance requires the designation of a local individual or local property management company responsible for the security and maintenance of the property. The owner must notify the City once the property is sold or is no longer vacant. Failure to register the property and to identify a contact person are each punishable by a fine up to \$300.00. Failure to maintain the property is punishable by a fine up to \$300.00 for each week the property is not maintained.



Recognizing that abandoned and/or dilapidated buildings encourage blighted and unsecured properties, cause the surrounding area to suffer from stagnant or declining real estate values, and invariably create significant municipal maintenance and monitoring costs, the Town of Randolph recently requested our assistance, as Town Counsel, in drafting a bylaw aimed at regulating the security and maintenance of such buildings. Similar to the Boston ordinance, the Randolph bylaw requires the owner of an abandoned and/or dilapidated building to register with the Town within 45 days of the building becoming abandoned and/or dilapidated, provide contact information, or face a fine if this requirement is violated. There is also an annual fee requirement, which is part of the registration process, and it increases over time as the building remains abandoned and/or dilapidated.

## TRENCH SAFETY LAW AND REGULATIONS NOW TO BECOME EFFECTIVE BY MARCH 1, 2009

Last November 2007, the Legislature adopted "Jackie's Law" (M.G.L. c. 82A), which requires all municipalities to establish a local authority to implement a permitting system to regulate the digging of trenches on all private property and within all public ways. In furtherance of Jackie's Law, the Massachusetts Department of Public Safety (DPS) adopted regulations (i.e., the Trench Regulations found at 520 C.M.R. § 14.00) setting forth extensive requirements that excavators must comply with prior to engaging in trench work. Originally, beginning on January 1, 2009, all excavators had to obtain a permit prior to the creation of a trench and all municipalities had to establish a

That enforcement date has now changed.

The DPS and the Division of Occupational Safety now expect to file an emergency regulation to extend the deadline for municipalities to implement the Trench Regulations to March 1, 2009. Consequently, we advise municipalities to take advantage of this delay and become familiar with the Trench Regulations so that a permitting procedure is in place by March 1, 2009.

See Volume 1, Issue 1 of our Municipal Law Newsletter, Spring/Summer 2008 edition, for a more comprehensive analysis of



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## SUPREME JUDICIAL COURT CLARIFIES USE OF COMMUNITY PRESERVATION ACT FUNDS

The Supreme Judicial Court has clarified when Community Preservation Act (CPA) funds may be used for work on land for recreational use that was not acquired or created with CPA funds. In *Seideman v. City of Newton*, 452 Mass. 472 (2008), a group of ten taxpayers challenged the use of CPA funds for various projects at two parks that had been used for recreational purposes since before enactment of the CPA. The work involved "reorganizing existing park facilities, grouping the playground structures together, building a new tennis court ... and reconfiguring and relocating the basketball courts, improving curb appeal through landscaping and [the] addition of new fencing, creating new paths, installing water fountains, constructing bleachers, installing additional lighting, interpretive signage and picnic tables, and preserving the ball fields."



The case turned on the interpretation of M.G.L. c. 44B, § 5(b)(2), which states that:

"[t]he community preservation committee shall make recommendations to the legislative body for the acquisition, creation and preservation of open space; for the acquisition, preservation, rehabilitation and restoration of historic resources; for the acquisition, creation and preservation of land for recreational use; for the acquisition, creation, preservation and support of community housing; and for the rehabilitation or restoration of open space, land for recreational use and community housing that is acquired or created as provided in this section. With respect to community housing, the community preservation committee shall recommend, wherever possible, the reuse of existing buildings or construction of new buildings on previously developed sites."

The lower court held that CPA funds could not be used for the work. The lower court noted that the parks were neither acquired nor

created with CPA funds and that such funds could be used only for the rehabilitation or restoration of land for recreational use that was originally acquired or created with CPA funds.

The Supreme Judicial Court upheld the lower court, rejecting the City of Newton's argument that CPA funds could be used to create new recreational uses within existing parks that would make the areas open and accessible to new groups of users, including disabled users. The Court stated that:

"[i]t is significant in this case that the parks have been devoted to recreational uses since before the enactment of the CPA. Contrary to the statutory construction proposed by Newton, the appropriation of CPA funds pursuant to the language of G.L. c. 44B, § 5(b)(2), is for the creation of land for recreational use, not the creation of new recreational uses on existing land already devoted to that purpose. ... Land for recreational use is not being created where a municipality chooses simply to enhance or redevelop that which already exists as such. However, to the extent that a municipality chooses to convert land that had been used for a purpose other than recreational use, including blighted land, or land that, at some point in the past, ceased to exist for recreational purposes, that action by the municipality would constitute the creation of land for recreational use, and CPA funds could be appropriated for the necessary costs of the project. Such statutory construction is in keeping with an underlying principle of the CPA to preserve the character and natural resources of a municipality, particularly its open space, in the face of growing urbanization and development. See G.L. c. 44B, § 2 (defining "[o]pen space" as including "land for recreational use")."

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## MASSACHUSETTS PASSES NATION'S FIRST COMPREHENSIVE OCEAN MANAGEMENT LAW

On May 28, 2008, at the Boston Aquarium, Governor Deval Patrick signed the Oceans Act of 2008 that will require the state to develop a first-in-the-nation integrated ocean management plan to manage, preserve and protect its state-controlled waters, balance natural resource preservation



with traditional and new uses, and include renewable energy. Upon final adoption of this legislation, the ocean plan will be incorporated into the existing coastal zone management plan and enforced through the state's regulatory and permitting processes, including the Massachusetts Environmental Policy Act (MPEPA) and Chapter 91, the Commonwealth's primary tool for protec-

## SUPREME JUDICIAL COURT CLARIFIES USE OF COMMUNITY PRESERVATION ACT FUNDS

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It also constitutes a recognition that in many communities there simply is little available open space, but that real property no longer being used for its original purpose can be transformed to create a new purpose, such as recreational use."

The Court also rejected the City's argument that the work constituted "preservation," stating that "[a]s to Newton's contention that its proposed projects at the parks constitute the 'preservation' of land for recreational use, we conclude that the work for which Newton has sought CPA funds is not designed for the 'protection of ... real property

from injury, harm or destruction.' G.L. c. 44B, § 2. Rather, Newton has requested the appropriation of CPA funds for extensive improvements and upgrades to the parks. Projects of this nature are not encompassed by the statutory definition of 'preservation.'"

The Court also noted that "[w]e agree with the motion judge that the proposed projects set forth in Newton's application to the community preservation committee fall more squarely within the definition of 'rehabilitation,' which includes 'the remodeling, reconstruction and making of extraordinary repairs' to

'lands for recreational use' so that they will be 'functional for their intended use, including but not limited to improvements to comply with the Americans with Disabilities Act.' M.G.L. c. 44B, § 2. However, the appropriation of CPA funds for the parks' 'rehabilitation' is not permitted under G.L. c. 44B, § 5 (b)(2), where, as here, it is undisputed that the parks were not acquired or created with such funds in the first instance."

We would be happy to answer any questions you may have concerning proposed use of CPA funds.

## REBUTTING THE PRESUMPTION THAT DELIVERY OF ALCOHOL IS PRIMA FACIE EVIDENCE OF A SALE

In Volume 1, Issue 1 of our Municipal Law Newsletter, Spring/Summer 2008 edition, we stated that it had come to our attention that many specialty wine retailers/wholesalers or "farmer-wineries" 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 pursuant to M.G.L. c. 138, § 12. This pouring license is in addition to the permission to sell wine, which is granted separately by the state. We have recently seen, however, that a Section 12 "pouring license" may not be required in every case under certain circumstances. More specifically, the presumption that delivery of alcoholic beverages is "prima facie evidence that such a delivery is a sale" and therefore requires a Section 12 license, may, in some limited cases, be sufficiently rebutted.

M.G.L. c. 138, § 41, in part, states that "[t]he delivery of alcoholic beverages in or from a building, booth, stand or other place, except a private dwelling house, or in or from a private dwelling house if any part thereof or its

shop of any kind, or other place of common resort, such delivery in either case being to a person not a resident therein, shall be prima facie evidence that such delivery is a sale." The case law interpreting this section, however, is extremely limited and very dated, and unclear as to under what circumstances the presumption of a sale may be sufficiently rebutted. For example, in *Com. v. Rowe*, 80 Mass. 47 (1859), the Court concluded "[t]hat delivery of intoxicating liquor in a shop was *prima facie* evidence of a sale, but was not conclusive, and might be rebutted or overcome by other evidence in the case [emphasis included in original]." *Id.* at 48. In the case of a farmer-winery where "wine-tasting" is sought, rebutting this presumption may be attempted by such considerations as:

- Delivery to be made in small portions, i.e. tastings, on the premises;
- Without any direct or indirect payment to the applicant; and
- Strictly for the edification of visitors to the farmer winery.



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In light of such affirmations by the applicant, along with any other evidence the local board of selectmen may require to assure it that the applicant will abide by all its conditions and requirements, the board may decide to grant "permission" to pour wine in lieu of a Section 12 permit. It should be noted, however, that such permission (with conditions) is not a license pursuant to Chapter 138 and therefore granted outside the statutory framework common to all locally-granted liquor licenses. In such cases, we have cautioned that the enforceability of such a position by the local board is very uncertain and, as such, will necessitate the imposition of numerous conditions and requirements, in addition to those mentioned above. We have also cautioned that the need for such elaborate and detailed conditions may set the stage for future litigation and that such permission has the potential to create an undesirable local precedent.

## ADOPTION OF GREEN COMMUNITIES ACT

On July 2, 2008, the Legislature adopted the Green Communities Act (St. 2008, c. 169). This Act effectuates a reformation of various state laws to establish a comprehensive, state-wide program to encourage the use of alternative and renewable energy resources and energy efficiency, to lower energy costs, to foster the development of new technologies, and to promote the use of cleaner energy sources and conservation values.

We feel that the Green Communities Act, and the "Green Communities Program" in particular, should benefit municipalities by providing assistance in reducing energy consumption and costs, reducing pollution, facilitating the development of renewable and alternative energy resources, and creating local jobs related to the building of renewable and alternative energy facilities and the installation of energy-efficient equipment. The Green Communities Program will also provide technical and financial assistance in the form of grants and loans for financing some or all the costs of studying, designing, constructing and implementing energy-efficiency activities, including:

- energy conservation measures and projects;
- procurement of energy management services;
- installation of energy-management systems;
- adoption of initiatives to reduce energy demand;
- adopting energy-efficiency policies;
- siting and construction of renewable and alternative energy projects on municipally-owned



- establishing a competitive-bidding procedure for municipal purchasing of electricity with bids at rates to remain uniform for a minimum of 5 years.

To qualify as a green community, a municipality must file an application with the Division of Green Communities, provide for an "as-of right" siting of alternative and renewable energy generating, development or manufacturing facilities, an "expedited" permitting procedure, commit to reducing municipal energy consumption by 20% within 5 years, and require, for all new residential construction exceeding 3,000 s.f. in area and all new commercial construction, the use of energy-efficiency, water-conservation and other renewable-energy, alternative-energy and conservation technologies in construction.

Some more specific highlights of the Green Communities Act include:

- the State Building Code shall use the standards set forth in the International Energy Conservation Code to encourage energy efficiency;
- all higher education construction projects shall incorporate the MA-CHPS Green Schools Guidelines standards;
- utility companies shall purchase all available energy-efficiency improvements whenever those improvements cost less than it costs to generate power, ultimately saving money on electricity bills; and
- utility companies shall offer rebates and other incentives for customers to upgrade lighting, air conditioning and industrial equipment to more efficient models and units, whenever those incentives cost less than gen-

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Deutsch Williams Brooks DeRensis & Holland, P.C. is a Boston-based law firm providing a wide range of legal services. Our clients include cities, towns, school committees, public agencies, corporations, closely held businesses, insurance carriers, non-profit corporations and individuals.

Deutsch Williams is among the one hundred largest law firms in Massachusetts\* and enjoys a scale of operations large enough to serve our clients' needs fully without sacrificing responsiveness and personal attention. It is our philosophy of practice to keep sight of client goals and respond with competent advice, aggressive advocacy and timely follow through. Deutsch Williams regards a positive, responsive relationship with our clients as the key to our effectiveness as counsel.

Whatever a client's needs, a Deutsch Williams attorney is available to listen, confer and take responsibility for achieving a timely, cost-efficient resolution of the matter. We believe in bringing to each client-attorney relationship a personal component that is result-oriented.

\*as listed in Massachusetts Lawyers Weekly.

## FIRM NEWS



Paul DeRensis was named in November 2008 as one of this year's New England's Super Lawyers along with three other members of the firm. The list of 2008 Super Lawyers is assembled by Law & Politics in conjunction with Boston Magazine based on surveys of more than 31,000 lawyers across the New England region aimed at selecting as Super Lawyers the top 5 percent of New England attorneys in more than 60 practice areas and reflects both peer recognition and professional achievement verified through careful selection process to determine New England's best.

Mr. DeRensis' practice is concentrated in the area of municipal law, and he was one of only twelve lawyers recognized as a Super Lawyer in the municipal law area in the six state New England region. This is the fourth time that Mr. DeRensis has been recognized as a municipal "Super Lawyer."

Mr. DeRensis is a graduate of Harvard College and Harvard Law School, and is admitted to practice in New York and Massachusetts and in various federal courts including the United States Supreme Court. He serves as Town Counsel to a number of Massachusetts municipalities.

All New England Super Lawyers will be listed in November's issue of Boston Magazine. If you have any questions, please contact Karen Egan, Director of Human Resources at Deutsch Williams Brooks DeRensis & Holland, P.C. (617.951.2300) or William White, Publisher at Law & Politics (206.282.9527).

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### MMA CONVENTION

The Massachusetts Municipal Association will be holding its annual convention on Friday, January 23rd (11am-5pm) and Saturday January 24th (10am-3pm). Please feel free to stop by the Deutsch Williams booth, where representatives of our Municipal Department will be on hand to answer all your questions and provide you with informative brochures and interactive displays showcasing the firm's wide range of legal services.