Massachusetts Department of Revenue
Division of Local Services

Current Developments in Municipal Law

2010

Court Cases

Book 2

Navjeet K. Bal, Commissioner
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Court Decisions

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Massachusetts Court & Arbitration Cases and Federal Court Cases

MILTON B. ADAMS & another [1] vs. BOARD OF ASSESSORS OF WESTPORT.

1 Marilyn Adams.

No. 09-P-324

APPEALS COURT OF MASSACHUSETTS

76 Mass. App. Ct. 180*; *920 N.E.2d 879*; *2010 Mass. App. LEXIS 81

November 10, 2009, Argued
January 26, 2010, Decided

SUBSEQUENT HISTORY: Review denied by *Adams v. Bd. of Assessors of Westport, 456 Mass. 1106, 925 N.E.2d 864, 2010 Mass. LEXIS 235 (Mass., Apr. 28, 2010)*

PRIOR HISTORY: [*1]**
Suffolk. Appeal from a decision of the Appellate Tax Board.

COUNSEL: Jeffrey T. Blake for Board of Assessors of Westport.

Dana Alan Curhan for the taxpayers.

JUDGES: Present: Rapoza, C.J., Smith, & Lenk, JJ.

OPINION BY: SMITH

OPINION

[*180] [879]** SMITH, J. The board of assessors of Westport (assessors) appeals from a decision of the **[**880]** Appellate Tax Board (tax board) abating a conveyance tax assessed pursuant to *G. L. c. 61A, § 12*, on real estate owned by Milton and Marilyn Adams (taxpayers). We affirm.

Under G. L. c. 61A, the so-called Agricultural Classification Act, [2] "the owner of five acres or more of land that has been in agricultural or horticultural use for the 'two immediately preceding tax years,' *G. L. c. 61A, § 4*, may apply to the board of **[*181]** assessors to have the land assessed on the basis of its value for agricultural purposes only, and not on its value as judged by the 'highest and best use' standard under which real property customarily is assessed." *Franklin v. Wyllie, 443 Mass. 187, 194, 819 N.E.2d 943 (2005)*. Essentially, c. 61A provides a tax break for landowners who devote at least five acres of their property to agricultural or horticultural use.

2 See *Mann v. Assessors of Wareham, 387 Mass. 35, 35, 438 N.E.2d 826 (1982)*.

In exchange for the benefit of the **[***2]** tax break, c. 61A requires that landowners "compensate the municipality if and when the land is sold for or converted to residential, commercial or industrial use" within a prescribed period. *Sudbury v. Scott, 439 Mass. 288, 294, 787 N.E.2d 536 (2003)*. The compensation may take one of three forms. *Id. at 294-295*. First, under *G. L. c. 61A, § 12*, a landowner who sells the subject property, or changes its use, may be liable for a conveyance tax, as was assessed in this case. [3] Second, under *G. L. c. 61A, § 13*, if the land ceases to qualify as agricultural land, rollback taxes may be assessed. [4] Finally, under *G. L. c. 61A, § 14* [5] any property which has **[**881]** been **[*182]** classified under the chapter as agricultural or horticultural cannot be sold for or converted to a nonqualifying use unless the municipality is notified and given a 120-day first refusal option to purchase the subject property.

3 As to a change in use, *G. L. c. 61A, § 12*, inserted by St. 1973, c. 1118, § 1, provides in relevant part that:

> "Any land in agricultural or horticultural use which is valued, assessed and taxed under the provisions of this chapter, if changed by the owner thereof to another use within a period of ten years from the date of **[***3]** its acquisition by said owner, shall be subject to the conveyance tax applicable hereunder at the time of such change in use as if there had been an actual conveyance, and the value of such land for the purpose of determining a total sales price shall be fair market value as determined by the board of assessors of the city or town involved for all other property."

The rate of the conveyance tax is ten percent if the property's use changes in the first year of ownership, and the rate decreases by one percent for each following year, so that if the usage change occurs after ten years of ownership, no conveyance tax will be due. *G. L. c. 61A, § 12*.

4 "Roll-back taxes are the difference between the property taxes actually paid under c. 61A and what would have been paid if the land had been assessed outside of c. 61A, for the current tax year and up to the four preceding tax years. The roll-back taxes only apply if they would exceed the conveyance taxes set forth in *§ 12* of the statute, in which case no conveyance taxes will be assessed against the property. *G. L. c. 61A, § 13*." *Sudbury v. Scott, 439 Mass. at 295 n.8*.

5 *General Laws c. 61A, § 14*, as appearing in St. 2006, c. 394, § 31, states **[***4]** in pertinent part:

> "Land taxed under this chapter shall not be sold for, or converted to, residential, industrial or commercial use while so taxed or within 1 year after that time unless the city or town in which the land is located has been notified of the intent to sell for, or to convert to, that other use . . . . Specific use of land for a residence for the owner, the owner's spouse or [certain others] . . . shall not be a conversion for the purposes of this section
>
> . . . ."

We note that this version of *§ 14* became effective on March 22, 2007, about three-fourths of the way through the 2007 fiscal year for which the tax assessment is in dispute in this case. See St. 2006, c. 394 (approved December 22, 2006, without emergency preamble or specified effective date); *Opinion of the Justices, 368 Mass. 889, 892-893, 336 N.E.2d 728 (1975)* (generally, act without emergency preamble takes effect ninety days from passage unless act specifies later date); *Vittands v. Sudduth, 41 Mass. App. Ct. 515, 518, 671 N.E.2d 527 (1996)* (same). In our view, however, for purposes of the narrow issue on appeal, the relevant language of the prior *§ 14* is substantially similar to that of the new version and leads to the same result. See *G. L. c. 61A, § 14*, **[***5]** inserted by St. 1973, c. 1118, § 1, and as amended by St. 1975, c. 794, § 8.

1. *Factual and procedural background*. The following undisputed facts are taken from the tax board's decision. On June 21, 2005, the taxpayers purchased about thirteen and one-half acres of land on Horseneck Road in Westport. Thereafter, they filed an application for classification pursuant to G. L. c. 61A, requesting an agricultural or horticultural classification of the parcel for fiscal year 2007 based on their planned cultivation of an alfalfa crop. The taxpayers noted the total acreage of 13.41 on the application, but left blank the adjoining line on the form entitled "Acres to be Classified." The assessors granted the application in November, 2005, as to all 13.41 acres, and notified the taxpayers that the classification would be effective as of January 1, 2006, for fiscal year 2007 (July 1, 2006, through June 30, 2007).

On December 11, 2006, the taxpayers applied to the local building inspector for a building permit to begin construction of a home for themselves on a 1.4 acre portion of the parcel. The building permit was issued on January 5, 2007. A few months later, on or about May 11, 2007, the assessors **[***6]** assessed a conveyance tax on some unspecified portion of the parcel pursuant to *G. L. c. 61A, § 12*, presumably as a result of their conclusion **[*183]** that the land was no longer being used for agricultural or horticultural purposes. [6] The tax amounted to $ 61,709, and was computed by applying a nine percent tax rate to a value of $ 685,590, and adding a $ 6.00 "Cert. Fee." [7] The taxpayers thereafter paid the tax, unsuccessfully sought an abatement from the assessors, and appealed to the tax board.

6 The fiscal year 2007 real estate tax bill on which the conveyance tax appears does not indicate the area of the parcel on which the tax was assessed.

7 As the tax board found, it "could not discern from the record the method used to arrive at the valuation or confirm that the tax assessed was based solely on the value of the [1.4 acre] building lot." On the latter point, see *G. L. c. 61A, § 12*, as amended by St. 2006, c. 394, § 26 ("The conveyance tax shall be assessed on only that portion of land on which the use has changed").

Following a hearing, the tax board concluded that the taxpayers' initiation of the building process for a residence on the property for their own habitation did not constitute **[***7]** a change in use within the meaning of *G. L. c. 61A, § 12*, because *G. L. c. 61A, § 14*, explicitly states that "[s]pecific use of land for a residence for the owner . . . shall not be a conversion [to a nonqualifying use] for the purposes of this section . . . ." See note 5, *supra*. The tax board accordingly issued a decision for the taxpayers, and granted an abatement in the amount of $ 61,709 plus statutory additions. This appeal by the assessors followed.

2. *Discussion*. A decision by the tax board will not be modified or reversed if it "is based on both substantial evidence and a correct application of the law." *Boston Professional Hockey Assn., Inc. v. Commissioner of Rev., 443 Mass. 276, 285, 820 N.E.2d 792 (2005)*. "Although the proper interpretation of a **[**882]** statute is for a court to determine, we recognize the [tax] board's expertise in the administration of tax statutes and give weight

to the [tax] board's interpretations." *Raytheon Co. v. Commissioner of Rev., 455 Mass. 334, 337, 916 N.E.2d 372 (2009)*, citing *Bell Atl. Mobile of Mass. Corp., Ltd. v. Commissioner of Rev., 451 Mass. 280, 283, 884 N.E.2d 978 (2008)*. See *Northeast Petroleum Corp. v. Commissioner of Rev., 395 Mass. 207, 213, 479 N.E.2d 163 (1985)* (describing court's "traditional deference **[***8]** to the expertise of the [tax] board in tax matters involving interpretation of the laws of the Commonwealth"); *CFM Buckley/North, LLC v. Assessors of Greenfield, 453 Mass. 404, 406, 902 N.E.2d 381 (2009)*. We strive to adopt a reading "consistent with the purpose of the statute and in harmony with the statute as a whole." *Sudbury v.* **[*184]** *Scott, 439 Mass. at 296 n.11*, and we also bear in mind the general principle favoring strict construction of tax statutes to resolve doubt in favor of taxpayers, see *South St. Nominee Trust v. Assessors of Carlisle, 70 Mass. App. Ct. 853, 856, 878 N.E.2d 931 (2007)*.

Here, the phrase that triggers the conveyance tax in *G. L. c. 61A, § 12*, "[a]ny land . . . changed . . . to another use," is not specifically defined in the statute, nor does it by its terms alone, as the assessors argue, unambiguously apply to the situation here. In its interpretation, the tax board relied on an exception to the notice and option to purchase requirement of *§ 14*, that of building a personal residence on land assessed pursuant to c. 61A, to inform the meaning of *§ 12*, which outlines conveyance tax liability. We agree with the tax board that the owners' building of their personal residence on their agricultural **[***9]** land did not constitute a change in use of that land for the purposes of *§ 12*. Our conclusion is supported by the legislative history and purpose of c. 61A, which were discussed at length in *Sudbury v. Scott, 439 Mass. at 299-301*. Therein, the Supreme Judicial Court observed that c. 61A was enacted because "[t]he Legislature was concerned with the rapidly decreasing number of farms in the Commonwealth during the 1940's and 1950's, and the resulting loss of a vital resource for the people of the Commonwealth." *Id. at 299*. Seeking a way to reverse that trend, the Legislature commissioned several studies between 1955 and 1970, which proposed as a solution the assessment and taxation of agricultural lands at agricultural use value. *Ibid*. The studies "were unanimous in recognizing that real estate taxation contributed to the demise of farms," but also voiced concern that the proposed lowered assessments, while alleviating some of the economic burden on farmers, could also "accelerate the worrisome loss of farmland to speculators and developers who would acquire and hold agricultural property at a low rate of taxation while awaiting the opportunity to convert or sell the land for development." **[***10]** *Id. at 299-300*. The conveyance tax, roll-back tax, and right of first refusal provisions were enacted to address those concerns. See *id. at 300* & n.17, *301*.

The taxpayers' plan to build their residence on their farmland was not the type of activity the Legislature sought to deter or penalize through the enactment of *G. L. c. 61A, § 12*. Rather, **[*185]** the idea of family farming, allowing farmers and farm workers to live on the farm without the burden of additional tax penalties, is exactly the type of activity the Legislature sought to protect and promote though the enactment of c. 61A. The construction of such a residence is not the equivalent of commercial or residential subdivision development under the statute.

[883]** Therefore, because "[w]e interpret a statute consistent with the legislative intent and in order to effectuate the purpose of its framers," *Baccanti v. Morton, 434 Mass. 787, 794, 752 N.E.2d 718 (2001)*, we conclude that an owner's effort to build a personal residence on a portion of a parcel assessed, until that point in time, under the provisions of G. L. c. 61A does not trigger the assessment of conveyance taxes under *§ 12* of the statute. [8]

8 We pause here to observe that *G. L. c. 61A, § 15*, inserted **[***11]** by St. 1973, c. 1118, § 1, instructs as follows:

> "All buildings located on land which is valued, assessed and taxed on the basis of its agricultural or horticultural uses in accordance with the provisions of this chapter and all land occupied by a dwelling or regularly used for family living shall be valued, assessed and taxed by the same standards, methods and procedures as other taxable property."

In reaching our conclusion we acknowledge that *§ 12* does not explicitly exclude from its scope the building of a personal residence on agricultural land, as does *§ 14* of the statute. Nevertheless, as did the tax board, we read the same principle to reside within the meaning of *§ 12*. See *Franklin v. Wyllie, 443 Mass. at 196* ("[R]emedial statutes such as G. L. c. 61A are to be liberally construed to effectuate their goals"), citing *Deas v. Dempsey, 403 Mass. 468, 470, 530 N.E.2d 1239 (1988)*, and *Plante v. Grafton, 56 Mass. App. Ct. 213, 217, 775 N.E.2d 1254 (2002)*. The tax board properly abated the conveyance tax levied on the taxpayers' land.

The decision of the Appellate Tax Board is affirmed.

So ordered.

MARK ANDREWS & others [1] vs. CITY OF SPRINGFIELD.

1 Joyce Andrews, Francis Harnois, Robert Hanois, Russell Pepe, Antonette Pepe, Edward J. Nieves, Sharon Nieves, John Scammon, and Robin Scammon.

No. 08-P-895.

APPEALS COURT OF MASSACHUSETTS

75 Mass. App. Ct. 678*; *915 N.E.2d 1133*; *2009 Mass. App. LEXIS 1340

April 8, 2009, Argued
November 3, 2009, Decided

PRIOR HISTORY: [*1]**

Hampden. Civil action commenced in the Superior Court Department on June 10, 2003. A motion for summary judgment was heard by Judd J. Carhart, J., and entry of judgment was ordered by Cornelius J. Moriarty, II, J.

Andrews v. City of Springfield, 63 Mass. App. Ct. 1117, 828 N.E.2d 956, 2005 Mass. App. LEXIS 535 (2005)

COUNSEL: Christopher N. Souris for the plaintiffs.

Harry P. Carroll (Edward M. Pikula, City Solicitor, with him) for the defendant.

Martha Coakley, Attorney General, & Karla E. Zarbo, Assistant Attorney General, for the Commonwealth & another, amici curiae, submitted a brief.

JUDGES: Present: Vuono, Meade, & Fecteau, JJ.

OPINION BY: VUONO

OPINION

[1134] [*679]** VUONO, J. The plaintiffs are taxpayers who reside in the city of Springfield. They brought this action in Superior Court pursuant to *G. L. c. 40, § 53*, [2] claiming that Springfield violated a competitive bidding statute, *G. L. c. 149, §§ 44A et seq. (c. 149)*, in connection with the construction of a new regional animal control center (center). In 2003, Springfield entered into a "lease" agreement with Monarch Enterprises, LLC (Monarch), [3] whereby Monarch agreed to build the center, according to Springfield's detailed specifications, and Springfield would lease the center for up to twenty-five years. A separate agreement executed on the same day gave **[**1135]** Springfield the option **[***2]** to purchase the center for one dollar at the end of that term.

2 Under *G. L. c. 40, § 53*, ten taxpayers of a city or town may commence an action seeking the enforcement of laws governing the expenditure of tax money by local officials. See *Edwards v. Boston, 408 Mass. 643, 646, 562 N.E.2d 834 (1990)*; *LeClair v. Norwell, 430 Mass. 328, 329 n.2, 719 N.E.2d 464 (1999)*.

3 Monarch is not a party to this action and did not attempt to intervene.

The plaintiffs filed a motion for summary judgment, which was denied. [4] The judge reasoned that Springfield was only required to, and did in fact, comply with the process for acquiring a lease set forth in G. L. c. 30B, as Springfield argued. See *G. L. c. 30B, § 16(c)(1)*. Judgment was subsequently entered in favor of Springfield, and the plaintiffs have appealed. [5] We conclude that Springfield's request for proposal (RFP), while styled as a lease, was in reality a construction project subject to the bidding procedures set forth in c. 149. Because it is undisputed that Springfield did not comply with these procedures, the lease and option to purchase agreements are invalid. [6] The judgment is **[*680]** vacated, and the case is remanded to the Superior Court for further proceedings consistent with **[***3]** this opinion. [7]

4 A different Superior Court judge denied the plaintiffs' application for a preliminary injunction, which sought to enjoin Springfield from making payments to Monarch under the lease. Although that judge ruled that the lease agreement was subject to c. 149, she concluded that the relief sought would adversely affect the public interest and therefore denied the application. See *LeClair, 430 Mass. at 331-332*. We affirmed the denial in an unpublished memorandum and order pursuant to our *rule 1:28*. See *Andrews v. Springfield, 63 Mass. App. Ct. 1117, 828 N.E.2d 956 (2005)*.

5 Following the parties' joint motion for entry of judgment, which was treated as Springfield's cross motion for summary judgment by another Superior Court judge, judgment was entered in favor of Springfield.

6 See *Majestic Radiator Enclosure Co. v. County Commrs. of Middlesex, 397 Mass. 1002, 1003, 490 N.E.2d 1186 (1986)* ("failure to follow the bidding procedure in any respect is fatal"). See, e.g., *Baltazar Contractors, Inc. v. Lunenberg, 65 Mass. App. Ct. 718, 720-724, 843 N.E.2d 674 (2006)* (contract void due to town's failure to comply with bidding requirement; contractor could not recover costs and expenses in quantum meruit).

7 We acknowledge the amicus **[***4]** brief submitted in support of the plaintiffs by the Attorney General, on behalf of the Commonwealth and the Inspector General.

Background. The following material facts are not in dispute. In 1998, Springfield and several other neighboring communities assumed control of the Thomas J. O'Connor Regional Dog Control Center located in Chicopee. Less than two years later, the Commonwealth acquired the property for the purpose of constructing a new correctional facility. That action required the relocation of the center. Eventually, Springfield, Chicopee, Holyoke, and West Springfield entered into an agreement to procure a replacement facility and designated Springfield as the "lead community" for this endeavor.

On January 16, 2002, Springfield issued a RFP to solicit bids for the "long-term lease and lease/purchase" of a replacement regional animal control facility. Springfield hired an architect to prepare a set of requirements for the center, which included detailed project specifications, design concepts, and comprehensive architectural drawings. These requirements were included in the RFP, and all bidders were required to meet them in order for their proposals to be considered responsive. **[***5]** The RFP also set forth minimum lease terms of twenty or twenty-five years and specified that proposals were required to include an option to purchase the center at the end of the term for one dollar.

Four bidders submitted proposals, only three of which were deemed responsive. The contract was awarded to Monarch, the lowest bidder, in October, 2002. On March 3, 2003, Monarch purchased the property designated in its proposal as the site for the center from Fontaine Brothers, **[**1136]** Inc. (Fontaine), [8] for $ 300,000. Monarch also employed Fontaine as its general contractor for construction of the new center. The estimated cost of construction was $ 3 million.

8 Although the deed indicates the property was purchased from Fontaine, Inc., the parties appear to agree that the seller was Fontaine Brothers, Inc.

[*681] Springfield and Monarch executed the lease and option to purchase agreements on March 18, 2003. The lease agreement required Monarch to construct a 22,739 square-foot building "in full compliance with the RFP." Springfield retained the right to review and approve any changes to design and construction documents. In addition, Springfield reserved, and ultimately exercised, the right to hire a professional **[***6]** construction manager to inspect and approve each phase of the construction. The lease was for a twenty-five year term and required Springfield to pay Monarch $ 380,000 in annual rent for each of the first ten years. The annual rent for subsequent years was subject to periodic increases based on a formula corresponding to the consumer price index. Springfield's rental obligations commenced on the date of occupancy. The option to purchase agreement provided Springfield with the opportunity to acquire ownership of the center at varying intervals for amounts ranging from $ 3,998,974.71 after five years, to one dollar at the end of the twenty-five year term.

Discussion. The central issue is whether the project was properly bid under G. L. c. 30B, as the judge concluded, or whether it should have been bid under c. 149. "On review of summary judgment, we . . . consider the record and the legal principles involved without deference to the motion judge's reasoning." *Clean Harbors, Inc. v. John Hancock Life Ins. Co., 64 Mass. App. Ct. 347, 357 n.9, 833 N.E.2d 611 (2005)*. Our review is de novo. [9]

9 Springfield contends that we should apply a deferential standard of review to its decision to proceed under c. 30B, **[***7]** rather than c. 149. There is no merit to this contention. Springfield has not provided us, nor have we found, any persuasive authority supporting this position.

a. *Standing*. We briefly address Springfield's contention that the plaintiffs lack standing under *G. L. c. 40, § 53*, because they filed suit almost three months after the lease agreement was executed. [10] The statute confers standing on qualified taxpayers in circumstances when a municipality is "about to . . . expend money *or* incur obligations" for an unlawful purpose. **[*682]** *G. L. c. 40, § 53* (emphasis supplied). [11] While it is correct that Springfield incurred an obligation on March 18, 2003, it was not required to "expend money" until the center was completed and its rental obligations began. Here, the complaint was filed while construction was ongoing, well before Springfield was required to "expend money" under the lease. Consequently, the suit was timely filed for the purpose of conferring standing on the taxpayers. [12] See *Fuller v. Trustees of Deerfield* **[**1137]** *Academy, 252 Mass. 258, 260-261, 147 N.E. 878 (1925)*. Contrast

Spear v. Boston, 345 Mass. 744, 746, 189 N.E.2d 519 (1963) (claims by taxpayers for injunctive relief to bar awarding of contract and payment **[***8]** of city funds thereunder became moot when contract expired by its terms and thus required no further payments).

10 The plaintiffs argue that Springfield has waived its challenge to standing because it did not oppose summary judgment on this theory. We reject this argument because "standing is a jurisdictional issue that cannot be waived." *Locator Servs. Group, Ltd. v. Treasurer & Rec. Gen., 443 Mass. 837, 846 n.12, 825 N.E.2d 78 (2005).*

11 See *Bleich v. Maimonides Sch., 447 Mass. 38, 46-47, 849 N.E.2d 185 (2006)*, quoting from *Eastern Mass. St. Ry. v. Massachusetts Bay Transp. Authy., 350 Mass. 340, 343, 214 N.E.2d 889 (1966)* ("It is fundamental to statutory construction that the word 'or' is disjunctive 'unless the context and the main purpose of all the words demand otherwise'").

12 We observe that Springfield's argument that the plaintiffs were at fault for not filing their complaint earlier was rejected by the judge who ruled on the plaintiffs' application for a preliminary injunction. She concluded that any delay in bringing a suit was the result of Springfield's failure to comply with the applicable notice requirements. On the record before us, however, we are unable to determine whether Springfield's failure in this regard provides **[***9]** an alternate basis for conferring standing on the plaintiffs.

b. *Character of RFP*. Chapter 149, *§ 44A(2)*, as appearing in St. 1985, c. 675, in pertinent part, states: "Every contract for the construction [or] reconstruction . . . of any building by a public agency estimated to cost more than [$ 25,000] except for a pumping station [13] . . . shall be awarded . . . on the basis of competitive bids in accordance with the procedure set forth in [c. 149]. [14]" Chapter 30B, in pertinent part, states that it "shall apply to every contract for . . . real property . . . [and] shall not apply to . . . a contract subject to the provisions of [c. 149]. **[*683]** *G. L. c. 30B, §§ 1(a)* & *1(b)(1)*, inserted by St. 1989, c. 687, § 3. *Section 16 of G. L. c. 30B* also states that proposals shall be solicited prior to "acquiring by purchase or rental real property or an interest therein . . . at a cost exceeding [$ 25,000]." *G. L. c. 30B, § 16(c)(1)*, as amended through St. 1995, c. 131, § 2.

13 As the instant case does not involve a pumping station, we shall omit this exception from our discussion.

14 We cite to the statutes in effect during the relevant time period. At that time, c. 149 applied to contracts estimated **[***10]** to cost more than $ 25,000. Although we note that the Legislature altered the monetary scheme of c. 149, see St. 2004, c. 193, § 11, as well as made other significant changes to competitive bidding procedures in 2004, see, e.g., St. 2004, c. 193, § 27, we express no opinion as to how application of any subsequent statutory changes would affect our analysis.

We think the statutory provisions at issue are clear and unambiguous. See *Bronstein v. Prudential Ins. Co., 390 Mass. 701, 704, 459 N.E.2d 772 (1984)* ("statutory language, when clear and unambiguous, must be given its ordinary meaning"). Chapter 149 applies to construction contracts for buildings estimated to cost more than $ 25,000. Chapter 30B applies to contracts for real property, including both purchase and lease contracts, and for the construction of buildings estimated to cost $ 25,000 or less.

To determine which statute applies in the instant circumstance, our cases require that we examine "the character of the RFP." *Datatrol Inc. v. State Purchasing Agent, 379 Mass. 679, 695, 400 N.E.2d 1218 (1980)*; *Thorn Transit Sys. Intl., Ltd. v. Massachusetts Bay Transp. Authy., 40 Mass. App. Ct. 650, 653-655, 667 N.E.2d 881 (1996)*. Here, our examination of the character of the RFP **[***11]** indicates that it is for the construction of a highly specialized "'State of the Art' animal center," built in accordance with Springfield's detailed specifications. For example, the RFP required that all building systems (plumbing, heating, air conditioning, ventilation, lighting, and electrical) be new, and it set forth (1) the size and location of over eighty-five rooms, (2) explicit descriptions of windows, doors, ceiling tiles, flooring, and paint, (3) the manufacturer and model numbers for sinks, toilets, drains, showers, and urinals, and (4) specifications for specialty heating/ventilation/air conditioning systems. Further, the stated purpose of the RFP was to provide Springfield, a public entity, with a replacement animal control center **[**1138]** for long-term use and the opportunity ultimately to acquire ownership of the center for one dollar. In addition, the RFP essentially provides that the cost of construction will be paid for with public funds in the form of rental payments for the "leased premises." In effect, the RFP used a lease-to-purchase arrangement as a means of conveying a newly constructed facility to Springfield. Accordingly, the "character of the RFP" supports the conclusion **[***12]** that the project was for the construction of a public building.

It is not determinative, as Springfield contends, that the RFP **[*684]** did not preclude bid proposals involving the renovation of an existing building. Chapter 149 applies both to construction of a new building and the "reconstruction . . . of any building" so long as the stat-

ute's monetary threshold has been met. *G. L. c. 149, § 44A(2)*.

Nor is the result determined by the fact that Springfield showed "good faith" by contacting the office of the Inspector General before issuing the RFP. [15] Springfield acknowledges, as it must, that the Inspector General never reviewed the RFP or provided any opinion as to whether the project was subject to c. 149. Moreover, the absence of bad faith or actual corruption does not excuse the failure to comply with the competitive bidding statutes. See *Gifford v. Commissioner of Pub. Health, 328 Mass. 608, 617, 105 N.E.2d 476 (1952)*; *Phipps Prod. Corp. v. Massachusetts Bay Transp. Authy., 387 Mass. 687, 692, 443 N.E.2d 115 (1982)*; *E. Amanti & Sons, Inc. v. R.C. Griffin, Inc., 53 Mass. App. Ct. 245, 257, 758 N.E.2d 153 (2001)*.

> 15 Springfield's "contact" consisted of three telephone calls placed by an associate city solicitor to the "attorney of the **[***13]** day" at the Inspector General's office. During one of these telephone conversations the "attorney of the day" indicated that Springfield "probably could" structure the RFP as a lease to purchase under c. 30B, but recommended that Springfield submit the RFP to the Inspector General's office for review.

Also relevant to our analysis is the high degree of control Springfield retained over the details of construction. The RFP required the submission of design and construction documents for Springfield's review and approval and provided for the right of Springfield to hire its own professionals to monitor, inspect, and approve the ongoing construction. These facts demonstrate that Springfield sought to direct construction far more than is customary for a commercial tenant.

Having determined that the RFP was for the construction of a new public building costing more than $ 25,000, it follows that Springfield was required to comply with the bidding procedures of c. 149, rather than the procedures of c. 30B. [16] See *Datatrol Inc., 379 Mass. at 695-696* (competitive bidding statute applied **[*685]** where RFP provided contract could involve equipment purchase, and operating and maintenance services in contract **[***14]** were incidental to equipment purchase). The plain language of the statutes themselves makes clear that the Legislature **[**1139]** did not intend to permit public agencies to avoid compliance with c. 149 by relying on c. 30B. Chapter 149 *§ 44A(2)*, applies to "*[e]very* contract for the construction . . . of any building by a public agency" (emphasis supplied). The use of the modifier "every" is significant, as it reflects the Legislature's intent that c. 149 apply to all contracts that involve public construction other than narrowly and carefully drawn exceptions. See *Norfolk Elec., Inc. v. Fall River Hous. Authy., 417 Mass. 207, 217-218, 629 N.E.2d 967 (1994)*. By contrast, c. 30B specifically excludes public construction contracts subject to c. 149. See *G. L. c. 30B, § 1(b)(1)*. Accordingly, the RFP was subject to c. 149. See *Datatrol Inc., supra* (public agencies cannot use long-term leases as means of evading competitive bidding requirements for procurement of equipment).

> 16 Our conclusion is also consistent with the objective of c. 149. The Legislature enacted and later extensively revised c. 149 in an effort "to improve the system of public construction in the Commonwealth." See St. 1980, c. 579, preamble & § 55. **[***15]** The statute's purposes are transparent: "to ensure that the awarding authority obtain the lowest price among responsible contractors," *Modern Continental Constr. Co. v. Lowell, 391 Mass. 829, 840, 465 N.E.2d 1173 (1984)*; "to establish an open and honest procedure for competition for public contracts," *ibid.*; and to "facilitate[] the elimination of favoritism and corruption as factors in the awarding of public contracts." *Interstate Engr. Corp. v. Fitchburg, 367 Mass. 751, 758, 329 N.E.2d 128 (1975)*.

Springfield's last argument, that the doctrine of claim preclusion applies to bar the plaintiffs' case, was not raised or argued below and may not now be argued for the first time on appeal. See *Carey v. New England Organ Bank, 446 Mass. 270, 285, 843 N.E.2d 1070 (2006)*. We deem this argument waived. See *ibid*.

Conclusion. The judgment is vacated. The case is remanded to the Superior Court for entry of a new judgment declaring that Springfield's lease and option to purchase agreements with Monarch are void because Springfield failed to comply with c. 149 and for the grant of such other relief as may be determined to be appropriate. [17]

> 17 Based on the record before us, we are unable to determine whether the public interest would support entering **[***16]** an order enjoining Springfield from making payments in accordance with the lease or, in the alternative, whether such action would adversely affect the public. Accordingly, we take no position on this issue.

So ordered.

In re OUADIA BERERHOUT AND JENNIFER FIORITA, Debtors; OUADIA BERERHOUT AND JENNIFER FIORITA, Plaintiffs v. CITY OF MALDEN, Defendant

Chapter 13, Case No. 09-18956-JNF, Adv. P. No. 09-01314

UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF MASSACHUSETTS

431 B.R. 42; 2010 Bankr. LEXIS 1888

June 22, 2010, Decided

COUNSEL: **[**1]** For Ouadia Bererhout, aka WJ Limosine, Debtor: Daniel Gindes, Salem, MA.

For Jennifer Fiorita, Joint Debtor: Daniel Gindes, Salem, MA.

JUDGES: Joan N. Feeney, United States Bankruptcy Judge.

OPINION BY: Joan N. Feeney

OPINION

[*43] MEMORANDUM

I. INTRODUCTION

The matter before the Court is a Motion for Reconsideration filed by the City of Malden (the "City"). The City seeks reconsideration of an order of this Court entered on October 2, 2009 pursuant to which the Court found the City in contempt for violating the automatic stay by failing to take necessary and appropriate action to enable Ouadia Bererhout and Jennifer Fiorita (the "Debtors") to renew their motor vehicle registration with the Commonwealth of Massachusetts (the "Commonwealth"). The Commonwealth had blocked renewal as a result of an "administrative hold" resulting from the City's notification to the Commonwealth of the Debtors' nonpayment of parking tickets. *See Mass. Gen. Laws ch. 90, § 20A 1/2*.

The issue presented is whether the City received adequate and appropriate notice of the "Debtors' Ex Parte Motion for Temporary Restraining Order to Enforce Automatic Stay" [1] and the hearing on that motion, where Debtors' counsel served the City Treasurer with notice **[**2]** of a hearing scheduled to take place on October 1, 2009 at 11:00 a.m. by facsimile late in the afternoon of September 30, 2009.

1 The Court recognizes that the Debtors' Ex Parte Motion for Temporary Restraining Order to Enforce Automatic Stay could be considered an improper pleading as *Fed. R. Bankr. P. 7001(7)* and *Fed. R. Bankr. P. 7065* contemplate the filing of a complaint when an injunction or restraining order is sought, and the Debtors filed their motion in the main case. Because of the exigencies set forth in the motion, the Court scheduled a hearing prior to the commencement of an adversary proceeding. *See Agean Fare, Inc. v. Commonwealth of Massachusetts (In re Aegean Fare, Inc.), 33 B.R. 745, 746, n.1 (Bankr. D. Mass. 1983).*

The Court conducted a hearing on the Motion for Reconsideration on May 18, 2010. In addition, the Court conducted a pretrial conference in the adversary proceeding commenced by the Debtors against the City on October 9, 2009. Neither party requested an evidentiary hearing on the Motion for Reconsideration, and neither party disputed the facts necessary to determine the Motion for Reconsideration. At the conclusion of the hearing, the Court took the Motion **[**3]** for Reconsideration under advisement, scheduled a trial on damages for September 27, 2010, and continued generally the Amended Application of Debtor's Counsel for Compensation filed in conjunction with the contempt matter pending the outcome of the adversary proceeding.

For the reasons set forth below, the Court finds that notice was adequate under the circumstances and, accordingly, denies the Motion for Reconsideration.

II. PROCEDURAL BACKGROUND

On September 21, 2009, the Debtors filed a voluntary Chapter 13 petition. On Schedule F - Creditors Holding Unsecured Nonpriority Claims, the Debtors listed the **[*44]** City as the holder of claims arising from unpaid parking tickets totaling $ 340. The City contends that it is owed $ 1,050, although it did not file a proof of claim and the deadline for doing so has passed. *See Fed. R. Bankr. P. 3002(c).*

On September 30, 2009, the Debtors filed a motion requesting a temporary restraining order against the City. In their motion, the Debtors alleged that the City was "putting a hold" on the registration of their vehicle at the Commonwealth's Registry of Motor Vehicles. As a consequence, the Debtors maintained that the City was violating the automatic stay, **[**4]** adding that the deadline for registering their vehicle was October 1, 2009. The Debtors also alleged that "[t]he City of Malden has received notice of the order of relief from this [the Debtors' attorney's] office by telephone, and, on information and belief, from the debtors who personally appeared there with a copy of the petition in hand." In support of their request for emergency consideration, the Debtors represented that Ms. Fiorita was eight months pregnant and that they required the vehicle to transport her to the hospital.

The Court scheduled a hearing on the Debtors' motion for the following day, October 1, 2009, at 11 a.m. Debtors' counsel filed a certificate of service, in which he stated:

> I, Daniel Gindes do hereby state that I served the Notice of Hearing for Debtors' Motion for a Temporary Restraining Order with the ECF system on September 30, 2009, and that it will therefore be served upon all relevant parties, and that I served the City of Malden Treasurer by Fax to (781) 397-1593.

The Court conducted the hearing as scheduled. The City did not appear. The Court also found that "[t]he debtor's attorney represented in open court that he gave notice of the emergency hearing **[**5]** to the City of Malden (the "City") Treasurer's Office by facsimile transmission on September 30, 2009. A representative of the City did not appear at the hearing." Accordingly, the Court granted the motion, finding that "the automatic stay prevents the City from placing a hold on the debtors' renewal of their motor vehicle registration(s)." *See 11 U.S.C. §§ 362(a)* and *525*. The Court also ordered the City and Commonwealth to "take all necessary and appropriate action to renew the Debtors' vehicle registration(s)." The Court scheduled a further hearing for October 8, 2009 at 9:30 a.m.

Late in the day on October 1, 2009, the Debtors commenced an adversary proceeding against the City by filing "Debtors' Verified Complaint For Contempt And Violation Of The Automatic Stay." Additionally, they filed Debtors' Motion For Short Order of Notice seeking an emergency hearing. The Court granted the motion and scheduled an emergency hearing for October 2, 2009 at noon before Judge Frank Bailey. The Court ordered that "[a] representative of the City of Malden shall appear personally at the hearing or shall file a Motion to appear telephonically. Debtor's counsel shall give immediate fax and telephonic **[**6]** notice of this order to such representative." The Debtors' attorney filed a Certificate of Service in which he stated:

> I Daniel Gindes do hereby certify that on October 2, 2009, I served a copy of the Notice of Hearing/Order issued this morning by Judge Feeney to the Treasurer and Legal department of the City of Malden to:
>
> legal@townofmalden.org
>
> treasurer@townofmalden.org[.]
>
> I also state that I called the City Legal Department, and left a message on an answering system. I also called the Treasurer's Office, and was told they **[*45]** would not attend the hearing because that was the legal department's responsibility.

On October 2, 2009, Judge Bailey conducted the emergency hearing. Counsel to the City was present. At the conclusion of the hearing, Judge Bailey entered an order in which he stated:

> [c]ounsel to the City of Malden (the "City") represented at the hearing that it had actual notice of the Court's Temporary Restraining Order dated 10/1/09 (Doc. No. 18) (the "Order"), entered in the Debtor's main case, which required that, inter alia, the City "shall take all necessary and appropriate action to renew the Debtor's vehicle registrations(s)."

The City orally moved for reconsideration on the **[**7]** basis of deficient service. The Court found that the City failed to "assert any legal ground for vacating the finding . . . that the City was in violation of the automatic stay." The Court denied the City's motion "without prejudice to renewal." The Court fined the City $ 250 per calendar day, commencing on October 2, 2009, for each day that it failed to comply with the October 1, 2009 order by releasing the hold. The Court also scheduled a status conference for October 8, 2009, to consider the award of "attorney's fees and costs and compensation and/or punitive damages."

On October 7, 2009, the City filed the Motion for Reconsideration. The City alleged that service by fax and email was "not compliant with any service rule." In particular, the City pointed to *Fed. R. Civ. P. 4(j)(2)* and *Mass. R. Civ. P. 4(d)(3)* and asserted that "notice for all actions must be done by mail or in person delivery." In seeking reconsideration under *Fed. R. Civ. P. 60(b)(6)*, the City conceded that the violation of the automatic stay was moot because it had voided 14 tickets. In support of its motion, the City submitted an affidavit of Anne Kerkentzes. In her affidavit, Ms. Kerkenzes stated, among other **[**8]** things, the following:

> 1. My current title is Law Clerk.
>
> 2. The Plaintiffs, Ouadia Bererhout and Jennifer Fiorita owed the City of Malden $ 1,050.00 in parking assessments.
>
> 3. Based upon my research, on October 5, 2009, the City voided 14 tickets and cleared them at the registry on Jennifer R Fiorita.
>
> 4. The Plaintiffs' attorney did tell me he would be filing legal paperwork and did not indicate a court appearance.
>
> 5. Plaintiffs' attorney never asked who the city attorney was despite speaking with me on several occasions. In addition, he said he got the city treasurer's fax number from the city website. If he was able to do that, he could have easily located the name of the city solicitor as well. See Exhibit A+B
>
> 6. Only after he indicated that he had faxed information to the Treasurer's Office on October 1, 2009 and I did call them to locate the fax [sic]. However, the city records will disagree on the time. He sent the faxes well after business hour of city hall [sic].
>
> 7. The Plaintiff's Attorney indicated in bankruptcy court that he called here 20-30 times. That is false. He called here no more than 5 times total.

On October 7, 2009, the Debtors filed an Application of Debtors' Counsel **[**9]** For Compensation, with legal fees of $ 5,355.00 and costs of $ 304.

On October 8, 2009, the Court conducted a status conference. The Court ordered **[*46]** the City to pay the Debtors $ 750, representing a fine of $ 250 per day for the three days between the entry of October 1, 2009 order and the City's compliance with it on October 5, 2009. The Court further ordered the City to send the Debtors a letter confirming that the tickets had been voided. In addition, the Court determined that the Debtors' application for further injunctive relief was moot as their automobile had been registered. The Court postponed consideration of the Application for Fees as it contained mathematical errors.

On May 18, 2010, this Court held a hearing on the Motion for Reconsideration and conducted a status conference in the adversary proceeding. The Court scheduled a trial with respect to the Debtors' damages for September 27, 2010. The Court also took the City's Motion for Reconsideration under advisement and continued generally Debtors' Counsel's Application pending the outcome of the adversary proceeding.

III. POSITION OF PARTIES

The City, in support of its Motion for Reconsideration, argues that the Debtors failed **[**10]** to comply with the applicable procedural rules governing service. According to the City, these rules require either personal delivery or delivery by certified mail, citing *Fed. R. Civ. P. 4(j)(2)* and *Mass. R. Civ. P. 4(d)(3)*, as incorporated by *Fed. R. Bankr. 7004*. The City claims that service by email, phone and fax are deficient under the rules. Furthermore, the City stresses that the Debtors "have provided no evidence they complied with the rules."

The Debtors respond by saying the City was given "adequate notice." At the May 18, 2010 hearing, the Debtors' lawyer argued:

> This matter was quick moving. I filed papers with the Court regarding the repeated, blatant, and undeniable violation of the automatic stay by the City. I called the Clerk's Office and was told to fax over notice of the hearing to the defendants. I did it immediately. It was late in the day, but that was because I had been in court on another matter that morning.

The City's response during the hearing was as follows:

> [T]he City doesn't deny it received notice. It's just saying it was improper.
>
> * * *
>
> I dispute that they received it the day before. They received it, I believe, the day of, because it was sent after business **[**11]** hours to the City Treasurer instead of the City Solicitor.

IV. DISCUSSION

A. Grounds for Reconsideration under *Fed. R. Bankr. P. 9023* and *9024*

The City cites both *Fed. R. Bankr. P. 9023*, which makes *Fed. R. Civ. P. 59* pertaining to new trials and altering or amending judgments applicable to bankruptcy cases, and *Fed. R. Bankr. P. 9024*, which makes *Fed. R. Civ. P. 60* pertaining to relief from a judgment or order applicable to bankruptcy cases. Because the City failed to address the requirements of either rule other than to argue that a motion to reconsider is an appropriate vehicle for addressing its view that the genesis of the contempt finding was defective service, the Court shall address *Rule 60*.

According to the court in *Hovis v. Grant/Jacoby, Inc. (In re Air South Airlines, Inc.), 249 B.R. 112 (Bankr. D.S.C. 2000)*,

> The decision of whether to grant a motion for relief from judgment under the standard set forth in *Rule 60(b)* lies within the discretion of the Court. *See,* **[*47]** *e.g. Augusta Fiberglass Coatings, Inc. v. Fodor Contracting Corp., 843 F.2d 808, 810 (4th Cir.1988)*; *Park Corp. v. Lexington Ins. Co., 812 F.2d 894, 896 (4th Cir.1987)*. In determining whether a judgment should be set **[**12]** aside under the standard of *Rule 60(b)*, the Court must engage in a two-pronged process. First, the moving party must satisfy three requirements: (1) the motion must be timely filed; (2) the moving party must have a meritorious defense to the action; and (3) the setting aside of the judgment must not unfairly prejudice the nonmoving party. *See Nat'l Credit Union v. Gray, 1 F.3d 262, 264 (4th Cir.1993)*; *Park Corp., 812 F.2d at 896*. Once the requirements of the first prong have been met, the moving party must next satisfy one of the six grounds for relief set forth in *Rule 60(b)*. See *Park Corp., 812 F.2d at 896*.

249 B.R. at 115-15. In the First Circuit, "[r]elief under *Rule 60(b)* is available . . . when exceptional circumstances exist to justify extraordinary relief." *Rodriguez Camacho v. Doral Fin. Corp. (In re Rodriguez Camacho), 361 B.R. 294, 301 (B.A.P. 1st Cir. 2007)* (citing *Simon v. Navon, 116 F.3d 1, 5 (1st Cir. 1997))*. Additionally, "'a party who seeks recourse under *Rule 60(b)* must persuade the trial court, at a bare minimum, that his motion is timely; that exceptional circumstances exist, favoring extraordinary relief; that if the judgment is set aside, he has the right stuff **[**13]** to mount a potentially meritorious claim or defense; and that no unfair prejudice will accrue to the opposing parties should the motion be granted.'" *361 B.R. at 301* (citing *Karak v. Bursaw Oil Corp., 288 F.3d 15, 19 (1st Cir. 2002))*.

Although its Motion for Reconsideration was timely filed, the Court finds that the City had no meritorious defense to the Debtors' request for injunctive relief, and the Debtors would be unfairly prejudiced were the Court to reconsider the finding of contempt and the fines imposed. In view of the substantive and procedural law applicable in bankruptcy cases, the Debtors should not have had to seek injunctive relief in the first instance. Once they filed their Ex Parte Motion for Temporary Restraining Order to Enforce Automatic Stay, the applicable procedural rules permitted this Court to conduct an emergency hearing on notice appropriate in the particular circumstances.

B. Procedural Requirements of Service in Bankruptcy Cases

The procedural requirements of service are set forth in the Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, the Local Bankruptcy Rules for the United States Bankruptcy Court for the District of Massachusetts, as well as **[**14]** in the Federal and Massachusetts Rules of Civil Procedure.

Section 102 of the Bankruptcy Code defines the term "after notice and a hearing" as "such notice as is appropriate in the particular circumstances, and such opportunity for a hearing as is appropriate in the particular circumstances." *11 U.S.C. § 102(1)(A)*. *Rule 9013 of the Federal Rules of Bankruptcy Procedure* governs the service of motions. It provides:

> A request for an order, except when an application is authorized by these rules, shall be by written motion, unless made during a hearing. The motion shall state with particularity the grounds therefor, and shall set forth the relief or order sought. Every written motion other than one which may be considered ex parte shall be served by the moving party on the trustee or debtor in possession and on those entities specified by these rules or, if service is not required or the entities to be served are not **[*48]** specified by these rules, the moving party shall serve the entities the court directs.

Fed. R. Bankr. P. 9013. *Rule 9014* governs motions filed in contested matters. It provides:

(a) **Motion.** In a contested matter not otherwise governed by these rules, relief shall be requested **[**15]** by motion, and reasonable notice and opportunity for hearing shall be afforded the party against whom relief is sought. No response is required under this rule unless the court directs otherwise.

(b) **Service.** The motion shall be served in the manner provided for service of a summons and complaint by *Rule 7004*. Any paper served after the motion shall be served in the manner provided by *Rule 5(b) F. R. Civ. P.*

Fed. R. Bank. P. 9014. [2] *Rule 7004 of the Federal Rules of Bankruptcy Procedure* permits service of a summons and complaint by first class mail. It provides that, except in certain circumstances,

(b) . . . service may be made within the United States by first class mail postage prepaid as follows:

(6) Upon a state or municipal corporation or other governmental organization thereof subject to suit, by mailing a copy of the summons and complaint to the person or office upon whom process is prescribed to be served by the law of the state in which service is made when an action is brought against such a defendant in the courts of general jurisdiction of that state, or in the absence of the designation of any such person or office by state law, then to the chief executive officer thereof.

Fed. R. Bank. P. 7004(b)(6). **[**16]** In addition, *Fed. R. Bank. P. 7004(a)(1)* incorporates *Fed. R. Civ. P. 4(j)(2),* which provides for service upon:

(j)(2) . . . A state, a municipal corporation, or any other state-created governmental organization that is subject to suit must be served by:

(A) delivering a copy of the summons and of the complaint to its chief executive officer; or

(B) serving a copy of each in the manner prescribed by that state's law for serving a summons or like process on such a defendant.

Fed. R. Civ. P. 4(j)(2). Rule 4(j)(2)(B) incorporates *Rule 4(d)(4)* of the Massachusetts **[*49]** Rules of Civil Procedure, which permits service as follows:

Upon a county, city, town or other political subdivision of the Commonwealth subject to suit, by delivering a copy of the summons and of the complaint to the treasurer or the clerk thereof; or by leaving such copies at the office of the treasurer or the clerk thereof with the person then in charge thereof; or by mailing such copies to the treasurer or the clerk thereof by registered or certified mail.

Mass. R. Civ. P. 4(d)(4). Notably, the City cited *Mass. R. Civ. P. 4(d)(3),* not *(d)(4).*

2 *Rule 5(b) of the Federal Rules of Civil Procedure* provides:

Service: How Made.

(1) Serving **[**17]** an Attorney. If a party is represented by an attorney, service under this rule must be made on the attorney unless the court orders service on the party.

(2) Service in General. A paper is served under this rule by:

(A) handing it to the person;

(B) leaving it:

(i) at the person's office with a clerk or other person in charge or, if no one is in charge, in a conspicuous place in the office; or

(ii) if the person has no office or

> the office is closed, at the person's dwelling or usual place of abode with someone of suitable age and discretion who resides there;
>
> (C) mailing it to the person's last known address--in which event service is complete upon mailing;
>
> (D) leaving it with the court clerk if the person has no known address;
>
> (E) sending it by electronic means if the person consented in writing--in which event service is complete upon transmission, but is not effective if the serving party learns that it did not reach the person to be served; or
>
> (F) delivering it by any other means that the person consented to in writing--in which event service is complete when the person making service delivers it to the agency designated to make delivery.

The above rules do not expressly address appropriate **[**18]** means of service when exigent circumstances require emergency consideration of a motion. In other words, the rules do not expressly provide for those circumstances when service by first class mail or personal service would be ineffective to provide the appropriate notice contemplated by *11 U.S.C. § 102*.

Massachusetts Local Bankruptcy Rule 9013-1(g)(1)(C) specifically addresses those circumstances. It sets forth the requirements applicable to notices of emergency hearings. It provides:

> The movant shall make a reasonable, good faith effort to advise all affected parties of the substance of the motion for relief, and the request for an emergency or expedited determination, prior to filing the motion for emergency or expedited determination, prior to filing the motion for emergency or expedited hearing, and, upon filing the motion, movant shall file a certification attesting to the efforts so made, together with a certificate of service of the motion setting forth the manner of service. Promptly after obtaining the date and time of the hearing from the court, movant shall advise all affected parties of the date and time of the hearing and any objection deadline and shall file a certificate **[**19]** of service setting forth the manner of service. *Such reasonable, good faith efforts may include providing notice by telephone, facsimile transmission or email in appropriate circumstances. . . .*

MBLR 9013-1(g)(1)(C)(emphasis supplied)

C. Service of the Ex Parte Motion for Temporary Restraining Order

The Debtors filed their Ex Parte Motion for a Temporary Restraining Order in the main case nine days after they filed their Chapter 13 petition. In their Motion, they alleged that the City had received notice of the filing of the bankruptcy petition through telephonic notice by their counsel and hand delivery of their bankruptcy petition by the Debtors. Additionally, they set forth grounds entitling them to the relief requested, including Ms. Fiorita's pregnancy.

In *Soares v. Brockton Credit Union (In re Soares), 107 F.3d 969 (1st Cir. 1997)*, the United States Court of Appeals for the First Circuit determined that actions taken in violation of the automatic stay are void. It stated:

> The automatic stay is among the most basic of debtor protections under bankruptcy law. *See Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Protection, 474 U.S. 494, 503, 106 S.Ct. 755, 760, 88 L.Ed.2d 859 (1986)*; **[**20]** *see also* S.Rep. No. 95-989, at 54 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5840. It is intended to give the debtor breathing room by "stop[ping] all collection efforts, all harassment, and all foreclosure actions."

> H.R.Rep. No. 95-595, at 340 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6296-97; *see also Holmes Transp., 931 F.2d at 987*; *In re Smith Corset* **[*50]** *Shops, Inc., 696 F.2d 971, 977 (1st Cir.1982).*
>
> The stay springs into being immediately upon the filing of a bankruptcy petition: "[b]ecause the automatic stay is exactly what the name implies-'automatic'-it operates without the necessity for judicial intervention." *Sunshine Dev., Inc. v. FDIC, 33 F.3d 106, 113 (1st Cir.1994).* It remains in force until a federal court either disposes of the case, see *11 U.S.C. § 362(c)(2),* or lifts the stay, *see* id. *§ 362(d)-(f).* This respite enables debtors to resolve their debts in a more orderly fashion, *see In re Siciliano, 13 F.3d 748, 750 (3d Cir.1994),* and at the same time safeguards their creditors by preventing "different creditors from bringing different proceedings in different courts, thereby setting in motion a free-for-all in which opposing interests maneuver to capture the lion's **[**21]** share of the debtor's assets." *Sunshine Dev., 33 F.3d at 114*; *see generally* 3 *Collier on Bankruptcy P 362.03* (15th rev. ed. 1996).

107 F.3d at 975.

In addition to the safeguards imposed by the automatic stay highlighted by the First Circuit in Soares, *11 U.S.C. § 525(a)* provides in relevant part: "a governmental unit may not deny, revoke, suspend, or refuse to renew a license permit, ... or other similar grant to ... a person that is or has been a debtor under this title . . . solely because such bankrupt or debtor is or has been a debtor under this title ... or has not paid a debt that is dischargeable in the case under this title." *11 U.S.C. § 525(a). See also Jessamey v. Town of Saugus (In re Jessamey), 330 B.R. 80 (Bankr. D. Mass. 2005)* (construing the automatic stay to require creditors to take action to discontinue collection proceedings that were commenced prepetition where the effect of failing to act would be to permit those proceedings to continue postpetition.); *Stmima Corp. v. Carrigg (In re Carrigg), 216 B.R. 303 (B.A.P. 1st Cir. 1998). Cf. State of California Employment Dev. Dept. v. Taxel (In re Del Mission Ltd.), 98 F.3d 1147 (9th Cir. 1996)*; *Bertuccio v. California State Contrators License Bd. (In re Bertuccio), 414 B.R. 604, 614 (Bankr. N.D. Ca. 2008)*; **[**22]** *In re Henry, 328 B.R. 664, 668 (Bankr. E. D.N.Y. 2005)*; *In re Abrams, 127 B.R. 239 (B.A.P. 9th Cir. 1991).*

The emergency notice of the hearing was appropriate under the circumstances. Because of the exigencies set forth in the Debtors' Motion for a Temporary Restraining Order, including Ms. Fiorita's near-term pregnancy, and the law applicable to the facts as alleged by the Debtors, this Court scheduled a hearing on the motion the day after it was filed. Accordingly, the City's Motion for Reconsideration lacks merit. The affidavit of Ms. Kerkentzes establishes that the City was aware of the bankruptcy petition and that the Debtors' counsel had spoken with her office on numerous occasions prior to the emergency hearing on October 1, 2009. On the day before the emergency hearing, the Debtors gave notice to the City by fax, email and telephone. The City was given ample time to file an objection and appear, which it failed to do. The City's attempt to place the burden on the Debtors to serve their emergency Ex Parte Motion for Temporary Restraining Order to Enforce Automatic Stay either by mail or in person delivery would subvert the Bankruptcy Code and the Federal Rules of Bankruptcy **[**23]** Procedure which contemplate the ability of the bankruptcy court to respond quickly to emergencies. The City's actions also demonstrate ignorance of the automatic stay and its affirmative duty to immediately cease its collections efforts. Moreover, when Judge Bailey denied its oral motion for reconsideration at the October **[*51]** 2, 2009 hearing, it was alerted that the grounds for its motion for reconsideration were deficient.

Not only did the City fail to appreciate the ramifications of the automatic stay, it did not comply with the Court's October 1, 2009 order until October 5, 2009. The finding of contempt and the Court's issuance of a $ 750 fine were justified under the circumstances as service of the Ex Parte Motion for Temporary Restraining Order to Enforce Automatic Stay was both adequate and proper, particularly as the City was aware of the Court's October 1, 2009 order at the time of the hearing on October 2, 2009 before Judge Bailey.

V. CONCLUSION

In view of the foregoing, the Court shall enter an order denying the City's Motion for Reconsideration.

By the Court,

/s/ Joan N. Feeney

Joan N. Feeney

United States Bankruptcy Judge

Dated: June 22, 2010

BRASI DEVELOPMENT CORP. vs. ATTORNEY GENERAL & another. [1]

1 University of Massachusetts, Lowell (university).

SJC-10527

SUPREME JUDICIAL COURT OF MASSACHUSETTS

456 Mass. 684*; *925 N.E.2d 826*; *2010 Mass. LEXIS 208

January 7, 2010, Argued
May 10, 2010, Decided

PRIOR HISTORY: [*1]**

Middlesex. Civil action commenced in the Superior Court Department on September 10, 2008. The case was heard by S. Jane Haggerty, J., on motions for summary judgment. The Supreme Judicial Court granted an application for direct appellate review.

COUNSEL: Karla E. Zarbo, Assistant Attorney General (Kate J. Fitzpatrick, Assistant Attorney General, with her) for the Attorney General.

Andre A. Sansoucy (John C. McCullough with him) for the plaintiff.

Elizabeth A. Sloane & Nicole Horberg Decter, for Massachusetts Building Trades Council & another, amici curiae, submitted a brief.

JUDGES: Present: Marshall, C.J., Ireland, Spina, Cowin, Cordy, Botsford, & Gants, JJ.

OPINION BY: COWIN

OPINION

[829] [*685]** COWIN, J. In this case we consider whether an agreement for the development, maintenance, and long-term lease of dormitory facilities by the University of Massachusetts, Lowell (university), was subject to the competitive public bidding requirements of *G. L. c. 149, §§ 44A-44H* (competitive bidding statute), where the developer agreed to assume the risks of construction and maintain ownership of the land and buildings, but the university provided detailed specifications for the facility and retained significant control over the construction process. **[***2]** A judge in the Superior Court concluded that the competitive bidding statute did not apply because the agreement was for the lease of a completed student dormitory and not a contract for construction of a dormitory by the university. She therefore allowed the developer's motion for summary judgment. We reverse. [2]

2 We acknowledge the joint amicus brief of the Massachusetts Building Trades Council and the Foundation for Fair Contracting of Massachusetts.

1. *Background and procedural history*. We set forth the undisputed material facts gleaned from the summary judgment record, reserving for later discussion certain terms in the request for proposals (RFP) and the agreement subsequently entered into between the plaintiff and the university.

In February and March of 2008, the university, a division of the publicly-funded University of Massachusetts system, see *G. L. c. 75, § 1*, issued an RFP for the lease of a student dormitory in the city of Lowell (city) to provide housing for 120 to 400 students. [3] The RFP sought a five-year lease with the potential **[*686]** to extend the agreement for two additional five-year terms. The RFP did not provide that the resident housing complex be newly constructed **[***3]** but did provide detailed requirements for the proposed dormitory, particularly in the area of building security. [4]

3 The request for proposals (RFP) sought bids for a "privately developed resident housing facility located in close proximity to the University Campus." The facility was variously described as a "resident housing complex or complexes" and an "apartment complex or complexes."

4 The initial RFP included a requirement that the university retain a right of first refusal to purchase the dormitory at the expiration of the term of the lease agreement. In response to questions concerning the RFP from potential developers at a scheduled pre-bid meeting, the university agreed to forgo this requirement.

The RFP set forth an occupancy schedule under which, if construction were required, **[**830]** the project was to be completed within fifteen months, and stated that the occupancy date was a critical factor in any proposal; the facility had to be available for occupancy by August, 2009, in time for the university's fall, 2009, term. [5] The university was not required to make any

payments until the dormitory was available for occupancy, and there were substantial penalties, including costs of replacement **[***4]** housing and storage of goods, if the selected bidder did not meet the work schedule. The university was responsible only for the lease payment amounts, and not for any increases in construction costs or other costs during the lease period.

5 The RFP stated that proposed occupancy by fall, 2008, would also be considered.

Under the terms of the RFP, the selected bidder would maintain the building and grounds in good repair for the period of the lease; provide day-to-day upkeep such as snow removal, landscape maintenance, trash removal, and daily cleaning of the facility; and assume all costs of operation and maintenance. The bidder was responsible for all utility payments, including telephone, Internet access, and cable television. The bidder was required to maintain liability insurance on the property, with the university as an additional named insured. The RFP included a sample form lease; [6] among other provisions, the sample lease stated that it could not be assigned, nor could any easement be granted on the property, without the university's written approval. The bidding process was open and public, but the RFP did not conform to the competitive bidding statute. [7] To the contrary, the **[***5]** **[*687]** RFP stated that selection would not necessarily be based on the lowest price among "responsible" bidders. See *G. L. c. 149, § 44D*, and note 14, *infra*.

6 The sample lease was based on sample lease agreements provided by the Division of Capital Asset Management (DCAM).

7 As far as can be determined from the record, the submission process appears to have complied with the terms of *G. L. c. 30B, § 16 (c) (1)*, regarding solicitation of proposals to lease or purchase real property.

The plaintiff, Brasi Development Corp. (Brasi), was one of seven companies to respond with bid proposals. Three of the bidders, including Brasi, proposed to construct new buildings; two proposed renovation of existing structures; and two proposed using existing structures "as is." Brasi had never built student housing [8] and had not been certified by the Division of Capital Asset Management (DCAM) as a "responsible" public bidder under *G. L. c. 149, § 44D*. [9] Brasi was eventually chosen as the developer, subject to additional conditions not included in the terms of the original RFP. The university and Brasi entered into negotiations for a "Lease Agreement" based on the terms of the sample lease agreement that had been **[***6]** attached to the RFP. The "Lease Agreement" was for an initial five-year term, renewable in five-year terms, at the university's option, for up to a total of thirty years; this term was different from that in **[**831]** the RFP. See part 3.d, *infra*. The property would at all times be owned by Brasi.

8 Brasi Development Corp. (Brasi) was formed in 2005 specifically for the purpose of purchasing and developing a particular parcel of land in the city of Lowell (city) that is adjacent to the university's campus. Brasi acquired this parcel in 2006; in May, 2007, it obtained zoning permission from the city's planning board to develop the land as student housing. Although no agreement was finalized, Brasi had previously approached the university about a project to develop on the parcel a different type of dormitory than the one at issue in this case.

9 One of the three Brasi partners was certified by DCAM as the head of another construction company.

Before the "Lease Agreement" was executed, an unsuccessful bidder, Academic Village Foundation, Inc. (Academic), filed a bid protest notice with the Attorney General, [10] asserting that there had been unfair collusion between the university and Brasi, and that, **[***7]** since Brasi had previously obtained zoning changes permitting it to build a dormitory for the university, Brasi had an unfair advantage in bidding on the current project. The Foundation for Fair Contracting of Massachusetts filed a separate bid protest on the ground that the proposed dormitory **[*688]** was not a lease, but rather a project to construct a public building, and that the bidding process had failed to comply with the competitive bidding statute.

10 See *G. L. c. 149, § 44H* (Attorney General "require[s] compliance" with competitive bidding statute and may initiate proceedings in Superior Court to restrain award or performance of contracts found to be in violation of its provisions). See also part 2, *infra*.

Brasi and the university signed the "Lease Agreement" while a decision on the bid protests was pending. Following an investigation and a bid protest hearing, see *G. L. c. 149, § 44H*, the Attorney General issued a combined decision on both protests, concluding that the university's RFP was a proposal to construct a public building, subject to the competitive bidding statute, and that the agreement between Brasi and the university was entered into in violation of those laws. [11] In reliance **[***8]** on the Attorney General's bid protest decision, the university attempted to terminate its contract with Brasi. [12]

11 As part of her findings of fact, the Attorney General concluded that Brasi's bid was not the

lowest one submitted; this finding appears to have been based on the amount of the lease payment for the first year of the five-year lease. The finding is disputed by both Brasi and the university; both contend that the proposal of Academic Village Foundation, Inc., which the Attorney General found to be the lowest bid, was nonresponsive because it failed to meet the scheduling requirements in the RFP, and also that it would have resulted in annual costs to students that would have been almost twice as much per student as Brasi's proposal.

12 Brasi disagreed, claiming that the university had no grounds on which to cancel the contract.

Brasi filed an action against the university and the Attorney General in the Superior Court, seeking a judgment declaring that the bid protest decision was incorrect and that the provisions of the competitive bidding statute were not applicable to the lease agreement. The Attorney General counterclaimed, asserting that the bid protest decision should **[***9]** be upheld.

The university moved successfully to dismiss on the ground that the plaintiff sought no relief from the university. Brasi and the Attorney General filed cross motions for summary judgment. Concluding that the agreement between Brasi and the university was a lease for a newly-constructed building rather than an agreement to construct a building, and therefore was not subject to the competitive bidding statute, a judge in the Superior Court allowed Brasi's motion for summary judgment and ordered entry of judgment accordingly. We granted the Attorney General's request for direct appellate review. [13]

13 Although the university canceled its contract with Brasi after the Attorney General issued her bid protest decision, the parties agree that the case is not moot. Both Brasi, in its briefs before this court, and the university, in earlier filings, state that, should the Attorney General's decision be reversed, they would "be in a position to address any remaining issues with respect to the lease agreement" and contend that the question is therefore not moot. See *Singer Friedlander Corp. v. State Lottery Comm'n, 423 Mass. 562, 563, 670 N.E.2d 144 (1996)*. In any event, given the university's continuing **[***10]** and pressing need for student housing, the question is likely to arise again. See *Allen v. Boston Redev. Auth., 450 Mass 242, 254 n.20, 877 N.E.2d 904 (2007)*. Moreover, the issue is of significant public importance, is generally capable of repetition, and has been well briefed before this court. See *Lockhart v. Attorney Gen., 390 Mass. 780, 783, 459 N.E.2d 813 (1984)*.

[*689] **[**832]** 2. *Statutory requirements*. Because the issue here is whether the university's resident housing project was subject to the competitive bidding statute, and because the university's acquisition or lease of real property is subject to the requirements of other statutes, we discuss the relevant portions of these statutes in some detail.

The competitive bidding statute sets forth detailed procedures governing the process that State agencies must follow in soliciting and accepting proposals for public construction projects. Pursuant to *G. L. c. 149, § 44A (2) (D)*, "[e]very contract for the construction, reconstruction, installation, demolition, maintenance or repair of any building by a public agency estimated to cost more than $ 100,000, except for a pumping station . . . , shall be awarded to the lowest responsible and eligible general bidder on the basis **[***11]** of competitive bids in accordance with the procedure set forth in *sections 44A to 44H*, inclusive." [14]

14 The statute was amended in 2004 to increase the estimated costs of projects subject to the provisions of *G. L. c. 149, § 44A (2) (D)*, from $ 25,000 to $ 100,000. See St. 2004 c. 193, § 11 (2) (D). See also St. 1984, c. 484, § 44 (increasing limit from $ 5,000 to $ 25,000). In all other relevant respects, the statutory provisions applicable at the time of the events at issue here are unchanged.

The competitive bidding statute was substantially modified in 1980 in response to the findings of the Special Commission Concerning State and County Buildings (Ward Commission) that public construction projects in the Commonwealth were plagued by rampant favoritism in awarding bids and "shoddy" construction practices. See St. 1980, c. 579; St. 2004, c. 193; *LeClair v. Norwell, 430 Mass. 328, 332, 719 N.E.2d 464 (1999)*; Final Report to the General Court of the Special Commission Concerning State **[*690]** and County Buildings, Vol. 1, 21-39 (Dec. 31, 1980) (Ward Commission Report). The purposes of the competitive bidding statute are to eliminate favoritism and corruption; to ensure an open and honest bidding process and **[***12]** an equal playing field for all bidders; and to ensure that qualified contractors build public buildings that are suitable for the uses for which they are intended. See *John T. Callahan & Sons, Inc. v. Malden, 430 Mass. 124, 128, 713 N.E.2d 955 (1999)*, quoting *Modern Cont. Constr. Co. v. Lowell, 391 Mass. 829, 840, 465 N.E.2d 1173 (1984)*, and *James J. Welch & Co. v. Deputy Comm'r of Capital Planning & Operations, 387 Mass. 662, 666, 443 N.E.2d 382 (1982)*. See also St. 1980, c. 579, preamble; Ward Commission Report at 29-30. The statute is designed to safeguard public funds by preventing unqualified contractors from

working on public buildings; providing the awarding authority the most favorable price consistent with satisfactory construction; and reducing the risk that construction projects will not be completed. See St. 1980, c. 579, preamble; *Annese Elec. Servs., Inc. v. Newton, 431 Mass. 763, 767, 730 N.E.2d 290 (2000)*. See also *Modern Cont. Constr. Co. v. Lowell, supra.*

The competitive bidding statute sets forth stringent requirements for precertification of contractors to assure that bidders will be able to complete the proposed project in terms both of their professional experience and their financial circumstances. See *G. L. c. 149, § 44D (2), (3)*; *810 Code Mass. Regs. § 8.03* (2005). **[**833]** Where a construction project is estimated to exceed $ 10 million, additional precertification requirements apply. See *G. L. c. 149, § 44D 1/2* Only contractors who are precertified for the amount of a given project are considered "responsible" [15] public bidders "eligible" [16] to submit bids for construction projects. See *G. L. c. 149, §§ 44A, 44D*. DCAM has supervisory authority over State construction contracts, see *G. L. c. 7, §§ 39A, 39B, 39D, 40A, 40G*, and certifies contractors as eligible public bidders. See *G. L. c. 149, § 44D*.

15 "'Responsible' means demonstrably possessing the skill, ability and integrity necessary to faithfully perform the work called for by a particular contract, based upon a determination of competent workmanship and financial soundness in accordance with the provisions of section forty-four D of this chapter." *G. L. c. 149, § 44A (1)*.

16 "'Eligible' means [one who is] able to meet all requirements for bidders or offerors set forth in sections forty-four A through forty-four H of this chapter . . . and who shall certify that he is able to furnish labor that can work in harmony with all other elements of labor employed or **[***14]** to be employed on the work." *G. L. c. 149, § 44A (1)*.

The Attorney General is charged with investigating allegations of violations of the competitive bidding statute and enforcing its provisions. Investigations of alleged violations are initiated when a "bid protest," alleging a violation of the competitive bidding statute, is filed with the fair labor and business practices unit of the Attorney General's office. After investigation and an evidentiary hearing, the Attorney General issues a "bid protest decision" allowing or denying the protest. If the Attorney General determines that a violation has occurred, she may bring an action in the Superior Court seeking to enjoin an agreement or otherwise to enforce a bid protest decision. See *G. L. c. 149, §§ 27C (a), 44H*. See also *Annese Elec. Servs., Inc. v. Newton, supra at 771*. Where an agreement is subject to the competitive bidding statute and the statutory requirements are not met, the agreement is invalid and unenforceable. See *Majestic Radiator Enclosure Co. v. County Comm'rs of Middlesex, 397 Mass. 1002, 1003, 490 N.E.2d 1186 (1986)*.

A State agency's acquisition of interests in real property, whether by lease or purchase, is regulated by the provisions **[***15]** of several other statutes. State entities are subject to stringent public notice and oversight requirements when entering into lease agreements. See *G. L. c. 7, §§ 40G, 40H*; *G. L. c. 30B, § 16*. DCAM has supervisory authority over all State rental agreements. See *G. L. c. 7, §§ 39A, 39B, 40G*. The office of the Inspector General is responsible for preventing "fraud, waste and abuse in the expenditure of public funds" on State "construction" [17] contracts either for lease or purchase. See *G. L. c. 12A, §§ 1, 7*.

17 For this purpose, "construction" is defined as "planning, acquiring, designing, building, altering, repairing, maintaining, servicing, improving, demolishing, equipping or furnishing any structure." See *G. L. c. 12A, § 1*.

The university is independently authorized to lease, purchase, and manage property. See *G. L. c. 75, §§ 11, 12*. Although the university is generally free from oversight by other State agencies, see St. 1960, c. 773, § 18, it is subject to the statutory provisions governing capital facility projects under DCAM, see *G. L. c. 75, § 1*, [18] as well as to the competitive bidding **[**834]** laws. **[*692]** See St. 1998, c. 319, § 15; *G. L. c. 29, § 7E*. [19] See also *Associated Subcontrs. of Mass., Inc. v. University of Mass. Bldg. Auth., 442 Mass. 159, 160, 810 N.E.2d 1214 (2004)*.

18 Pursuant **[***16]** to *G. L. c. 75, § 1*, "[i]n exercising such authority, responsibility, powers and duties [the board of trustees of the State university] shall not in the management of the affairs of the university be subject to, or superseded by, any other state agency, board, bureau, commission, department or officer, except as provided in section 14A of chapter 6A [Executive Office of Education], sections thirty-eight A 1/2 to forty-three I, inclusive, of chapter seven [capital facility projects under DCAM], chapter fifteen [Department of Education], chapter fifteen A [public education] or in this chapter."

19 Limited exceptions to the public bidding requirement are authorized in specific circumstances. For instance, the University of Massachusetts, acting through its building authority, is not subject to the competitive bidding statute where at least half of the funds for construction are from a nonpublic source, see St. 1998, c. 319,

§ 15, and courts may lease public or private buildings constructed to their needs where "the interest of the efficient and cost-effective administration of justice requires." See *G. L. c. 29A, § 4*. See also *G. L. c. 7, § 41C*.

3. *Discussion*. The Attorney General contends **[***17]** that the agreement between Brasi and the university was a contract for construction of a public building. She argues that the university sought to construct, rather than lease, a building because the RFP sets forth "extraordinarily detailed" and "very specialized" design requirements that required a new, special-purpose building. See *Andrews v. Springfield, 75 Mass. App. Ct. 678, 680-681, 683-684, 915 N.E.2d 1133 (2009)* (city's hiring of architect to produce detailed design documents which were part of RFP for animal shelter was factor in decision that RFP was subject to competitive bidding statute). The Attorney General relies most extensively on the degree of supervision and control that the university maintained over the construction process as indicating that Brasi was acting as the university's agent. She cites also the potential thirty-year length of the agreement and the specific conditions governing the university's occupancy of the property. The Attorney General argues that Brasi's building permit, obtained prior to the issuance of the RFP, see note 8, *supra*, indicates that the university intended indefinite use of the proposed dormitory, and that the highly "specialized" nature of the dormitory, **[***18]** in conjunction with the provisions of the building permit, meant that any change in use of the property would require substantial, time-consuming, and costly modifications.

In addition, although the bid protest decision declined to address these issues, and the judge did not consider them in ruling on Brasi's action for a declaratory judgment, the Attorney General **[*693]** argues that, based on the short time frame (fifteen months) between the date of acceptance of the bid and the required occupancy date, Brasi had an unfair advantage because it had previously obtained zoning approval to build a dormitory; she maintains that, for all practical purposes, there may have been no other bidder able to compete with Brasi since other bidders would be unable to obtain zoning approval to construct a dormitory in the required time frame. Lastly, the Attorney General argues that, pursuant to *G. L. c. 149, § 44H*, she is responsible for enforcing the competitive bidding statute, and we should therefore accord substantial deference to her decisions interpreting that statute.

Brasi asserts that the judge determined correctly that the university sought a true lease and not a disguised construction contract. **[***19]** Brasi contends that it owned the land, assumed all risks and costs of construction, and would have owned and maintained the newly-built facility. While the university was responsible for fixed lease payments, Brasi was required to pay taxes, utilities and other costs, and assumed as well the risk of damage or destruction of the building; any damage to the building **[**835]** not repaired within 150 days would allow the university to cancel the lease. Brasi was required to maintain liability insurance on the property, to assume all liability for injuries incurred by residents and visitors to the premises, and to indemnify the university for any such injuries.

In addition, Brasi argues that the developer was responsible for the costs of maintenance and repair of the property, as well as the day-to-day operation and cleaning of the building and grounds. Brasi states there was no unfair competition, and there is no basis in the record for the Attorney General's finding that the university will most likely seek to acquire the facility at the end of the lease. Finally, Brasi contends that the Attorney General does not have the type of discretionary rule-making authority under *G. L. c. 149, § 44H*, that **[***20]** would entitle her interpretation of the public bidding statute to deference. See *Annese Elec. Servs., Inc. v. Newton, 431 Mass. 763, 771, 730 N.E.2d 290 (2000)*.

a. *Standard of review*. Ordinarily, we review a question of statutory interpretation de novo. See *Costa v. Fall River Hous. Auth., 453 Mass. 614, 620, 903 N.E.2d 1098 (2009)*, citing *Commerce Ins. Co. v. Commissioner of Ins., 447 Mass. 478, 481, 852 N.E.2d 1061 (2006)*. The Attorney **[*694]** General has no rule-making authority with respect to the competitive bidding statute and no broad discretion in issuing enforcement decisions. Contrast *Dahill v. Police Dept. of Boston, 434 Mass. 233, 239-240, 748 N.E.2d 956 (2001)*, and *American Family Life Assur. Co. v. Commissioner of Ins., 388 Mass. 468, 471, 474-475, 446 N.E.2d 1061*, cert. denied, *464 U.S. 850, 104 S. Ct. 160, 78 L. Ed. 2d 147 (1983)*. The competitive bidding statute sets forth detailed criteria concerning virtually every aspect of the bidding process and the manner in which it is to be conducted, and the Attorney General has authority only to "require compliance" with its terms if, "after investigation of the facts, [s]he has made a finding that [a bid] award or performance has resulted in violation" of the statutory provisions. See *G. L. c. 149, § 44H*. Because the decision involves neither an **[***21]** adjudicatory proceeding nor rule making, we conclude, as we did in similar circumstances in *Annese Elec. Servs., Inc. v. Newton, supra*, that the Attorney General's decision interpreting the competitive bidding statute should be accorded no deference.

b. *Whether the competitive bidding statute is applicable to requests for long-term lease agreements*. "We construe [the competitive bidding statute], as we must, in light of the legislative objectives which were served by its enactment so as to effectuate the purpose of the fram-

ers." *John T. Callahan & Sons, Inc. v. Malden, 430 Mass. 124, 128, 713 N.E.2d 955 (1999)*, quoting *Interstate Eng'g Corp. v. Fitchburg, 367 Mass. 751, 757, 329 N.E.2d 128 (1975)*. Consistent with its broad remedial purpose, the competitive bidding statute is to be strictly construed. See *Modern Cont. Constr. Co. v. Lowell, 391 Mass. 829, 840, 465 N.E.2d 1173 (1984)*.

The judge decided that the lease agreement between Brasi and the university was not "the functional equivalent of a construction contract" because Brasi retained ownership of the land and the building, assumed the risks and costs of construction, and assumed also the costs of ownership of the finished dormitory. The judge concluded that:

> "Although the student **[***22]** housing project at issue clearly contemplated construction activities, [the university's] primary objective has always been to lease a student housing facility. All costs associated with the construction of the facility are to be paid by Brasi. [The university's] **[**836]** obligation to pay rent, on the other hand, is unrelated to **[*695]** the costs of construction, and does not commence until the date of occupancy. Brasi has retained ownership of the property and bears all risks associated therewith, including the risk of casualty loss and the obligation to maintain the property in good repair."

Thus, the judge determined that the agreement was not subject to the competitive bidding statute.

The Legislature has provided no guidance for distinguishing a lease by a public agency from a construction contract subject to the competitive bidding statute, and we have had little opportunity to construe the competitive bidding statute in this respect. Therefore, we look more generally to our decisions regarding other statutes requiring public bidding. See *Modern Cont. Constr. Co. v. Lowell, supra at 836 n.9*, citing *Datatrol Inc. v. State Purch. Agent, 379 Mass. 679, 690, 400 N.E.2d 1218 (1980)*; *Modern Cont. Constr. Co. v. Lowell, supra at 840*. **[***23]** See also *Andrews v. Springfield, 75 Mass. App. Ct. 678, 684, 915 N.E.2d 1133 (2009)*, citing *Datatrol Inc. v. State Purch. Agent, supra at 695-696*.

We have concluded previously that other statutes requiring competitive public bidding may be broad enough to encompass long-term leases. See *Datatrol Inc. v. State Purch. Agent, supra at 688 n.7, 695* (agreement to lease computer system for State lottery, where agency retained option to purchase equipment at end of lease period, was actually agreement to purchase equipment and was therefore subject to general procurement statute, *G. L. c. 7, § 22*). In that case, we determined that, because the general procurement statute applies to both purchases and to agreements "contracting for . . . equipment," it is broad enough to include a lease. See *id*. Otherwise, the parties could easily employ long-term leases to evade the "competitive bidding requirement" of the procurement statute. *Id. at 695-696*. In addition, the Appeals Court has recently decided that an agreement described as a long-term lease of an animal control center was in essence a contract for construction of a public building, and therefore that public bidding on the project was required pursuant to **[***24]** the provisions of the competitive bidding statute. See *Andrews v. Springfield, supra at 683-685*.

We agree with the Appeals Court that a contract for a long-term lease may, in some circumstances, be subject to the requirements **[*696]** of the competitive bidding statute. The statute, which is to be strictly construed, applies to construction "of any building by a public agency," without limitation to buildings that will be owned by the Commonwealth. See *G. L. c. 149, § 44A (2) (D)*. Exempting agreements labeled "leases" that are intended clearly to create buildings for long-term use by public agencies defeats the purposes of the competitive bidding statute. The issue before us, then, is to define those circumstances.

c. *Test to determine when a lease agreement is subject to the competitive bidding statute*. A determination whether a project is construction "of any building by a public agency" is fact specific and cannot be based on any single factor. In the context of other public bidding statutes in the Commonwealth, the use of public funds, the length of the agreement, the use of private contractors or construction on private land, and whether relatively minor renovations are required that nonetheless **[***25]** exceed a statutory limit for construction projects, have not been determinative. See *Norfolk Elec., Inc. v. Fall* **[**837]** *River Hous. Auth., 417 Mass. 207, 208-209, 213-214, 216 n.8, 629 N.E.2d 967 (1994)* (renovation of low income housing project with Federal funds was subject to State public bidding law where State agency had "day-to-day control" of operation); *Helmes v. Commonwealth, 406 Mass. 873, 874, 876-877, 550 N.E.2d 872 (1990)* (public procurement statute did not apply because charity was not acting as agent of Commonwealth); *Salem Bldg. Supply Co. v. J.B.L. Constr. Co., 10 Mass. App. Ct. 360, 361-362, 407 N.E.2d 1302 (1980)* (private development of apartment complex for low income residents not construction of public building subject to *G. L. c. 149, § 29*, because housing agency only provided financing and developer retained control of project).

Without explicitly setting forth a new test, the Appeals Court relied on a multifactor analysis in reaching its determination that the city of Springfield's (Springfield's) long-term lease agreement for construction of an animal shelter was actually construction of a building by a State agency that was subject to the competitive bidding statute. See *Andrews v. Springfield, supra at 683-684*. **[***26]** In that case, Springfield entered into a twenty-five year lease with a private firm to build the animal shelter according to Springfield's specifications. *Id. at 681*. The Appeals Court **[*697]** examined the character of the RFP that Springfield issued to determine if the competitive bidding statute applied. *Id. at 683*.

As significant factors supporting its decision that the lease agreement was subject to the competitive bidding statute, the Appeals Court emphasized the length of the lease; the detailed design and construction requirements that Springfield set forth; the degree of Springfield's control over the construction process; and the fact that the lease payments were more than the costs of constructing the building. See *id. at 682-684*. Primary factors in the analysis were that, as stated in the RFP, Springfield intended to acquire an animal shelter for long-term use, and retained an option to purchase the facility for one dollar at the end of the lease, thereby obtaining the facility through lease payments using public funds. *Id. at 683*. Additionally, the Appeals Court observed that its holding was consistent with the statutory language applying to "[e]very contract for the construction **[***27]** . . . of any building by a public agency," and that to allow Springfield to evade the competitive bidding laws by styling a construction contract as a lease agreement was contrary to the statutory purpose. *Id. at 684-685*.

We agree with the analysis of the Appeals Court in *Andrews v. Springfield, supra at 683-685*, and with the factors it considered. We conclude that no specific set of factors will be sufficient for every situation, and that a totality of the circumstances test, which examines the circumstances in each case in detail, is the best approach for determining whether "build to lease" agreements are subject to the competitive bidding statute. Factors that may be helpful, but not dispositive, in determining whether a project is subject to the competitive bidding statute include the extent of control retained by the agency during development and construction; the length of the proposed lease, including any proposed extensions; whether the source of money is public funds; whether payments made under the agreement essentially cover the costs of construction; whether the State agency retains an option to purchase for a nominal sum at the end of the lease period or whether the building **[***28]** automatically **[**838]** transfers to the public agency on expiration of the lease; whether the agency initially owned the land and then sold or leased it to the private party, or whether the agency had the building constructed and then leased the newly constructed building; and whether the facility is of a **[*698]** specialized nature that would render it unsuitable for another commercial purpose without significant renovations. [20]

20 Courts in other jurisdictions that have considered this issue have also applied a fact-specific, multifactor test. See, e.g., *Division of Labor Standards v. Friends of the Zoo of Springfield, 38 S.W.3d 421, 422-424 (Mo. 2001)*; *Webster v. Camdenton, 779 S.W.2d 312, 313-314, 316-317 (Mo. Ct. App. 1989)*; *United States Corrections Corp. v. Department of Indus. Relations, 73 Ohio St. 3d 210, 212, 217-220, 1995 Ohio 102, 652 N.E.2d 766 (1995)*; *Celebrezze v. Tele-Communications, Inc., 62 Ohio Misc. 2d 405, 412-416, 419-424, 601 N.E.2d 234 (1990)*; *Mechanical Contrs. Ass'n v. University of Cincinnati, 141 Ohio App. 3d 333, 335-336, 340, 750 N.E.2d 1217 (2001)*; *Willman v. Children's Hosp., 505 Pa. 263, 270-271, 479 A.2d 452 (1984)*; *Affiliated Constr. Trades Found. v. University of W. Va. Bd. of Trustees, 210 W. Va. 456, 469-472, 557 S.E.2d 863 (2001)*.

The Attorney General has **[***29]** cited the detailed multifactor test set forth by the Supreme Court of Appeals of West Virginia, see *Affiliated Constr. Trades Found. v. University of W. Va. Bd. of Trustees, supra*, in some of her bid protest decisions. See, e.g., Enlace de Familias de Holyoke/Holyoke Community Charter School, Bid Protest Decision (July 15, 2002), at 10-12.

d. *Nature of the university's agreement with Brasi*. In granting summary judgment on Brasi's declaratory judgment action, the judge declared, in our view erroneously, that the contract between Brasi and the university was "for the lease of a completed student dormitory, rather than the construction of a building by a public agency." Although the factors the judge considered in reaching her decision were appropriate, her conclusion that the project was not construction of a building by a public agency was error. Applying the multifactor analysis discussed in part 3.c, *supra*, and considering all the circumstances in this case, we conclude that the lease agreement was subject to the competitive bidding statute.

The competitive bidding statute governs all construction "of a building by a public agency." *G. L. c. 149, § 44A (2) (D)*. It is to be strictly **[***30]** construed to effect its remedial purposes. See *Modern Cont. Constr. Co. v. Lowell, 391 Mass. 829, 840, 465 N.E.2d 1173 (1984)*. The statute does not distinguish between buildings that a public agency will own and buildings that a public agency will lease. Rather, it focuses on the crea-

tion of a project by the agency for the agency's use in carrying out its public purposes.

Were we to consider only the character of the RFP, as has been done in other contexts, see *Datatrol Inc. v. State Purch. Agent, 379 Mass. 679, 695, 400 N.E.2d 1218 (1980)*; *Andrews v. Springfield, 75 Mass. App. Ct. 678, 683, 915 N.E.2d 1133 (2009)*, [21] we would agree with Brasi that **[*699]** the dormitory project was not subject to the competitive bidding statute. However, limiting the inquiry to the RFP ignores relevant circumstances that have a direct bearing on the transaction that the parties contemplated. In the context of this case, where the lease agreement was signed only three months after the bidder was selected, and significant terms were **[**839]** included in that agreement that were not included in the university's RFP, we must consider the provisions of both documents.

> 21 *Datatrol Inc. v. State Purch. Agent, 379 Mass. 679, 695, 400 N.E.2d 1218 (1980)*, concerned the general procurement statute **[***31]** (*G. L. c. 7, § 22*), not the competitive bidding statute. *Andrews v. Springfield, 75 Mass. App. Ct. 678, 683, 915 N.E.2d 1133 (2009)*, although evaluating the statute at issue here, relied on cases interpreting other public bidding statutes, notably *Datatrol Inc. v. State Purch. Agent, supra.*

We recognize that contracts acceptable to a private bidder will necessarily differ in some respects from the terms of an RFP. We acknowledge also that, in certain circumstances, it will not be practical to review the terms of a contract which the parties may have executed long after the selection of a particular bidder. Here, however, the RFP was issued in February, 2008; the bidder was selected in May, 2008; and Brasi and the university executed the lease agreement on August 1, 2008, well before any construction had begun.

The agreement the university ultimately entered into with the selected bidder differs substantially in provisions that are critical to a determination whether the agreement was a contract for construction by a public agency. In situations such as the one here, considering only the RFP would defeat entirely the purposes of the competitive bidding statute. If agencies are permitted to issue an RFP **[***32]** that is not subject to the competitive bidding statute, yet then place in a subsequent agreement key terms that indicate that the agreement is in fact a construction contract, the objectives of the competitive bidding statute would easily be frustrated.

Ultimately, the residential housing project here involved creation of a new building, adjacent to the university's campus and dependent on the use of the university's parking lot, which the university had the right to occupy for thirty years. These facts persuade us that the dormitory project was indeed construction of a building by the university in the sense contemplated by the competitive bidding statute. Certain modified provisions are critical to our conclusion that the final agreement is one for **[*700]** construction of a residential housing facility, including the material change in the length of the agreement (doubling its length), and the increased degree of the university's supervision of the construction process from that in the RFP. We also deem critical several provisions that were added to the lease agreement that were not part of the RFP, particularly the facts that the new facility depends on other property already owned by the **[***33]** university, and that the university is granting Brasi an easement, apparently unlimited in duration, for use of university land.

We begin by examining the significant number of factors in the RFP establishing that the project proposed in the RFP itself was not subject to the competitive bidding statute. Then we consider deviations from the RFP that were made in the final agreement between Brasi and the university which rendered it a contract for construction by the university subject to the competitive bidding statute.

Standing alone, the RFP sought the use of land and buildings owned and maintained by proposed bidders and did not involve university property. Although the RFP initially required an option to purchase if the proposed bidder chose to sell the property during the lease term, that requirement was eliminated at a prebid conference where an amended RFP was issued. The sample lease attached to the RFP, as well as the agreement eventually executed with Brasi, required that the university relinquish possession on termination of the agreement. [22]

> 22 In seeking reconsideration of the bid protest decision, the university submitted documents asserting that the RFP contemplated a short-term **[***34]** lease to meet immediate needs while the university developed long-term plans to double its student housing by new construction on its existing campus that would include other facilities as well. The university stated that it was working with its building authority, see *G. L. c. 75, §§ 1-2*, to develop an over-all site plan encompassing the three separate parcels of land that constitute the university's campus and to generate adequate funds; that this was a well-documented public project; and that the current chancellor was selected in part because of his commitment to this development. The Attorney General does not dispute these assertions. Moreover, in another bid protest decision, the Attorney General has relied

on an agency's plans for separate long-term development as indicating that a shorter-term lease was not construction subject to the competitive bidding laws. See Town of Hadley, Trial Court Leasing Project, Bid Protest Decision (January 31, 2003), at 7, 9.

[840]** The length of the lease term set forth in the RFP was consistent with the university's assertion that it intended a short-term **[*701]** occupancy. Not only was the lease period in the RFP of relatively short duration (five years, **[***35]** with options for two five-year extensions), the RFP placed all risk of nonrenewal on the lessor. If a bidder responded with a proposal to construct a building, that bidder would have no assurance of recouping its construction costs during the initial five-year term of the lease, and would be certain of the university's occupancy for no more than five years. Indeed, Brasi's proposal indicated that it would have incurred at least $ 25 million in construction costs (in addition to the cost of acquisition of the property) before the university was required to make any lease payments, and that the university would have guaranteed to pay only $ 8 million towards those costs. [23] Furthermore, we note that DCAM's standard lease agreement is for a five-year term with options to renew at the discretion of the lessee. See also Town of Hadley, Trial Court Leasing Project, Bid Protest Decision (January 31, 2003) at 2.

23 Based on documents in Brasi's proposal, in addition to the purchase costs of the property, it would have entered into a $ 22.5 million bank loan to construct the building, and would have paid over $ 1 million annually in taxes, insurance, and maintenance costs, while the university **[***36]** was obligated to pay only $ 2.6 million annually (including costs for utilities, telephone service, cable television, snow removal, and daily cleaning) for no more than a five-year period and only after the building was useable.

We turn next to the type of building required by the university. The RFP sought a residential facility containing a mixture of one- and two-bedroom apartments to house 120 to 400 students. It required a minimum of ninety to one hundred square feet per student in each bedroom and one two-bedroom apartment for a resident director for each 250 students. It stated also that the facility should not "conflict with" the university's or the city's architecture, and should be "attractive to college students."

As is evident from the responses received by the university, a new building clearly was not required under the terms of the RFP. After reviewing the RFP at the university's request to determine the zoning approvals that would be needed, a city manager concluded that existing multifamily residential buildings could be used to satisfy the RFP without any change in zoning or additional permits. The city manager's letter of opinion was distributed to all potential bidders. **[***37]** In fact, four of the seven proposals submitted in response to the RFP were for the use of **[*702]** existing structures, and two of those proposed structures were to be used without any modifications. The judge observed correctly: "It bears noting that if Brasi had already completed construction of the facility, the substance of the parties' agreement would remain the same. A fully constructed facility would equally qualify for consideration under the RFP, as would **[**841]** a proposal to modify an existing structure. . . ."

The record indicates also that the building described in Brasi's proposal, to which Brasi's earlier permit would apply according to the city manager's letter, could readily have been used as an ordinary apartment building at the end of the lease term. The permit issued to Brasi allowed a "dormitory" use of the property. [24] Under the city's zoning code, a "dormitory" use of a multifamily building differs only in that the city-wide restriction of no more than three unrelated individuals living in any one apartment unit does not apply (i.e., a two-bedroom apartment in a "dormitory" can house four students, whereas the same apartment can house only three students in a "multi-family" unit). **[***38]** [25] Thus, Brasi would have had an economically viable use of the building after the expiration of the lease term contemplated in the RFP. This factor weighs in favor of a conclusion that the agreement was not subject to the competitive bidding laws.

24 The permit required Brasi to enter into a thirty-year lease with the university and to seek zoning board approval before converting the building to any other use. In its motion to reconsider, the university stated both its belief that this condition was invalid and unenforceable and its understanding that the condition had subsequently been removed from the permit.

25 The city manager's zoning opinion letter, attached to the RFP, explained also that in the "institutional" zone, where dormitory use is allowed as of right, no zoning approvals would be required. Obtaining a special permit (new or existing building) or site plan approval (new building) for a "dormitory" use in the numerous zones where such uses were permissible would take three to four months. Obtaining a zoning change for a dormitory use in a zone where a dormitory use was not permitted would generally take from four to six months. Thus, the city manager's zoning opinion letter **[***39]** does not support the Attorney General's assertion that no other bidders

would be able to compete effectively with Brasi, given the eighteen-month period from issuance of the RFP to the occupancy date, because Brasi had an existing special permit. In addition, as long as all bidders are responding to the same set of requirements, and evaluated by the same set of criteria, the process is fair. That some bidders have advantages in experience, financial strength, or available resources does not infringe on the purpose of the competitive bidding law to allow all to compete on an equal footing. See *Department of Labor & Indus. v. Boston Water & Sewer Comm'n, 18 Mass. App. Ct. 621, 626, 469 N.E.2d 64 (1984)*.

[*703] Next, we consider the degree of the university's control over the design requirements. We conclude that the university did not retain significant control of the design specifications in the RFP. Bidders responded to a set of basic requirements for a student residential housing facility consisting of one- and two-bedroom apartments. See *J.F. White Contr. Co. v. Massachusetts Port Auth., 51 Mass. App. Ct. 811, 816, 748 N.E.2d 1020 (2001)*. The RFP required bidders to submit documents and specifications showing the design **[***40]** and floor plans of the building or buildings, and stated that the university would evaluate all proposals for attractiveness of design, quality of materials, durability, and cost.

Unlike the very specialized requirements for construction of an animal shelter discussed in *Andrews v. Springfield, 75 Mass. App. Ct. 678, 683, 915 N.E.2d 1133 (2009)*, nothing in the university's RFP indicates the "extraordinary" level of specialized design suggested by the Attorney General. To the contrary, many of the requirements are basic and standard for any multifamily residential housing. For instance, the requirements of a window and a closet in each bedroom, peepholes in apartment doors, mail boxes meeting United States Post Office standards in the **[**842]** entry area, and compliance with Federal accessibility requirements for disabled individuals are common and would generally be mandated by provisions of the city zoning code and Federal law.

Certain provisions for electrical systems and security features were peculiar to the university. In separate schedules, the RFP contained requirements for Internet, telephone, and cable television access in each room, and security features, including video cameras at outside entrances, **[***41]** capable of connecting to the university's computer network. However, as the bid protest decision observed, the fact that an agreement contemplates some level of customization or "build out" of leased space is "common" in commercial leases, and tenants' involvement in this process does not convert a lease into a construction agreement. See, for example, the following bid protest decisions: Four Rivers Charter School, School Construction Project, Bid Protest Decision (September 24, 2004); Pioneer Valley Performing Arts School, Bid Protest Decision (April 20, 2004); Town of Hadley, Trial Court Leasing Project, Bid Protest Decision (January 31, 2003). Contrast *Andrews v. Springfield, supra at 680-681, 683-684* (city controlled design specifications where city **[*704]** hired architect to develop detailed design and construction documents, attached them to RFP, and required all bidders to comply with those specifications; specifications included location of over eighty-five rooms in building, required finishes for all surfaces, descriptions of tiles, flooring and paint, and specific manufacturers and model numbers for fixtures and fittings).

Thus, the terms of the RFP, viewed in isolation, indicate **[***42]** that the university's dormitory project contemplated the leasing of a building that might or might not already exist; was not a construction project; and therefore was not subject to the competitive bidding statute. However, that is not the end of the inquiry. As stated, several significant provisions in the RFP were materially altered in the lease agreement. The modified provisions in the final agreement contrast markedly with important terms of the RFP and change the character of the project. In addition, the lease agreement contained several provisions that formed no part of the RFP and which indicate an intention by the university to exercise long-term control of the dormitory. [26]

26 These provisions support an inference that the university will eventually seek to acquire the facility, although our conclusion does not depend on this assumption.

First, while the RFP sought an initial five-year lease period, with an option to extend by the university for two additional five-year terms, the agreement ultimately executed between Brasi and the university provided for a maximum of a thirty-year lease; it included an initial five-year lease period, with automatic renewal of the lease for **[***43]** two additional five-year periods (rent to be negotiated), and then an option on the part of the university to renew for up to three additional five-year terms. The contractual provision allowing the university to use the dormitory for thirty years supports a conclusion that the university intended to acquire the facility or at least to retain effective permanent control thereof. In any event, the guaranteed fifteen-year period of the lease, with extensions totaling another fifteen years, is substantially different from that described in the RFP; thus, the provision suggests that the requirements set forth in the RFP did not reflect the university's true purpose.

In addition, the agreement eventually negotiated by the parties provided for the construction by Brasi of an

entirely **[**843]** new building. While creation of a new structure is not determinative, **[*705]** see, e.g., Town of Hadley, Trial Court Leasing Project, Bid Protest Decision (January 31, 2003), it is a factor that is entitled to weight in this case, in conjunction with other factors such as the length of the lease, in deciding whether there is construction "of a building by a public agency."

The degree of supervision and control that the **[***44]** university maintained over the construction process is also a meaningful factor here. This factor was relied on extensively by the Attorney General as evidence that Brasi was acting as the university's agent. The RFP stated that the successful bidder would be responsible for managing the project and maintaining liability insurance. It provided only that the university would have approval of the architectural design and the construction materials, and does not tend to indicate university control over the day-to-day construction. The lease agreement, however, provided the university significantly greater control and approval over the construction process. Most particularly, the university had the right to attend weekly construction meetings and to approve various phases of the work.

The judge considered the terms of the lease agreement, and determined that the university's right to attend weekly meetings and approve various phases of construction represented only "limited participation in the construction process" and that "monitoring the building's development is the only practical means of safeguarding the [u]niversity's interests." However, in our view, the agreement's provisions allowed **[***45]** more than "limited" participation in the construction process. The lease agreement allowed the university to exercise supervisory authority and approval at least over major phases of the construction, and to have an ongoing role in monitoring the building process. Thus, the university retained substantially greater supervision over construction than was described in the RFP. The level of supervision afforded the university is similar in kind to the city of Springfield's right to hire a "construction manager to inspect and approve each phase of the construction," see *Andrews v. Springfield, supra at 681*.

Thus, it is apparent that the parties' ultimate agreement departed in material respects from what appeared in the RFP. What started as a relatively short-term occupancy of a building that might already exist ended as a potentially long-term commitment **[*706]** to a new structure over which the university would exercise considerable influence.

Other terms in the agreement that were not part of the RFP provide additional indications that the agreement contemplated construction of a dormitory by the university in the sense embraced by the competitive bidding statute. Importantly, the lease agreement **[***46]** would have resulted in creation of a building that was dependent on the continuing use of university land. As stated, Brasi had obtained previously a zoning permit for the never-undertaken dormitory project that Brasi had proposed to the university. That permit had a provision stating that parking for the proposed dormitory would be in one of the parking lots on the university's campus, because Brasi's property was not large enough to contain a parking lot of the size necessary to meet city zoning requirements for the ratio of parking spaces to student beds.

The RFP required that bidders proposing development describe their plans for obtaining approval from the city. In response, Brasi submitted the permit it had obtained previously and a letter from the **[**844]** city stating that the earlier permit could be used for the dormitory sought in the RFP. Both the permit and the university's acceptance of the permit requirements were incorporated in the terms of the lease agreement. The lease provided that the university agreed to the use of its parking lot for dormitory parking. Thus, the lease agreement would have resulted in Brasi owning a building that was dependent on the indefinite use of university **[***47]** land in order to comply with the requirements of Brasi's building permit.

Furthermore, to alleviate its concerns over the proximity of Brasi's property to a commuter rail line, in its conditional acceptance letter the university required Brasi to build, at no additional cost to the university, a climate controlled and handicapped accessible pedestrian bridge over the tracks as well as a twelve-foot fence along Brasi's property line abutting the railroad property. The university agreed also that, to facilitate placement of the pedestrian bridge, it would grant Brasi an easement over a portion of the university parking lot. These conditions, including the university's commitment to grant Brasi such an easement, were incorporated in the lease agreement. Thus, the lease agreement **[*707]** transferred to Brasi an interest in a portion of the university campus and permitted Brasi an indefinite use of another portion.

The additional provisions in the lease concerning construction of the pedestrian bridge on a portion of the university's parking lot, and use of the university's existing parking lot to meet zoning requirements for dormitory parking, suggest that the university intends indefinite use of **[***48]** the proposed dormitory and eventually to incorporate the dormitory into the university campus. Given the university's acknowledged urgent need for student housing, such a conclusion is not inconsistent with the university's stated intention of doubling the capacity of the dormitory facilities on its existing property.

The Attorney General makes several arguments regarding financial factors that have been significant to determinations made in other cases. However, because the record does not contain adequate information to support these arguments, we are unable to evaluate these factors in this case. Therefore, although such financial factors could have an impact on a determination whether the agreement was a lease or a contract for construction, we reach no conclusion on these matters.

Considering all the provisions of the RFP and the lease agreement in this case, including the relevant changes that we have identified, we conclude that the university's agreement with Brasi was subject to the competitive bidding statute. Therefore, we conclude that the lease agreement was for construction of a dormitory by the university, and was entered into in violation of the competitive bidding statute.

4. **[***49]** *Conclusion*. The competitive bidding statute, *G. L. c. 149, §§ 44A-44H*, is applicable to the university's agreement with Brasi to develop and maintain a student dormitory near its campus. The judgment of the Superior Court is reversed, and a declaration in accordance with this opinion shall be entered.

So ordered.

DUARTE CALVAO, ET AL., Plaintiffs, Appellants, v. TOWN OF FRAMINGHAM, Defendant, Appellee.

No. 09-1648

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

599 F.3d 10; 2010 U.S. App. LEXIS 5515; 159 Lab. Cas. (CCH) P35,719; 15 Wage & Hour Cas. 2d (BNA) 1665

March 17, 2010, Decided

PRIOR HISTORY: [1]**

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS. Hon. George A. O'Toole, U.S. District Judge.

Calvao v. Town of Framingham, 2008 U.S. Dist. LEXIS 50422 (D. Mass., July 2, 2008)

COUNSEL: Jack J. Canzoneri with whom Mark A. Hickernell, Alan J. McDonald, and McDonald Lamond & Canzoneri were on brief for the appellants.

Christopher J. Petrini with whom Peter L. Mello and Petrini & Associates, P.C. were on brief for the appellee.

John Foskett and Deutsch Williams Brooks Derensis & Holland, P.C. were on brief for amici curiae City Solicitors and Town Counsel Association, Massachusetts Municipal Association, and Massachusetts Chiefs of Police Association, Inc., in support of the appellee.

JUDGES: Before Lynch, Chief Judge, Boudin and Howard, Circuit Judges.

OPINION BY: LYNCH

OPINION

[*12] LYNCH, *Chief Judge*. This case under the Fair Labor Standards Act ("FLSA") raises an issue about whether a city or town must give notice to its public safety officers as a matter of federal law before the municipality takes advantage of a special statutory exemption for these officers from usual overtime requirements, *29 U.S.C. § 207(k)*. We hold no such notice is required.

Plaintiffs are police officers of the Town of Framingham who brought a putative class action suit against the Town in April 2005, alleging **[**2]** that the Town had failed to pay them sufficient overtime in violation of the FLSA, *29 U.S.C. §§ 201-19*, and seeking damages. Anticipating the Town's defense, the officers sought a declaratory judgment that the Town was ineligible for the FLSA's limited public safety exemption from overtime, *29 U.S.C. § 207(k)*. That exemption eases the FLSA's overtime pay requirements on public employers who establish work schedules that meet statutory requirements.

The district court granted partial summary judgment, holding the Town met the eligibility requirements for the public safety exemption. *Calvao v. Town of Framingham, No. 05-10708, 2008 U.S. Dist. LEXIS 50422, 2008 WL 2690358, at *4 (D. Mass. July 2, 2008)*. The parties have since stipulated to judgment on the remaining issues.

We affirm the district court and reject plaintiffs' argument that the Town was required to notify affected employees before establishing a valid work period under *§ 207(k)*. The text of the statute and the Department of Labor's interpretive guidance, as well as our caselaw, confirm that a public employer need only establish a *§ 207(k)*-compliant work period to claim the exemption's benefits without explicitly giving notice to the affected employees. **[**3]** The Town has done so and is entitled to judgment. We also reject plaintiffs' claim that the district court abused its discretion by denying their motion to strike certain evidence.

I.

A. *Legal Background: The FLSA's Public Safety Exemption, 29 U.S.C. § 207(k)*

The history and scope of the FLSA public safety exemption set the background. **[*13]** "Congress enacted the FLSA in 1938 to establish nationwide minimum wage and maximum hours standards." *Moreau v. Klevenhagen, 508 U.S. 22, 25, 113 S. Ct. 1905, 123 L. Ed. 2d 584 (1993)*; Ellen C. Kearns et al., *The Fair Labor Standards Act* § 1.III, at 12-13 (1999). Later amendments in 1966 and 1974 extended the Act's reach to state and municipal employers. *See Moreau, 508 U.S. at 25-26*. Despite congressional efforts to mitigate the effect of these amendments on municipal coffers, *e.g.*,

Kearns et al., *supra* § 11.V.B., at 687, the amendments triggered protracted litigation, as state and local public employers mounted constitutional challenges to the FLSA's regulation of state-employer compensation schemes. *See Moreau, 508 U.S. at 26* & n.6 (collecting cases). In part, the employers were successful. *See Nat'l League of Cities v. Usery, 426 U.S. 833, 851-52, 96 S. Ct. 2465, 49 L. Ed. 2d 245 (1976)* (invalidating 1974 amendments to **[**4]** the FLSA to the extent that they "impermissibly interfere[d] with the integral governmental functions" of states and municipalities).

In February 1985, the Supreme Court upheld Congress's power under the FLSA to regulate the payments due to state and local employees. *See Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 105 S. Ct. 1005, 83 L. Ed. 2d 1016 (1985)*. State and municipal authorities reacted with "grave concern" to the decision, due in part to "[t]he projected 'financial costs of coming into compliance with the FLSA--particularly the overtime provisions.'" *Moreau, 508 U.S. at 26* (quoting S. Rep. No. 99-159, at 8 (1985)).

In response, both the House and Senate held hearings on the issue "and considered legislation designed to ameliorate the burdens associated with necessary changes in public employment practice." *Id.* Congress ultimately enacted several provisions designed to allay public employers' fears and contain costs. *See, e.g., id.* Congress also delayed enforcement of the FLSA against state and local employers until April 15, 1986, to give them time to comply with the Act's amended requirements. *See* Fair Labor Standards Amendments of 1985, Pub. L. No. 99-150, § 2(c), 99 Stat. 787, 788-89.

Section 207(k) **[**5]** was originally passed in 1974. The provision created a partial FLSA exemption for law enforcement and fire protection personnel ("public safety personnel"). *See 29 U.S.C. § 207(k)*. When *Garcia* held the FLSA applied to municipal employees, *§ 207(k)* became very important to municipalities. *See Martin v. Coventry Fire Dist., 981 F.2d 1358, 1361 (1st Cir. 1992)*.

Under the FLSA, employees other than public safety personnel are generally entitled to payment "at a rate not less than one and one-half times" their regular wages for any time worked in excess of forty hours in a seven day period. *29 U.S.C. § 207(a)(1)*. However, the partial exemption in *§ 207(k)* set a higher threshold number of hours that public safety personnel can work in a twenty-eight day work period--or a proportional number of hours in a shorter work period of at least seven days--before these employees become entitled to overtime compensation. *See id. § 207(k)*. [1]

1 *Section 207(k)* reads in its entirety:

> (k) Employment by public agency engaged in fire protection or law enforcement activities.
>
> No public agency shall be deemed to have violated subsection (a) of this section with respect to the employment of any employee in fire **[**6]** protection activities or any employee in law enforcement activities (including security personnel in correctional institutions) if--
>
> (1) in a work period of 28 consecutive days the employee receives for tours of duty which in the aggregate exceed the lesser of (A) 216 hours, or (B) the average number of hours (as determined by the Secretary pursuant to section 6(c)(3) of the Fair Labor Standards Amendments of 1974) in tours of duty of employees engaged in such activities in work periods of 28 consecutive days in calendar year 1975; or
>
> (2) in the case of such an employee to whom a work period of at least 7 but less than 28 days applies, in his work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of consecutive days in his work period as 216 hours (or if

> lower, the number of hours referred to in clause (B) of paragraph (1)) bears to 28 days, compensation at a rate not less than one and one-half times the regular rate at which he is employed.

The work period at issue here falls under clause two.

[*14] In *§ 207(k)*, Congress set the maximum number of pre-overtime hours; it gave the Secretary of Labor authority **[**7]** to promulgate regulations establishing a lower ceiling. *Id. § 207(k)(1)(B)*; *see also O'Brien v. Town of Agawam, 350 F.3d 279, 290 n.20 (1st Cir. 2003)*. The Secretary did so in 1987, setting a limit for law enforcement personnel of 171 hours over a twenty-eight-day period, or the proportional equivalent over a shorter span of time. *See 29 C.F.R. 553.230*. For a twenty-four-day work period, this ratio works out to approximately 147 hours, or about forty-three hours every seven days. *Id. § 553.230(c)*.

Section 207(k) eases the burden of the FLSA's overtime provisions on state and local employers two ways. The partial exemption provides for higher hourly standards before requiring the payment of overtime; further, it permits overtime hours to be computed over a workweek that may be longer than a forty-hour workweek and that the employer selects. As we explained in *Agawam*:

> *[Section 207(k)*] raises the average number of hours the employer can require law enforcement and fire protection personnel to work without triggering the overtime requirement, and it accommodates the inherently unpredictable nature of firefighting and police work by permitting public employers to adopt work periods longer **[**8]** than one week. The longer the work period, the more likely it is that days of calm will offset the inevitable emergencies, resulting in decreased overtime liability.

350 F.3d at 290 (internal citations omitted); *see also Garcia, 469 U.S. at 554 n.17* (citing *§ 207(k)*'s limited public safety exemption as an illustration of Congress's attention to "the special concerns of States and localities"); *Avery v. City of Talladega, 24 F.3d 1337, 1344 (11th Cir. 1994)* ("The work period concept was intended to ease the overtime burdens of certain public employers.") (citing *52 Fed. Reg. 2012, 2024 (Jan. 16, 1987)*); *Martin, 981 F.2d at 1361*.

Before a public employer may qualify for the limited public safety exemption, two things must be true: (1) the employees at issue must be engaged in fire protection or law enforcement within the meaning of the statute and (2) the employer must have established a qualifying work period. *See Agawam, 350 F.3d at 290*. In turn, the qualifying work period must be at least seven but not more than twenty-eight consecutive days. *29 C.F.R. § 553.224(a)*. Overtime need not be paid unless the number of hours worked exceeds ratios, different for police than for fire employees **[**9]** that are set forth in Department **[*15]** of Labor regulations. *29 C.F.R. § 553.230*. There are other requirements that are not germane here.

Assuming these conditions are satisfied, "the employer can simply start paying its employees under *§ 207(k)*." *Agawam, 350 F.3d at 291*. Further, the employer may opt to pay its employees more than *§ 207(k)* mandates without forfeiting the benefits of the exemption. *Id. at 291 & n.21*; *Milner v. Hazelwood, 165 F.3d 1222, 1223 (8th Cir. 1999)* (per curiam). Public employers bear the burden of proving they met *§ 207(k)*'s requirements by clear and affirmative evidence. *Agawam, 350 F.3d at 290-91*; Kearns et al., *supra* § 11.V.B., at 688.

B. *Factual Background*

Plaintiffs do not dispute the district court's description of the Town's actions and agree that the officers were law enforcement personnel within the meaning of the statute. However, they argue that the court erred by concluding that the Town could--and did--establish a qualifying work period under *29 U.S.C. § 207(k)*, without explicitly notifying affected employees it was doing so. We briefly review the relevant facts.

In September 1985, after *Garcia* was decided, the Town's personnel board prepared a memorandum **[**10]** that expressed "extreme concern" at the application of the FLSA's wage and hour requirements to municipal employers and sought guidance from the Town's counsel. Over the ensuing months, the Massachusetts Municipal Association and the National League of Cities gave the Town information about the FLSA's impact on local employers. In March 1986, the Town's director of personnel prepared a memo to "all department heads, appropriate boards and commissions." That memo provided information on employees exempt from the FLSA's coverage and noted that "determination of who is exempt must be

made prior to April 15, 1986; the effective date for coverage under the act."

On April 11, 1986, the Town's executive administrator circulated a memo to the police chief, fire chief, personnel director, and town counsel. The memo was addressed to the publicly available personnel file maintained by the Town's board of selectmen. Its subject line read "Declared Work Period-Police and Fire Personnel." The memo stated, in its entirety,

> Pursuant to *section 207(k) of the Fair Labor Standards Act* and 29 C.F.R. Part 553, the declared work period for Police and Fire regular shifts is 24 days. This declaration is effective **[**11]** with work periods commencing April 13, 1986.

There is no evidence about whether the Town provided a copy of this memo to the police officers' union or individual police officers, or otherwise notified officers of the declared work period. That lack of evidence is a key component of plaintiffs' claim that summary judgment could not be entered.

Both before and after the April memo was circulated, the Town's police officers worked a "4-2" schedule; that is, they worked four consecutive days followed by two days off duty. In 2000, as part of a new collective bargaining agreement, the police officers' union negotiated a "5-3" schedule, which shifted the officers' work cycle to five days on duty followed by three days off. These schedules both divide evenly into a twenty-four day work period and so are compliant with *§ 207(k)*.

II.

A. *The Town Established a Qualifying Work Period within the Meaning of § 207(k) and Was Not Obliged to Provide Notice to Its Employees*

Plaintiffs assert that the Town was required to give affected employees notice in order to establish a *§ 207(k)* work period **[*16]** and qualify for the public safety exemption. Plaintiffs' claim raises an issue of statutory interpretation and **[**12]** is before us on summary judgment. For both of these reasons, our review is de novo. *See Chiang v. Verizon New England Inc., 595 F.3d 26, 2010 WL 431873, at *5 (1st Cir. 2010)*. "We may affirm the district court on any basis apparent in the record." *Id.*

We reject plaintiffs' argument in light of *§ 207(k)*'s text and history, as well as the interpretive guidance given by the Department of Labor in its regulations. On the undisputed facts, the Town's actions were sufficient to establish a qualifying work period, despite the asserted lack of notice to its employees. [2] Summary judgment was appropriate.

> 2 We will assume arguendo, to the officers' benefit, that the Town's dissemination of the April 11, 1986, memorandum to the various department heads, and subsequent maintenance of the document as a public record, available for inspection under Massachusetts law, *see Mass. Gen. Laws ch. 4, § 7*; *id.* ch. 66, § 10, did not constitute notice to its employees.

We start with the statutory text. The text of *§ 207(k)* does not specify that a public employer is required to establish a work period or identify how an employer might do so. Further, the text contains no requirement of notice to the affected **[**13]** employee. *29 U.S.C. § 207(k)*.

The Town points to related legislative history. Congress explicitly rejected a proposal mandating employee agreement before a *§ 207(k)* work period could be established. *Barefield v. Vill. of Winnetka, 81 F.3d 704, 710 (7th Cir. 1996)* (citing H.R. Rep. No. 953, 93d Cong., 2d Sess. (1974) (Conf. Rep.)); *see also Agawam, 350 F.3d at 291* (noting that "employees' approval is not required" under ' 207(k)). The Town argues this is indicative that not only was no agreement required but no notice was required. This reading is consistent with Congress's goal of "ensur[ing] that public agencies would not be unduly burdened by the FLSA's overtime requirements." Kearns et al., *supra* § 11.V.B., at 687; *see also* H.R. Rep. 93-913, at 2837-38 (1974) (describing the House's original version of *§ 207(k)*, which provided for a complete overtime exemption for public safety personnel to help ensure that the FLSA would have a "virtually non-existent" impact on state and local governments).

It is true that *§ 207(k)*'s text does not prohibit giving notice either. However, Congress expressly delegated responsibility for implementing the statute to the Secretary of Labor, *see Moreau, 508 U.S. at 27* **[**14]** (citing *29 U.S.C. § 203*), [3] who, after notice and comment, promulgated regulations, *see 52 Fed. Reg. 2012*; *51 Fed. Reg. 13402 (Apr. 18, 1986)*. These regulations make it clear the Secretary rejected a notice requirement under *§ 207(k)*. Under these circumstances, "Congress clearly 'expect[ed] the agency to be able to speak with the force of law,'" and we "must defer to the regulations' resolution of a statutory ambiguity, so long as it is 'reasonable.'" *Rucker v. Lee Holding Co., 471 F.3d 6, 11 (1st Cir. 2006)* (quoting *United States v. Mead Corp., 533 U.S. 218, 229,* **[*17]** *121 S. Ct. 2164, 150 L. Ed. 2d 292 (2001))*.

> 3 When it enacted the 1985 amendments to the FLSA Congress delegated authority to the Secre-

tary to promulgate "such regulations as may be required to implement" them. Fair Labor Standards Amendments § 6, 99 Stat. at 790. Since these amendments concerned, inter alia, alternative compensation for public employees to whom "overtime compensation is required" by the FLSA, *29 U.S.C. § 207(o)(1)*, the implementing regulations necessarily addressed both the 1985 amendments and prior FLSA provisions concerning public employees, including *§ 207(k)*. *See 29 C.F.R. § 553.2(a)*. The Secretary's interpretation of a *§ 207(k)* "work period" **[**15]** explicitly cited the 1985 delegation as a source of its authority. *29 C.F.R. § 553.224*.

During rulemaking, the Secretary of Labor reviewed and rejected a proposal to impose a notice requirement for *§ 207(k)*. *52 Fed. Reg. at 2024-25*. The Secretary observed that unlike other sections of the FLSA, which "require[] that there be an agreement or understanding concerning compensatory time prior to the performance of work, there is no requirement in the Act that an employer *formally state its intention* or obtain an agreement in advance to pay employees under *section 207(k)*." *Id. at 2025* (emphasis added).

The resulting regulation, *29 C.F.R. § 553.224*, plainly rejected both a requirement that municipalities make a formal statement of intention and a requirement that they obtain agreement. The regulation explains that "any established and regularly recurring period of work which, under the terms of the Act and legislative history, cannot be less than 7 consecutive days nor more than 28 consecutive days" suffices as a work period, noting that "[e]xcept for this limitation, the work period can be of any length, and it need not coincide with the duty cycle or pay period or with a particular day of **[**16]** the week or hour of the day." *Id. § 553.224(a)*.

Section 553.224's reference to an "established" work period is the foundation of plaintiffs' claim that an employer must provide notice to employees to set up a *§ 207(k)* work period. But *§ 553.224* includes no procedural steps of any kind, let alone a notice requirement.

Our caselaw reflects in dicta the Secretary's interpretation that federal law in *§ 207(k)* does not require notice to the affected employee, *see Agawam, 350 F.3d at 291*; *see also id. at 291 n.21* ("The work period requirement is ordinarily not a high hurdle."), as does the law in other circuits to have considered the issue, *see Milner, 165 F.3d at 1223* (per curiam) ("[T]he *[§ 207(k)]* exemption need not be established by public declaration."); *Spradling v. City of Tulsa, 95 F.3d 1492, 1505 (10th Cir. 1996)* ("[A] public employer may establish a 7(k) work period even without making a public declaration, as long as its employees actually work a regularly recurring cycle of between 7 and 28 days.") (internal quotation marks and citation omitted); *Barefield, 81 F.3d at 710* (finding a municipal employer entitled to *§ 207(k)* exemption, even though the work schedule at issue predated **[**17]** the enactment of the provision and the employer "made no declaration of intent to come under *Section 207(k)*") (internal quotation marks omitted).

Here, the Town has used a *§ 207(k)*-compliant work period at all relevant times. The Town's memo of April 11, 1986, shows that its "4-2" and "5-3" work cycles are component parts of a fixed, recurring twenty-four day work period. *Cf. Agawam, 350 F.3d at 291* (rejecting public employer's claim to the *§ 207(k)* exemption when the employer used six-day work cycles and could "not point to a single statement or document indicating that it adopted a work period longer than six days"). Both of these schedules are consistent with the identified work period, as both divide evenly into a twenty-four day period. *See Avery, 24 F.3d at 1344* (holding that a "five days on, two days off duty cycle, repeated four times" constitutes a "valid twenty-eight day work period") (internal quotation marks omitted). Additional memoranda discussing the FLSA's imminent effective date and expressing the Town's intention to take advantage of the public safety exemption further support this conclusion.

Plaintiffs do not directly challenge the regulatory framework outlined above. **[**18]** They instead urge that a subsequent letter ruling by an administrator at the Department of Labor mandates a notice requirement **[*18]** and is entitled to deference by this court under *Auer v. Robbins, 519 U.S. 452, 461, 117 S. Ct. 905, 137 L. Ed. 2d 79 (1988)*, or *Skidmore v. Swift & Co., 323 U.S. 134, 140, 65 S. Ct. 161, 89 L. Ed. 124 (1944)*. That argument was not properly presented to the district court and is waived. *E.g., McCoy v. Mass. Inst. of Tech., 950 F.2d 13, 22 (1st Cir. 1991)*. We nonetheless address the claim to ensure clarity on this point of law, and we reject plaintiffs' assertion for three distinct reasons.

First, the administrator's letter ruling made no mention of a notice requirement. It said only that "[a]n employer must designate or otherwise objectively establish the work period . . . and pay the affected employees in accordance with its provisions." Dep't of Labor Ltr. Rul. FLSA-1374 (Jan. 3, 1994). The letter's emphasis on "objectively establish[ing]" a work period is not inconsistent with *29 C.F.R. § 553.224*. To the contrary, it merely paraphrases the regulation's requirement that employers make use of an "established and regularly recurring period of work," *id. § 553.224(a)*, in order to claim the benefits of the exemption. [4]

4 Plaintiffs' **[**19]** argument relies heavily on dicta in an *Agawam* footnote, in which we, too, paraphrased this requirement, observing that an

employer must "announce and take bona fide steps to implement a qualifying work period." *Agawam,350 F.3d at 291 n.21*. Plaintiffs assert this language implicitly mandated a notice requirement. Their reading is inconsistent with the text and history of *§ 207(k)* and its implementing regulations, and does not reflect the standard we applied in *Agawam*.

Second, the letter responded to an inquiry regarding a specific decision by this court, *Martin v. Coventry Fire Dist., 981 F.2d 1358 (1st Cir. 1992)*, which addressed different issues. [5] When responding to the inquiry, the administrator plainly stated that the letter ruling was "based exclusively on the facts and circumstances" presented. Dep't of Labor Ltr. Rul. FLSA-1374. The letter is irrelevant to plaintiffs' present argument.

5 In *Martin*, we affirmed a district court's ruling that the fifty-three-hour workweek provided for firefighters by *§ 207(k)* should be used to calculate damages for firefighters who had not been paid sufficient overtime. *See 981 F.2d at 1359-62*. There was no indication that the defendant municipal **[**20]** employer in *Martin* had not used a *§ 207(k)*-compliant work period, nor did the *Martin* plaintiff so argue. *See id. at 1359-60*.

Finally, "[i]nterpretations such as those in opinion letters . . . do not warrant *Chevron-style* deference." *Christensen v. Harris County, 529 U.S. 576, 587, 120 S. Ct. 1655, 146 L. Ed. 2d 621 (2000)*. To the contrary, such letters "are 'entitled to respect' . . . only to the extent that th[eir] interpretations have the 'power to persuade.'" *Id*. (quoting *Skidmore, 323 U.S. at 140*). Here, the Secretary of Labor explicitly rejected the very position that plaintiffs ascribe to the administrator's letter, stating clearly during rulemaking that employers need not formally declare their intentions to pay employees under *§ 207(k)*. *52 Fed. Reg. at 2024-25*. Even if plaintiffs' reading of the letter were accurate, the letter's inconsistency with the Secretary's earlier pronouncement would render it unpersuasive. *See Skidmore, 323 U.S. at 140*.

Plaintiffs' argument fails. The Town was not required to notify plaintiffs that it had established a *§ 207(k)* work period. Summary judgment was appropriately granted.

B. *The District Court Did Not Abuse Its Discretion by Denying Plaintiffs' Motion to Strike under Fed. R. Civ. P. 37(c)(1)*

Plaintiffs **[**21]** also challenge the district court's denial of their motion to strike **[*19]** copies of the April 11, 1986, memorandum, as well as related evidence. We review for abuse of discretion. *Poulis-Minott v. Smith, 388 F.3d 354, 357 (1st Cir. 2004)*.

Plaintiffs' primary claim is that the Town's failure to "provide detail as to several alleged locations" of the memorandum in its August 2007 supplemental response to interrogatories merited sanction under *Fed. R. Civ. P. 37(c)(1)*. *See id*. ("If a party fails to provide information . . . the party is not allowed to use that information . . . to supply evidence on a motion . . . unless the failure was substantially justified or is harmless.").

Plaintiffs' argument fails. The Town provided plaintiffs a copy of the memo in January 2006, as part of its initial disclosure under *Fed. R. Civ. P. 26*. The copies at issue are identical to that copy, except for nonsubstantive handwritten markings, some of which apparently indicate where each copy was on file. The memo's recipients were identified on its face, and plaintiffs were free to probe the files of the relevant departments for additional copies through discovery or a public documents request. Assuming arguendo **[**22]** that the Town was required to detail the location of various copies of the memo, the district court did not abuse its discretion by concluding that any omission was either substantially justified or harmless. Plaintiffs' related evidentiary claims also fail.

III.

The district court's grant of summary judgment is *affirmed*.

CITY OF LYNN vs. LYNN POLICE ASSOCIATION.

SJC-10422

SUPREME JUDICIAL COURT OF MASSACHUSETTS

455 Mass. 590; 919 N.E.2d 158; 2010 Mass. LEXIS 2; 187 L.R.R.M. 3189

October 8, 2009, Argued
January 6, 2010, Decided

PRIOR HISTORY: [*1]**

Essex. Civil action commenced in the Superior Court Department on January 13, 2006. The case was heard by Kathe M. Tuttman, J. After review by the Appeals Court, the Supreme Judicial Court granted leave to obtain further appellate review.

City of Lynn v. Lynn Police Ass'n, 73 Mass. App. Ct. 489, 899 N.E.2d 106, 2009 Mass. App. LEXIS 21 (2009)

COUNSEL: David F. Grunebaum, for the plaintiff.

John M. Becker, for defendant.

JUDGES: Present: Marshall, C.J., Ireland, Spina, Cowin, Cordy, Botsford, & Gants, JJ.

OPINION BY: IRELAND

OPINION

[159] [*590]** IRELAND, J. We granted further appellate review to decide whether the arbitration award in this case should be vacated. In his award, the arbitrator ordered the city of Lynn to restore wages and other benefits voluntarily relinquished by the members **[*591]** of the Lynn Police Association (union) [1] pursuant to a memorandum of agreement that modified the then-existing collective bargaining agreement between the parties. The city filed a complaint in the Superior Court requesting declaratory relief and seeking to vacate the arbitration award. The union filed an answer and a counterclaim requesting confirmation of the award. The city moved for summary judgment and the union moved for a judgment on the pleadings. A Superior Court judge denied the city's motion, allowed the union's motion, and entered a judgment **[***2]** confirming the award. The city appealed, and the Appeals Court essentially affirmed the judgment of the Superior Court (the Appeals Court ordered modification of the judgment to reflect a declaration of rights). See *Lynn v. Lynn Police Ass'n, 73 Mass. App. Ct. 489, 495-496, 899 N.E.2d 106 (2009)*. On the grant of its application for further appellate review, the city argues that we vacate the award, contending that compliance with it would violate a State statute, namely, the so-called "Lynn Bailout Act," see St. 1985, c. 8 (Bailout Act), and that the arbitrator exceeded his authority in ordering payment to the union. For reasons different from those stated by the Appeals Court, we affirm.

1 The union represents all employees of the police department of Lynn save its chief and deputy chief.

Background. The parties do not dispute the relevant facts. As noted by the Appeals Court, "[t]he dispute between the city and the union is rooted in a statute [the Bailout Act] enacted in 1985 when the city was on the verge of bankruptcy and unable to meet financial obligations, including wage obligations under its collective bargaining agreements." *Lynn v. Lynn Police Ass'n, supra at 489*. To prevent a cessation of **[***3]** municipal services, the city requested a loan from the State. In response, the Legislature enacted the Bailout Act, "under which it loaned the city $ 3.5 million [interest-free] but required the city to comply with certain financial safeguards to prevent spending in excess of revenues, the practice that had created the city's crisis." *Id. at 490*.

The Appeals Court correctly summarized some of the safeguards of the Bailout Act:

> **[**160]** "The [Bailout Act] amended the city's charter to require, **[*592]** among other things, that each department head submit to the city's chief financial officer quarterly spending schedules, or allotments, within ten days after the mayor and city council set the department's annual appropriation. Under the amended charter, no department may overspend a quarterly allotment without the mayor's approval. If the mayor approves excess spending within a quarter, the department head must adjust the remaining quarterly allotments to ensure that future spending does not exceed the department's annual appropriation. See St. 1985, c. 8, § 3.

"Under the charter as amended by the [Bailout Act], any city official who intentionally causes his or her department to overspend an appropriation **[***4]** is personally liable to the city for the excess. [*Id.*]"

Lynn v. Lynn Police Ass'n, supra.

In addition, § 3 of the Bailout Act provides:

"On or before August first of each year . . . the city officials in charge of departments or agencies including the superintendent of schools for the school department, shall submit to the chief financial officer, with a copy to the city clerk, in such form as the chief financial officer may prescribe, an allotment schedule of the appropriations of all personnel categories included in said budget, indicating the amounts to be expended by the department or agency for such purposes during each of the fiscal quarters of said fiscal year . . . . Whenever said chief financial officer determines that any department or agency, including the school department, will exhaust or has exhausted its quarterly . . . allotment and any amounts unexpended in previous periods, he shall give notice in writing to such effect to the department head, the mayor, the city solicitor, and to the city clerk who shall forthwith transmit the same to the city council. . . .

"The mayor within seven days after receiving such notice, shall determine whether to waive or enforce such allotment. **[***5]** If the allotment for such period is waived or is not enforced, as provided above, the department or agency head shall reduce the subsequent period allotments appropriately. If the allotment for such period is enforced **[*593]** or not waived, thereafter the department shall terminate all personnel expenses for the remainder of such period. . . .

"No personnel expenses earned or accrued, within any department, shall be charged to or paid from such department's . . . [quarterly] allotment of a subsequent period without approval by the mayor, except for subsequently determined retroactive compensation adjustments. [2] Approval of a payroll for payment of wages, or salaried or other personnel expenses which would result in an expenditure in excess of the allotment shall be a violation of this section by the department or agency head . . . . If the continued payment of wages, salaries or other personnel expenses is not approved in a period where a department has exhausted the period allotment or allotments as specified above, or, in any event, if a department has exceeded its appropriation for a fiscal year, the city shall have no obligation to pay such personnel cost or expense arising after such allotment **[***6]** or appropriation has been exhausted."

[161]** Last, § 3 requires all collective bargaining agreements executed after the effective date of the Bailout Act "be subject to" and "expressly incorporate the provisions of this section."

2 The city does not rely on this exception in seeking to vacate the arbitration award. In view of our conclusions, we need not interpret this provision.

The city and union negotiated a collective bargaining agreement for the period July 1, 2001, through June 30, 2004 (CBA), that governed employment and compensation, and provided for binding arbitration of grievances. [3] As a result of a reduction of aid to the city from the State in fiscal year (FY) 2004 (June 30, 2003, through June 30, 2004), the city and union entered into a memorandum of agreement (MOA) on October 1, 2003, that temporarily and conditionally modified the CBA for FY 2004. Pursuant to the MOA, the union agreed to relinquish (in FY 2004 only) certain wages and benefits in the amount of $ 290,360 (concessions), [4] to avoid layoffs, on the condition that the city would restore the concessions if it received additional funds **[*594]** from the State or Federal government. [5] The MOA saved the city $ 290,360, and there **[***7]** were no layoffs in the police department.

3 As required by the Bailout Act, § 3 of the Bailout Act essentially is set forth and incorporated into the collective bargaining agreement.

4 Specifically, the union agreed to reduce wages for eight hours in one week, to waive payment of a certain "floating" holiday, to allow the school resource officers to be assigned to the patrol division, to waive payment of a $ 410 shooting allowance, to waive a $ 150 clothing allowance,

and to relieve the police department of the requirement "to inverse hire for a third [s]ergeant." 5 The MOA provided as follows:

"In the event of the following occurrences, the modifications made in this Agreement will immediately terminate and all terms, conditions and practices will return to those in existence prior to entering into this Agreement;

"If at any time during [FY] 2004 the [c]ity lays off any bargaining unit employee(s) or;

"If the [c]ity otherwise violates the terms and conditions of this Agreement.

"In the event that the [c]ity receives additional assistance from the State or Federal governments during FY 04 that improves the [c]ity's current financial situation the concessions of this Agreement shall be reconfigured **[***8]** proportionately to repay the officers up to the amount of these concessions. For example, if the concessions of this Agreement equal $ 300,000 and the [c]ity receives an additional $ 100,000 from the Commonwealth of Massachusetts, the concessions will be reconfigured to be reduced by 1/3.

"At the end of FY 2004, if the police department has unspent funds, those funds will be paid to the bargaining unit employees by equally dividing the funds to all bargaining unit employees . . . ."

In December, 2003, the Lynn police department received a "community policing" grant in the amount of $ 277,815 from the Massachusetts Executive Office of Public Safety (EOPS) for FY 2004. Under the program, grant funds were to supplement, and not supplant, local police department budgets. While grant funds could only be used for "community policing," the funds could be used, at the discretion of the chief of police, to defray personnel costs; to defray costs of training law enforcement and civilian personnel; for overtime; for supplies, operating expenses, and equipment; and to defray other reasonable costs intended to facilitate or enhance community policing. In light of these permitted uses of the grant **[***9]** funds, the arbitrator concluded, and the city does not challenge this conclusion, that the grant "was for all intents and purposes unrestricted." Taking note of the fact that the FY 2004 budget was in place when the grant was received, and that there was no change in the budget as a result of the grant, the arbitrator further concluded (and, again, the city does not challenge this conclusion) that the grant funds were used to supplement **[**162]** the department's budget for FY 2004. The city did not use the grant funds to repay the union members for the **[*595]** MOA concessions, but did expend all the grant funds in FY 2004. [6]

6 The department spent the grant funds as follows: $ 240,515 was used to match funds for two Federal community policing grants, $ 24,304 for overtime, $ 4,120 to replace personnel, $ 7,276 for cellular telephone charges, $ 1,000 for membership in the Massachusetts Chiefs of Police Association, $ 300 for the "Police Executive Research Forum," and $ 300 for the "International Association of Chiefs of Police."

The union became aware of the grant funds in February, 2004, and requested termination of the MOA and use of the grant funds to repay the MOA concessions. The city refused and **[***10]** the union filed a grievance that led to the underlying arbitration proceeding. [7]

7 At the end of FY 2004, $ 7,000 remained in the police department's budget account. The city distributed these funds to union members in accordance with the MOA. See note 4, *supra* (pertaining to use of unspent funds in budget). This distribution only partially satisfied the MOA obligation.

The arbitrator found that, by failing to restore the concessions to the union members after receiving the grant funds, the city had violated the MOA. He rejected the city's claim that restoring the concessions would violate the Bailout Act, noting that it would be up to the city to decide how to comply with the MOA without violating the Bailout Act. He ordered that the city "must comply with the [MOA] by repaying the bargaining unit employees up to the amount of the grant," and retained temporary jurisdiction to resolve any questions concerning the remedy.

The city, as noted, sought relief in the Superior Court, which was denied. The Superior Court judge entered a judgment confirming the arbitrator's award. Because the Superior Court judgment did not contain declaratory relief as sought by the city, the Appeals Court ordered **[***11]** "that the judgment be modified to declare that the arbitrator's award does not require the city to violate any law, and payment of that award will not violate [the Bailout Act] because that statute does not prohibit payment of awards for breach of contract." *Lynn v. Lynn Police Ass'n, 73 Mass. App. Ct. 489, 495-496, 899 N.E.2d 106 (2009)*. The Appeals Court affirmed the judgment of the Superior Court as so modified. *Id. at 496*.

Standard of review. The familiar standard of review of arbitration awards is set forth in *Superadio Ltd. Partnership v. Winstar Radio Prods., LLC, 446 Mass. 330,*

334-335, 844 N.E.2d 246 (2006), quoting **[*596]** *Plymouth-Carver Regional Sch. Dist. v. J. Farmer & Co., 407 Mass. 1006, 1007, 553 N.E.2d 1284 (1990)*:

> "Consistent with policy strongly favoring arbitration . . . an arbitration award is subject to a narrow scope of review. . . . The bases for review are set forth in *G. L. c. 251, § 12*. Judicial intervention is permitted where an award 'was procured by corruption, fraud or other undue means,' *§ 12 (a) (1)*, or where the 'arbitrators exceeded their powers,' *§ 12 (a) (3)*. 'An arbitrator exceeds his authority by granting relief beyond the scope of the arbitration agreement . . . by awarding relief beyond that to which **[***12]** the parties bound themselves . . . or by awarding relief prohibited by law.' . . . 'Arbitration, it is clear, may not "award relief of a nature which offends public policy or which directs or requires a result contrary to express statutory provision" . . . or otherwise transcends the limits of the contract of which the agreement to arbitrate **[**163]** is but a part.'" (Citations omitted).

Discussion. Some preliminary observations are in order. The city contends that this dispute arose, in part, out of disagreement concerning the confines of the grant funds. Understanding that our review is very narrow, the city conceded during oral argument that it is bound by the arbitrator's determinations that the grant funds were unrestricted and that use of the funds to satisfy the MOA obligation would have "supplemented" and not "supplanted" the police department's budget. Accordingly, because the city received unrestricted grant funds from the State that were unforeseen, that were not included in its FY 2004 budget, and that improved its financial condition by $ 277,815, the repayment obligation in the MOA was triggered. That the repayment obligation in the MOA was triggered is not in dispute. Also not **[***13]** in dispute is the fact that the city breached the repayment obligation under the MOA, and that in fulfilling its repayment obligation, the terms of the Bailout Act cannot be violated. It is this latter issue, whether the city must necessarily violate the Bailout Act in complying with the arbitration award, that is before us.

a. *Violation of the Bailout Act*. The city's principal argument is that it cannot comply with the arbitration award because payment **[*597]** of the MOA concessions would violate the Bailout Act. The city contends that, whether the grant funds were restricted or unrestricted, it cannot comply with the arbitration award because § 3 of the Bailout Act requires an appropriation before an expenditure may be made, and here, there was no such appropriation. The city further asserts that the Bailout Act "relieves" it from "any obligation to fund retroactive personnel costs." [8]

> 8 The city relies on the following language in § 3 of the Bailout Act: "[I]f a department has exceeded its appropriation for a fiscal year, the city shall have no obligation to pay such personnel cost or expense arising after such allotment or appropriation has been exhausted."

We have not had occasion to construe **[***14]** the provisions of the Bailout Act on which the city relies. We conclude that, as relevant here, § 3 of the Bailout Act does not apply because it does not pertain to a potential expenditure of a city department that is contractually conditioned on being financed from funds received separate from and in excess of that department's budget. Several considerations compel our conclusion.

"Where the language of a statute is plain, it must be interpreted in accordance with the usual and natural meaning of the words." *Gurley v. Commonwealth, 363 Mass. 595, 598, 296 N.E.2d 477 (1973)*. Section 3 of the Bailout Act, as relevant here, pertains to expenses, allotments, and appropriations "included in [the police department's] budget." [9] By its own unambiguous terms, § 3 of the Bailout Act is limited in scope.

> 9 Section 3 of the Bailout Act first limits its application to expenses, allotments, and appropriations. The MOA obligation was not an expense included in the police department's FY 2004 allotment schedules, and there was no appropriation made for it. The MOA obligation was a conditional contractual undertaking.

Here, the MOA obligation could only be satisfied from the police department's budget if the department **[***15]** had unspent funds at the end of the fiscal year, see notes 5 and 7, *supra*. As noted, the police department's unspent funds only partially satisfied the MOA obligation, and thus, this circumstance has no further bearing in this case.

[164]** Apart from the occurrence of unspent funds, the sole manner of satisfying the MOA obligation depended on the police department's receipt of "additional assistance," here the grant funds. Significantly, these funds would be and were separate **[*598]** from, and in excess of, the police department's budget. Thus, satisfaction of the MOA obligation with the grant funds would *not* create a debt or liability chargeable *to the police department's budget* and is not a matter contem-

plated under the Bailout Act. Further, no violation of § 3 of the Bailout Act could have resulted from the funding of the MOA obligation in this manner, that is, with the grant funds, because nothing in § 3 required an appropriation to spend funds that were not part of the police department's budget.

Our conclusion does not contravene the clear intent of the Legislature in enacting the Bailout Act. See *Commonwealth v. Rahim, 441 Mass. 273, 278, 805 N.E.2d 13 (2004)*. The Bailout Act serves to prevent irresponsible **[***16]** municipal spending by department heads and to secure financial stability for the city. See St. 1985, c. 8, §§ 1, 3, 4, 5. The MOA obligation was not a result of irresponsible overspending by a department head; rather, the obligation arose out of good faith contractual dealings between the union and the city in attempt to avert a fiscal crisis. Because the union at no time acted to impose a financial obligation on the police department that would adversely affect its own budget or the city (on account of satisfying the obligation only with unspent budget funds and with the grant funds), the MOA obligation was not at odds with the legislative purposes of the Bailout Act.

The city's argument concerning a prohibition under § 3 of the Bailout Act to fund retroactive personnel costs similarly fails. The language on which the city relies, see note 8, *supra*, does not pertain to conditional contractual expenditures to be financed by funds outside of, and not part of, the police department's budget.

b. *Remedy*. It should first be noted that the city erroneously contends that the arbitrator directly awarded it "to appropriate money." The award does not require an appropriation; it instead orders **[***17]** compliance with the MOA obligation "by repaying the bargaining unit employees up to the amount of the grant." We reject the city's contention that the arbitrator exceeded his authority in entering this order on the ground that the order violates § 3 of the Bailout Act. As previously discussed, § 3 of the Bailout Act does not speak to or concern conditional contractual expenditures to be made from funds received by a city department **[*599]** separate from, and in excess of, its budget. The arbitrator's order is therefore not invalid and, in keeping with general principles of avoiding interference with municipal managerial prerogative, see *Massachusetts Coalition of Police, Local 165 v. Northborough, 416 Mass. 252, 255, 620 N.E.2d 765 (1993)*, appropriately leaves the manner of payment (but *not* the question whether or not to pay) to the city's discretion. [10]

10 Indeed, the city conceded during oral argument that the mayor is not prohibited from asking the city council for the money to satisfy the MOA obligation.

c. *Declaratory relief*. In its complaint filed in the Superior Court, the city sought two declarations: (1) "that the payment of any funds, in the absence of an appropriation in the [p]olice [d]epartment **[***18]** for FY 04 sufficient to fund the [a]ward violates [the Bailout Act]," and (2) "that the [arbitration award] requires the [c]ity to violate the law, and is void." The union does not contend that the city's request for declaratory relief was improperly brought. **[**165]** In a properly brought action for declaratory relief, there must be a declaration of the rights of the parties even though relief is denied to a plaintiff. *Cherkes v. Westport, 393 Mass. 9, 12, 468 N.E.2d 269 (1984)*; *Boston v. Massachusetts Bay Transp. Auth., 373 Mass. 819, 829, 370 N.E.2d 1359 (1977)*. Accordingly, while we affirm that portion of the judgment of the Superior Court affirming the arbitrator's award, the judgment is to be modified to declare that the arbitrator's order does not violate the Bailout Act and does not require the city to violate the Bailout Act.

So ordered.

CITY OF WORCESTER vs. AME REALTY CORPORATION & others. [1]

1 Demetrios G. Venetis, formerly known as James G. Venetis, intervener; Main South Community Development Corporation, intervener.

No. 08-P-2049

APPEALS COURT OF MASSACHUSETTS

77 Mass. App. Ct. 64*; *928 N.E.2d 656*; *2010 Mass. App. LEXIS 809

January 8, 2010, Argued
June 21, 2010, Decided

PRIOR HISTORY: [*1]**

Suffolk. Petition filed in the Land Court Department on June 11, 1999. A motion for relief from judgment, filed on April 15, 2008, was heard, pursuant to *G. L. c. 185, § 6*, by a deputy recorder.
City of Worcester v. AME Realty Corp., 62 Mass. App. Ct. 1110, 817 N.E.2d 817, 2004 Mass. App. LEXIS 1294 (2004)

DISPOSITION: Order dated September 24, 2008, affirmed.

COUNSEL: Israel M. Sanchez, Jr., for Demetrios G. Venetis.

John F. O'Day, Jr., Assistant City Solicitor, for the plaintiff.

James A. Vevone, II, for Main South Community Development Corporation.

JUDGES: Present: Cypher, Berry, & Sikora, JJ.

OPINION BY: SIKORA

OPINION

[*65] [658]** SIKORA, J. Demetrios G. Venetis, an alleged party-in-interest whom we shall treat as an effective intervener in the Land Court proceedings, appeals from a 2008 final order of that court denying his motion to vacate a tax lien foreclosure judgment entered in favor of plaintiff city of Worcester (city) on October 2, 2001. That order effectively concluded his claim to a mortgage interest purportedly conveyed to him on or about November 1, 1996. The order also preserved the current ownership of the property by Main South Community Development Corporation (Main South) by purchase from the city on September 13, 2005. In addition, the order imposed financial sanctions upon both Venetis and his counsel for prosecution of a claim "not advanced **[***2]** in good faith, as both Venetis and his Attorney . . . had actual knowledge of both the [prior] Land Court judgment and Appeals Court decision" negating that claim. For the following reasons we affirm all terms of the final order.

Background. A summary of the main events of the long and winding history of this litigation is unavoidable. As of the close of fiscal year 1991, Ripley Real Estate Realty Trust, as owner of the property at 10 Ripley Street, had failed to pay its municipal real estate taxes. On or before March 30, 1992, mortgagee JRS Holdings Corporation (JRS) pursuant to *G. L. c. 244, §§ 1* and *2*, made an open, peaceable, unopposed entry onto the property for breach of mortgage conditions and recorded its certificate of entry. By deed dated January 19, 1993, and recorded on December 31, 1993, Ripley Real Estate Realty Trust conveyed the property to defendant AME Realty Corporation (AME). On or about January 4, 1993, the city's tax collector delivered a tax collection deed to the city by reason of Ripley Real Estate Realty Trust's nonpayment of the 1991 taxes. The city recorded that deed on February 2, 1993. On March 31, 1995, by operation of law pursuant to *G. L. c. 244, § 1*, **[***3]** JRS's certificate of entry **[*66]** would have ripened into a fee interest. On November 1, 1996, JRS, by its president Ara Eresian, Jr., granted and recorded a $ 15,000.00 mortgage interest to Venetis.

In June of 1999, the city brought a tax lien foreclosure action in the Land Court and achieved a judgment extinguishing all rights of redemption in the property. The city had provided notice to AME as the recorded owner. AME did not appear for scheduled hearings and incurred a default judgment.

In May, 2002, AME brought a petition to vacate the judgment upon the contention that JRS as true owner of the property had not received notice of the foreclosure action and could not be bound by it.

A Land Court judge concluded that JRS's certificate of entry had *not* matured into a fee of ownership on March 31, 1995, because it had not acted as a genuine arm's length mortgagee during the three year gestation

period prescribed by *G. L. c. 244, §§ 1* and *2*, but rather as a hand's length business cohort of AME. That collusive relationship negated the right of foreclosure by entry. See *Trow v. Berry, 113 Mass. 139, 147 (1873)*; *Willard v. Kimball, 277 Mass. 350, 358, 178 N.E. 607 (1931)*. The judge concluded further that, if **[***4]** JRS had been entitled to notice of the city's tax lien foreclosure action, it had effectively received it because the entities were thoroughly entwined in the person of Eresian **[**659]** as the president of AME and as the rent-collecting agent of JRS. [2]

> 2 Real estate papers in the record of the present appeal evidence the consorted activity of four actors. As of January 13, 1993, JRS was a trustee of Ripley Real Estate Realty Trust; AME maintained its usual place of business at 10 Ripley Street; and Eresian, president of AME and rent collector for JRS, notarized the grant of a mortgage from JRS as Trustee of Ripley Real Estate Realty Trust to AME on December 31, 1993. The record corroborates the finding that no trustworthy exchanges of title or mortgage interests occurred within or from the consortium.

On appeal, this court affirmed the Land Court's order, and its reasoning, denying AME's motion to vacate the tax-lien judgment in an unpublished memorandum and order on November 10, 2004. *Worcester v. AME Realty Corp., 62 Mass. App. Ct. 1110, 817 N.E.2d 817 (2004)*. The memorandum included the following observation:

> "The record also reflects evidence consistent with ownership **[*67]** of the property by AME and inconsistent **[***5]** with ownership by JRS, and reflects interruptions in the purported three-year period JRS would have had to have been the owner in order to perfect any right to hold the subject property under its mortgage foreclosure and notice of entry."

This element of the holding further diminished the probable merits of any argument premised upon JRS's ownership of the property and upon the validity of any consequent mortgage to Venetis dependent upon that ownership.

Nonetheless in April of 2008, almost three and one-half years after this court's affirmance and more than two and one-half years after the purchase of the abandoned property from the city by Main South for the construction of two units of low or moderate income housing, Venetis brought the underlying petition (captioned as a "motion") to vacate the city's foreclosure judgment. A Land Court deputy recorder concluded that Venetis had submitted no grounds to overcome the Land Court's original reasoning (and that of the Appeals Court) locating true ownership of the property in AME and not JRS, and precluding the grant of any purported mortgage by JRS to Venetis on November 1, 1996. The deputy recorder accordingly denied the petition and **[***6]** assessed Venetis and his counsel attorney's fees and costs in favor of Main South in the sum of $ 2,890. Venetis appeals from that final order.

Analysis. 1. *Standard of review*. *General Laws c. 60, § 69A*, and related case law, govern petitions to vacate judgments of foreclosure. An interested party must file such a petition within one year of the entry of the judgment sought to be vacated, unless that party alleges a violation of its rights to substantive or procedural due process. See *ibid.; Andover v. State Financial Servs., Inc., 432 Mass. 571, 574-576, 736 N.E.2d 837 (2000)*; *North Reading v. Welch, 46 Mass. App. Ct. 818, 819-820, 711 N.E.2d 603 (1999)*. "Such petitions 'are extraordinary in nature and ought to be granted only after careful consideration and in instances where they are required to accomplish justice.'" *Lynch v. Boston, 313 Mass. 478, 480, 48 N.E.2d 26 (1943)*, quoting from *Russell v. Foley, 278 Mass. 145, 148, 179 N.E. 619 (1932)*. Allowance of a petition rests "largely but not entirely in the discretion of the trial judge." *Lynch v. Boston, supra*, quoting from *Bucher v. Randolph, 307 Mass. 391, 393, 30 N.E.2d 234 (1940)*. Consequently we review the denial of the petition for abuse of discretion and error of law.

[*68] 2. *Merits*. In this court Venetis **[***7]** advances essentially two arguments: (a) **[**660]** that the tax collector's deed to the city on January 4, 1993, failed to recite "the name of the person to whom the [unpaid tax] was assessed" in accordance with *G. L. c. 60, § 54*, and the name of the person upon whom the collector had made demand for payment before commencement of enforcement proceedings in accordance with *G. L. c. 60, §§ 16* and *43*; and (b) that the city and the Land Court failed to furnish Venetis, as a recorded mortgagee, notice of the tax title foreclosure proceedings and so deprived him of procedural and (impliedly) substantive due process. As to his first contention, Venetis argues that the collector's designation of "Ripley Real Estate Realty Trust" in the deed to the city was insufficient because it failed to identify the individual trustees; and that, consequently, the city never acquired valid tax foreclosure title for later conveyance to Main South.

Multiple weaknesses doom Venetis's first contention. First, he lacks standing to challenge the city's title because he lacks a valid mortgagee's interest, as explained below. Second, the record fails to show that he presented this argument to the Land Court in the proceeding **[***8]** from which he now appeals. He cannot raise it for the first time on appeal. See, e.g., *Carey v.*

New England Organ Bank, 446 Mass. 270, 285, 843 N.E.2d 1070 (2006); *The Gen. Convention of the New Jerusalem in the U.S., Inc. v. MacKenzie, 66 Mass. App. Ct. 836, 841-842, 851 N.E.2d 455 (2006)*. He has waived it. Third, even if he were entitled to assert the contention, it would fail. Under *G. L. c. 60, § 37*, as appearing in St. 1943, c. 478, § 1, "[n]o tax title . . . shall be . . . invalid by reason of any error or irregularity which is neither substantial nor misleading . . . ." The designation in the tax collector's deed is neither. The argument is meritless.

Venetis's alternative general claim of deprivation of procedural and substantive due process requires an entitlement to a mortgagee's interest in the property at 10 Ripley Street. Without such an interest, he has no property right as to which he can suffer any denial of due process. In neither his petition to the Land Court, nor his present appeal, has he offered any argument against the determination of the Land Court in 2003 and the affirmance by the Appeals Court in 2004 that he could not have received any **[*69]** valid mortgage interest from JRS in 1996. Nor has he **[***9]** identified any separate argument which he would have submitted if he had participated in the Land Court proceedings of 2003. In sum, the Land Court's disposition of the merits shows no sign of error of law or abuse of discretion.

3. *Sanctions*. As part of its opposition to Venetis's 2008 petition to vacate the city's tax title foreclosure judgment, Main South requested an award of attorney's fees and costs from Venetis and his attorney, Israel Sanchez, upon the grounds that *both* were familiar with the reasoning and results of the 2003 Land Court decision and the 2004 Appeals Court affirmance; that Venetis and Sanchez were advancing no argument or factual information responsive to the essential reasoning of those decisions (that JRS had no fee interest necessary for conveyance of a mortgage interest to Venetis); that the petition was wholly unsubstantiated, frivolous, and not advanced in good faith; and that Sanchez's advocacy constituted a wilful violation of professional duty under *Mass.R.Civ.P. 11(a)*, 365 Mass. 753 (1974), and exposed him to the sanctions of an assessment of attorney's fees and costs. The Land Court deputy recorder assessed against Venetis and Sanchez, jointly and **[***10]** severally, fees in the sum of $ 2,890, the figure itemized and proposed by counsel for Main South.

[661]** On appeal, in accordance with the procedure prescribed by *Fabre v. Walton, 441 Mass. 9, 10-11, 802 N.E.2d 1030 (2004)*, Main South has requested in its brief an assessment of appellate fees and costs against both Venetis and Sanchez. We address first the award in the Land Court and then the proposed award from the Appeals Court.

(a) *The Land Court award*. (i) *The party*. By motion Main South requested an award of fees from the Land Court upon the ground that the Venetis claim was "wholly unsubstantiated, frivolous and not advanced in good faith." It emphasized the absence of good faith and cited a significant decision concerning *G. L. c. 231, § 6F*, *Massachusetts Adventura Travel, Inc. v. Mason, 27 Mass. App. Ct. 293, 299, 537 N.E.2d 609 (1989)*. However, it never specifically invoked or mentioned the statute. Similarly the Land Court awarded the requested fees for lack of good faith conduct by Venetis and Sanchez, but did not identify c. 231, **[*70]** *§ 6F*, as the authority for the assessment. Those omissions may have diverted Venetis's attention from the appellate procedure prescribed by *G. L. c. 231, § 6G*: a party suffering a *§ 6F* **[***11]** award in the Land Court must lodge an appeal with a single justice of this court within ten days of notice. See *Vittands v. Sudduth, 49 Mass. App. Ct. 401, 412, 730 N.E.2d 325 (2000)*. Venetis has instead consolidated his appeal from the fee award with his appeal on the merits. As a matter of equitable discretion, and not of right, we have considered the entitlement to the award and found it fully justified for the following reasons.

Main South occupied the position of an effective intervener forced to protect an important interest, its ownership and reliant development of the real property at 10 Ripley Street. In response to our postargument order for additional information about Main South's status, it has furnished a certified copy of the Land Court's allowance, on or about April 29, 2008, of its motion as "record owner" to file documents in opposition to Venetis's petition to vacate the tax title foreclosure judgment. Main South's obvious interest in the proceedings entitled it to intervention of right under the standard of *Mass.R.Civ.P. 24(a)*, 365 Mass. 769 (1974), (claim of "an interest relating to the property . . . which is the subject of the action" requiring adequate representation). [3] Main **[***12]** South's simultaneous opposition to Venetis's petition served the purpose of an intervener's pleading as contemplated by *Mass.R.Civ.P. 24(c)*, 365 Mass. 770 (1974). It fully informed the opposing party of the intervener's allegations and arguments.

> 3 Preferably Main South would have moved to intervene explicitly under *rule 24(a)*, and the Land Court would have allowed the motion in those terms.

That necessary intervention was clearly foreseeable to Venetis and Sanchez. In anticipation of the petition to vacate, on October 25, 2007, Sanchez had forwarded to Main South, by sheriff's service, a confrontational letter informing it of Venetis's entry upon, and claim to, the property (and all improvements), and "instruct[ing]" Main South "to cease and desist from any further activity" on the property or else face charges of trespass; to turn over "all keys or access devices" to Sanchez; and to add Venetis to all hazard and liability insurance coverage. The letter also **[*71]** advised Main South that Ve-

netis would be changing the locks and securing the premises within fifteen days.

The circumstances of this initiative support the deputy recorder's conclusion that Venetis's petition was wholly insubstantial, **[***13]** frivolous, and advanced without good faith. The petition was egregiously tardy; it **[**662]** trailed the tax lien foreclosure judgment by six and one-half years, the Land Court order denying AME's motion to vacate by four years and seven months, and the Appeals Court affirmance of that order by three years and five months. Consequently it threatened the substantial reliant intervening investment and work on the part of Main South. Further it aggressively threatened to disrupt Main South's significant assumption of more than $ 620,000 of acquired loans by means of an alleged interest of a small fraction of that amount ($ 15,000 plus interest), and it imposed litigation and its accompanying expense and delay upon the project.

Finally, beyond its tardiness and disruption, the Venetis petition was blatantly unmeritorious. With no new facts or argument, it proceeded in contradiction of an emphatically reasoned prior Land Court decision and Appeals Court affirmance, both of which viewed with skepticism the relationship and dealings of the AME and JRS entities from which Venetis had derived his claimed mortgage. In particular, the distinctive meritlessness of the Venetis petition in light of the prior **[***14]** decisions supports the Land Court's award against Venetis under the standards of *G. L. c. 231, § 6F*.

(ii) *The attorney*. As to Sanchez's role in the Land Court, under *Mass.R.Civ.P. 11(a)*, his signature upon the Venetis petition to vacate constituted "a certificate by [Sanchez] . . . that to the best of his knowledge, information, and belief there [was] a good ground to support it." The rule continues: "For wilful violation of this rule an attorney may be subjected to appropriate disciplinary action." *Rule 11(a)* sanctions extend to the assessment of fees and costs if an attorney fails to show a subjective good faith belief that a pleading or motion has factual and legal support. See *Van Christo Advertising, Inc. v. M/A-COM/LCS, 426 Mass. 410, 416, 688 N.E.2d 985 (1998)* (pleading); *Vittands v. Sudduth, 49 Mass. App. Ct. at 412* (pleading); *Psy-Ed Corp. v. Klein, 62 Mass. App. Ct. 110, 113-114, 117-118, 815 N.E.2d 247 (2004)* (motion); *Tilman v. Brink, 74 Mass. App. Ct. 845, 850-851, 911 N.E.2d 764* (2009) (pleading). Once **[*72]** the attorney is on notice of a *rule 11(a)* claim and has the opportunity for response by argument or affidavit, the trial court judge may make a finding about the attorney's good faith from the circumstances of his or **[***15]** her performance and without an evidentiary hearing. See *Psy-Ed Corp. v. Klein, supra at 118*; *Tilman v. Brink, supra at 851-852*. The reviewing court will examine the finding for abuse of discretion, "which includes consider[ation] whether proper legal standards were applied and whether there was reasonable support for the judge's evaluation of the facts." *Van Christo Advertising Inc. v. M/A-COM/LCS, supra at 417*. Under those standards, especially in light of the prior contrary decisions of the Land Court and Appeals Court, the absence of any distinguishing material facts or legal argument, and the unsupported confrontational letter to Main South on October 25, 2007, the Land Court had sound reason to include Sanchez in the assessment fees in favor of Main South. [4]

> 4 On appeal attorney Sanchez challenges the grant of the award against Venetis and himself, but not its amount. In light of the quantity and quality of Main South's Land Court papers, its resulting success, and its counsel's verified itemization of time and services, we find the figure of $ 2,890 well supported.

(b) *Appellate award*. (i) *The party*. Main South requests an award of appellate fees and costs. The gist of its reasoning **[***16]** is that the present appeal is frivolous and not advanced in good faith. **[**663]** *Rule 25 of the Massachusetts Rules of Appellate Procedure*, as amended, 378 Mass. 925 (1979), authorizes the reviewing court to "award just damages and single or double costs to the appellee" if it determines an appeal to be "frivolous." Our decisions interpret the "just damages" of a frivolous appeal to include typically the attorney's fees caused to the appellee. See, e.g., *Allen v. Batchelder, 17 Mass. App. Ct. 453, 458-459, 460, 459 N.E.2d 129 (1984)* (award of $ 5,000 in damages for appellee's legal fees for the appeal, as well as double costs); *Hoppe v. Haskins, 29 Mass. App. Ct. 411, 416, 560 N.E.2d 746 (1990)* (award of $ 7,000 for "costs and attorney's fees" for frivolous appeal); *Price v. Cole, 31 Mass. App. Ct. 1, 7, 574 N.E.2d 403 (1991)* (award of $ 3,000 for attorney's fees plus double costs for frivolous appeal).

Here, the reasons itemized above in support of the Land Court's assessment against Venetis apply all the more forcefully **[*73]** after one more ruling and admonition from the Land Court. An appeal is frivolous if, under settled law, the appellant has no "reasonable expectation of a reversal." *Avery v. Steele, 414 Mass. 450, 455, 608 N.E.2d 1014 (1993)*, quoting from **[***17]** *Allen v. Batchelder, supra at 458*. This appeal followed three adverse decisions (two from the Land Court and one from this court) upon the same dispositive issues and still failed to address the essential point of each: Venetis's lack of a valid mortgage interest. It was abundantly frivolous. It put the opposing parties to the expense of another unnecessary chapter of litigation for which they deserve compensation. [5]

> 5 The city has not sought an award of appellate fees.

(ii) *Appellate award against counsel*. Finally Main South has requested the award of its appellate fees jointly and severally against attorney Sanchez. As grounds it summarily incorporates its argument for an award by the Land Court under *Mass.R.Civ.P. 11(a)*. However, "*[r]ule 11* does not apply to appellate briefs" or procedure. *Avery v. Steele, supra at 454* & n.4. Rather, in the absence of statutory authority, the appropriate vehicle for the assessment of appellate fees against either a party or its counsel remains *Mass.R.A.P. 25*. "Although we have not considered the issue directly, courts interpreting the cognate Federal rule, *Fed. R. A. P. 38*, have held that sanctions under the rule may be imposed *on either the party* **[***18]** *or the attorney*. We agree." (Emphasis supplied). *Avery v. Steele, supra at 455* (footnote and citations omitted). For either purpose our appellate courts will consult the decisional law developed under the cognate Federal rule, *Fed.R.A.P. 38*. See *Rollins Envtl. Servs., Inc. v. Superior Ct., 368 Mass. 174, 179-180 (1975)*; *Vyskocil v. Vyskocil, 376 Mass. 137, 139, 379 N.E.2d 1090 (1978)*; Reporter's Notes to *Mass.R.A.P. 25*, 47 Mass. Gen. Laws Ann., Rules of Appellate Procedure, at 1183 (West 2006). To date no reported Massachusetts decision has analyzed the imposition of appellate fees against counsel under *rule 25*. Substantial case law is available for consultation under *Fed.R.A.P. 38*. [6] **[**664]** Main South has not employed that source or developed adequate argument upon the important issue of an **[*74]** appellate attorney's liability for an assessment of fees. In these circumstances, the appropriate course is to defer the question to a case presenting a fully constructed argument. See *Lolos v. Berlin, 338 Mass. 10, 13-14, 153 N.E.2d 636 (1958)*. See also *Cameron v. Carelli, 39 Mass. App. Ct. 81, 83-84, 653 N.E.2d 595 (1995)*, and cases cited.

6 Numerous decisions applying the sanctions of "damages" and "costs" for "frivolous" appeals under *Fed. R. A. P. 38* **[***19]** impose both fees and expenses upon responsible appellate attorneys to serve the purposes of (a) punishment of counsel causing the waste of the court's public resources; (b) compensation of opposing litigants for the waste of their private resources; and (c) deterrence of further abuse by the same or other attorneys. See, e.g., *Hill v. Norfolk & W.Ry. Co., 814 F.2d 1192, 1200-1203* (7th Cir. 1987; *Quiroga v. Hasbro, Inc., 943 F.2d 346, 347-348 (3d Cir. 1991)*. See 20A *Moore's Federal Practice §§ 338.02, 338.11* (3d ed. 2010); 16AA Wright, Miller, Cooper & Struve, Federal Practice & Procedure § 3984 (4th ed. 2008).

The Court of Appeals for the First Circuit has provided illustrative decisions. See *Cronin v. Amesbury, 81 F.3d 257, 262 (1st Cir. 1996)* ("An attorney's duty to represent a client zealously is not a license to harass. . . . [A]ppellants' attorney . . . crossed the line from zealous advocacy to vexatious advocacy"); *Maher v. Hyde, 272 F.3d 83, 87-88 (1st Cir. 2001)*; *Goya Foods, Inc. v. Unanue-Casal, 275 F.3d 124, 130-131 (1st Cir. 2001)*.

Corollaries refining the responsibility of counsel have evolved. A client's wish for further action will not excuse his attorney's prosecution **[***20]** of a frivolous appeal. E.g., *McConnell v. Critchlow, 661 F.2d 116, 119 (9th Cir. 1981)* ("Pursuit of a meritless claim is not justified by the client's desire to do so"); *Quiroga v. Hasbro, Inc., supra at 347* (counsel, "as a trained lawyer, should have known better" than to pursue a frivolous appeal, wasteful of the resources of the opposing party and the court, and should have "an affirmative obligation" to prevent frivolous appeals) (citations omitted).

Repetitive pursuit of unmeritorious appeals after prior warnings from trial and appellate courts will increase counsel's exposure to the assessment of financial sanctions. E.g., *Grove Fresh Distribs., Inc. v. John LaBatt, LTD, 299 F.3d 635, 642 (7th Cir. 2002)* (counsel warned of possible sanctions in prior appeal in the same litigation); *Macklin v. City of New Orleans, 300 F.3d 552, 553-554 (5th Cir. 2002)* (both trial and appellate courts rejected counsel's similar argument in prior separate cases).

Thus far a short but growing line of unpublished decisions of this court has allowed the assessment of fees under *Mass.R.A.P. 25* against appellate counsel. E.g., *Symrna Rebar, Inc. v. Modern Continental Constr. Co., 67 Mass. App. Ct. 1115, 857 N.E.2d 46 (2006)* **[***21]** (appellate attorney's fees and costs awarded; subsequent order for payment of $ 11,500); *Symrna Rebar, Inc. v. Modern Continental Constr. Co., 75 Mass. App. Ct. 1103, 912 N.E.2d 1040 (2006)* (same, subsequent order for payment of $ 18,533,58 plus double costs).

Conclusion. Within fourteen days of the date of the rescript, counsel for Main South shall submit to this court a verified itemization of its appellate fees and costs supported wherever possible by time sheets or summaries of time sheets (specifying the working attorney, the service rendered, its date and duration, **[*75]** and the hourly rate) and by invoices or receipts of disbursements. Within fourteen days thereafter, counsel for Venetis shall file any opposition to the requested amounts.

Order dated September 24, 2008, affirmed.

DISTRICT ATTORNEY FOR THE NORTHERN DISTRICT vs. SCHOOL COMMITTEE OF WAYLAND.

SJC-10406

SUPREME JUDICIAL COURT OF MASSACHUSETTS

455 Mass. 561; 918 N.E.2d 796; 2009 Mass. LEXIS 1016

November 2, 2009, Argued
December 31, 2009, Decided

PRIOR HISTORY: [*1]**

Middlesex. Civil action commenced in the Superior Court Department on December 14, 2006. The case was heard by Leila R. Kern, J., on motions for summary judgment. The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.
DA for the N. Dist. v. Wayland Sch. Comm., 2008 Mass. Super. LEXIS 185 (Mass. Super. Ct., 2008)

COUNSEL: Robert J. Bender, Assistant District Attorney (Bethany Stevens, Assistant District Attorney, with him) for the plaintiff.

Regina Williams Tate (Kevin F. Bresnahan with her) for the defendant.

The following submitted briefs for amici curiae:

Michael J. Long for Massachusetts Association of School Superintendents. Brian W. Riley for Massachusetts Municipal Association. Stephen J. Finnegan for Massachusetts Association of School Committees, Inc. Robert J. Ambrogi & Peter J. Caruso for Massachusetts Newspaper Publishers Association.

JUDGES: Present: Marshall, C.J., Ireland, Spina, Cordy, Botsford, & Gants, JJ.

OPINION BY: SPINA

OPINION

[798] [*562]** SPINA, J. The district attorney for the Northern District initiated a civil action against the school committee of Wayland for violations of the open meeting law, *G. L. c. 39, §§ 23A-24*. The district attorney alleged that the school committee violated the open meeting law during two executive sessions and in communicating via electronic mail **[***2]** messages (e-mails) prior to an open meeting. The school committee answered that (1) it properly deliberated in executive sessions to conduct "contract negotiations with nonunion personnel," based on the superintendent's contract terms, and (2) preliminary e-mail communications between the school committee members were not considered "records of a meeting," and were appropriate under the open meeting law. The parties filed cross motions for summary judgment. A judge in the Superior Court denied the district attorney's motion, allowed the school committee's motion, and entered declaratory judgment in the school committee's favor, declaring that the school committee did not violate the open meeting law. We transferred the case from the Appeals Court to this court on our own motion. [1] We vacate the summary judgment and declaratory judgment entered for the school committee in this case and remand to the Superior Court for the entry of summary judgment for the district attorney and a declaratory judgment is to enter as appearing herein.

1 We acknowledge the amicus briefs filed by the Massachusetts Newspaper Publishers Association; the Massachusetts Municipal Association; the Massachusetts **[***3]** Association of School Superintendents; and the Massachusetts Association of School Committees, Inc.

1. *Statutory framework*. The open meeting law, *G. L. c. 39, §§ 23A-23C*, **[*563]** as it applies to the school committee, was created by St. 1975, c. 303, § 3. [2]

2 On July 1, 2009, the Legislature amended G. L. c. 30A, the Administrative Procedure Act, St. 2009, c. 28, §§ 18-20, effective July 1, 2010. The 2009 amendments make numerous changes in the existing law. Among others, the amended statute places responsibility for enforcement of the open meeting law with the Office of the Attorney General for State, regional, county, municipal, and all other governmental bodies. *G. L. c. 30A, §§ 19 (a), 23 (a), 24 (a)*, inserted by St. 2009, c. 28, *§ 18*. It also addresses the definition of "deliberations" and sets forth exemptions to the public records law. *G. L. c. 30A, §§ 18, 22 (e)*, inserted by St. 2009, c. 28, § 18. Because the events at issue took place in 2004, we do not purport to interpret the amended statute.

The open meeting law reflects a general policy that all meetings of a governmental body should be open to the public unless exempted by the statute. *Attorney Gen. v. School Comm. of Taunton, 7 Mass. App. Ct. 226, 229, 386 N.E.2d 1295 (1979).* **[***4]** The Legislature designed the open meeting law "to eliminate much of the secrecy surrounding the deliberations and decisions on which public policy is based." *Ghiglione v. School Comm. of Southbridge, 376 Mass. 70, 72, 378 N.E.2d 984 (1978).* To that end, *G. L. c. 39, § 23B,* second par., provides: "No quorum of a governmental body shall meet in private for the purpose of deciding on or deliberating toward a decision on any matter except as provided by this section."

However, the Legislature has recognized that "not everything done by public officials and employees can or should occur in a public meeting." *McCrea v. Flaherty, 71 Mass. App. Ct. 637, 640, 885 N.E.2d 836 (2008).* Accordingly, *§ 23B* lists ten specific exceptions that allow a governmental body to convene in a private executive **[**799]** session. There are three exceptions that are applicable in this case:

> "Executive sessions may be held only for the following purposes:
>
> > "(1) To discuss the reputation, character, physical condition or mental health *rather than the professional competence of an individual . . . .*
> >
> > "(3) To discuss strategy with respect to collective bargaining or litigation if an open meeting may have a detrimental effect on the bargaining or litigating position **[***5]** of the governmental body, *to conduct strategy sessions in preparation for negotiations with nonunion* **[*564]** *personnel,* to conduct collective bargaining sessions or contract negotiations with nonunion personnel . . . .
> >
> > "(7) To comply with the provisions of any general or special law or federal grant-in-aid requirements." (Emphasis added.)

G. L. c. 39, §§ 23B (1), (3), (7).

The open meeting law also requires a governmental body to follow certain procedures before entering an executive session. These procedures require: "No executive session shall be held until the governmental body has first convened in an open session for which notice has been given, a majority of the members have voted to go into executive session and the vote of each member is recorded on a roll call vote and entered into the minutes, the presiding officer has cited the purpose for an executive session, and the presiding officer has stated before the executive session if the governmental body will reconvene after the executive session." *G. L. c. 39, § 23B,* third par.

2. *Facts*. We summarize the undisputed material facts. The school committee is comprised of five members, and has the powers and duties set forth in *G. L. c. 71, § 37.* **[***6]** Among these are the duty "to select and to terminate the superintendent" and "to fix [the superintendent's] compensation." *G. L. c. 71, §§ 37, 59.*

On June 2, 2004, Jeff R. Dieffenbach, the school committee chair, contacted the other members of the school committee via e-mail. [3] In that message, he sought input from school committee members on the performance of the superintendent of schools, Gary Burton. The e-mail set forth various topics on which the school committee members were requested to comment. Lori C. Frieling and Heather Pineault each created written comments pertaining to Burton's performance and forwarded them directly to Dieffenbach. Dr. Frederick K. Knight created written comments pertaining to Burton's performance and forwarded them to the entire school committee via e-mail. Robert B. Gordon did not create any written comments. From those written comments, **[*565]** Dieffenbach prepared a draft evaluation for discussion at the school committee meeting scheduled for June 21, 2004, and distributed a draft evaluation to the members of the school committee in advance of that date.

> 3 The members of the school committee at that time were Jeff R. Dieffenbach, Lori C. Frieling, Robert B. **[***7]** Gordon, Dr. Frederick K. Knight, and Heather Pineault.

On June 21, 2004, the school committee convened in open session, then voted to convene in executive session "for purposes of matters relating to Collective Bargaining as set forth in [*G. L. c. 39, § 23B*]." After discussing collective bargaining and other issues, Burton left the executive session, and the school committee turned to Burton's annual evaluation. After twelve minutes of discussion, the school committee adjourned from the executive session. On June 28, 2004, the school committee **[**800]** convened in open session, then immediately

voted to convene in executive session "for purposes of matters relating to Collective Bargaining and Personnel as set forth in [*G. L. c. 39, § 23B*]." During the executive session, after discussing other matters, the school committee discussed Burton's draft evaluation.

On May 12, 2005, a newspaper reporter for the Wayland Town Crier filed a complaint with the district attorney alleging that the process by which the school committee evaluated the superintendent and the school committee's refusal to release the evaluation of Burton violated the open meeting law. The district attorney determined that the **[***8]** school committee "violated the [o]pen [m]eeting [l]aw by conducting the [s]uperintendent's performance evaluation outside of the public view," and ordered the school committee to make the draft evaluation, all written or electronic comments, and the final written evaluation available to the public. The district attorney also ordered the school committee to amend the minutes of its June 21 and June 28, 2004, meetings to reflect the substance of the discussions that took place in executive session regarding Burton's performance evaluation.

In response to the district attorney's letter, and with the consent of Burton, the school committee made the written draft evaluation and final evaluation documents available to the public. The school committee also amended the minutes of the June 21 and June 28, 2004, executive sessions, but to indicate only that Burton was not present during the discussion of the draft evaluation and that "[t]he substance of the results of that discussion may be found in the final [s]uperintendent's evaluation as compared **[*566]** with the draft evaluation." Finally, the school committee made public the written comments of Knight, who had forwarded his comments to the entire **[***9]** school committee via e-mail, but declined to release the written comments of Frieling and Pineault.

3. *Standard of review*. This court reviews a grant of summary judgment de novo, *Miller v. Cotter, 448 Mass. 671, 676, 863 N.E.2d 537 (2007)*, to determine "whether, viewing the evidence in the light most favorable to the nonmoving party, all material facts have been established and the moving party is entitled to judgment as a matter of law." *Augat, Inc. v. Liberty Mut. Ins. Co., 410 Mass. 117, 120, 571 N.E.2d 357 (1991)*. The court need not rely on the rationale cited and "may consider any ground supporting the judgment." *Id.*

4. *June 21 and June 28, 2004, executive sessions*. The district attorney asserts that the school committee violated the open meeting law by meeting in executive session on June 21 and June 28, 2004, to discuss the "professional competence" of the superintendent. The judge determined that the school committee properly entered into executive session on both dates, pursuant to *§ 23B (3)*, to discuss matters relating to collective bargaining and negotiations with nonunion personnel, among them the superintendent's evaluation and salary. We disagree.

"The burden to show the need for a closed session rests **[***10]** on the governmental body." *District Attorney for the Northwestern Dist. v. Selectmen of Sunderland, 11 Mass. App. Ct. 663, 666, 418 N.E.2d 642 (1981)*. The exceptions in *§ 23B* allowing a governmental body to meet in executive session may not be used to circumvent the requirements of the open meeting law. See *id.* ("The exceptions in *§ 23B* are not to be used as a subterfuge to retreat from an open meeting into an executive session"). The meeting minutes indicate that on June 21 and June 28, 2004, the school committee, after **[**801]** convening in an open meeting, voted to retire into executive session, "for purposes of matters relating to Collective Bargaining," and "for purposes of matters relating to Collective Bargaining and Personnel," respectively.

The school committee committed two errors here. First, collective bargaining does not cover the superintendent, as he is not a union employee. "Purpose 3" of *§ 23B*, which states that a governmental body may convene in executive session "to conduct strategy sessions in preparation for negotiations with nonunion personnel," would allow the school committee to enter into **[*567]** executive session to discuss the Superintendent's contract renewal or salary. However, there is **[***11]** no indication in the open meeting minutes that the executive sessions would consider the superintendent's contract renewal or salary. A precise statement of the reason for convening in executive session is necessary under the open meeting law because that is the only notification given to the public that the school committee would conduct business in private, and the only way the public would know if the reason for doing so was proper or improper. Therefore, the school committee's votes to enter into executive session to consider "collective bargaining" or "collective bargaining and personnel" were not proper.

Second, the executive session minutes from June 28, 2004, state that the school committee "discussed the draft document of the [s]uperintendent's evaluation." Even had the purpose of the executive session been correctly stated to include "to conduct strategy sessions in preparation for negotiations with nonunion personnel," there is no indication that the school committee discussed the superintendent's contract renewal or salary at either executive session -- it appears that only professional competence was discussed. [4]

4 The superintendent's contract submitted into the record **[***12]** was dated March 21, 2005,

governing the three-year period from July 1, 2004, to June 30, 2007. The executive sessions at issue in this case took place in June of 2004, nine months before the contract was signed, and concerned Burton's performance in 2003-2004. While the 2004-2007 contract includes a provision requiring the school committee to prepare a written evaluation of Burton for the purposes of determining his salary for the next year, there is no contract in the record governing the time period at issue in this case. Moreover, neither the draft evaluation nor the final evaluation indicates in any way that the school committee discussed its position on the superintendent's contract or compensation. While the school committee chairman, when requesting feedback from other members regarding Burton's professional competence, stated that one of the goals of the evaluation was to "[p]rovide information to help the [s]chool [c]ommittee determine the [s]uperintendent's compensation," there is no evidence in the record suggesting that the superintendent's contract renewal or compensation for either the 2003-2004 or the 2004-2005 school years was tied in any way to his performance evaluation **[***13]** for the 2003-2004 year.

Viewing the evidence in the light most favorable to the district attorney, and drawing all reasonable inferences in his favor, we conclude that the school committee failed to bear its burden of showing that it properly entered into executive sessions on June 21 and June 28, 2004, for one of the permissible purposes **[*568]** delineated in *§ 23B*, fourth par. See *District Attorney for the Northwestern Dist. v. Selectmen of Sunderland, 11 Mass. App. Ct. 663, 666, 418 N.E.2d 642 (1981)* (finding no evidence to indicate that executive session was part of collective bargaining strategy, despite stated reason for executive session). The undisputed evidence does show that, with respect to Burton, the school committee limited its discussion in executive session to his professional competence, which, under *§ 23B (1)*, must be **[**802]** deliberated in open session. Accordingly, the meetings on June 21 and June 28, 2004, violated the open meeting law.

Where a school committee is doing an evaluation of a superintendent as part of, or as a demonstrably linked prelude to, its contract or salary negotiations with the superintendent, a nonunion employee, then the executive session provision in *§ 23B (3)* may apply. **[***14]** While professional competence must first be discussed in an open session, how that evaluation will factor into a contract or salary negotiation strategy may be suitable discussion for an executive session. However, as we have stated, there is no evidence here indicating that this is what occurred.

While a school committee's deliberation of the superintendent's professional competence must take place in an open session, written performance evaluations, whether draft or final, are not a public record, and are not required to be made available to the public. Employee work evaluations are exempt from public disclosure under the public records law, *G. L. c. 66, § 10*, pursuant to *G. L. c. 4, § 7, Twenty-sixth (c)*. In *Wakefield Teachers Ass'n v. School Comm. of Wakefield, 431 Mass. 792, 731 N.E.2d 63 (2000)*, we held that a disciplinary decision and report of the superintendent of Wakefield public schools regarding the performance of a Wakefield public school teacher was exempt from disclosure under the public records law. While that decision did not invoke the open meeting law, it held that the term "personnel [file] or information" includes, "at a minimum, employment applications, *employee work evaluations*, **[***15]** disciplinary documentation, and promotion, demotion, or termination information pertaining to a particular employee" (emphasis added). *Id. at 798*.

Where possible, we construe statutes on the same subject matter together, "so as to constitute a harmonious whole consistent with the legislative purpose." *Board of Educ. v. Assessor of* **[*569]** *Worcester, 368 Mass. 511, 513-514, 333 N.E.2d 450 (1975)*. See *Sullivan v. Chief Justice for Admin. & Mgt. of the Trial Court, 448 Mass. 15, 27, 858 N.E.2d 699 (2006)* ("Preference is given to a harmonious reading of statutes"). "If reasonably practicable and there is no positive repugnancy, a rational and workable effect must be given to both statutes, to the end that there may be a harmonious and consistent body of legislation." *Yaro v. Board of Appeals of Newburyport, 10 Mass. App. Ct. 587, 589, 410 N.E.2d 725 (1980)*, quoting *Smith v. Director of Civil Serv., 324 Mass. 455, 458, 87 N.E.2d 196 (1949)*.

Here, the open meeting law expressly directs the school committee to convene in open session to discuss the professional competence of an individual. *G. L. c. 39, § 23B (1)*. However, the public records law explicitly exempts employee work evaluations from public disclosure. *G. L. c. 66, § 10*, pursuant to *G. L. c. 4, § 7, Twenty-sixth (c)*. **[***16]** In light of the requirements of both the open meeting law and the public records law, the correct procedure in this case would have been for the school committee to meet in open session to discuss the professional competence of the superintendent. When the school committee reached the state of deliberations where the preparation and drafting of the written performance evaluation was imminent, it should have voted to adjourn to an executive session under *G. L. c. 39, § 23B (7)*, which allows a governmental body to meet in executive session to comply with the provisions of any

general or special law, here, the public records law. [5] Although **[**803]** the school committee, with the approval of the superintendent, did make the draft and final performance evaluations available to the public in this case, this was not necessary. Without the superintendent's consent, the performance evaluation would be absolutely exempt from disclosure. See *Wakefield Teachers Ass'n v. School Comm. of Wakefield, supra at 798-800*.

> 5 This issue is partially addressed by the 2009 amendment, which makes the following materials, attached to the minutes of an open session, specifically exempt from disclosure: **[***17]** "[M]aterials used in a performance evaluation of an individual bearing on his professional competence, provided they were not created by the members of the body for the purposes of the evaluation." *G. L. c. 30A, § 22 (e)*, inserted by St. 2009, c. 28, § 18. See note 2, *supra*.

5. *Private written communication prior to an open meeting.* The district attorney argues that e-mail messages between individual members of the school committee to the school committee **[*570]** chair were improper "deliberation[s]" under the open meeting law, as the exchanges concerned the professional competence of the superintendent and were not open to the public. We hold that, while some of these exchanges were not between a quorum of members, and therefore were not strictly "deliberation," they had the effect of circumventing the requirements of the open meeting law and must be made available to the public.

The open meeting law defines "[d]eliberation" as "a verbal exchange between a quorum of members of a governmental body attempting to arrive at a decision on any public business within its jurisdiction." *G. L. c. 39, § 23A*. Open meetings provide an opportunity for each member of the governmental body to debate the issues **[***18]** and disclose their personal viewpoints before the governmental body reaches its decision on a matter of public policy. They also provide an opportunity for members of the public to hear the opinions of the members of the governmental body.

Here, prior to convening in an open session on June 21, 2004, the school committee chair sent an e-mail to the members of the school committee, requesting that they send him written comments "pertaining to the [s]uperintendent's performance evaluation." One member replied to the entire school committee, and two members replied directly to the chair of the school committee. The comments of the individual members were compiled into the draft evaluation. The school committee chair then circulated a draft evaluation in advance of the next school committee meeting.

This exchange was a deliberation that violated the open meeting law. An executive session may not be held until the deliberating body has conducted an open meeting. *G. L. c. 39, § 23B*, third par. "It is essential to a democratic form of government that the public have broad access to the decisions made by its elected officials *and to the way in which the decisions are reached*" (emphasis added). **[***19]** *Foudy v. Amherst-Pelham Regional Sch. Comm., 402 Mass. 179, 184, 521 N.E.2d 391 (1988)*. Here, prior to conducting an open meeting, the school committee commenced a private e-mail exchange in order to deliberate the superintendent's professional competence. This violated the letter and spirit of the open meeting law. Governmental bodies may not circumvent the requirements of the open meeting law by conducting deliberations **[*571]** via private messages, whether electronically, in person, over the telephone, or in any other form. [6]

> 6 The open meeting law, as amended in 2009, defines "[d]eliberation" as: "an oral or written communication through any medium, including electronic mail, between or among a quorum of a public body on any public business within its jurisdiction; provided, however, that 'deliberation' shall not include the distribution of a meeting agenda, scheduling information or distribution of other procedural meeting or the distribution of reports or documents that may be discussed at a meeting, provided that no opinion of a member is expressed." *G. L. c. 30A, § 18*, inserted by St. 2009, c. 28, § 18 (effective July 1, 2010). See note 2, *supra*.

[804]** This court and the Appeals Court have held, in numerous **[***20]** cases, that a governmental body may not avoid the requirements of the open meeting law. In *McCrea v. Flaherty, 71 Mass. App. Ct. 637, 648-649, 885 N.E.2d 836 (2008)*, the Boston city council attempted to rotate intentionally the presence of council members to avoid a quorum during a discussion of urban renewal plans. The city council argued that "deliberation between seven or more members for the purpose of arriving, in private, at a decision on public business within the council's jurisdiction is legally permissible so long as no more than six members are allowed in the same room at the same time." *Id. at 649*. The Appeals Court found that this argument was "asserted for the sole purpose of defeating the fundamental purpose of the law." *Id.* The deliberations were required to be conducted in an open meeting, as set forth in *G. L. c. 39, §§ 23A-23C*. *Id.*

Similarly, in *Gerstein v. Superintendent Search Screening Comm., 405 Mass. 465, 469-470, 541 N.E.2d 984 (1989)*, this court held that interviews consisting of prepared questions asked by committee members, and

the candidates' answers, were "deliberations," as the information gathered was sufficient to constitute a "verbal exchange" between the committee members. Accordingly, **[***21]** the committee was bound to comply with the open meeting law. *Id. at 470.*

Here, the school committee, although required by law to discuss the professional competence of the superintendent in open session, began deliberations regarding this topic in private via e-mail, prior to the commencement of an open meeting. [7] These written comments of the individual members are not protected **[*572]** in this case, as we must presume the substance of the written comments would have been stated orally at an open meeting in which the superintendent's professional competence was discussed. [8] The mechanism used here, however, was an improper attempt to avoid a public discussion of the superintendent's professional competence in an open meeting, and was not in compliance with the open meeting law. Accordingly, the school committee is required to release each member's written comments and make them available to the public. [9]

7 While "deliberation" requires a "verbal exchange," it cannot be avoided by committing the required exchange to writing, as was done here. Cf. *Gerstein v. Superintendent Search Screening Comm., 405 Mass. 465, 470, 541 N.E.2d 984 (1989).*

8 If, however, the school committee had met as required by law in an open **[***22]** meeting to discuss the superintendent's professional competence, it then could have moved into a proper executive session to draft the evaluation.

9 The Superior Court judge found that, even if the e-mail communications were deliberations, this was cured by the release of the minutes of the June 21 and June 28, 2004, executive sessions and the draft and final evaluations. The district attorney argues that, at this point in time, release of the written e-mail correspondence is the only way to "cure" the improper deliberations held by the school committee and the improper executive sessions held by the school committee. We agree with the district attorney that, in order to cure the violation, the school committee must release the written comments of the individual school board members.

[805]** 6. *Conclusion*. For the foregoing reasons, the judgment of the Superior Court is reversed, and the case is remanded for the entry of summary judgment for the district attorney. In addition, a declaratory judgment is to enter stating:

"The school committee of Wayland violated the open meeting law when it deliberated the professional competence of the Superintendent in an executive session. The school committee **[***23]** is required to make written comments from individual school committee members available to the public. The school committee must deliberate the professional competence of any individual in open session, in accordance with *G. L. c. 39, § 23B (1)*, but draft or final written performance evaluations are exempt from disclosure, pursuant to the public records law, *G. L. c. 66, § 10*, and *G. L. c. 4, § 7, Twenty-sixth (c)*."

So ordered.

DEPARTMENT OF STATE POLICE vs. MASSACHUSETTS ORGANIZATION OF STATE ENGINEERS AND SCIENTISTS. [1]

1 We acknowledge receipt of two amicus briefs: one filed by the National Association of Government Employees and Service Employees International Union; and the other filed by Massachusetts AFL-CIO; American Federation of State, County, and Municipal Employees, Council 93, AFL-CIO; Service Employees International Union, Local 509; and Service Employees International Union, Local 888.

SJC-10453

SUPREME JUDICIAL COURT OF MASSACHUSETTS

456 Mass. 450*; *924 N.E.2d 248*; *2010 Mass. LEXIS 185*; *188 L.R.R.M. 2465

December 7, 2009, Argued
April 2, 2010, Decided

PRIOR HISTORY: [*1]**

Suffolk. Civil action commenced in the Superior Court Department on July 25, 2008. The case was heard by Paul E. Troy, J. The Supreme Judicial Court granted an application for direct appellate review.

DISPOSITION: Judgment affirmed.

COUNSEL: Paul F. Kelly (James A.W. Shaw with him) for the defendant.

Julie B. Goldman, Assistant Attorney General, for the plaintiff.

Shelley B. Kroll, Joseph L. DeLorey, David B. Rome, & Katherine D. Shea, for Massachusetts AFL-CIO & others, amici curiae, submitted a brief.

Lawrence D. Humphrey & Jean E. Zeiler, for National Association of Government Employees, Service Employees International Union, amicus curiae, submitted a brief.

JUDGES: Present: Marshall, C.J., Ireland, Spina, Cowin, Cordy, Botsford, & Gants, JJ.

OPINION BY: BOTSFORD

OPINION

[*451] [250]** BOTSFORD, J. Pursuant to *G. L. c. 150C, § 2 (b)*, a judge in the Superior Court permanently stayed arbitration of a dispute between the Department of State Police (department) and the Massachusetts Organization of State Engineers and Scientists (MOSES), acting on behalf of Robert E. Pino, a chemist employed by the department and a member of MOSES. MOSES appealed, and we granted its application for direct appellate review. It contends that a collective bargaining agreement **[***2]** between MOSES and the Commonwealth required the department to arbitrate MOSES's claims that the colonel of the State Police (colonel) terminated Pino without just cause and in retaliation for union activity. Agreeing that under *G. L. c. 22C, § 9*, the colonel had the exclusive and nondelegable authority to remove Pino, we affirm the judgment of the Superior Court.

Background. The record reflects the following facts. Pino was employed as a chemist in the department's criminal laboratory since 1984. As of 2007, Pino was classified as a "Chemist III" and was the system administrator for the department's "Combined DNA Index System" (CODIS). He was a member of MOSES and shop steward for the criminal laboratory during his entire employment with the department, and included within unit 9, a bargaining unit certified by the division of labor relations (division). [2]

2 The Labor Relations Commission was renamed the division of labor relations. See *G. L. c. 23, § 1A (c)*, as amended by St. 2007, c. 145, § 2. See also *G. L. c. 23, § 9O* , as appearing in St. 2007, c. 145, § 5.

On March 30, 2007, the department conducted a predisciplinary hearing concerning Pino's work performance, presided over by an **[***3]** agency hearing officer. [3] The **[**251]** hearing officer made findings of fact and a recommendation to the colonel. On April 13, 2007, **[*452]** the colonel informed Pino by letter that he found "just cause" to terminate Pino's employment with the

department under *G. L. c. 22C, § 9*, inserted by St. 1991, c. 412, § 22. [4] The letter stated, in relevant part:

> "Having received the findings and recommendations of [the hearing officer] and upon review of the same, together with an examination of all evidence submitted at the March 30, 2007 pre-disciplinary hearing, I find just cause to terminate your employment as a CODIS Administrator/Chemist III for the Department . . . .
>
> "Additionally, I find your continued employment with the Department . . . to be contrary to the public interest and the mission of the Department of State Police. In accordance with *[G. L. c.] 22C, § 9*, I have determined that your removal is necessary for the operation of the Department and hereby remove and discharge you from your appointment pursuant to that statute."

3 According to Pino's affidavit, submitted in support of MOSES's motion for reconsideration of the Superior Court judge's decision, the department alleged that Pino had held notifications **[***4]** of deoxyribonucleic acid (DNA) matches until the applicable statutes of limitations had run; had improperly conducted and reported the results of "familial" searches; and had reported DNA matches based on faulty information. Pino denies these allegations.

4 *General Laws c. 22C, § 9*, states: "The colonel may appoint, transfer and remove experts, clerks and other assistants as he may deem necessary for the operation of the department; provided, however, that all such actions shall be exempt from the provisions of [*G. L. c. 31*, the civil service statute]; and provided, further, that such positions shall be subject to the provisions of [*G. L. c. 30, §§ 45*, *46*, and *46C* (job classifications and pay scales)]."

At the time Pino received this letter, a collective bargaining agreement between MOSES and the Commonwealth (agreement), executed in 2005, governed the terms of Pino's employment with the department. The agreement expressly superseded any prior collective bargaining agreements. It covered bargaining unit 9 employees in various Commonwealth agencies, including, but not limited to, the department. [5] The agreement addresses union fees, antidiscrimination policy, schedules, leave, salaries, **[***5]** insurance contributions, promotions, layoffs, training, performance evaluations, arbitration of disciplinary action, and a grievance procedure.

5 The collective bargaining agreement (agreement) ran from July 1, 2003, through June 30, 2006, but provided that it would remain in full force and effect until a successor agreement was executed. We infer from the record that the agreement was in effect at all relevant times in 2007.

Relevant here, art. 23A of the agreement details a four-step grievance procedure to resolve disputes that in its fourth step **[*453]** provides for arbitration of grievances that the parties have not resolved under the first three steps. Section 23A.4 limits the scope of arbitration, providing that "[t]he arbitrator shall have no power to add to, subtract from, or modify any provision of this Agreement or to issue any decision or award inconsistent with applicable law." Additionally, art. 28, entitled "saving clause," states that "[i]n the event that any Article, Section or portion . . . is found to be invalid . . . then such specific Article, Section or portion shall be unenforceable . . . ."

On April 19, 2007, MOSES filed a grievance on Pino's behalf, claiming that the department **[***6]** had terminated his employment without just cause in violation of § 23.1 of the agreement, which provides that no employee with six or more consecutive months of service "shall be discharged, suspended, or demoted for disciplinary reasons or given a warning or reprimand without just cause." Further, **[**252]** MOSES alleged that the department terminated Pino's employment in retaliation for his union activity in violation of § 6.6 of the agreement, which reads: "There shall be no discrimination by the Employer or its Agent against any employee because of his/her activity or membership in MOSES." MOSES sought the following remedy: "Reinstate grievant. Cease and desist retaliatory, discriminatory conduct. Make grievant whole. All lesser included remedies are incorporated herein."

The department argued to the arbitrator that *G. L. c. 22C, § 9* (see note 4, *supra*), confers on the colonel nondelegable managerial authority to remove civilian employees, including Pino, and the arbitration of the grievance was therefore outside the arbitrator's authority. MOSES disagreed. It contended that the grievance was arbitrable because, among other reasons, Pino retained collective bargaining rights when he and other **[***7]** department of public safety employees were reorganized into the department, pursuant to St. 1991, c. 412, § 1 and § 136. [6]

6 The Legislature consolidated the Metropolitan District Commission police, the division of the State police in the Executive Office of Public Safety, the capitol police, and the division of law enforcement of the registry of motor vehicles into the Department of State Police. St. 1991, c. 412, § 1.

On July 14, 2008, the arbitrator issued a prehearing ruling in which he (1) declined to address whether St. 1991, c. 412, § 136 **[*454]** (see note 20, *infra*) conflicted with *G. L. c. 22C, § 9*, stating that "[r]econciling conflicting statutes . . . is reserved exclusively to the judiciary"; and (2) determined that "whether the [c]olonel's statutory rights under [*G. L. c. 22C, § 9*,] are nondelegable rights of management that may not be abrogated by a collective bargaining agreement is a legal question for the courts." Despite finding these two issues outside his jurisdiction, the arbitrator concluded that the question whether the colonel had just cause to terminate Pino's employment was arbitrable nonetheless, because the colonel's authority to take that action stemmed from § 23.1 **[***8]** of the agreement in addition to *G. L. c. 22C, § 9*, and § 23.1 required just cause for Pino's discharge. [7]

7 The arbitrator did not address MOSES's claim of antiunion discrimination in his prehearing ruling.

On July 25, 2008, the department filed in the Superior Court an application for a permanent stay of arbitration pursuant to *G. L. c. 150C, § 2 (b)*. MOSES opposed the application. On September 9, 2008, after a hearing, the judge granted the stay, concluding that because Pino was an "expert" within the meaning of *G. L. c. 22C, § 9*, the agreement could not supersede the colonel's nondelegable right of management granted by that statute, and "an arbitrator could not issue an award which would interfere with this explicit prerogative." The judge rejected MOSES's contentions that its grievance sought remedies besides reinstatement and that arbitration was necessary to address "procedural standards," finding that MOSES had not alleged that the department had violated any particular procedures. The judge observed that MOSES had pointed to § 6.6 of the agreement, the provision barring antiunion discrimination, but determined that MOSES had cited "no evidence of discrimination or retaliation **[***9]** based on Pino's union membership or activity."

MOSES moved for reconsideration of the judge's order pursuant to *Mass. R. Civ. P. 60 (b)*, 365 Mass. 828 (1974). In February, 2009, the judge denied the motion. In his accompanying decision, the **[**253]** judge addressed MOSES's alternative remedies argument. He noted that MOSES had raised factual allegations of antiunion discrimination in the Pino affidavit supporting its motion for reconsideration, but he concluded that even in light of the new allegations, an arbitrator still could not award any lawful **[*455]** relief without interfering with the colonel's nondelegable managerial prerogative set out in *G. L. c. 22C, § 9*.

Discussion. *General Laws c. 150C, § 2 (b)*, authorizes a judge in the Superior Court to "stay an arbitration proceeding commenced or threatened" if the judge finds that two conditions are met: (1) "the claim sought to be arbitrated does not state a controversy covered by the provision for arbitration"; and (2) "disputes concerning the interpretation or application of the arbitration provision are not themselves made subject to arbitration." As to the statute's first condition, "we regard an agreement to arbitrate a dispute which lawfully **[***10]** cannot be the subject of arbitration as equivalent to the absence of a controversy covered by the provision for arbitration." *Dennis-Yarmouth Regional Sch. Comm. v. Dennis Teachers Ass'n, 372 Mass. 116, 119, 360 N.E.2d 883 (1977)*. See *Berkshire Hills Regional Sch. Dist. Comm. v. Berkshire Hills Educ. Ass'n, 375 Mass. 522, 526-527, 377 N.E.2d 940 & n.5 (1978)*. Thus, the first issue to consider is whether the colonel's termination of Pino -- the basis of the dispute MOSES seeks to arbitrate -- legally could be the subject of arbitration. [8]

8 The parties do not address whether the second condition of *G. L. c. 150C, § 2 (b) (2)*, which looks to the provisions of the particular collective bargaining agreement, was met in this case. We therefore do not consider the second condition any further but assume -- as the parties and the judge below appear to have -- that it was satisfied.

General Laws c. 22C, § 9 (see note 4, *supra*), authorizes the colonel to "appoint, transfer and remove experts, clerks and other assistants as he may deem necessary for the operation of the department." The import of this language is plainly to confer on the colonel exclusive managerial authority over the appointment, transfer, and removal of any **[***11]** person employed in one of the specified positions, authority that cannot be delegated to an arbitrator under a collective bargaining agreement. See, e.g., *Leominster v. International Bhd. of Police Officers, Local 338, 33 Mass. App. Ct. 121, 125-128, 596 N.E.2d 1032 (1992)* (arbitrator exceeded authority in ruling that police officer's discharge at end of probationary period was arbitrable issue requiring city to prove just cause, where *G. L. c. 31, § 34*, vested discretionary authority in city to dismiss probationary police officer if work was not "satisfactory to [city]"). [9]

9 See also *School Comm. of Natick v. Education Ass'n of Natick, 423 Mass. 34, 38-41, 666 N.E.2d 486 (1996)* (*Natick*) (superintendent's decision

not to reappoint grievant as coach not subject to arbitration; collective bargaining agreement could not abrogate provision in *G. L. c. 71, § 47A*, vesting exclusive appointment authority in superintendent); *Massachusetts Coalition of Police, Local 165 v. Northborough, 416 Mass. 252, 254, 620 N.E.2d 765 (1993)* (*Massachusetts Coalition of Police*) (*G. L. c. 41, § 97A*, giving town selectmen power to appoint such police officers "as they deem necessary" for terms of fixed duration established nondelegable managerial prerogative **[***12]** in selectmen to decide not to reappoint particular officer). Cf. *Somerville v. Somerville Mun. Employees Ass'n, 451 Mass. 493, 500, 887 N.E.2d 1033 (2008)* (*Somerville*) (arbitrator was without power to direct city to appoint grievant as director of veterans' services in light of statute vesting specific authority in city's mayor to appoint director; arbitrator's award vacated); *Berkshire Hills Regional Sch. Dist. Comm. v. Berkshire Hills Educ. Ass'n, 375 Mass. 522, 526-530, 377 N.E.2d 940 (1978)* (*Berkshire Hills*) (stay of arbitration under *G. L. c. 150C, § 2 [b]*, properly granted where appointment of school principal was within nondelegable management authority of school committee and not proper subject of arbitration).

[*456] [254]** MOSES briefly argues that *G. L. c. 22C, § 9*, does not apply in this case because as a Chemist III, Pino was an "other employee[]" governed by *G. L. c. 22C, § 10*, rather than an "expert" covered by *§ 9*. The contention lacks merit. As the judge concluded, c. 22C, *§ 10*, applies to the uniformed branch of State police officers, while *§ 9* applies to civilian employees of the department, such as Pino. Aside from one reference to "other employees" in the first paragraph of *§ 10*, all five paragraphs of the section **[***13]** concern the appointment and conditions of employment of the uniformed officers of the State police. [10] Moreover, the record offers no indication that the Governor authorized Pino's appointment, as the first paragraph of *§ 10* would seem to require if Pino were an "other" employee within the scope of that section. The explicit use of the term "expert" **[*457]** in *§ 9* also indicates that *§ 9* is intended to cover employees with specialized training such as chemists.

10 The first paragraph of *G. L. c. 22C, § 10*, states in part:

> "Whenever the governor shall deem it necessary to provide more effectively for the protection of persons and property and for the maintenance of law and order in the commonwealth, he may authorize, in writing, the colonel to make appointments to the department of state police, together with such other employees as the governor may deem necessary for the proper administration thereof. The appointment of the officers herein provided for shall be by enlistment and such appointees shall be exempt from the requirements of [G. L. c. 31]; provided, however, that the classification of such positions shall be subject to the provisions of [*G. L. c. 30, § 45*]. . . . The colonel may, subject **[***14]** to the provisions of this chapter and of [G. L. c. 150E], make rules and regulations for the force, including matters pertaining to the discipline, organization, government, training, compensation, equipment, rank structure, and means of swift transportation . . . ."

In sum, because we conclude that *G. L. c. 22C, § 9*, applies to Pino, and that it grants the colonel exclusive and nondelegable authority to appoint and remove civilian "experts" in the department, it follows that Pino's removal from his position as a Chemist III was not legally arbitrable. Section 23.1 of the agreement, the provision granting employees "just cause" protections after six months, conflicts with the colonel's statutory prerogative. [11]

11 In determining that a particular statute grants a public officer or public body nondelegable managerial authority that is inconsistent with arbitration under a public employee collective bargaining agreement, we have often pointed to the fact that the statute in question was not listed under *G. L. c. 150E, § 7 (d)* ("If a collective bargaining agreement . . . contains a conflict between matters which are within the scope of negotiations pursuant to [c. 150E, *§ 6*,] and . . . **[***15]** any of the following statutory provisions . . . the terms of the collective bargaining agreement shall prevail"). See, e.g., *Somerville, 451 Mass. at 500*; *Natick, 423 Mass. at 39*; *Berkshire Hills, 375 Mass. at 527*. Similarly, in this case, *G. L. c. 22C, § 9*, is not listed in *G. L. c. 150E, § 7 (d)*, as one of the statutes over which a collective bargaining agreement will prevail.

MOSES argues that even if *G. L. c. 22C, § 9*, confers exclusive managerial authority on the colonel that cannot be delegated, under the exception to the nondelegability doctrine this court recognized in *Blue Hills Regional Dist. Sch. Comm. v. Flight, 383 Mass. 642, 421 N.E.2d 755 (1981)* (*Flight*), MOSES's claim of discrimination based on union activity remains arbitrable. [12]

12 The department argues that MOSES waived this argument by raising it only in its motion for reconsideration under *Mass. R. Civ. P. 60 (b)*, 365 Mass. 828 (1974), the denial from which it did not appeal. The record indicates, however, that MOSES alleged retaliatory antiunion discrimination in its grievance, and appears at least to have made reference to this allegation in its opposition to the motion to stay filed in the Superior Court. In any event, the judge **[***16]** appears to have considered the merits of the claim, determining that MOSES had cited "no evidence of discrimination or retaliation based on Pino's union membership or activity." We do not treat MOSES's claim as waived.

[255]** In *Flight*, this court confirmed an arbitrator's award that determined a school committee had violated a collective bargaining agreement by failing to promote the grievant teacher because of her gender, and that directed the school committee to promote the teacher with back pay. *Id. at 643-644*. In response to the argument that an award compelling the school committee to promote the grievant would violate the nondelegability doctrine, we concluded **[*458]** that the case called for "an exception" to the doctrine, referencing a case "where we suggested an exception if committee action was 'a pretense or device actuated by personal hostility,'" [13] and also citing a decision by the Court of Appeals of New York where an exception to the doctrine was recognized if tenure was refused "for constitutionally impermissible reasons or in violation of statutory proscriptions." [14] *Id. at 644*. We noted that the collective bargaining agreement at issue "provided explicitly that appointments would **[***17]** be made without regard to sex," *id. at 643*, and that "[d]enial of promotion to a public employee because of her sex is constitutionally impermissible and violates statutory proscriptions . . . ." *Id. at 644*. We then stated that a "[d]ecision by an arbitrator in such a case is no more intrusive than [a] decision by an independent commission, and does not unreasonably trespass on the managerial authority of the employing agency." *Id*.

13 *School Comm. of Braintree v. Raymond, 369 Mass. 686, 689, 343 N.E.2d 145 (1976)*, was the case cited in *Blue Hills Regional Dist. Sch. Comm. v. Flight, 383 Mass. 642, 644, 421 N.E.2d 755 (1981)* (*Flight*).

14 *Cohoes City Sch. Dist. v. Cohoes Teachers Ass'n, 40 N.Y.2d 774, 777, 358 N.E.2d 878, 390 N.Y.S.2d 53 (1976)*. See *Flight, supra.*

MOSES is correct that similar to the treatment of gender discrimination in the agreement discussed in *Flight*, § 6.6 of MOSES's agreement with the Commonwealth expressly prohibits discrimination because of union activity or membership. Also similar to *Flight*, there is a statutory (but not constitutional) proscription against this type of discrimination. See *G. L. c. 150E, §§ 10 (a), 11*. Nevertheless, cases decided since *Flight* suggest that the exception we made to the nondelegability doctrine **[***18]** in that case is a very narrow one, and does not apply where the claim is one of discrimination on account of union activity.

In *Massachusetts Coalition of Police, Local 165 v. Northborough, 416 Mass. 252, 620 N.E.2d 765 (1993)* (*Massachusetts Coalition of Police*), the union claimed that the town's decision not to reappoint its member as a police officer was "the product of discrimination on account of [the officer's] union activities," in violation of a collective bargaining agreement's provision expressly barring such discrimination. *Id. at 257*. After holding that the town's statutory authority to appoint police officers was nondelegable and that the matter was, therefore, not arbitrable, the court in **[*459]** dictum rejected the union's discrimination claim, stating that, even if the claim were not waived, "we are satisfied that [the discrimination claim] must **[**256]** fail . . . because it appears that no lawful relief could be granted without conflicting with the town's nondelegable managerial prerogative." *Id.* Similarly, in *Sheriff of Middlesex County v. International Bhd. of Correctional Officers, Local R1-193, 62 Mass. App. Ct. 830, 821 N.E.2d 512 (2005)*, the Appeals Court rejected a union's contention that *Flight* excepted from **[***19]** the nondelegability doctrine -- and therefore preserved for arbitration -- the union's claim that its member was not reappointed in violation of the collective bargaining agreement's provision barring discrimination based on union activity. *Id.* [15] *at 833-834*. Citing *Massachusetts Coalition of Police, supra*, the court determined that the *Flight* exception was not triggered where the discrimination claim was based on union membership and not membership in a constitutionally protected category such as gender or race. *Id. at 834*.

15 The court in the *Massachusetts Coalition of Police* case did not discuss or cite to the *Flight* case.

We follow the lead of these cases. [16] Accordingly, we conclude that *Flight's* restricted exception to the nondelegability doctrine does not cover MOSES's discrimination claim based on Pino's union membership and activities.

16 It bears emphasizing as well that the posture of this case differs from *Flight*. In *Flight*, the school committee initially agreed to submit to arbitration the question whether the teacher's grievance was arbitrable. See *Blue Hills Regional Dist. Sch. Comm. v. Flight, 10 Mass. App. Ct. 459, 461, 409 N.E.2d 226 & n.3 (1980), S.C., 383 Mass. 642, 421 N.E.2d 755 (1981)*. The school **[***20]** committee challenged the enforceability of the award only after the arbitrator had made a finding of constitutionally impermissible gender discrimination. *Id. at 463 & n.6*. Whether the school committee might have obtained a stay of arbitration under *G. L. c. 150C, § 2 (b)*, had it sought one at the outset of the arbitration proceedings was not considered or decided.

MOSES also relies on our decision in *Southern Worcester County Regional Vocational Sch. Dist. v. Labor Relations Comm'n, 386 Mass. 414, 423 n.10, 436 N.E.2d 380 (1982)* (*Southern Worcester*), as supporting the position that an arbitrator has authority to order reinstatement if the arbitrator determines the employee was discharged for union activity. The *Southern Worcester* case, however, concerned the statutory authority of the Labor Relations Commission (now division of labor relations, see note 2, *supra*) to remedy **[*460]** prohibited labor practices under *G. L. c. 150E, §§ 10 (a)* & *11*; [17] the case was not concerned with the power of an arbitrator acting pursuant to a public employee collective bargaining agreement. [18] **[**257]** There does not appear to be any reason that MOSES could not have sought relief under these statutes from the division for any discrimination **[***21]** that, in MOSES's view, motivated the colonel's termination decision in this case. See *Massachusetts Coalition of Police, 416 Mass. at 257* & n.1 (holding decision not to reappoint officer inarbitrable because "no lawful relief could be granted [under arbitration clause in collective bargaining agreement] without conflicting with the town's nondelegable managerial prerogative," but noting that "a union charge of prohibited practice focused on discrimination and retaliation . . . in connection with union activity was pending before the Labor Relations Commission").

17 *General Laws c. 150E, § 10 (a)*, states, in relevant part: "It shall be a prohibited practice for a public employer or its designated representative to: . . . (3) Discriminate in regard to hiring, tenure, or any term or condition of employment to encourage or discourage membership in any employee organization." *General Laws c. 150E, § 11*, as appearing in St. *2007, c. 145, § 7 (d)*, authorizes a division of labor relations hearing officer who has determined that a practice prohibited by *§ 10* has been committed to reinstate an employee, with or without back pay.

18 We concluded in *Southern Worcester County Regional Vocational Sch. Dist. v. Labor Relations Comm'n, 386 Mass. 414, 436 N.E.2d 380 (1982)*, **[***22]** that under *G. L. c. 150E, §§ 10* and *11*, the Labor Relations Commission had the authority to order the reinstatement of a teacher, even if reinstatement resulted in an award of tenure, if the school district had discriminated against her for participating in union activity. *Id. at 422-423* & n.10. In response to the district's argument that only a district or a school committee can grant tenure, and that allowing the Labor Relations Commission to do so violated the nondelegability doctrine, we said, "[I]n this case, the school [district] has not attempted to delegate its authority over tenure to the commission. *Rather, the Legislature has limited the power of a school [district or] committee to deny tenure*. We therefore conclude that the nondelegability doctrine . . . does not apply to this case." (Emphasis added.) *Id. at 423*.

MOSES also asserts that an arbitrator may remedy procedural violations without intruding on a public employer's exclusive management authority, and could have done so in this case. Accordingly, it contends, the stay of arbitration was in error. A public employer with nondelegable managerial authority "may be required to arbitrate with respect to ancillary matters, **[***23]** such as procedures that the employer has agreed to follow prior to making the decision" at issue. *Somerville v. Somerville Mun. Employees* **[*461]** *Ass'n, 451 Mass. 493, 499, 887 N.E.2d 1033 (2008)*, quoting *Lynn v. Labor Relations Comm'n, 43 Mass. App. Ct. 172, 179, 681 N.E.2d 1234 (1997)*. However, as the judge pointed out, MOSES has not alleged what, if any, specific procedures the department failed to follow. See *Sheriff of Middlesex County v. International Bhd. of Correctional Officers, Local R1-193, 62 Mass. App. Ct. at 835* ("Claiming a violation of a general nondiscrimination provision is insufficient to find a procedural basis to reverse the stay of arbitration"). Moreover, the nature of the dispute in this case precludes any remedy other than reinstatement. See *Massachusetts Coalition of Police, 416 Mass. at 256* (finding no arbitrable dispute where "arbitrator lawfully could neither order [officer's] reappointment nor provide a form of relief that might reasonably promote or advance the union's goal that [he] be reappointed"). [19] See also *School Comm. of Natick v. Education Ass'n of Natick, 423 Mass. 34, 40, 666 N.E.2d 486 (1996)*. Cf. *Somerville v. Somerville Mun. Employees Ass'n, 451 Mass. at 499*, quoting *Lynn v. Labor Relations Comm'n, supra at 184* **[***24]** ("mayor's specific authority granted by *G. L. c. 115, § 10*, leaves 'nothing to bargain about'").

19 In *Massachusetts Coalition of Police, 416 Mass. at 256*, we explained:

> "[T]his case is different from cases such as *School Comm. of W. Bridgewater v. West Bridgewater Teachers' Ass'n, 372 Mass. 121, 360 N.E.2d 886 (1977), Dennis-Yarmouth Regional Sch. Comm. v. Dennis Teachers Ass'n, [372 Mass. 116, 360 N.E.2d 883 (1977)]*, and *School Comm. of Danvers v. Tyman, [372 Mass. 106, 360 N.E.2d 877 (1977)]*. In those cases, the court held that, although decisions concerning whether to grant tenure to teachers are nondelegable, and therefore nonarbitrable, issues concerning the procedure to be followed in making such tenure decisions are arbitrable. In those cases, the procedure in issue was reasonably related to the hiring decision. Here, however, an order requiring a hearing to determine whether there was just cause for discharge would have little or no bearing on whether, from the town's point of view, reappointment was indicated. Such an order would not constitute 'relief' in any realistic sense."

We also reject MOSES's claim that Pino retains contractual rights from before the **[**258]** 1991 consolidation of law enforcement agencies, [20] including a "just **[***25]** cause" standard in a then-applicable collective bargaining agreement. Section 25.4 of the current **[*462]** agreement states: "Any prior agreement covering employees in Bargaining Unit 9 *shall be terminated upon the effective date of this Agreement and shall be superseded by this Agreement*" (emphasis added). This language leaves no question that the current agreement's terms, and only its terms, apply. [21]

20 Statute 1991, c. 412, § 136, provides: "Any duly existing contract, lease, or obligation of the division of capitol police, the division of metropolitan district commission police, the division of state police or the division of law enforcement in the registry of motor vehicles or any bureau, unit officer or employee thereof which shall be consolidated pursuant to the provisions of this act which are in force immediately prior to the effective date of this act [July 1, 1992,] shall be deemed to be the obligation of the department of state police."

21 We similarly reject MOSES's argument that Pino had a right to arbitration of his claim for name-clearing purposes, even if the arbitrator could award no other remedy. Any right Pino may have to a "name-clearing" hearing is "independent of his termination" **[***26]** and not at issue here. *Police Comm'r of Boston v. Cecil, 431 Mass. 410, 416, 727 N.E.2d 846 (2000)*. Moreover, it appears MOSES raises this argument for the first time on appeal, as the judge did not address it in his original decision or his decision on the motion for reconsideration.

Finally, we decline MOSES's request to allow arbitration for cathartic value, as doing so would undermine the colonel's managerial discretion under *G. L. c. 22C, § 9*.

Conclusion. The Superior Court judge properly allowed the department's application permanently to stay arbitration.

Judgment affirmed.

FANEUIL INVESTORS GROUP, LIMITED PARTNERSHIP vs. BOARD OF SELECTMEN OF DENNIS & another. [1]

1 Dennis Housing Authority.

No. 08-P-1222.

APPEALS COURT OF MASSACHUSETTS

75 Mass. App. Ct. 260*; *913 N.E.2d 908*; *2009 Mass. App. LEXIS 1171

March 10, 2009, Argued
September 28, 2009, Decided

SUBSEQUENT HISTORY: Review granted by *Faneuil Investors Group, Ltd. P'ship v. Bd. of Set Selectmen of Dennis, 455 Mass. 1106, 920 N.E.2d 43, 2009 Mass. LEXIS 1034 (Mass., Dec. 22, 2009)*

PRIOR HISTORY: [*1]**

Suffolk. Civil action commenced in the Land Court Department on April 24, 2008. A motion for lis pendens and a motion to dismiss were heard by Keith C. Long, J. *Faneuil Investors Group v. Otis, 2008 Mass. LCR LEXIS 86 (2008)*

COUNSEL: Dana Alan Curhan, for the plaintiff.

Jeffery D. Ugino (Kathleen M. O'Donnell with him), for the defendants.

JUDGES: Present: Lenk, Mills, & Katzmann, JJ.

OPINION BY: KATZMANN

OPINION

[909] [*260]** KATZMANN, J. Plaintiff Faneuil Investors Group, Limited Partnership (Faneuil), filed an action to reinstate the mortgage it had held on property formerly owned by the Dennis Housing **[*261]** Authority (DHA) and described in a deed from the town of Dennis (town) to the DHA. The property reverted to the town after violation of the restrictions set forth in the deed, namely, the grant of a mortgage by the DHA to Citizens Bank of Massachusetts (Citizens). Faneuil is the current holder of the note and mortgage by assignment from Citizens.

Faneuil filed a verified complaint in the Land Court against members of the town's board of selectmen (board) and the DHA, seeking, inter alia, a declaratory judgment that a right of reverter -- contained in the deed -- was not triggered by the mortgage. Faneuil also filed a motion for endorsement of a memorandum of lis pendens. The judge ruled that Faneuil did not have a valid mortgage **[***2]** on the property and ordered all references to that mortgage and Faneuil's other interests struck from the certificate of title. Additionally, the judge denied the lis pendens motion and dismissed Faneuil's claims under *Mass.R.Civ.P. 12(b)(6), 365 Mass. 755* (1974). Faneuil now appeals. We affirm.

Background. [2] The property is a 6.41-acre parcel of land that the town acquired **[**910]** by eminent domain on August 14, 2001, with the consent of its prior owners. The taking occurred pursuant to a town meeting vote which, inter alia:

> "authorize[d] the [board] to acquire by eminent domain . . . for the purposes of affordable housing, the [6.41 acre parcel] . . .; and further . . . authorize[d] the [board] to transfer ownership and/or control to the [DHA] . . . for the purpose of providing affordable housing . . . [and specified that] *[a]ny deed transferring the property shall provide that in the event the property ceases to be used for the purposes provided herein, the title to said parcel shall revert to the [town], acting by and through its [board]*" [emphasis supplied].

2 We recite the undisputed facts from the judge's careful memorandum.

The town subsequently took the property and, by deed dated February 22, **[***3]** 2002, conveyed it for nominal consideration to the DHA. The conveyance, however, explicitly was made subject to "a condition subsequent, with a possibility of reverter retained by the Town," which, in pertinent part, stated:

> "The Town shall have the right to enter upon the Property **[*262]** and revest title back to it upon the occurrence of any of the following events:
>
> "(1) The Grantee ceases to exist or function as a municipal housing authority, or be recognized as a housing authority by

the Commonwealth of Massachusetts Department of Housing and Community Development and its successors.

"(2) *The Property is conveyed or transferred without the written consent of the [board]*.

". . .

"Notwithstanding the foregoing, no such entry shall occur until such time as the Town has notified the [DHA] of such occurrence and the [DHA] fails to cure such event to the reasonable satisfaction of the Town within thirty (30) days of receipt of such notice." (Emphasis supplied.)

The deed was executed by the board, with its conditions "accepted and agreed to as perpetual conditions by the [DHA] as authorized by vote of its board." [3] The deed was filed with the registry of deeds on March 7, 2002, and noted on the certificate **[***4]** of title's encumbrance sheet with the "restrictions."

3 The deed from the town to the DHA was one for a "determinable or qualified fee," an estate to continue until the happening of a certain event, which, in its pure form, causes the estate to cease by its own limitation upon the happening of that event without a re-entry by the grantor, see *First Universalist Soc. of N. Adams v. Boland, 155 Mass. 171, 174, 29 N.E. 524 (1892)*; 1 Jones, Real Property §§ 628-629 (Bowen-Merrill Co. 1896), with a condition subsequent (notice by the town that the "event" had occurred, and the DHA's failure to cure within thirty days after receipt of the notice). Both types of estates (determinable or qualified fee and deeds with a condition subsequent) are recognized and enforced in Massachusetts. See *First Universalist Soc., supra at 175-176*.

Prior to the conveyance of the property from the town to the DHA, the DHA secured a $ 400,000 construction and permanent loan commitment from Citizens. The commitment letter provided that "the [l]oan shall be secured by a valid first mortgage upon the fee simple title on the [p]roperty," with "[t]he final legal description of the [p]roperty [to be] approved by [Citizens] and its **[***5]** counsel." The commitment also required the DHA to provide Citizens with "a Standard American Land Title Association **[*263]** . . . mortgagee's title policy binder containing no exceptions other than those approved by [Citizens]." Under the terms of the commitment, Citizens had "no obligation to close the Loan in the event of . . . **[**911]** (iv) [the] failure of [the DHA] or any Guarantor to comply with the terms and conditions of [the] commitment letter; or (v) [if] any collateral offered for the Loan or any documents, instruments, agreement or information furnished to [Citizens] pursuant to [the] commitment [was] not in all respects in form and substance satisfactory to [Citizens]."

By subsequent agreement between Citizens and the DHA, the time for performance and completion of the closing was extended to March 4, 2002. By that time, the property had been deeded from the town to the DHA. Citizens closed the loan with knowledge of the limitations on the DHA's interest. The DHA's certificate of title, issued on March 7, 2002, referenced the DHA's deed (explicitly noting on the encumbrance sheet a description of the deed as "restrictions") and, immediately thereafter, the Citizens mortgage, the DHA's collateral assignment of contracts, licenses, **[***6]** permits, leasehold interests, and other rights to Citizens, and the Citizens financing statement. Citizens assigned all of these interests to Faneuil on July 11, 2007, as noted on the certificate of title.

On February 21, 2008, at the request of the board, town counsel sent notice to the DHA of the board's intent to exercise the right of reverter on the ground that the DHA impermissibly granted the mortgage to Citizens in contravention of provision 2 (provision or reverter provision) in the deed that prohibited the transfer of the property without the written consent of the board. On March 5, 2008, the DHA voluntarily conveyed the property to the town by means of a deed recorded on March 12, 2008.

The judge in the Land Court ruled that the mortgage was a "conveyance of title, *Maglione v. BancBoston Mort[.] Corp., 29 Mass. App. Ct. 88, 90-91, 557 N.E.2d 756 (1990)*, and [that] the mortgagee [could] only acquire such title as the mortgagor possesse[d] and [had] the capacity to grant, see *Coraccio v. Lowell Five Cents Sav[.] Bank, 415 Mass. 145, 151-152, 612 N.E.2d 650 (1993)*; *Brewster v. Weston, 235 Mass. 14, 17, 126 N.E. 271 (1920)*. . . . By the terms of [the] deed, the [DHA's] title terminated when it mortgaged the property to Citizens **[***7]** (a conveyance of title) without the written consent of the Board, the Board gave notice, the [DHA] failed to 'cure' within **[*264]** thirty days, and the town reentered the property and revested title back to it." The judge further ruled that the reverter provision contained in the deed was authorized by the vote of the town meeting.

Discussion. Faneuil challenges the judge's denial of its motion for endorsement of a memorandum of lis pendens, dismissal of its claims, and striking of all refer-

ences to its mortgage and other interests from the town's certificate of title, claiming, in essence, that (1) the mortgage did not trigger the reverter provision; and (2), even if the mortgage triggered the reverter provision, that provision was unauthorized and therefore unenforceable.

1. *Triggering of reverter provision*. The provision in the deed that is at the heart of this case provides for a reverter where "[t]he Property is conveyed or transferred without the written consent of the [board]." Faneuil argues that the judge erred in treating the mortgage as a conveyance that triggered the reverter. [4] **[**912]** Specifically, Faneuil contends that the reverter provision should not apply because (1) no Massachusetts appellate case has addressed **[***8]** whether the granting of a mortgage constitutes a conveyance of title as defined in a reverter provision such as the one at issue here, and case law from other jurisdictions supports the conclusion that the mortgage did not trigger the instant reverter provision; and (2) the language of the reverter provision is ambiguous.

> 4 The DHA asserts in its brief that Faneuil is barred from raising this claim on appeal because Faneuil's counsel conceded during a hearing below that under Massachusetts law, the granting of a mortgage is a "conveyance or transfer." Although it appears from the Land Court judge's memorandum that Faneuil may have conceded that the reverter provision, if authorized by the vote, was triggered by the mortgage, no transcript of the hearing was included with either appellee's brief or in the record appendix. Further, Faneuil's reply brief disputes that it waived its claim that the mortgage did not trigger the reverter clause. At oral argument, the board reiterated that the claim had been waived during the motion to dismiss hearing, but conceded that it could provide no record to prove it. Under the circumstances, we will consider the claim. See *Shawmut Community Bank, N.A. v. Zagami, 30 Mass. App. Ct. 371, 372-373, 568 N.E.2d 1163 (1991),* **[***9]** *S.C., 411 Mass. 807, 586 N.E.2d 962, 586 N.E.2d 975 (1992).*

a. *Mortgage theory*. *General Laws c. 260, § 35*, inserted by St. 1957, c. 370, defines a mortgage as a "conveyance made for the purpose of securing performance of a debt . . . ." Under our title theory of mortgages, "[a] mortgage of real estate is a conveyance of the title or of some interest therein defeasible **[*265]** upon the payment of money or the performance of some other condition." [5] *Murphy v. Charlestown Sav. Bank, 380 Mass. 738, 747, 405 N.E.2d 954 (1980)*, quoting from *Perry v. Miller, 330 Mass. 261, 263, 112 N.E.2d 805 (1953)*. See *Atlantic Sav. Bank v. Metropolitan Bank & Trust Co., 9 Mass. App. Ct. 286, 288, 400 N.E.2d 1290 (1980)*. See also Eno & Hovey, Real Estate Law § 9.2 (4th ed. 2004); Mendler, Massachusetts Conveyancers' Handbook § 20.1 (4th ed. 2008). "Literally, in Massachusetts, the granting of a mortgage vests title in the mortgagee to the land placed as security for the underlying debt." *Maglione, 29 Mass. App. Ct. at 90*. "The payment of the mortgage note . . . terminates the interests of the mortgagee . . . and revests the legal title in the mortgagor." *Pineo v. White, 320 Mass. 487, 489, 70 N.E.2d 294 (1946)*.

> 5 "American courts have traditionally recognized one of three theories of mortgage law. Under the **[***10]** title theory, legal 'title' to the mortgaged real estate remains in the mortgagee until the mortgage is satisfied or foreclosed; in lien theory jurisdictions, the mortgagee is regarded as owning a security interest only and both legal and equitable title remain in the mortgagor until foreclosure. Under the intermediate theory, legal and equitable title remain in the mortgagor until a default, at which time legal title passes to the mortgagee." *Restatement (Third) of Property (Mortgages) § 4.1, comment a* (1997).

It is true that our case law has placed some limitations on the mortgagee's right to title. See, e.g., *Vee Jay Realty Trust Co. v. DiCroce, 360 Mass. 751, 753, 277 N.E.2d 690 (1972)*, quoting from *Dolliver v. St. Joseph Fire & Marine Ins. Co., 128 Mass. 315, 316 (1880)* (although "a mortgagee has legal title to the mortgaged real estate . . . 'as to all the world except the mortgagee, a mortgagor is the owner of the mortgaged lands, at least till the mortgagee has entered for possession'"); *Negron v. Gordon, 373 Mass. 199, 204, 366 N.E.2d 241 (1977)* ("It is only for the purpose of securing the debt that the mortgagee is to be considered owner of the property"); *Maglione, supra* ("The mortgage splits the title **[***11]** into two parts: the legal title, which becomes the mortgagee's, and the equitable title, which the mortgagor retains"). However, while our cases may implicate a distinction in how whole the transfer or how absolute the conveyance, they also have made it clear that a mortgage is a conveyance. See *Geffen v. Paletz, 312 Mass. 48, 53, 43 N.E.2d 133 (1942)* (mortgage is "conveyance of real **[**913]** estate or of some interest therein"); *Krikorian v. Grafton Co-op. Bank, 312 Mass. 272, 274, 44 N.E.2d 665 (1942)* (mortgage is "conveyance in fee"); *Pineo, supra* **[*266]** (mortgage is "conveyance in fee"); *Perry, supra* (mortgage "is a conveyance of the title or of some interest therein"); *Atlantic Sav. Bank, supra* (mortgage constitutes "deed of conveyance"). See generally Alperin, Summary of Basic Law § 15.116 (2008-2009 ed.) ("a mortgage takes the form of a deed of conveyance of real property, transferring a fee interest to the mortgagee").

Citing to cases from other States, Faneuil, in effect, argues that there is enough flexibility in title theory to treat a mortgage as a security interest, rather than as a transfer of title. Faneuil asserts that courts in a number of title theory States have recognized that the vesting of title upon the grant **[***12]** of a mortgage is a "legal fiction," and that title is not conveyed until foreclosure when "legal fiction" becomes "legal fact." [6] In support of this assertion, Faneuil cites cases from Arkansas, Connecticut, Georgia, and Pennsylvania. However, only two of these States, Connecticut and Pennsylvania, could be considered title theory jurisdictions, see *Restatement (Third) of Property (Mortgages) § 4.1*, note on mortgage theories followed by American jurisdictions (1997) (Connecticut follows title theory; Pennsylvania follows either intermediate or title theory; Georgia appears to follow lien theory; and it is unclear which theory Arkansas follows). Moreover, in neither of the two title jurisdiction cases cited by Faneuil did the court conclude that a mortgage did not trigger the transfer of title. Although the Supreme Court of Connecticut in *Red Rooster Constr. Co. v. River Assocs., Inc., 224 Conn. 563, 569, 620 A.2d 118 (1993)*, stated that "the law of mortgages is built primarily on a series of legal fictions," the court's conclusion that the term "owner" in a statute did not include a mortgagee because the Connecticut Legislature intended that term to be given its commonly accepted meaning, did not **[***13]** veer from the "undisputed [principle of title theory] that a mortgagee . . . is **[*267]** deemed to have taken legal title upon the execution of a mortgage on real property." Similarly, while the Supreme Court of Pennsylvania in *Pines v. Farrell, 577 Pa. 564, 848 A.2d 94 (2004)*, recognized that a mortgage can act as both a security interest and conveyance, see *id. at 574*, the court's conclusion that an administrative regulation construing the statutory phrase "property transfer" to include mortgages rested on the primary tenet of title theory that a mortgage is a conditional conveyance of property. See *id. at 575*.

> 6 Faneuil also asserts that other jurisdictions have held that a reverter provision is triggered not upon the granting of a mortgage, but upon a default. In support of this assertion, Faneuil cites three cases: *Lovlie v. Plumb, 250 N.W. 2d 56 (Iowa 1977)*; *McPherson v. McPherson, 117 Kan. 380, 232 P. 597 (1925)*; and *Land O'Lakes Dairy Co. v. County of Wadena, 229 Minn. 263, 39 N.W.2d 164*, aff'd, *338 U.S. 897, 70 S. Ct. 251, 94 L. Ed. 552 (1949)*. As the reverter provision at issue in each of these cases explicitly stated that title would revert if the mortgage was not satisfied or payment was not received in accordance with the parties' agreement, see *Lovlie, supra at 58*; **[***14]** *McPherson, supra at 381*; *Land O'Lakes Dairy Co., supra at 266*, these cases are distinguishable from the instant case and add no weight to Faneuil's argument.

The basic divide between title and lien theory is whether a mortgage is considered a conveyance of title. One of the crucial differences between lien theory and title theory is the point at which title is considered to have passed from the mortgagor to the mortgagee, respectively, at mortgage grant, or at foreclosure. See **[**914]** note 5, *supra*. Since the present case concerns language in a deed that specifies reverter upon conveyance, Faneuil's argument that the reverter provision should be triggered at foreclosure essentially boils down to asking this court to follow lien theory practice. We agree that a distinction between title and ownership does implicate a legal fiction. See *Vee Jay Realty Trust Co., 360 Mass. at 753*; *Negron, 373 Mass. at 204*. However, what Faneuil calls a legal fiction has been recognized by our jurisprudence as a basis for title theory, and the understanding that a mortgage is a conveyance. Faneuil is asking us to follow a theory in direct conflict with established Massachusetts mortgage principles, and thus, it **[***15]** cannot prevail. See *Hampshire Natl. Bank of S. Hadley v. Calkins, 3 Mass. App. Ct. 697, 699, 339 N.E.2d 244 (1975)*; *Erhard v. F.W. Woolworth Co., 5 Mass. App. Ct. 770, 770, 359 N.E.2d 66 (1977), S.C., 374 Mass. 352, 372 N.E.2d 1277 (1978)*.

b. *Language of reverter provision*. Faneuil next argues that the language of the reverter provision is ambiguous and does not give notice that the grant of a mortgage would trigger it. [7] Deed language can be ambiguous if "its meaning . . . is uncertain **[*268]** and susceptible of multiple interpretations." *Hamouda v. Harris, 66 Mass. App. Ct. 22, 26, 845 N.E.2d 374 (2006)*.

> 7 In support of this argument, Faneuil asserts that although courts in a number of jurisdictions have held that the granting of a mortgage triggers a reverter clause, in most instances the language in question specifically mentions the granting of a mortgage as a triggering event. As all the cases cited by Faneuil in support of this contention are from lien theory jurisdictions where both legal and equitable title remain with the mortgagor until foreclosure, or from intermediate theory jurisdictions where legal and equitable title remain in the mortgagor until a default (see note 5, *supra*), these cases, even if they support the proposition asserted by Faneuil, **[***16]** are inapposite to the case before us.

We do not think that the language of the reverter provision in the instant deed is ambiguous. [8] The deed clearly and simply states that "[t]he Town shall have the right to enter upon the Property and revest title back to it

upon the occurrence of any of the following events . . . [t]he Property is conveyed or transferred without the written consent of the [b]oard." Ambiguity arises only if we take to be true Faneuil's contention that "conveyed or transferred" does not necessarily apply to a mortgage grant. As discussed, *supra*, that is contrary to our well-settled law. Thus, we find no ambiguity here.

> 8 While we reject Faneuil's argument that the provision is ambiguous, given the well-settled principle that "one dealing with officers of a municipality must at his peril ascertain their powers," *Elbe File & Binder Co. v. Fall River, 329 Mass. 682, 686, 110 N.E.2d 382 (1953)*, see *Sancta Maria Hosp. v. Cambridge, 369 Mass. 586, 595, 341 N.E.2d 674 (1976)*, we note that if Faneuil considered the provision ambiguous, it should have sought clarification before it assumed the mortgage.

2. *Board's authority*. Faneuil argues that even assuming that the mortgage constituted a conveyance or transfer **[***17]** within the meaning of the reverter provision, [9] the provision is unenforceable because the board was limited to the language of the town meeting vote and the board did not have the authority to add **[**915]** conditions to the deed not specified by the vote. [10]

> 9 Faneuil's brief asserts that "the [town meeting] vote said noting [*sic*] about a reverter provision based on a transfer or conveyance of the property." As Faneuil's argument assumes that the reverter provision was triggered by the mortgage, and as we have rejected this argument in part 1, *supra*, we do not address that assertion here.
>
> 10 We assume that Faneuil's repeated claim in its brief that the reverter provision was not authorized by the "board's vote" is a typographical error, and that Faneuil intended to assert that the reverter provision was not authorized by the "town meeting vote."

In determining that the board acted within the bounds of its authority in drafting the deed, the judge below relied heavily on the first clause of *G. L. c. 40, § 3*, which provides, in relevant part: "A town may hold real estate for the public use of the inhabitants and may convey the same by a deed of its selectmen thereto duly authorized." The judge stated, **[***18]** "*G. L. c. 40, § 3* certainly contemplates the Board's ability to implement a town **[*269]** meeting vote in such a way, i.e., reasonable and consistent additional terms that enable the Board to more easily and efficiently carry out the town meeting intentions. The law does not expect or require [a] town meeting to involve itself in micromanagement of real estate transactions." We agree. As the statutory language is broad enough to encompass the board's ability to execute the town's intent with a certain degree of flexibility, we reject Faneuil's initial claim that the board was limited to the language of the town meeting vote.

We also reject Faneuil's contention that the language of the reverter provision is "different in a substantial respect" from that approved and authorized by the town vote. We agree that the test for determining if the provision was authorized by the town vote is whether the altered language is "different in a substantial respect" from that which was approved, and we note that if the challenged language has no effect on the execution of intent, then the difference is without substance. *Salem Sound Dev. Corp. v. Salem, 26 Mass. App. Ct. 396, 399, 528 N.E.2d 504 (1988)*. We disagree, however, **[***19]** with Faneuil's conclusion that application of that test indicates the provision was not authorized.

The vote specified that "[*a]ny* deed transferring the property shall provide that in the event the property ceases to be used for [affordable housing], the title . . . shall revert to the [t]own" (emphasis supplied). Here, the deed to the DHA included two reverter clauses which, when read together, achieve the intent of the vote. The first clause provides for reverter if the DHA "ceases to exist or function as a municipal housing authority, or be recognized as a housing authority by the Commonwealth." This clause ensures that title reverts to the town if the DHA holds title to the property but no longer functions in the same capacity as the housing authority empowered to manage affordable housing. The second clause -- the provision at issue here -- anticipates a similar scenario where title to the property is held by someone other than the DHA. This provision establishes a mechanism by which the board can execute the intent of the vote as to any future deeds, i.e., ensure that *any* deed transferring the property provide for reversion in the event the property ceases to be used for affordable **[***20]** housing. By requiring that the DHA obtain the written consent of the board before conveying or transferring the **[*270]** property, the board ensured that it had an opportunity and the power by which it could require that a subsequent deed, including a mortgage deed, contain the requisite restriction. [11] **[**916]** See *Pope v. Burrage, 115 Mass. 282, 285 (1874)* ("The power to do an act includes the power to do all such subordinate acts as are usually incident to or are necessary to effectuate the principal act in the best manner").

> 11 The record before us is silent as to how funding was to be secured for the development of affordable housing on the instant property. Consistent with its affordable housing program, the board may have contemplated that the DHA would mortgage the property and, recognizing

that a provision which tracked the language of the town vote could inhibit the DHA's ability to secure such financing and that a mortgage without appropriate restrictions would make the property vulnerable to uses other than affordable housing, the board crafted a provision that enabled it to secure the intent of the town vote, while providing flexibility that may have been necessary to obtain funding for the **[***21]** project.

Conclusion. For the reasons stated above, we affirm the judgment. [12]

12 In its brief, the DHA requests double costs and reasonable attorney's fees. As we do not consider Faneuil's appeal frivolous, we deny that request.

So ordered.

CHIEF CHARLES D. FOLEY, JR., Plaintiff, Appellant, v. TOWN OF RANDOLPH, MASSACHUSETTS; RICHARD W. WELLS, PAUL J. CONNORS, WILLIAM ALEXOPOULOS IN THEIR OFFICIAL CAPACITIES; MAUREEN C. KENNY AND JAMES BURGESS IN THEIR INDIVIDUAL AND OFFICIAL CAPACITIES, Defendants, Appellees.

No. 09-1558

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

598 F.3d 1*; *2010 U.S. App. LEXIS 5020*; *30 I.E.R. Cas. (BNA) 718

March 10, 2010, Decided

PRIOR HISTORY: [1]**

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS. Hon. Patti B. Saris, U.S. District Judge.

Foley v. Town of Randolph, 601 F. Supp. 2d 379, 2009 U.S. Dist. LEXIS 20334 (D. Mass., 2009)

COUNSEL: Kevin G. Powers with whom Linda Evans and Rodgers, Powers & Schwartz LLP were on brief for appellant.

John Foskett with whom Paul R. DeRensis and Deutsch, Williams, Brooks, Derensis & Holland, P.C., were on brief for appellees.

JUDGES: Before Lynch, Chief Judge, Stahl, Circuit Judge, and DiClerico, * District Judge.

* Of the District of New Hampshire, sitting by designation.

OPINION BY: STAHL

OPINION

[*2] STAHL, ***Circuit Judge***. Plaintiff-appellant Charles D. Foley, Jr. ("Foley"), Chief of the Fire Department in Randolph, Massachusetts, claims that the Town of Randolph and the Town selectmen ("Defendants") wrongfully retaliated against him in violation of his *First Amendment* rights when they suspended him for fifteen days based on public statements that he made at the scene of a fatal fire. Plaintiff brought suit pursuant to *42 U.S.C. § 1983*, and the district court granted summary judgment in favor of Defendants. Plaintiff now appeals, and after a careful review, we affirm.

I. Facts and Background

The following facts are undisputed, except where stated. On May 17, 2007, at approximately 5:00 a.m., the Randolph **[**2]** Fire Department ("Department") responded to a fire at a single-family residence in Randolph. When Foley arrived at the scene, he took command as Chief of the Fire Department. Tragically, two children, ages seventeen and ten, were trapped in a second floor bedroom and died. At the scene of the fatal fire, the State Fire Marshal, Foley, and Sergeant Frank McGinn, an employee of the State Fire Marshal's office and the lead investigator that day, answered questions from the media at press conferences convened by the Marshal. [1] Foley was in uniform and fire suppression activities were still ongoing when he spoke, though Foley asserts that, by the time of the **[*3]** first press conference, the fire was under control and he had stepped away from command, leaving the deputy chief in charge. At that first press conference, the Marshal spoke, and then Foley addressed the reporters.

1 According to Foley, there were three press conferences at the scene, all of which were facilitated by the Marshal. Foley also recalled in his deposition that Deputy Marshal Leonard, the State Fire Marshal's second-in-command, was present at the press conferences, but Foley said that he did not believe that Leonard made a **[**3]** statement.

Foley spoke about the details of the fire, but he also commented on what he considered to be inadequate funding and a related lack of staffing at the Randolph Fire Department. [2] Foley noted that the Department had lost positions each year since 2002 and that the Department's response times had increased over the same period. While Foley could not definitively state that the outcome in this particular fire would have been different if the Department had been better staffed, he indicated that the operation would have gone more professionally and more according to standard if the Department had more manpower.

2 Foley characterizes his role at the press conferences as "talking about the fire" and answering questions from the press. However, it is unclear from the partial transcript of the first press conference whether Foley's comments about the understaffing and underfunding of the Department were prompted by a question from the press or were made on Foley's own initiative.

Foley then declined to answer questions from the press which related to the ongoing investigation of the fire, for example, whether there were any working smoke detectors inside the house and where in the house **[**4]** the fire started. Subsequently, in response to questions from reporters, he again spoke of his frustration that the staffing levels of the Department were inadequate to accomplish the Department's goals. He referred specifically to Proposition 2 1/2, *Mass. Gen. Laws ch. 59, § 21C*, the Massachusetts statute which limits property tax increases by municipalities, and lamented that the proposed overrides to Proposition 2 1/2 had been defeated in the Town of Randolph for two years in a row. He said, "I've been asking to replace the fire fighters here in the Town over the last five years and it seems to have fallen on deaf ears." He then said to the reporters, "As many of you are here today you have the resources to bring this information to the public."

Also, at the scene of the fire, Foley objected to the reduction in the number of firefighters in the Department to Defendant James F. Burgess, Jr., a Randolph Selectman. Burgess asserted in his affidavit that during this exchange, Foley grabbed the draft of a reporter's newspaper article and "shoved [it] forcefully" into Burgess's chest. Foley disputes this allegation, asserting that he "passed the draft to Burgess." Foley also spoke with **[**5]** Defendant Maureen C. Kenney, a Selectwoman of Randolph, at the scene and made reference to the manpower cuts in the Department.

Later that day, Foley called Kenney at her home, and Kenney criticized him for addressing staffing and budgetary issues at the scene of the fire, rather than focusing on the victims or the heroism of the firefighters.

Subsequent to these events, disciplinary charges were brought against Foley. [3] It was alleged that Foley's statements to the media at the scene of the fire "demonstrated a lack of sound judgment and of accuracy" and "were not conducive to the Town's mission of providing effective fire protection services"; that Foley had "initiated inappropriate physical contact" with Burgess; and that Foley "displayed a lack of the demeanor, ability, and independent judgment required for competent command and control" while interacting with Kenney at the scene.

3 Though Foley asserts that it was Burgess and Kenney who brought the charges against him, the record does not reveal the origin of the allegations.

[*4] The Town appointed a hearing officer to evaluate the allegations and determine whether there was cause to discipline Foley. The hearing officer considered testimony **[**6]** and exhibits during a three-day hearing, and on August 27, 2007, issued a report finding that Foley did "initiate inappropriate and unprovoked physical contact" with Burgess and that he made "inappropriate, inaccurate, intemperate, and misleading statements to the news media" at the scene of the May 17, 2007, fire. [4] The hearing officer recommended that Foley be suspended without compensation for fifteen workdays. On September 10, 2007, the Board of Selectmen voted three-to-two to adopt the hearing officer's recommendation, and Foley was suspended for fifteen consecutive workdays without compensation, commencing on September 17, 2007.

4 Regarding the third allegation, the hearing officer concluded that while Foley was, in fact, "emotional" at the scene, "his exhibition of emotions did not impair him from being in command or in tactical control of the fire scene nor was such behavior inappropriate or irregular under those circumstances."

Neither the contract which governed Foley's employment from 2003 to 2006 nor the "strong" chief statute, *Mass. Gen. Laws ch. 48, § 42*, which governed his employment subsequent to October 31, 2006, specifically authorized or required Foley to make public **[**7]** statements on matters affecting the Fire Department as part of his official duties as Chief. However, nothing in the contract or the statute prohibited Foley from doing so. [5]

5 In 2006, when Foley and the Board of Selectmen were engaged in contract negotiations, Foley proposed a provision that specifically granted him, as Fire Chief, the authority to make public statements on "any matters which may affect the public as they may apply to public safety . . . or the fire department generally." That provision and the majority of the other provisions proposed by Foley were rejected by the Board. Because Foley and the Town were unable to agree on a negotiated contract, the Board reappointed Foley under the provisions of *Mass. Gen. Laws ch. 48, § 42*.

Previously, in August 2006, Foley received a written performance evaluation from the Town, which scored his job performance in seven categories, including "Public &

Community Relations/Communication." The description of that category included: "[i]nteracts well with the media." In an affidavit, Foley stated that his communications with the media were made of his "own volition" but that he was expected by Town officials and residents to "interact **[**8]** well" with the media on those occasions when he chose to do so.

Prior to the incident at issue in this case, Foley had conducted at least one other press conference, answered media inquiries, and offered comment to the media regarding the business of the Department and the Department's activities. Richard Wells, Foley's immediate predecessor in the Fire Chief position, also routinely responded to inquiries from the media regarding the Fire Department during his tenure.

Foley filed this action in the United States District Court for the District of Massachusetts, on November 30, 2007, alleging a violation of his *First Amendment* rights and several state law claims. Both parties filed motions for summary judgment, and after a hearing and a review of the submissions, the district court granted the Defendants' motion as to Foley's *First Amendment* claim in a Memorandum and Order dated March 11, 2009. It is from that order that Foley now appeals. [6]

> 6 The district court dismissed Foley's state law claims without prejudice, and Foley has limited his appeal to his *First Amendment* claim.

[*5] II. Discussion

A. Standard of Review

We review the district court's grant of summary judgment de novo, viewing the **[**9]** evidence in the light most favorable to Foley and drawing all reasonable inferences in his favor. *Schubert v. City of Springfield, 589 F.3d 496, 500 (1st Cir. 2009)*. Summary judgment is appropriate when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(c)(2)*.

B. Foley's *First Amendment* Claim

Foley argues that his speech to the media at the scene of the fire on May 17, 2007, was protected by the *First Amendment* and that by disciplining him on account of that speech, the Defendants have violated the Constitution. Given the circumstances surrounding the speech in this case, we disagree.

The Supreme Court has long recognized that public employees do not forego all the protections of the *First Amendment* by virtue of working for the government. *See Pickering v. Bd. of Educ., 391 U.S. 563, 568, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968)*. The Court's employee-speech jurisprudence has protected the rights not only of the employees themselves, but of the general public "in receiving the well-informed views of government employees engaging in civic discussion." **[**10]** *Garcetti v. Ceballos, 547 U.S. 410, 419, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006)*. Against these interests, the Court has sought to balance the interests of government employers in exercising some degree of control over their employees' words and actions in order to ensure the efficient provision of public services. *Id. at 418-19*. The Court has held that "[s]o long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively." *Id. at 419*.

In other words, to determine whether Foley's speech is entitled to *First Amendment* protection, the first question we must answer is whether Foley was both (1) speaking about a matter of public concern and (2) speaking as a citizen. [7] If the answer to either of these subparts is no, then he has no *First Amendment* claim based on the Defendants' action in relation to his speech. *Garcetti, 547 U.S. at 418*. It is only if we determine that Foley was speaking as a citizen about a matter of public concern that "the possibility of a *First Amendment* claim arises, and the second step of the inquiry is made: 'The question becomes whether the relevant government **[**11]** entity had an adequate justification for treating the employee differently from any other member of the general public.'" *Curran v. Cousins, 509 F.3d 36, 45 (1st Cir. 2007)*(quoting *Garcetti, 547 U.S. at 418*).

> 7 Though Foley argues otherwise, we have previously held that this is a question of law for the court when, as here, the material facts are not in dispute. *Curran v. Cousins, 509 F.3d 36, 45 (1st Cir. 2007)*; *accord Gagliardi v. Sullivan, 513 F.3d 301, 306 n.8 (1st Cir. 2008)*.

Here, Foley was obviously speaking about a matter of public concern. The budget and effectiveness of a town's fire department is certainly of concern to the public, especially when that budget may be impacted by voter approval of an increase to the town's property tax burden. As Chief of the Fire Department, Foley's opinion on the effect of diminished resources **[*6]** on the Department's ability to fight fires is an example of the "well-informed views" which the public has an interest in receiving.

At issue, then, is whether Foley was speaking as a citizen when he made his remarks to the press about underfunding and understaffing. In *Garcetti*, the Court held that when public employees make statements "pursuant to their **[**12]** official duties," they are not speaking as

citizens for *First Amendment* purposes, and the Constitution does not insulate their communication from employer discipline. *547 U.S. at 421*. This is so because "[e]mployers have heightened interests in controlling speech made by an employee in his or her professional capacity." *Id. at 422*. But the Court acknowledged that the case afforded it "no occasion to articulate a comprehensive framework for defining the scope of an employee's duties in cases where there is room for serious debate" since the plaintiff, Ceballos, had conceded his speech was pursuant to his employment duties. [8] *Id. at 424*.

> 8 Ceballos, a deputy district attorney, had prepared an internal memorandum for his supervisors expressing his belief that an affidavit used to obtain a critical search warrant in a case contained serious misrepresentations and recommending dismissal of the case. *Garcetti, 547 U.S. at 413-14*. Ceballos claimed that the memorandum was protected speech.

The Court did provide some guidance, however, indicating that the scope of an employee's duties for *First Amendment* purposes may not necessarily be determined by the employee's formal job description, as "[f]ormal **[**13]** job descriptions often bear little resemblance to the duties an employee actually is expected to perform." *Garcetti, 547 U.S. at 424-25*. Further, it was not dispositive that Ceballos "expressed his views inside his office, rather than publicly" or that the speech in question "concerned the subject matter of [his] employment." *Id. at 420-21*. Ultimately, "[t]he proper inquiry is a practical one." *Id. at 424*.

In dicta, the Court stated that an employee's speech retains some possibility of *First Amendment* protection when it is "the kind of activity engaged in by citizens who do not work for the government." *Garcetti, 547 U.S. at 423*. The Court cited two examples of such activity: (1) writing a letter to a local newspaper, as the teacher-plaintiff did in *Pickering* to criticize the school board, *see 391 U.S. at 566*, and (2) discussing politics with a coworker, *see Rankin v. McPherson, 483 U.S. 378, 107 S. Ct. 2891, 97 L. Ed. 2d 315 (1987)*, and equated them to "public statements [made] outside the course of performing [one's] official duties." *Garcetti, 547 U.S. at 423*. The Court distinguished those examples from speech made pursuant to employment responsibilities, for which "there is no relevant analogue to speech by citizens **[**14]** who are not government employees." *Id. at 424*. Ceballos's speech had no such analogue; when he wrote the internal memorandum at issue in the case, he "spoke *as a prosecutor* fulfilling a responsibility to advise his supervisor about how best to proceed with a pending case." *Id. at 421* (emphasis added).

In analyzing whether Foley spoke as a citizen rather than as the Chief of the Fire Department, we first note that it is not dispositive that Foley was not *required* to speak to the media. *See Brammer-Hoelter v. Twin Peaks Charter Academy, 492 F.3d 1192, 1203 (10th Cir. 2007)* ("speech may be made pursuant to an employee's **[*7]** official duties even if it deals with activities that the employee is not expressly required to perform"); *Williams v. Dallas Ind. Sch. Dist., 480 F.3d 689, 693 (5th Cir. 2007)* ("[a]ctivities undertaken in the course of performing one's job are activities pursuant to official duties" even if the speech at issue "is not necessarily required by [the employee's] job duties"). Foley's job description is "neither necessary nor sufficient" to determine whether his speech at the press conference was pursuant to his official duties, *Garcetti, 547 U.S. at 425*, though we do note **[**15]** that the fact that Foley was ostensibly evaluated on whether he "[i]nteracts well with the media" suggests that speaking to the press is a duty he "actually [was] expected to perform." *Id. at 424-25*.

More critical to our analysis is the context of Foley's speech. Though Foley was not required to speak to the press as part of his job, he did, in fact, choose to do so at a press conference convened by the State Fire Marshal, at the scene of a fatal fire, at which no one but the Marshal, the Marshal's lead investigator, and Foley himself gave comment. Foley was in uniform and on duty at the time. [9] While he declined to answer certain questions posed by reporters, he voluntarily spoke about issues related to the budget and staffing of the Department. As Chief, he had been in command of the scene, and when choosing to speak to the press, he would naturally be regarded as the public face of the Department when speaking about matters involving the Department. [10] Under these circumstances, Foley addressed the media in his official capacity, as Chief of the Fire Department, at a forum to which he had access because of his position. Thus, "there is no relevant analogue to speech by citizens." **[**16]** *Garcetti, 547 U.S. at 424*; *see Brammer-Hoelter, 492 F.3d at 1203* (equating speaking as a government employee with speaking "as an individual acting 'in his or her professional capacity'" (quoting *Garcetti, 547 U.S. at 422*)); *cf. Tamayo v. Blagojevich, 526 F.3d 1074, 1092 (7th Cir. 2008)* (holding that a senior administrator of an agency was not speaking as a citizen when testifying before a legislative committee since she was testifying "because of the position she held within the agency" and was "not appearing as 'Jane Q. Public'").

> 9 While neither of these factors is dispositive, each is relevant and important to the inquiry. *See, e.g., Nixon v. City of Houston, 511 F.3d 494, 498 (5th Cir. 2007)* (noting that police officer spoke to the media while on duty, in uniform, and while working at the scene of an accident, and holding

that speech was not protected); *Mills v. City of Evansville, 452 F.3d 646, 648 (7th Cir. 2006)* (observing that police officer was on duty and in uniform when engaged in challenged speech, and concluding that she spoke "in her capacity as a public employee").

10 *Cf. Tabb v. District of Columbia, 605 F. Supp. 2d 89, 95 (D.D.C. 2009)* ("If plaintiff was generally responsible **[**17]** for presenting the public face of the agency to the District of Columbia government and to the media, and if she expressly spoke in that capacity when she contacted the Mayor's Office and media outlets . . ., then . . . [her] statements likely are not protected.").

We note that Foley's speech is distinguishable from the letter to the editor written by the plaintiff in *Pickering*. As the Court noted in *Garcetti*, that letter had "no official significance and bore similarities to letters submitted by numerous citizens every day." *Garcetti, 547 U.S. at 422*. Here, given that Foley spoke from the scene of the fire where he was on duty, in uniform, and speaking alongside the State Fire Marshal, we cannot **[*8]** say that the speech had "no official significance." In fact, it is more likely that anyone who observed the speech took it to bear the imprimatur of the Fire Department.

Certainly, Foley's comments to the press fall closer to the line of citizen speech than the internal memorandum that Ceballos submitted to his supervisor in *Garcetti*. However, the fact that Foley expressed his views to the public rather than within the workplace is not dispositive, and other courts have found employee speech **[**18]** to fall outside the protection of the *First Amendment* even when it is delivered publicly. *See, e.g., Nixon, 511 F.3d at 498*; *Turner v. Clark County Sch. Dist., No. 2:07-CV-00101-JCM-GWF, 2009 U.S. Dist. LEXIS 23093, 2009 WL 736016, at *2 (D. Nev. Mar. 19, 2009).*

Foley argues that his speech is nonetheless analogous to that of citizens "who avail themselves of opportunities to publicly express themselves through the media." Foley points specifically to a *Boston Globe* article in which Randolph residents expressed their opinions on the budgetary and staffing issues of the Fire Department as they related to the May 17, 2007, fire. Foley also cites an article from the *Patriot Ledger* in which Randolph residents spoke to a reporter regarding their votes on the Proposition 2 1/2 override of 2008. However, this speech is not analogous to Foley's. Any citizen can be interviewed by a reporter about her reaction to an event or her thoughts about an issue. But when a government employee answers a reporter's questions involving matters relating to his employment, there will be circumstances in which the employee's answers will take on the character of "[o]fficial communications," *Garcetti, 547 U.S. at 422*, and thus will not **[**19]** be entitled to *First Amendment* protection. Those circumstances were present here: Foley spoke while in uniform and on duty; he spoke from the scene of a fire where he had been in command as the Chief of the Fire Department; and his comments were bookended by those of another official -- the State Fire Marshal. When Foley availed himself of this particular opportunity to communicate with Town residents through the media on matters involving his Department, his speech took on a degree of official significance that has "no relevant analogue to speech by citizens." *Garcetti, 547 U.S. at 424*.

Foley also contends that the content of his speech at the press conference entitles that speech to *First Amendment* protection. He argues that once he stopped speaking about the fire and began to "lecture" the Town residents about their defeat of the Proposition 2 1/2 overrides, he was speaking as a citizen. We disagree. Foley characterizes the nature of his comments about Proposition 2 1/2 too narrowly. His remarks on Proposition 2 1/2 related to his concerns about its impact on the budget and staffing needs of the Fire Department. The general topic of Foley's remarks was the struggle of the Fire Department **[**20]** to accomplish its goals in the absence of additional funding and staffing that an override of Proposition 2 1/2 could provide. The subject of Foley's speech was entirely related to matters concerning the Fire Department. [11] Under **[*9]** the circumstances of the press conference, when speaking about such matters, Foley was speaking in his official capacity as Chief.

11 *Lindsey v. City of Orrick, 491 F.3d 892 (8th Cir. 2007)*, which Foley cites for the proposition that an employee speaks as a citizen when his speech deviates from a subject related to his job duties, is distinguishable. In *Lindsey*, the city public works director, whose duties included maintaining the city's parks, water systems, streets, and sewers, spoke at several City Council meetings about what he believed to be the city's noncompliance with the state's "sunshine" law. *491 F.3d at 895-96*. Lindsey questioned whether the city was violating the law by entering into non-public executive sessions and passing city ordinances without public discussion. *Id. at 896*. Though Lindsey's job required him to attend Council meetings to report about public works issues, *id. at 895*, his comments about the city's alleged noncompliance with the **[**21]** sunshine law were in no way related to public works.

Our holding does not, as Foley claims, strip him of the opportunity ever to speak publicly on similar issues, without fear of retaliatory discipline. As Chief, Foley is

on call at all hours, but that does not mean that *any* public statements he makes regarding the Fire Department will be outside the protection of the *First Amendment*. As the Supreme Court has recognized, "[w]ere [public employees] not able to speak on [the operation of their employers], the community would be deprived of informed opinions on important public issues." *Garcetti, 547 U.S. at 420* (citing *San Diego v. Roe, 543 U.S. 77, 82, 125 S. Ct. 521, 160 L. Ed. 2d 410 (2004))* (second and third alterations in *Garcetti*). As Fire Chief, Foley is "'the member[] of [the] community most likely to have informed and definite opinions'" about the budget and staffing of the Fire Department, *see Garcetti, 547 U.S. at 419* (quoting *Pickering, 391 U.S. at 572*), but he is also the individual whose speech is most likely to be construed as an "[o]fficial communication" of the Department. Thus, determining whether a government employee who is the head and de facto spokesperson of his department is speaking as a citizen **[**22]** or an employee is a highly fact-specific inquiry.

We emphasize that our holding is limited to the particular facts of this case. Under the circumstances of the press conference discussed above, there could be no doubt that Foley was speaking in his official capacity and not as a citizen. However, as the district court noted, had Foley voiced his concerns and frustrations in another forum -- at a town meeting, in a letter to the editor, or even in a statement to the media at a different time and/or place -- we might characterize his speech differently. *See, e.g., McLaughlin v. City of Nashville, Civil No. 06-4069, 2006 U.S. Dist. LEXIS 78133, at *8-9 (W.D. Ark. Oct. 23, 2006)* (holding that city finance director stated a claim that she spoke "in her capacity as a concerned citizen, rather than in her official capacity" when she spoke about the financial situation of the city, via newspaper and radio, "at her own expense and on her own time"); *Hailey v. City of Camden, Civil No. 01-3967, 2006 U.S. Dist. LEXIS 45267, 2006 WL 1875402, at *16 (D.N.J. July 5, 2006)* (holding that deputy fire chiefs who attended City Council meeting and complained about fire department practices after "plac[ing] their names on the agenda **[**23]** as any citizen would" were not speaking pursuant to their official duties).

C. Conclusion

We recognize that there is a delicate balance that must be struck between the constitutional rights of government employees to express their views on matters related to their employment and the public's interest in hearing those views, on the one hand, and the interest of a government employer in controlling employee speech that contravenes the employer's goals, on the other. We hold that when the circumstances surrounding a government employee's speech indicate that the employee is speaking in his official capacity, *Garcetti* dictates that we strike the **[*10]** balance in favor of the government employer. Under such circumstances, the employee's speech takes on an official significance and, as the Supreme Court has reasoned, "[o]fficial communications have official consequences, creating a need for substantive consistency and clarity. Supervisors must ensure that their employees' official communications are accurate, demonstrate sound judgment, and promote the employer's mission." *Garcetti, 547 U.S. at 422-23*. Here, under circumstances which indicate that Foley was speaking as Chief, members of the Board **[**24]** did not violate Foley's free speech right when they concluded that it was inappropriate for Foley to address budgetary and staffing issues at the scene of a fatal fire.

Speaking to the media under the circumstances discussed above, Foley could have hoped and anticipated that his frustration with the budgetary and staffing shortfalls of the Department might have reached a greater audience and had a greater impact than if he voiced his views in another forum. However, those same circumstances imbued his speech with the official significance that removed it from the protection of the *First Amendment*.

We conclude that Foley was not speaking as a citizen and that he consequently has no *First Amendment* cause of action. [12] We thus *affirm* the order of the district court granting summary judgment in favor of the Defendants.

12 We acknowledge that in *Brasslett v. Cota, 761 F.2d 827 (1st Cir. 1985)*, we reached a different outcome on a somewhat similar set of facts. However, that case was decided before *Garcetti*, which now governs our review of the issues.

KIRT FORDYCE & others [1] vs. TOWN OF HANOVER & others. [2]

1 John Robison, Brian Feinstein, Stephen O'Brien, David Kleimola, William Bzdula, David Ferris, Sean Freel, Peter Serighelli, and Gerard McCann.

2 Callahan, Inc. (Callahan), whose motion to intervene was allowed in the Superior Court; and the Commonwealth, whose motion to intervene was allowed in this court.

SJC-10643

SUPREME JUDICIAL COURT OF MASSACHUSETTS

457 Mass. 248; 2010 Mass. LEXIS 402

March 1, 2010, Argued
July 9, 2010, Decided

PRIOR HISTORY: [1]**

Suffolk. Civil action commenced in the Superior Court Department on November 9, 2009. After a motion for preliminary injunction was heard by Richard J. Chin, J., a proceeding for interlocutory review was heard in the Appeals Court by David A. Mills, J. The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

COUNSEL: Kevin Conroy, Assistant Attorney General, for the Commonwealth.

Christopher N. Souris for the plaintiffs.

James A. Toomey (Bryan R. LeBlanc with him) for town of Hanover.

Paul W. Losordo for Callahan, Inc.

The following submitted briefs for amici curiae: Patrick J. Sullivan & James G. Grillo for TLT Construction Corp.

Donald J. Siegel & James A.W. Shaw for Foundation for Fair Contracting of Massachusetts & another.

Joel Lewin & Robert V. Lizza for Construction Industries of Massachusetts, Inc., & another.

Christopher J. Petrini, Peter L. Mello, & Thomas J. Urbelis for City Solicitors and Town Counsel Association.

Stanley A. Martin & Edwin L. Hall for Associated General Contractors of Massachusetts.

Christopher A. Kenney & Michael P. Sams for Associated Builders and Contractors, Inc.

JUDGES: Present: Marshall, C.J., Ireland, Spina, Cowin, Cordy, Botsford, & Gants, **[**2]** JJ.

OPINION BY: GANTS

OPINION

[*249] GANTS, J. This case comes to us on appeal from an order of a single justice of the Appeals Court vacating a preliminary injunction issued by a judge in the Superior Court against the town of Hanover (town) and Callahan, Inc. (Callahan), a general contractor with whom the town has entered into a contract for the construction of a new high school. The injunction ordered the town and Callahan to cease further work on the school pending a trial on the merits of the plaintiffs' claim that the contract had been entered into in violation of the public bidding statutes, *AG. L. c. 149, §§ 44A-44H*, because Callahan had made intentional misrepresentations to the town's prequalification committee regarding its experience in school building projects. We affirm the order of the single justice, though on different grounds from those expressed in his order. Although a contractor's **[*250]** intentional misrepresentation in seeking prequalification may allow an awarding authority to terminate a previously awarded contract, we conclude that where, as here, there is no allegation that any member of the town's prequalification committee acted corruptly in deciding to prequalify Callahan, there is unrefuted **[**3]** evidence that the committee did not act in reliance on any of the alleged misrepresentations, and the town wishes to proceed with the contract, the motion judge committed an error of law in issuing a preliminary injunction requiring the town to cease further work on the school. [3]

3 We acknowledge amicus briefs filed by the Attorney General; Associated Builders and Con-

tractors, Inc.; the Associated General Contractors of Massachusetts; the City Solicitors and Town Counsel Association; Construction Industries of Massachusetts, Inc., and Utility Contractors Association of New England, Inc.; Foundation for Fair Contracting of Massachusetts and Brockton & Vicinity Building Trades Council; and TLT Construction Corp.

1. *Background*. Under *G. L. c. 149, § 44A (2) (D)*, contracts for the construction of public buildings that are estimated to cost more than $ 100,000 may only be awarded to "the lowest responsible and eligible general bidder" on the basis of competitive bids and in conformity with procedures set forth in *§§ 44A-44H*. Where, as here, a public construction project has an estimated cost in excess of $ 10 million, a general contracting firm must satisfy two requirements to be deemed a **[**4]** "[r]esponsible" and "[e]ligible" bidder. *G. L. c. 149, § 44A (1)*. First, the contractor must hold a certificate of eligibility, issued by the commissioner of the division of capital asset management and maintenance (DCAM), showing that the firm has the expertise and financial capacity to perform the work required. *G. L. c. 149, §§ 44A (2) (D), 44D (1) (a)*. Second, the contractor must be prequalified to bid on the project by a four-member committee of the awarding authority, that is, the agency, municipality, or other governmental authority awarding the contract, [4] based on the contractor's responses to questions contained in a written request for qualifications (RFQ) issued by the committee. *G. L. c. 149, § 44D1/2 (a)* & *(c)*.

4 "The prequalification committee shall be comprised of 1 representative of the designer and 3 representatives of the awarding authority." *G. L. c. 149, § 44D 1/2 (c)*.

While the questions that must be asked in the RFQ and the potential points to be awarded in each category of questions are **[*251]** specified by statute, the relative value assigned to each individual question and the scoring of contractor responses is committed to the discretion of the prequalifying committee. **[**5]** [5] This allows a prequalification committee to evaluate a general contractor's experience and qualifications in light of the specific needs of the particular project for which the awarding authority will be soliciting bids. *G. L. c. 149, § 44D1/2 (a)-(h)*. Only general contractors whose responses to the RFQ receive a score of seventy points or more may be prequalified by the committee, and only prequalified contractors may be invited to submit bids on the project. *G. L. c. 149, § 44D 1/2 (h)*. "The prequalification committee shall select a minimum of [three] qualified general contractors to submit bids . . . ." *Id*. *Section 44D 1/2 (h)* protects the considerable discretion vested in the prequalification committee by providing that all decisions of the committee "shall be final and shall not be subject to appeal except on grounds of arbitrariness, capriciousness, *fraud* or collusion" (emphasis added). *Id*.

5 The statute instructs each awarding authority issuing a request for qualifications (RFQ) to solicit information in four specified categories and to assign points among the first three categories according to a fixed formula: (1) management experience (fifty points); (2) references (thirty **[**6]** points); (3) capacity to complete projects (twenty points). *G. L. c. 149, § 44D1/2 (e)*. The awarding authority is instructed to use its own discretion in allocating points within each of these categories and in evaluating and scoring contractor responses. *G. L. c. 149, § 44D1/2 (e), (h)*. The fourth category, for which no points are awarded, requires applicants to submit: (1) a commitment letter for payment, and performance bonds in the full estimated value of the contract from a surety company licensed to do business in the Commonwealth and approved by the United States Treasury Department; and (2) a certificate of eligibility from the division of capital asset management and maintenance (DCAM) demonstrating that the contractor has a capacity rating commensurate with the size and scope of the project, as well as an update statement with the information required under *G. L. c. 149, § 44D (1) (a)*. *G. L. c. 149, § 44D1/2 (e)*.

In conformity with these statutory requirements, in May, 2009, the town issued a RFQ inviting interested general contractors to submit statements of qualification (SOQs) to prequalify to bid on the construction of a new high school. Eleven general contractors submitted **[**7]** SOQs by the June 5 deadline, and on July 6, the town reported the results of the committee's evaluation in a public register. Callahan was one of nine applicants prequalified by the committee to submit formal bids on the project. **[*252]** General bids were opened by the town on September 11. Callahan was the low bidder, with a base price of $ 37,099,999. The next low bidder was almost one million dollars higher. [6]

6 The project specifications allowed for certain alternate design elements above the base plan. Callahan was also the winning bidder when estimates were considered with the alternate design elements included.

On September 17, 2009, N.B. Kenney Company, Inc., a heating and air conditioning subcontractor whose subbid had not been adopted in Callahan's winning general bid, filed a bid protest with the Attorney General,

who is charged with enforcement of the competitive bidding statutes. See *G. L. c. 149, § 44H*. The Attorney General also received bid protests from J & J Contractors, Inc., the second lowest bidder among the general contractors, and from the Laborers' New England Region Organizing Fund. The protesters alleged that the committee's decision to prequalify Callahan was obtained **[**8]** through fraud because Callahan's SOQ contained misrepresentations of the firm's prior construction experience that were intended to mislead the committee. Consequently, they argued, Callahan should have been disqualified as an eligible bidder, and the town should be prohibited from entering into a contract with Callahan. Following the filing of the protests, the town requested and received additional information from Callahan about the representations made in its SOQ concerning the company's prior construction experience.

In response to the bid protests, the Attorney General undertook an investigation and asked the town to refrain from awarding the contract or commencing work on the project while her investigation was ongoing. On September 24, however, the town issued Callahan a notice to proceed. At the bid protest hearing later that month, the Attorney General requested that the town suspend further work on the project pending her determination of the bid protests on the merits. Notwithstanding these requests, the town entered into a general contract with Callahan on or about October 15 and proceeded with construction. Two weeks later, on October 30, the Attorney General issued a **[**9]** decision which essentially confirmed the allegations of the bid protestors.

The Attorney General concluded that Callahan had committed "fraud" within the meaning of *G. L. c. 149, § 44D1/2 (h)*, by knowingly misrepresenting material facts in its SOQ with **[*253]** the intention of misleading the prequalifying committee. The Attorney General found that Callahan had misleadingly identified itself in its SOQ as the "successor corporation" to another general contracting company, J.T. Callahan & Sons, Inc. (JTC). In fact, although many of the senior managers of Callahan were former employees of JTC, Callahan had been incorporated independently, JTC continued to survive as a corporation, and the two companies shared no corporate officers. According to the Attorney General, the effect of this misrepresentation was to permit Callahan in its SOQ to claim JTC's experience in building seventy-five schools in Massachusetts over the preceding twenty years, when Callahan itself lacked this kind of project experience. More specifically, where the SOQ required a listing of "Similar Project Experience" undertaken by the firm in the last five years, defined by the prequalification committee to mean construction **[**10]** of "phased educational facilities," the only educational facility Callahan included was North Andover High School, a $ 42 million project completed in 2005. [7] In fact, JTC had been the general contractor on this project and had completed nearly all of the work before running into financial difficulties. In order to finish the project, the insurance company serving as JTC's surety recommended the formation of a new corporate entity, Callahan, which employed former JTC personnel and in effect acted as a subcontractor for JTC. Under this arrangement, Callahan completed the final $ 1.2 million of work on the $ 42 million project, comprising three per cent of the school's total construction cost. The Attorney General also found that Callahan had made selective use of JTC's prior history in its SOQ: while Callahan took credit for JTC's work on the North Andover High School project and its almost twenty years of public construction experience, Callahan did not list the North Andover High School project where the SOQ required disclosure of projects the applicant had failed to complete, and Callahan similarly failed to disclose pending or adversely concluded legal proceedings against JTC, although **[**11]** the SOQ also called for this information.

> 7 Callahan also included five residential projects and one project on a university campus, none of which fell within the definition of "Similar Project Experience" specified by the statement of qualification (SOQ).

Based on these findings, the Attorney General concluded that **[*254]** Callahan should not have been prequalified by the committee, and as a consequence, that Callahan should not have been awarded the contract. When the town made no move to halt construction or terminate its contract with Callahan following the Attorney General's announcement of her bid protest decision, the plaintiffs, ten taxable inhabitants of the town, brought suit in the Superior Court under *G. L. c. 40, § 53*, seeking temporary and permanent injunctive relief to restrain the town from making payments to Callahan under the contract and to require the town to rescind the contract. [8], [9] The plaintiffs alleged that Callahan had committed fraud during the mandatory bidder prequalification procedure, that its fraud effectively voided the decision of the prequalification committee under *G. L. c. 149, § 44D1/2 (h)*, and that, because Callahan could no longer be considered a "responsible **[**12]** and eligible bidder," the town's award of the contract to Callahan was unlawful under *G. L. c. 149, § 44A (2)*.

> 8 *General Laws c. 40, § 53*, provides that ten taxable inhabitants of a municipality may bring suit to enforce laws relating to the expenditure of public funds by local officials. See *Edwards v. Boston, 408 Mass. 643, 646, 562 N.E.2d 834 (1990)*, and cases cited.

9 N.B. Kenney Company, Inc. (Kenney), one of the parties who had filed a bid protest with the Attorney General following Callahan's selection as the winning bidder, filed a separate suit and was a party to the proceedings in the Superior Court and before the single justice.

After a nonevidentiary hearing on November 16, 2009, the motion judge allowed the plaintiffs' motion for a preliminary injunction and ordered the town and Callahan to cease further construction of the school pending a trial on the merits. In reaching his decision, the judge held that, in contrast to common-law fraud, there is no requirement of detrimental reliance to prove fraud under *G. L. c. 149, § 44D 1/2 (h)*. Relying principally on the reasoning of earlier bid protest decisions issued by the Attorney General, the judge concluded that, to succeed on the merits in **[**13]** their effort to overturn the decision of the prequalifying committee under *§ 44D1/2 (h)*, the plaintiffs need only establish that "(1) Callahan made statements or omissions relating to a material fact, (2) that had the tendency to be relied upon by or to influence the average person, (3) that were knowingly false or misleading, and (4) were intended to mislead the prequalification committee or awarding authority." After setting forth this standard for fraud under the statute, the judge found that the plaintiffs had **[*255]** shown a reasonable likelihood of prevailing on the merits at trial because Callahan's misrepresentation of its prior construction experience on the North Andover High School project, together with its failure to mention in the SOQ that JTC had failed to complete that project, were "highly suggestive" of Callahan's intent to deceive the prequalification committee. The judge also concluded that the public interest favored the issuance of a preliminary injunction, because "[t]he inconvenience and expense caused by the delay in the construction of the school is of significantly less importance than ignoring this type of disregard for the competitive bidding statute." [10]

10 Where, **[**14]** as here, a suit is brought by citizens acting as private attorneys general to enforce a statute or a declared policy of the Legislature, a showing of irreparable harm is not required for the issuance of a preliminary injunction. *LeClair v. Norwell, 430 Mass. 328, 331-332, 719 N.E.2d 464 (1999)*. In these circumstances, a judge instead must first determine whether the plaintiffs have shown a likelihood of success on the merits of the asserted claim and then determine whether "the requested order promotes the public interest, or, alternatively, that the equitable relief will not adversely affect the public." *Id.*, quoting *Commonwealth v. Mass. CRINC, 392 Mass. 79, 89, 466 N.E.2d 792 (1984)*.

Presumably because he deemed it irrelevant under his interpretation of the meaning of fraud under *G. L. c. 149, § 44D1/2 (h)*, the judge did not address unrefuted evidence in the record that the prequalification committee had not been misled by the misrepresentations in Callahan's SOQ and had not relied on them to its detriment. Affidavits submitted by two members of the four-person committee stated that, before the committee prequalified Callahan to bid, the committee members knew and had discussed the true nature of the relationship **[**15]** between Callahan and JTC, and were aware that JTC, not Callahan, had done the great majority of the work on North Andover High School. The committee's consideration of this information is reflected in the fact that it awarded Callahan two out of a possible ten points for similar project experience.

The defendants sought relief from a single justice of the Appeals Court under *G. L. c. 231, § 118*, first par. In reviewing the motion judge's grant of the preliminary injunction, the single justice adopted the judge's factual findings as well as his interpretation of the meaning of fraud under *G. L. c. 149, § 44D1/2 (h)*. The single justice agreed that the plaintiffs had demonstrated a likelihood of success on the merits, but he found that the **[*256]** motion judge had "insufficiently considered the fact that enjoining performance on the contract will shut down the project for several months (or longer) as the town sorts through the bid protests and conducts the re-bidding process. . . . [S]hutting down this project will result in substantial cost for the town." He concluded that "the judge's failure to place these factors on the scale governing preliminary injunctive relief resulted in an abuse of **[**16]** discretion," and he vacated the preliminary injunction.

The plaintiffs appealed from the single justice's order to the full Appeals Court, *Mass. R. A. P. 3 (a)*, as amended, 378 Mass. 927 (1979), [11] and we transferred the case here on our own motion. [12]

11 The defendants each filed cross appeals as to specific conclusions reached by the single justice but not as to his decision that the preliminary injunction should be vacated.

12 Kenney also appealed from the order of the single justice to the full Appeals Court but withdrew its appeal prior to oral argument before this court.

2. *Standard of review*. In reviewing the allowance of a preliminary injunction, whether that review is conducted by a single justice of the Appeals Court pursuant to *G. L. c. 231, § 118*, first par., or by an appellate court reviewing a decision of the single justice, the standard is whether the *motion* judge abused his discretion in issuing the preliminary injunction. See *Planned Parenthood*

League of Mass., Inc. v. Operation Rescue, 406 Mass. 701, 709, 550 N.E.2d 1361 & n.7, 717 (1990) (vacating suspension of preliminary injunction ordered by single justice); *Packaging Indus. Group, Inc. v. Cheney, 380 Mass. 609, 615, 405 N.E.2d 106 (1980)* (standard **[**17]** of review framed in terms of abuse of discretion). In conducting our review, we decide "whether the judge applied proper legal standards and whether there was reasonable support for his evaluation of factual questions." *Commonwealth v. Fremont Inv. & Loan, 452 Mass. 733, 741, 897 N.E.2d 548 (2008)*. See *Packaging Indus. Group, Inc. v. Cheney, supra*. On review, the motion judge's "conclusions of law are subject to broad review and will be reversed if incorrect." *Id. at 616*, quoting *Buchanan v. United States Postal Serv., 508 F.2d 259, 267 n.24 (5th Cir. 1975)*.

3. *Discussion*. The motion judge did not abuse his discretion in finding from the circumstantial evidence that Callahan knowingly made false or misleading statements of material fact in the **[*257]** SOQ with the intention of misleading the prequalification committee. Therefore, in determining whether the judge abused his discretion in finding that the plaintiffs were likely to prevail at trial, the key issue is whether the judge was correct as a matter of law in concluding that Callahan's intentional misrepresentations constituted fraud within the meaning of *G. L. c. 149, § 44D1/2 (h)*, even in the absence of evidence of detrimental reliance by the prequalification **[**18]** committee. We conclude that he erred.

Fraud is not a defined term under *G. L. c. 149, § 44D1/2 (h)*, and no appellate court of the Commonwealth has previously decided any claim involving this statute. Under the common law, fraud is a knowing false representation of a material fact intended to induce a plaintiff to act in reliance, where the plaintiff did, in fact, rely on the misrepresentation to his detriment. See *Masingill v. EMC Corp., 449 Mass. 532, 540, 870 N.E.2d 81 (2007)*; *Barrett Assocs. v. Aronson, 346 Mass. 150, 152, 190 N.E.2d 867 (1963)*. As earlier noted, in bid protest decisions issued pursuant to her authority under *G. L. c. 149, § 44H*, to enforce compliance with the competitive bidding statutes, the Attorney General has asserted that proof of fraud under *G. L. c. 149, § 44D1/2 (h)*, does not require the element of detrimental reliance. See, e.g., Matter of Everett High Sch. Elec. Subcontract, Att'y Gen. Bid Protest Decision (Nov. 2, 2006); Matter of Police Headquarters and East Fire Station, Att'y Gen. Bid Protest Decision (Aug. 10, 2006). However, these bid protest decisions, because they arise from the Attorney General's prosecutorial, rather than her adjudicative, function, carry no precedential weight. **[**19]** See *Brasi Dev. Corp. v. Attorney Gen., 456 Mass. 684, 694, 925 N.E.2d 826 (2010)*; *Annese Elec. Servs, Inc. v. Newton, 431 Mass. 763, 771, 730 N.E.2d 290 (2000)*. See also *E. Amanti & Sons v. R.C. Griffin, Inc., 53 Mass. App. Ct. 245, 253, 758 N.E.2d 153 (2001)*; *Department of Labor & Indus. v. Boston Water & Sewer Comm'n, 18 Mass. App. Ct. 621, 623-624 n.7, 469 N.E.2d 64 (1984)*.

To determine the meaning of "fraud" as used in *G. L. c. 149, § 44D1/2 (h)*, we look to the intent of the Legislature "ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated." *Industrial Fin. Corp. v.* **[*258]** *State Tax Comm'n, 367 Mass. 360, 364, 326 N.E.2d 1 (1975)*, quoting *Hanlon v. Rollins, 286 Mass. 444, 447, 190 N.E. 606 (1934)*. We do not read statutory language in isolation. *LeClair v. Norwell, 430 Mass. 328, 333, 719 N.E.2d 464 (1999)*. "Where possible, we construe the various provisions of a statute in harmony with one another, recognizing that the Legislature did not intend internal contradiction." *DiFiore v. American Airlines, Inc., 454 Mass. 486, 491, 910 N.E.2d 889 (2009)*. In a case such as this, **[**20]** where the meaning of a single word in a statute is at issue, we generally infer that the Legislature intended the word be interpreted in accordance with its "ordinary and approved usage." *Suffolk Constr. Co. v. Division of Capital Asset Mgt., 449 Mass. 444, 454, 870 N.E.2d 33 (2007)*. Where a statute employs a word with an established meaning in the common law, we consider the statute in light of that meaning, and we do not construe the statute as "effecting a material change in or repeal of the common law unless the intent to do so is clearly expressed." *Id*., quoting *Riley v. Davison Constr. Co., 381 Mass. 432, 438, 409 N.E.2d 1279 (1980)*. See *Busalacchi v. McCabe, 71 Mass. App. Ct. 493, 497, 883 N.E.2d 966 (2008)* ("Without a clear expression from the Legislature breaking with the common law, the common law will apply"). Nowhere in *G. L. c. 149, §§ 44A-44H*, does the Legislature direct us to disregard the well-settled common-law meaning of fraud in interpreting and applying *§ 44D1/2 (h)* which, in the context of an intentional misrepresentation, requires detrimental reliance.

Notwithstanding these familiar principles of statutory construction, the plaintiffs, the Attorney General, and the two judges who ruled on the injunction concluded **[**21]** that the Legislature intended that a contractor's intentional misrepresentation would constitute the fraud necessary to vacate a decision of a prequalifying committee under *§ 44D1/2 (h)*, even where the contractor's deception falls short of common-law fraud. The plaintiffs contend that this conclusion is compelled by the objectives of the competitive bidding statutes, *G. L. c. 149, §§ 44A-44H*. A careful examination of the evolution of these statutes, however, reveals that, in the con-

text of a claim of intentional misrepresentation, defining fraud under *§ 44D1/2* to mean common-law fraud, as the defendants contend, respects the Legislature's purpose in enacting *§ 44D1/2* and is consistent with the over-all objectives of the competitive bidding statutes.

The basic framework of the Commonwealth's contemporary **[*259]** competitive bidding statutes was created thirty years ago when the Legislature repealed the previously enacted public construction statute and adopted a series of amendments that extensively revised the Commonwealth's system of public construction. See St. 1980, c. 579, § 55. See also St. 1984, c. 484, § 46. These revisions were undertaken in response to a report issued by the Special **[**22]** Commission Concerning State and County Buildings chaired by Amherst College President John William Ward (Ward Commission), which documented extensive corruption in the awarding of public construction contracts and proposed comprehensive remedial legislation. See *LeClair v. Norwell, supra at 332*; *Modern Cont. Constr. Co. v. Lowell, 391 Mass. 829, 832 n.5, 465 N.E.2d 1173 (1984)*. Accordingly, the statute enacted in 1980 states as its purpose the creation of a system of public construction which will provide fair costs, professionalism, and accountability, and which will "reduce [] opportunities for corruption, favoritism, and political influence in the award and administration of public contracts." St. 1980, c. 579, Preamble. The statute is intended "not only to ensure that the awarding authority obtain the lowest price among responsible contractors, but also to establish an open and honest procedure for competition for public contracts." *Modern Cont. Constr. Co. v. Lowell, supra at 840*.

The competitive bidding statutes in effect before 1980, as they do today, required that public construction contracts be awarded to the "lowest responsible and eligible bidder," [13] but prior to the reform undertaken following **[**23]** the Ward Commission report, there were no useful statutory or regulatory criteria for what constituted a responsible and eligible bidder and no centralized system to monitor and document the competency and integrity of contractors undertaking public construction projects. [14] See 8 Ward Commission Report at 343-346 (Final Report 1980); Note, Prescribing Preventive Remedies for an Ailing Public Construction Industry: Reforms Under the New Massachusetts Competitive Bidding **[*260]** Statute, 23 B.C. L. Rev. 1357, 1359-1364 (1982) (Note). It was instead left to each awarding authority, at its option and without the benefit of guidelines issued by an expert authority, to solicit information from prospective contractors that might allow it to determine whether a bidder firm was competent to perform the work under consideration in an honest and professional manner. See *G. L. c. 149, § 44A*, as appearing in St. 1956, c. 679, *§ 1* ("Essential information in regard to such qualifications shall be submitted in such form as the awarding authority may require"); 8 Ward Commission Report, *supra*; Note, *supra*. Because the law required that contracts be awarded to the lowest bid received from a "responsible and **[**24]** eligible bidder," but provided minimal guidance for determining whether a bidder was "responsible and eligible," the result too often was that all bidders were deemed "responsible and eligible," regardless of their competency or experience, and the selection of a contractor was based solely on price. This resulted in a widespread problem of defective construction work requiring extensive repair. See Note, *supra* at 1365.

13 Compare *G. L. c. 149, § 44A*, as amended through St. 1977, c. 968, with *G. L. c. 149, § 44A*, as appearing in St. 1980, c. 579, § 55.

14 The only guidance given in the earlier statute was that a "responsible and eligible bidder" was a bidder "possessing the skill, ability and integrity necessary to the faithful performance of the work and who shall certify that he is able to furnish labor that can work in harmony with all other elements of labor employed or to be employed on the work." *G. L. c. 149, § 44A*, as appearing in St. 1956, c. 679, *§ 1*. (See *G. L. c. 30, § 39M*.)

Beginning with the Ward Commission legislation enacted in 1980, the Legislature required bidders to provide specified information regarding their competence and experience to the awarding authority, which **[**25]** the awarding authority was required to evaluate "according to procedures and criteria which the deputy commissioner [of DCAM] [15] shall prescribe by regulations or guidelines." [16] *G. L. c. 149, § 44D (3)*, as appearing in St. 1980, c. 579, § 55. In 1984, the Legislature transferred responsibility for determining whether a bidder was "responsible and eligible" to DCAM. *G. L. c. 149, § 44D (3)*, as appearing in St. 1984, c. 484, *§ 46*. Any bidder for a public construction contract now must submit as part of the bid process a certificate of eligibility from the commissioner of DCAM showing that the bidder has the classification and capacity rating to complete the project on which it is bidding. *G. L. c. 149, § 44D (1) (a)*. Certificates of **[*261]** eligibility, which must be renewed annually, are issued only after DCAM's review of the contractor's prior construction experience, professional references, financial condition, and organizational capacity. [17] See *G. L. c. 149, § 44D (1)-(3)*. DCAM may "decertify a contractor or reduce the classes of work and amount of work on which the contractor is eligible to bid," if DCAM learns of a contractor's incompetence, poor performance, or misconduct. See *G. L. c. 149, § 44D (5)*. **[**26]** A contractor who is debarred or whose certification is suspended, revoked, or not renewed by DCAM, loses the ability to contract for construction

work from any public authority in the Commonwealth. See *G. L. c. 29, § 29F*; *G. L. c. 149, § 44E*.

15 At the time of the 1980 and 1984 legislation, the agency was known as the division of capital planning and operations. In 1990, it was changed to the division of capital asset management and maintenance (DCAM). St. 1998, c. 194, §§ 182-185. For purposes of simplicity, we refer to it as DCAM.

16 Pursuant to St. 1980, c. 579, § 55, the burden of making this determination remained with the awarding authority, although the statute permitted an awarding authority to request that DCAM perform such an evaluation on its behalf.

17 Every bid made to an awarding authority for a contract of general construction must also include an "update statement" reflecting changes in the bidder's financial position or business organization since the date of certification of eligibility. *G. L. c. 149, § 44D (1) (a).*

It was not until 2004, with the enactment of *G. L. c. 149, § 44D1/2*, inserted by St. 2004, c. 193, *§ 19*, that awarding authorities were required to prequalify **[**27]** general contractors for individual projects; the statutory requirement, however, applies only to projects estimated to cost at least $ 10 million. [18] *G. L. c. 149, § 44D1/2 (a)*. *Section 44D1/2* was one of several amendments proposed by a special commission, see St. 2003, c. 46, § 138, charged with recommending legislation to improve the "adequacy and efficiency" of the public construction laws. While the 1980 and 1984 legislation had standardized the review and monitoring of contractors under the centralized administration of DCAM, many of the 2004 amendments enhanced the flexibility and discretion of municipalities, State agencies, and other governmental authorities in managing their own construction projects. [19] See St. 2004, c. 193, *§§ 13, 19, 27*.

18 For contracts estimated to cost at least $ 100,000 but not more than $ 10,000,000, *G. L. c. 149, § 44D1/2* (*a*), permits, but does not require, an awarding authority to prequalify general contractors. Therefore, an awarding authority issuing a public contract costing less than $ 10,000,000 is free to rely on DCAM's certification alone as a guarantee of a bidder's capacity and expertise. See *id*.

19 The 2004 amendments expanded the range of **[**28]** construction options available to awarding authorities by allowing for the election of "at risk" and "[d]esign build" approaches for projects estimated to cost $ 5 million or more (*G. L. c. 149A, §§ 1, 14*), and required awarding authorities to retain an "owner's project manager" for any project estimated to cost $ 1.5 million or more to ensure hands-on project oversight (*G. L. c. 149, § 44A1/2 [a]*). See St. 2004, c. 193, *§§ 13, 19, 27*.

As a result of the 2004 legislation, a general contractor who **[*262]** submits a bid for a project costing at least $ 10 million has been twice qualified for the work, initially through the DCAM certification procedure, and then again by the prequalification committee's approval of the applicants' specific responses to its RFQ. [20] The prequalification process serves to ensure that parties who may be "responsible and eligible bidders" in a general sense also have the particular skills and experience most relevant to the project at issue. It also requires the awarding authority to invest substantial time and effort, and exercise its sound discretion, in determining the considerations critical to the project and assigning points within the statutory categories accordingly, **[**29]** and then, after submission of the SOQs, in scoring the responses of potential bidders according to the weighted criteria.

20 An awarding authority must select its prequalified bidders before soliciting general bids. By regulation, the deadline for submission of general bids from prequalified general contractors must be at least fourteen days after the awarding authority's issuance of invitations to bid. *810 Code Mass. Regs. § 9.10* (2005).

The 2004 legislation narrowly limited the grounds for appealing from the committee's prequalification decision: "A general contractor's score shall be made available to the general contractor upon request. The decision of the prequalification committee shall be final and shall not be subject to appeal except on grounds of fraud or collusion." *G. L. c. 149, § 44D1/2 (h).* [21]

21 In 2008, *G. L. c. 149, § 44D1/2 (h)*, was amended to include "arbitrariness" and "capriciousness" as additional grounds for appeal. St. 2008, c. 303, *§ 23*. Because the plaintiffs here allege only fraud, the addition of these grounds for appeal do not affect our analysis.

In determining the meaning of "fraud" as it appears in *§ 44D1/2 (h)*, we note that the logical implication of the **[**30]** sequence of these two sentences -- with the sentence governing an appeal from a decision of the prequalification committee following immediately after the sentence declaring that a general contractor is entitled to learn the score given to its SOQ by the prequalification committee -- is that the Legislature anticipated that a general contractor denied prequalification might seek to challenge the committee's scoring of the contractor's SOQ. In such an appeal, "fraud" could not mean an intentional misrepresentation in the SOQ itself, because a

general contractor **[*263]** challenging an unfavorable decision of the committee would not allege that it was entitled to relief because it had intentionally misrepresented material information in its own SOQ. Rather, in the context of a general contractor challenging the denial of its *own* prequalification, "fraud" must mean corrupt conduct *by one or more members of the committee* designed unfairly to prevent the general contractor from being prequalified to bid. Pragmatically, in this context, "fraud" would surely involve "collusion," *G. L. c. 149, § 44D1/2 (h)*, a corrupt agreement between at least one member of the committee and another person, most likely **[**31]** a competing general contractor seeking to fix its competitor's score below the minimum threshold for prequalification to prevent that competitor from bidding. See *Dickerman v. Northern Trust Co., 176 U.S. 181, 190, 20 S. Ct. 311, 44 L. Ed. 423 (1900)*; Black's Law Dictionary 300 (9th ed. 2009) (collusion is "[a]n agreement to defraud another or to do or obtain something forbidden by law"). [22]

22 The inclusion in 2008 of "arbitrariness" and "capriciousness" as additional grounds for appeal allows a disqualified contractor to challenge the denial of his prequalification without needing to make the difficult showing of collusion. St. 2008, c. 303, § 23. Before this amendment, a contractor without direct evidence of collusion had only the argument that collusion should be inferred from the arbitrariness and capriciousness of the committee's decision.

The Legislature, however, did not foreclose an appeal from a decision of a prequalification committee from third parties. Because *G. L. c. 149, § 44D1/2 (g)*, provides that the "register of responders shall be open for public inspection," and, on completion of the evaluations by the prequalification committee, the "contents of the [SOQs] shall be open to the public," we infer **[**32]** that the Legislature also recognized the possibility of an appeal from an allowance of prequalification by a fellow bidder or a member of the general public based, at least in part, on the contents of the SOQ. In this context, "fraud" could still mean corrupt conduct by one or more members of the committee, alone or in collusion with another, but we do not so limit its meaning. We conclude that, consistent with its common-law meaning, "fraud" in this context means a fraudulent misrepresentation by a general contractor applying for prequalification that the committee relied on to its detriment in qualifying the general contractor to bid. In the absence of detrimental reliance by the committee, a general contractor's intentional misrepresentation, even if intended to **[*264]** deceive the committee, does not constitute "fraud" within the meaning of *G. L. c. 149, § 44D1/2 (h)*, and therefore does not require that the committee's prequalification of the contractor be vacated.

We believe that this conclusion is consistent with the comprehensive legislative scheme embodied in the public construction statute for two reasons. First, we do not believe the Legislature, by allowing a prequalification decision **[**33]** to be appealed from on grounds of "fraud," intended to require an awarding authority to disqualify a general contractor or terminate a construction contract because of an intentional misrepresentation in a SOQ where the committee did not act corruptly or in reliance on the misrepresentation and where, in its discretion, the awarding authority does not wish to disqualify the contractor or terminate the contract. Under *G. L. c. 149, § 44D (2)*, "[a]ny materially false statement" made by a general contractor in its application for DCAM certification or its update statement "may, in the discretion of the awarding authority, result in termination of any contract awarded the applicant by the awarding authority." As a result, where an awarding authority learns that a general contractor with whom it has contracted has made an intentional misrepresentation in either of these two filings, the awarding authority may terminate the contract, but is not required to do so. The awarding authority retains this discretion even though a certificate of eligibility from DCAM and an update statement are both mandatory elements of a general contractor's SOQ. *G. L. c. 149, § 44D1/2 (e) (4)*. [23] Under the interpretation **[**34]** of "fraud" proffered by the plaintiffs and the Attorney General, if an intentional misrepresentation were made in a SOQ or an incorporated update statement rather than an application for DCAM certification, an awarding authority would lose this discretion because a court, as the motion judge did here, could enjoin the awarding authority from continuing with the contract. We see nothing in *G. L. c. 149, § 44D1/2 (h)*, to suggest that the Legislature intended to deny an awarding authority the discretion it has under *G. L. c. 149, § 44D (2)*, **[*265]** simply because the materially false statement appears in a committee-scored portion of a SOQ rather than in an application for DCAM certification or update statement. In addition, we note that, even where a general contractor's misconduct results in debarment or suspension by DCAM, the Legislature did not require termination of the contractor's existing public construction contracts. Rather, pursuant to *G. L. c. 29, § 29F* (*h*), a public agency may not "execute, renew, or extend any contract with, a debarred or suspended contractor," but it need not rescind or terminate a contract. [24]

23 Because the application for DCAM certification, the update statement, **[**35]** and the SOQ are so interwoven in the statutory scheme to ensure that bidders are qualified, we understand that the awarding authority would have the same dis-

cretion to terminate a construction contract based on a materially false statement in a SOQ.

24 For this reason, we are not persuaded by the plaintiffs' argument that fraud under *G. L. c. 149, § 44D1/2* (*h*), does not require detrimental reliance because a DCAM regulation provides, "Any General Contractor who fails to respond to the RFQ in accordance with the instructions provided in the RFQ in any material way shall be deemed to be disqualified from consideration for prequalification." *810 Code Mass. Regs. § 9.06(5)* (2005). This regulation disqualifies a general contractor from prequalification who has failed to abide by the procedural requirements in the RFQ, such as the deadline for submission, the obligation to sign the SOQ under the pains and penalties of perjury, and the need to include the required commitment letter, performance bonds, and DCAM's certificate of eligibility. *Id*. It cannot reasonably be understood to require an awarding authority to disqualify a general contractor and terminate a contract based on an intentional **[**36]** misrepresentation that the authority did not rely on in its prequalification decision, where the statutes cited above do not require an awarding authority to terminate a contract after debarment, or after learning of an intentional misrepresentation in the contractor's application for DCAM certification or in the update statement submitted with its SOQ. See *G. L. c. 29, § 29F* (*h*); *G. L. c. 149, § 44D (2).*

Second, giving the word "fraud" its common-law meaning under *§ 44D1/2 (h)* does not conflict with the "transparent" legislative intent that the competitive bidding statutes "establish an open and honest procedure for competition for public contracts." *John T. Callahan & Sons v. Malden, 430 Mass. 124, 128, 713 N.E.2d 955 (1999)*, quoting *Modern Cont. Constr. Co. v. Lowell, 391 Mass. 829, 840, 465 N.E.2d 1173 (1984)*. In formulating the provisions of *§ 44D1/2* in 2004, the Legislature had no need to, and did not, concern itself with remedying intentional misrepresentations that do not infect a prequalification committee's decision-making process because sufficient means to remedy this kind of misconduct -- and thereby to ensure the integrity of the public bidding process -- were already provided by statute. A general contractor **[**37]** who makes an intentional misrepresentation in a SOQ with the intention of deceiving the prequalification committee risks grave **[*266]** sanctions, regardless of whether the committee acted in reliance on the misrepresentation. The commissioner of DCAM has broad statutory authority to debar a contractor from public contracting based on "substantial evidence" that the contractor has "willfully suppli[ed] materially false information incident to obtaining or attempting to obtain or performing any public contract or subcontract." *G. L. c. 29, § 29F (c) (2) (i)*. See *G. L. c. 149, § 44C*. Under regulations promulgated by the commissioner, wilfully supplying false material information in obtaining or attempting to obtain any public contract or subcontract within the last five years "shall constitute cause for decertification or denial of certification." *810 Code Mass. Regs. § 4.04(8)(e)* (2005). The "[f]ailure to provide accurate information" to any party with whom a contractor does business may also be grounds for denial of certification or debarment. *810 Code Mass. Regs. § 4.04(6)* (2005). Finally, a contractor making an intentionally false statement in a SOQ risks criminal conviction and its consequent **[**38]** penalties. An applicant must sign the SOQ "under pains and penalties of perjury," *G. L. c. 149, § 44D1/2 (e) (ii)*, so a wilful false statement in the SOQ may subject the applicant to a perjury charge. *G. L. c. 268, §§ 1, 1A*. Moreover, any person who intentionally makes a material false statement, or omits or conceals a material fact in a written statement, in attempting to procure a construction contract from any department, agency, or municipality of the Commonwealth, may be charged criminally under *G. L. c. 266, § 67A*.

4. *Conclusion*. In view of our interpretation of the meaning of fraud under *G. L. c. 149, § 44D1/2 (h)*, we conclude that the motion judge committed an error of law in determining that the plaintiffs would not need to prove detrimental reliance by the prequalification committee to prevail on their claim for injunctive relief. As a result of this error, because there is no allegation that any member of the prequalification committee acted corruptly in deciding to prequalify Callahan, and because there is unrefuted evidence that the committee did not act in reliance on any of the alleged misrepresentations, the motion judge abused his discretion in concluding that the plaintiffs **[**39]** were likely to succeed on the merits at trial. Having so found, we need not reach the issue whether a preliminary injunction would promote or adversely affect the public interest, because the **[*267]** preliminary injunction cannot survive if the plaintiffs are unlikely to succeed on the merits.

We affirm the single justice's order vacating the allowance of the plaintiff's motion for a preliminary injunction.

So ordered.

INTERNATIONAL SALT COMPANY, LLC, Plaintiff - Appellant, v. CITY OF BOSTON, Defendant - Appellee.

No. 08-1663

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

590 F.3d 1; 2009 U.S. App. LEXIS 27838

December 18, 2009, Decided

PRIOR HISTORY: [1]**

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS. Hon. Richard Stearns, U. S. District Judge.
Int'l Salt Co., LLC v. City of Boston, 547 F. Supp. 2d 62, 2008 U.S. Dist. LEXIS 32020 (D. Mass., 2008)

COUNSEL: Bruce W. Edmands with whom Julia B. Vacek and Eckert Seamans Cherin & Mellott, LLC, were on brief for appellant.

Adam Cederbaum with whom William F. Sinnott, Corporation Counsel, and Scott C. Holmes, Assistant Corporation Counsel, City of Boston Law Department, were on brief for appellee.

JUDGES: Before Boudin, John R. Gibson, * and Howard, Circuit Judges.

* Of the Eighth Circuit, sitting by designation.

OPINION BY: JOHN R. GIBSON

OPINION

[*2] JOHN R. GIBSON, *Circuit Judge*. International Salt Company, LLC ("International Salt") appeals from the district court's entry of judgment for the City of Boston ("City") in a dispute over payment for road salt that the company supplied during the winter of 2004-05. The City awarded a contract to International Salt to supply 75,000 tons of road salt for that winter, but its supply dwindled midway through the season after several unusually heavy snows hit the area. In early February 2005, the City demanded another 25,000 tons of salt, which International Salt said it could provide but at a higher price because its shipping costs had risen. The City was insistent **[**2]** in its demand but did not agree to pay more than the original contract price. International Salt supplied the additional salt after the City characterized the situation as a public safety issue for which it would hold the company responsible, but the company reserved the right to litigate the price. True to its word, the City paid the same rate per ton as it had under the contract, and this suit followed. The district court entered judgment for the City of Boston following a non-jury trial. International Salt appeals, arguing: 1) the parties' failure to comply with the Massachusetts Uniform Procurement Act was excused under the Act's emergency provisions; 2) the District Court erred in holding that International Salt's claims are barred by its failure to show that it strictly complied with the Boston City Charter; and 3) it should be permitted to assert equitable estoppel against the City. We will affirm the judgment.

I.

The parties largely stipulated to the relevant facts. International Salt was the successful bidder to supply the City with 75,000 tons of road maintenance salt for the period between October 1, 2004 and June 30, 2005. The contract received both the written approval of **[**3]** the Mayor of Boston and approval by a city official that appropriations were available. From November 2004 to March 2005, Boston received more than eighty-five inches of snow, with roughly half falling in January. Road salt is critically important during winter snow and ice storms, and its absence poses a significant threat to public health and safety. Without it, the City's streets become dangerous to vehicles and pedestrians. Effective use of road salt requires that the City apply it to streets and highways before, during, and after storms.

The City wrote the contract at issue. The only provision over which International Salt had any control was the bid (and ultimately, the contract) price. This lawsuit arose because the parties could not **[*3]** agree on an interpretation of certain contract language. The first dispute is over an incorporated contract provision of the City's invitation for bids, which reads: "Price will be held for the term of the contract and shall not be limited to the estimated number of items." However, the City did not use the word "estimated" anywhere else in the contract documents.

In addition to uncertainty over the word "estimated," the contract contains other ambiguities. **[**4]** The signature page of the contract, in listing the terms, states that the "total amount [of the contract is] not to exceed $ 2,731,500.00." That figure is derived from multiplying 75,000 tons by $ 36.42, the price bid per ton. The bid response form contains two additional pertinent state-

ments. First, in the space allotted to the "total bid price" for the contract, International Salt recorded it as $ 36.42 a ton, for a total of $ 2,731,500.00. Second, where asked to list the price components of the bid price, International Salt wrote: "Total contract. Based upon 75,000 tons."

As of the first week of February 2005, International Salt had delivered 70,848 tons of salt to the City, and the City had approximately 28,117 tons remaining in its storage yards. Much of the winter was yet ahead, and the City's Public Works Superintendent, Joseph Canavan, liked to keep the reserves above 20,000 tons because of the uncertainty of weather and the problems caused by running out of salt.

On February 7, Daniel Thompson, vice president of government sales for International Salt, faxed a letter to Vincent Caiani, an Assistant Purchasing Agent for the City, informing him that an increase in ocean freight **[**5]** rates would cause International Salt to increase its price of salt from $ 36.42 a ton to $ 46.36 a ton, effective with any shipments above the 75,000 tons specified in the contract. That same day, Mr. Caiani telephoned Mr. Thompson to ask that International Salt provide the City with additional salt in excess of 75,000 tons, but at the contract price of $ 36.42 per ton. They disagreed over whether International Salt was obligated to provide it. The next day, Mr. Thompson spoke with William Hannon, the City's Purchasing Agent. Mr. Hannon said that the City was precluded by Massachusetts General Laws chapter 30B from agreeing to pay more than $ 36.42 per ton, and Mr. Thompson took the position that International Salt had fulfilled its obligations under the contract by supplying the City with 75,000 tons of salt and that it could not supply additional salt at the same price because shipping costs had increased. As these conversations were taking place, the City was applying salt to its streets, and its supply diminished by nearly 3000 tons in one day.

The parties continued to discuss this issue, with each side holding fast to its position. Ultimately, on February 10, the Boston Commissioner **[**6]** of Public Works, Joseph Casazza, telephoned International Salt's Chief Executive Officer, Robert Jones, to demand written assurance that the company would continue to supply the City with salt. The Commissioner presented his demand as a safety issue; it was the middle of winter, in emergency conditions, and he did not want the City to be shut down or to face problems with unsafe streets or with police and fire vehicles being unable to move about. Mr. Casazza threatened to hold International Salt responsible for streets rendered unsafe by lack of salt. He deflected any talk of price as not his responsibility.

Following this February 10 conversation between the Commissioner and the company's CEO, Mr. Hannon sent Mr. Jones a letter setting forth the City's expectation **[*4]** that International Salt would honor its contract and provide additional road salt at the same price. Mr. Jones also sent Mr. Casazza a letter informing him that International Salt would continue to supply salt even though it had fulfilled its obligations under the contract, and that if the parties could not agree on a price, International Salt would seek fair market value as determined by a court or through mediation. International **[**7]** Salt's attorney sent Mr. Hannon a letter the following day reiterating the company's position and refuting the City's contract interpretation.

On February 16, International Salt completed delivery of 75,000 tons of road salt to the City, all of which came from inventory at its facility in Charlestown, Massachusetts. The City issued three more purchase orders for salt: February 11 (25,000 tons), March 11 (3000 tons), and April 15 (50 tons). From February 16 to March 14, International Salt made an additional eighteen deliveries of salt, totaling 27,021.84 tons. For those deliveries, International Salt turned to the ocean freight spot market and paid higher shipping rates. The City, however, continued to pay International Salt a constant rate of $ 36.42 per ton for the additional shipments.

On April 15, International Salt's counsel wrote in a letter to Mr. Hannon that the company viewed the City's lack of response to its previous correspondence about pricing and its additional orders as an implicit agreement to pay fair market value, which it determined to be $ 56.37 per ton. The letter concluded that the City owed International Salt an additional $ 1,523,221.10. Mr. Hannon replied five **[**8]** days later and said that the City had been consistent in its view that the contract allowed the City to buy quantities of greater than 75,000 tons of salt at the contract price, and that Massachusetts law and the City Charter did not permit the City to pay a higher price.

International Salt filed this action in three counts: breach of contract, quantum meruit/unjust enrichment, and declaratory judgment. The district court conducted a non-jury trial and entered judgment for the City, finding that International Salt had no viable claim of recovery. This appeal followed.

II.

Although the City once took the position that the parties' contractual relationship continued to exist after International Salt had completed delivery of 75,000 tons of road salt, it does not make that argument on appeal. The City does not take exception to the district court's ruling on the first day of trial that the City's interpretation of the original contract was commercially unreasonable and that International Salt fully discharged its obligations

by delivering 75,000 tons of salt to the City in compliance with the contract's terms.

The parties thus agree that International Salt must be able to demonstrate that **[**9]** a new contract was formed if it is to prevail on its legal claims. In this case, we cannot determine if a new contract was formed by looking solely at the parties' dealings. Instead, we must also consider Massachusetts law and the Boston City Charter, both of which set out procurement procedures and contract requirements that demand strict compliance. The district court examined those provisions and determined they were unmet, thereby leaving International Salt without contractual recourse unless it could demonstrate that the emergency provision of the Massachusetts Uniform Procurement Act applied. The district court concluded that the emergency provision did not apply.

[*5] We review de novo the district court's legal conclusions, *Williams v. Poulos, 11 F.3d 271, 278 (1st Cir. 1993)*, and its application of the statute and charter to the facts, *Servicios Comerciales Andinos, S.A. v. Gen. Elec. Del Caribe, Inc., 145 F.3d 463, 469 (1st Cir. 1998)*. The Massachusetts Uniform Procurement Act, Massachusetts General Laws chapter 30B, governs every contract for the procurement of supplies by the City of Boston. *Mass. Gen. Laws ch. 30B, §§ 1-2*. *Section 8* **[**10]** of the Act addresses emergency procurements.

> Whenever the time required to comply with a requirement of this chapter would endanger the health or safety of the people or their property, a procurement officer may make an emergency procurement without following that requirement. An emergency procurement shall be limited to only supplies or services necessary to meet the emergency and shall conform to the requirements of this chapter to the extent practicable under the circumstances. The procurement shall make a record of each emergency as soon after the procurement as practicable, specifying each contractor's name, the amount and the type of each contract, a listing of the supply or service provided under each contract, and the basis for determining the need for an emergency procurement.
>
> The procurement officer shall submit a copy of this record at the earliest possible time to the state secretary for placement in any publication established by the state secretary for the advertisement and procurements.

Mass. Gen. Laws ch. 30B, § 8. International Salt argues that the district court's findings compel the conclusion that *section 8* applies. Specifically, it points to the district court's finding **[**11]** that it is "undisputed that salt is critical in keeping City streets safe during snow emergencies for all vehicles, and especially emergency vehicles." The district court further found that it is "beyond dispute that the City was alarmed by the prospect that its inventory of salt might be depleted, and that as a result it pressured [International Salt] to guarantee deliveries over and above the originally contemplated 75,000 tons." Finally, the district court noted that the City perceived an urgent need for some amount of additional salt in mid-February 2005.

In spite of its sympathetic tone, the district court concluded as a matter of law that International Salt had not proved that the City had an immediate need for 25,000 tons of salt. The emergency provisions of *section 8* limit procurements to only those supplies necessary to meet the emergency and excuse compliance if the time required to comply would endanger the health or safety of people or property. Given those statutory limitations and the narrow construction given by the Massachusetts courts, the district court determined that *section 8*'s emergency provisions did not apply.

Our review of the record reveals that the district **[**12]** court did not err. Although the City exerted a great deal of pressure on International Salt to supply more salt -- pressure which was ultimately successful -- International Salt has not met its burden of proving that a true emergency existed. Public Works Commissioner Casazza and Public Works Superintendent Canavan both testified that they did not consider the City's salt supply to be at an emergency level in mid-February 2005. International Salt introduced no competing testimony. Moreover, *section 8* does not excuse compliance with all of chapter 30B's requirements in the face of an emergency. It excuses only those requirements for which health and safety would be endangered if the parties took time to complete them. **[*6]** When discussing the City's request for more salt, the parties parried back and forth for several days, ultimately involving Public Works Commissioner Casazza and International Salt's CEO Jones. They clearly had each other's attention and the record does not suggest that they lacked sufficient time to have negotiated a new written contract as required by *section 17* of chapter 30B. *Section 8* also requires the City's procurement officer to make a detailed record of an emergency **[**13]** procurement, including the basis for determining the need, and to submit such record to the secretary of state. No such record was created.

Similarly, the district court concluded that International Salt did not show compliance with the Boston City Charter. The Charter requires contracts involving $

10,000 or more to be in writing and to have both the Mayor's approval and the City Auditor's certification of available appropriations.

> All contracts made by any department of the city of Boston . . . shall, when the amount involved is $ 10,000 or more, . . . be in writing; and no such contract shall be deemed to have been made or executed until the approval of the mayor of said city has been affixed thereto in writing and the auditor of said city has certified thereon that an appropriation is available therefor or has certified thereon the statute under authority of which the contract is being executed without an appropriation.

1890 Mass. Acts ch. 418, § 6, as amended by 1998 Mass. Acts ch. 262, § 1. Although the City Auditor ultimately certified that appropriated funds were available for two of the three purchase orders, the other two requirements were not met. Moreover, unlike the Uniform **[**14]** Procurement Act, the Charter has no emergency exception.

In Massachusetts, a party seeking to enter into a municipal contract has the responsibility of knowing the limitations on a municipality's contracting power, and such party cannot recover on a contract that does not comply. *Marlborough v. Cybulski, Ohnemus & Assocs., 370 Mass. 157, 346 N.E.2d 716, 717 (Mass. 1976)*. International Salt argues that strict compliance with the City Charter is not required in all circumstances, citing *Bradston Associates, LLC v. County Sheriff's Department, 452 Mass. 275, 892 N.E.2d 732 (Mass. 2008)*, and should not be required in this case because it would frustrate the purposes of the Uniform Procurement Act. However, *Bradston Associates* does not support International Salt's argument. The contract in *Bradston Associates*, which was subject to the same City Charter provisions at issue here, was a lease that was in writing, signed by the mayor, and approved by the city auditor. Through "inadvertence, negligence, or inadequate procedures," the auditor's certification showed "$ 0.00" as the approved and funded contract amount, when in fact sufficient funds were appropriated and available. *Id. at 735 & n.5*. The court refused to invalidate **[**15]** the contract for its lack of "a ministerial, nondiscretionary verification of existing budgetary authority." *Id. at 738*. It went on to contrast that function to that of the mayor, whose approval is mandatory and discretionary and not a mere ministerial act. *Id*. at n.9.

The lack of a contract bearing the Mayor's signature stands in the way of International Salt's ability to recover, and the district court did not err in so holding. The district court correctly determined as a matter of law that no new contract was created between the City of Boston and International Salt that would satisfy the requirements of Chapter 30B or the City Charter, and that such failure was not **[*7]** excused by the emergency provisions of chapter 30B.

III.

International Salt also asserts that the district court erred by concluding that it was not entitled to relief under a theory of equitable estoppel, even though it acknowledges that the Massachusetts Supreme Judicial Court has consistently refused to allow equitable recovery on a contract that does not comply with the material requirements of public bidding laws. *E.g., Massachusetts Gen. Hosp. v. City of Revere, 385 Mass. 772, 434 N.E.2d 185, 187 (Mass. 1982)*. Nonetheless, International **[**16]** Salt suggests a distinction exists because no other case has dealt with the emergency provision of the Uniform Procurement Act.

The district court applied Massachusetts law and, as federal courts are bound to do, applied the interpretation formulated by the Supreme Judicial Court. *See Daigle v. Maine Med. Ctr., Inc., 14 F.3d 684, 689 (1st Cir. 1994)*. We are not free to create an exception based on International Salt's public policy argument. The record supports International Salt's assertion that it was in a difficult position. The City was experiencing an unusually wet winter, and its salt supplies were rapidly dwindling. It was only February, and the City wanted to safely make it through the rest of the winter. A new contract was out of the question because the process would take too long. The City thus put pressure on International Salt to continue delivering salt at the old price, threatening to hold the company liable if any streets became unsafe due to lack of salt. The City made it known that it considered its need for additional salt to be an urgent public safety issue, yet it would not invoke the emergency provisions of the Uniform Procurement Act to enter into a new contract. **[**17]** Unfortunately for International Salt, it experienced an inherent risk of doing business with the City, and the fact that the City benefited from International Salt's acquiescence is now of no consequence. *See Massachusetts Gen. Hosp., 434 N.E.2d at 187* ("That the city may have benefited by the hospital's actions is irrelevant to this issue. The statutes are controlling.").

For the foregoing reasons, we affirm the judgment of the district court.

MARILYN KUNELIUS, Plaintiff, Appellant, v. TOWN OF STOW; THE TRUST FOR PUBLIC LAND; CRAIG A. MACDONNELL, in his individual capacity, Defendants, Appellees, A PARTNERSHIP OF UNKNOWN NAME BETWEEN TOWN OF STOW AND THE TRUST FOR PUBLIC LAND, Defendant.

No. 08-2393

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

588 F.3d 1; 2009 U.S. App. LEXIS 24524

November 9, 2009, Decided

PRIOR HISTORY: [1]**

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS. Hon. George A. O'Toole, Jr., U.S. District Judge.

Kunelius v. Town of Stow, 2008 U.S. Dist. LEXIS 72048 (D. Mass., Sept. 23, 2008)

COUNSEL: Michael C. McLaughlin for appellant.

Richard A. Oetheimer, with whom Dahlia S. Fetouh and Goodwin Procter LLP, were on brief, for appellees The Trust for Public Land and Craig A. MacDonnell.

Deborah I. Ecker, with whom Deidre Brennan Regan and Brody, Hardoon, Perkins & Kesten, LLP, were on brief for appellee Town of Stow.

JUDGES: Before Torruella, Lipez and Howard, Circuit Judges.

OPINION BY: HOWARD

OPINION

[*2] HOWARD, ***Circuit Judge***. Similar to other states, Massachusetts provides tax relief to landowners of agricultural, horticultural or forest land. When such land is converted to other uses, the Commonwealth requires landowners to compensate their respective municipalities. The compensation may be take the form of, for example, payment of a conveyance tax when the land is sold, or payment of roll-back taxes if the land otherwise ceases to qualify for preferential tax treatment. In addition to these tax features, Massachusetts law also provides that once a landowner decides to sell the land for other than agricultural, horticultural, or as relevant here, forest uses, the municipality is entitled **[**2]** to a right of first refusal ("ROFR"). Mass. Gen. Laws ch. 61. This ROFR provides the municipality with a 120-day period in which to meet a bona fide offer to purchase the land. The municipality thus has the right but not the obligation to preserve salutary land uses by purchasing land that the landowner desires to sell, and the landowner receives the compensation that a willing buyer in an arm's-length transaction is prepared to pay.

In this case, plaintiff-appellant Marilyn Kunelius accepted a bona fide offer to purchase a parcel of land, which included acreage that had been certified under Mass. Gen. Laws ch. 61 as forest land. Pursuant to the statute, the Town of Stow chose to exercise its ROFR. In addition, the Town assigned this right, as also permitted by the statute, to the Trust for Public Land ("TPL" or "Trust"), a nonprofit conservation organization. From the beginning, it was clear that a number of circumstances had to align in a precise constellation for the Trust and the Town to consummate the transaction. Despite potential difficulties with the transaction, the Town and TPL nevertheless went through **[*3]** with the assignment of the ROFR. The Trust's optimistic hopes for obtaining **[**3]** private philanthropy, state grants, and local zoning relief, however, were not fulfilled. As a result, the Town and the Trust failed to complete the transaction. In the interim, Kunelius's previous buyer chose to develop other land.

Conceding that it had breached its obligations under its contract with Kunelius, the Trust paid liquidated damages in the amount specified in the purchase and sale contract that had been negotiated between Kunelius and her original buyer. Kunelius, however, believing that she was entitled to significantly more, brought suit in the district court. The complaint sought several species of relief, including the invalidation of the liquidated damages clause, specific performance or full contract damages, remedies for the Town and Trust's breach of the covenant of good faith and fair dealing, relief under the business-to-business provisions of Chapter 93A, and relief under the *Contracts Clause of the United States Constitution*. **[**4]** On cross-motions for summary judgment, the district court granted summary judgment to all of the defendants: the Town, the Trust, an alleged partnership between the Town and Trust, and Trust employee Craig MacDonnell. Kunelius now appeals.

I. Background

By and large, the facts are not in dispute, but to the extent that they are, we recite them in the light most favorable to the non-moving party, here, the appellant. *See Essex Ins. Co. v. BloomSouth Flooring Corp., 562 F.3d 399, 401 (1st Cir. 2009)*; *CoxCom, Inc. v. Chaffee, 536 F.3d 101, 108 (1st Cir. 2008)*.

A. The Original Transaction

Beginning in 2001, Kunelius sought to sell her horse farm located at 142 and 144 Red Acre Road in Stow, Massachusetts. The land abuts two conservation areas, the Red Acre Woods conservation area and the Captain Sargent conservation area, and it sits atop the Town's largest aquifer. The total land area of this parcel is approximately 50.67 acres, 42.1 acres of which had been designated as forest land since 1985, pursuant to *Mass. Gen. Laws ch. 61 § 2*. Upon the remainder of the parcel (approximately 8.57 acres) sit a main house and a caretaker's house, as well as the accouterments of a horse farm, including **[**5]** a paddock, barn, and other improvements.

In mid-2002, Kunelius entered into negotiations with Cohousing Resources LLC ("Cohousing"), a consulting company based in the state of Washington that assists local communities in forming and developing cohousing projects. Co-housing projects like the one Cohousing contemplated here place an emphasis on open space and communal living. Because Cohousing requires the groups on whose behalf it undertakes development to commit to a certain threshold level of funding before Cohousing becomes involved, Cohousing's projects have a relatively high probability of coming to fruition. Through extensive negotiation and personal contact, Kunelius, her attorney and her real estate agent came to trust Cohousing and its principal representative, Chris ScottHansen. As a result, Kunelius was comfortable offering terms to Cohousing that she may not have offered to another counterparty.

Cohousing's initial offer was for a purchase price of $ 1.1 million, with a deposit of $ 50,000 to be held in escrow pending closing. In this first signed offer, the only contingency was an evaluation of the property's suitability for the eventual construction of a thirty-unit development. **[**6]** The offer contained a provision that permitted **[*4]** the seller to select from a range of remedies in the event of the buyer's breach:

> Upon default by Buyer, Seller, at its sole option, may (i) retain the deposit as liquidated damages as its sole remedy, or (ii) repay the deposit to the Buyer and subsequently enforce this Agreement and pursue any and all remedies available at law or equity, including an action for specific performance and damages.

This offer was not accepted, and negotiations continued. Cohousing's next offer was for the same purchase price, but contemplated that Kunelius would provide substantial seller financing. In addition, the deposit amount was reduced to only $ 10,000 up front and a payment of $ 1,500 per month thereafter. The record suggests that the monthly payment was to replace Kunelius's horse farm income, because her customers would likely look elsewhere to board their horses. After a period for the feasibility study, Kunelius was free to make use of the deposits. This revised offer also specifically contemplated the probability that Cohousing would file an application for relief from local zoning requirements, invoking the streamlined approval process for affordable **[**7]** housing set forth in Chapter 40B of the Massachusetts General Laws. *See Mass. Gen. Laws ch. 40B § 20-23*. In view of the anticipated approval process, the time for closing on this offer was approximately two years.

At Kunelius's request, this revised offer, although written to include all of her property, contemplated the possibility that "a significant portion of the undeveloped land . . . not to exceed 42 acres may be encumbered by or deeded to the Town of Stow," and that this encumbrance or transfer was to occur *after* all 40B approvals had been made and *before* closing. The upshot of this feature was to allow Kunelius to receive any tax credit for the transfer or encumbrance. [1] Finally, the liquidated damages provision in Cohousing's revised offer remained the same as in the prior offer.

> 1 The record reflects that Kunelius intended to donate the 42.1 acres of forest land to the Town. We need not speculate about her reasons for structuring her affairs in the way that she did, rather than attempting to sell only the 8.57 acres in a transaction separate from the contemplated land donation. *See Mass. Gen. Laws ch. 61 § 8* (2001) (providing that only land taxed under Chapter 61 is subject **[**8]** to the right of first refusal); *see also Town of Sudbury v. Scott, 439 Mass. 288, 787 N.E.2d 536, 542 & n.11 (Mass. 2003)* (clarifying that *Mass. Gen. Laws ch. 61A § 17* should be interpreted to allow "the municipality to exercise its first refusal rights as to the portion of the land that is to be separated from *the remainder*, when sold or converted, as set forth in [*Mass. Gen. Laws ch. 61A § 14*], while the remainder of the land may remain in *c. 61A*"(emphasis added)).

Although Kunelius did not accept the second offer, negotiations continued, and the parties eventually

reached an agreement. The terms of the contract, which was drafted by Kunelius's attorney, diverged in several ways from previous offers. The slightly increased purchase price was to be paid in the same fashion as before, with Kunelius holding a note for a portion of the price. The time for performance was set at September 26, 2003, although Cohousing had the opportunity to extend this period for a year if "the *Chap. 40B* approval process is proceeding forward."

Among other changes were the inclusion of at least two references to the possibility of the Town exercising its ROFR. One provision stated flatly that "[i]n the event that the Town **[**9]** of Stow exercises its right of first refusal pursuant to *Mass. Gen. Laws ch. 61*, all monies deposited hereunder **[*5]** shall be forthwith returned to BUYER without further recourse by either party in equity or law." Another change involved a clarification of Kunelius's right to transfer that portion of her land classified as forest land: after the 40B development was approved and the seller received all "purchase monies," the seller would transfer "all right, title, and interest in the said 42.1 acre parcel currently under [sic.] *Mass. Gen. Laws ch. 61*, as a charitable contribution."

For purposes of this action, however, the most important change between the prior offers and the signed contract was the clause specifying the remedies available to the seller in the event of the buyer's breach. The revised clause reads:

> If BUYER shall fail to fulfill the BUYER'S agreements herein, all deposits made hereunder by the BUYER shall be retained by the SELLER as liquidated damages and this shall constitute SELLER'S sole remedy in equity and law.

Both Kunelius and Cohousing signed this agreement sometime in October of 2002.

B. The Town Assigns Its ROFR to TPL

Within days of signing her agreement with Cohousing, **[**10]** Kunelius provided notice to the Town, and other parties required to be notified by statute, of her intent to sell all of her 50.67 acres. Spearheaded by a group known as the Friends of Red Acre ("FORA"), which included many of Kunelius's immediate neighbors on Red Acre Road, opposition to the proposed co-housing development sprouted quickly. This opposition eventually focused on alleged excess costs the Town would have to bear as the result of the co-housing development. Urging that the Town exercise its ROFR was one of the principal arrows in the opposition's quiver.

By December 2002, FORA proposed an alternative to the Cohousing's proposed development. The FORA plan provided that the Town would contribute $ 100,000 from Community Preservation Act funds and $ 300,000 from general town funds, as well as assign its ROFR to a non-profit conservation group. Additional funds would be raised by selling both homes on the property as affordable housing, and selling the horse farm operations to Eye of the Storm, a non-profit equine rescue organization. (These proposed sales contemplated relief from various zoning regulations). All of the remaining purchase price funding was to come through **[**11]** private donations.

The Trust for Public Land was identified as the non-profit conservation organization most likely to accept assignment of the Town's ROFR. TPL expressed a strong interest in accepting the assignment, but only if certain conditions were met. Those conditions included the Town's appropriating $ 400,000 to support the project, FORA and others raising the $ 22,000 in required deposits under Kunelius's contract with Cohousing, TPL determining that the project was feasible, and its governing board approving the assignment. On January 13, 2003, the Town decided to borrow and appropriate $ 305,000 from its general funds to support the Town's exercise of the ROFR. (The remaining $ 95,000 was to come from Community Preservation Act funds). But because the Town wished to exempt the borrowing from the limitations of Proposition 2 1/2, see *Mass. Gen. Laws ch. 59 § 21C*, the vote was tentative, pending confirmation in a Special Town Election. By a vote of 515 to 355, however, Stow voters declined to approve the project.

Undaunted, FORA and the Trust pushed ahead and convinced the Town to extend consideration of the ROFR to the full 120-day period specified in the statute. **[*6]** During that **[**12]** time, Craig McDonnell, the TPL project manager for this transaction, prepared a lengthy "Project Fact Sheet" to brief TPL's governing board on the project and assist the board in arriving at a decision about how to proceed. In this document, McDonnell explained that Kunelius was planning to deed most of the forest acres to the Town free of charge, but that TPL's involvement in the project would result in the conservation of three additional acres and provide the Town access to a pond on the 8.57 acres that Cohousing was planning to develop for fire suppression purposes.

As to the financing and risks of the proposal, McDonnell noted that with the failure of the appropriation, TPL would have to accept the assignment before the Town could replace the defeated $ 300,000 appropriation with additional Community Preservation Act funds, but that this risk was mitigated by the fact that he believed that TPL's exposure was limited to liquidated damages in the amount of $ 22,000, as provided in the contract between Kunelius and Cohousing. (Concomitantly, with this candid private assessment of TPL's obli-

gations and exposure with respect to this transaction, McDonnell publicly made disparaging statements **[**13]** about developers and touted TPL's commitment to complete the transaction and make Kunelius "whole.") McDonnell further noted that Kunelius was upset at the prospect of the Town assigning its ROFR to the Trust. He suggested, however, that the litigation risk was "minimal" due to the clarity of the liquidated damages clause, and he predicted that the Trust would prevail on summary judgment after minimal discovery in any suit brought by Kunelius. Eventually, TPL's governing board approved the acceptance of the assignment, but the board nonetheless withheld authority for TPL to close on the transaction.

Armed with this limited authority, McDonnell went ahead with efforts to acquire an assignment of the ROFR. Without disclosing to the Town the constraints placed on TPL, McDonnell negotiated with the Town's Board of Selectmen regarding the terms under which TPL would accept the assignment. By and large, the negotiations did not reflect significant disagreement between the Town and TPL, although TPL refused to indemnify the Town for potential damages or defense costs in the event of potential litigation. TPL did acknowledge that "the decided cases under Chapter 61 do not explicitly resolve **[**14]** all of the potential issues that arise when a municipality assigns its right of first refusal to a nonprofit conservation organization, including which terms of the underlying contract should obligate the assignee."

At a Board of Selectmen meeting on February 11, 2003, [2] days before the Town's ROFR was scheduled to lapse, the Town assigned the ROFR to the Trust on the terms described above. At the meeting, McDonnell gave a presentation describing the benefits of the transaction and urged approval of the assignment, but McDonnell did not disclose the conditions that the Trust's governing board placed on its acceptance of the assignment. By a vote of three to one, the Town's Board of Selectmen voted to assign the ROFR to the Trust, which the Trust accepted in writing the next day. In due course, Kunelius was provided with written notice **[*7]** that the Town had assigned the ROFR to the Trust, which provided notice of its acceptance.

> 2 The day before, on February 10, 2003, The Stow Community Preservation Committee, the body that administers Community Preservation Act Funds, heard a joint FORA/TPL plea to use funds to support the Trust's planned exercise of the ROFR. The Committee voted to recommend **[**15]** that the Town approve the necessary expenditures at the Town's annual meeting in May 2003.

C. The Transaction Sours

About a month later, by March 19, 2003, McDonnell was singing a different tune. On that date, McDonnell wrote in confidence to members of FORA, "I recently have spent some time thinking through this project in detail . . . and have realized that a number of key assumptions about structure and timing are unworkable." In an attached confidential memorandum, McDonnell explained that the TPL would require $ 1.154 million at closing and proposed relying on Eye of the Storm, a fledgling non-profit with little infrastructure, to raise $ 400,000 either through fundraising or a loan secured by its interest in 144 Red Acre Road before closing. In addition, McDonnell contemplated raising $ 450,000 through private philanthropy prior to closing.

FORA agreed with these observations but concluded that McDonnell's proposed fund raising timetable was overly optimistic and urged the Trust to close with borrowed funds. To that end, FORA arranged for a line of credit for the Trust.

McDonnell replied with another confidential memorandum dated March 27, after the assignment but before the Town **[**16]** provided any funds. In this memorandum, for the first time, McDonnell disclosed to FORA that "TPL's national board has given only a tentative approval to this excellent adventure we are undertaking together. . . . We have not received the go-ahead to actually purchase the property. Our board is awaiting progress on both the political and fundraising fronts. Unless we secure approval at the May town meeting *and* make substantial progress on the remaining finances, I do not believe we will get national approval for this project." [3] Although McDonnell did not foreclose the possibility of TPL's obtaining "conservation financing," he made clear that it would have to be limited to $ 600,000, the combined value of the main house and the horse farm/caretaker's house. [4]

> 3 There is no indication in the record that these limitations on TPL's authority were disclosed to Kunelius or the Town at this time.
>
> 4 In April 2003, McDonnell represented to the Massachusetts Department of Housing and Community Development that TPL had access to a six million dollar line of credit from a bank and would consider using this resource, even though internal TPL discussions suggested that TPL's governing board was unlikely **[**17]** to approve the use of financing in this project.

Despite these doubts with respect to the financing of the project, the Trust, FORA, and the Town pressed onward. The Trust and the Town applied for state aid to rehabilitate the two homes on the Kunelius property, and prepared for the Town meeting, which was to confirm

the Town's contribution of Community Preservation Act funds. At the meeting, the funds were approved, but this approval marked the high-water mark of the potential transaction.

Soon thereafter, in mid-June 2003, although contrary indications were evident even before the Trust accepted the ROFR, it became clearer that the Trust's plan of dividing the parcel in order to sell the two homes on the Kunelius property was unlikely to fare well in the zoning process. In another blow to the project, in early July 2003, the State Department of Housing and Community Development denied the grant application to renovate the two houses on the property. The combination of these body blows forced the Trust to ramp up planning for abandoning the transaction, and to that end, McDonnell **[*8]** wrote to TPL colleagues "I think the most important thing about the 'exit strategy' is not to be seen as **[**18]** TPL pulling the plug, but for a consensus to emerge from all that the project has now got some fatal flaws . . . ."

The prediction of fatal flaws proved prescient, though some of them were of TPL's own making. Peter Christiansen, a leader of FORA, wrote that McDonnell's conduct led him to "feel raped," and that McDonnell had told him that TPL would neither engage in any fundraising nor supply any fundraising prospects. Christiansen further claimed that the Trust solicited leads that FORA members had identified for funding of other projects. This alleged poaching, combined with TPL's threats to pull out of the purchase altogether, made it difficult for FORA members to harness their relationships with potential donors. Once it appeared likely that TPL would withdraw from the transaction, that appearance would bode ill for FORA-members' relationships with repeat players in the conservation world.

By July 31, 2003, the Trust informed FORA that it was "not particularly sanguine" that the transaction could close. Indeed, TPL unequivocally stated that only price concessions from Kunelius, who was forced to deal with TPL by virtue of the ROFR, could save the transaction. [5] TPL then requested **[**19]** $ 350,000 in price concessions from Kunelius, which she refused. Although TPL and FORA continued to trade arguments about the feasibility of financing, the project was effectively dead. TPL unilaterally withdrew its application for a zoning variance on September 25, 2003, and did not close on September 26, 2003.

> 5 At this time, TPL received discouraging news on the zoning front: outside counsel advised TPL that approval of the variances was extremely unlikely.

D. Proceedings Below

Although further discussions occurred between TPL and Kunelius (sometimes with the facilitation of Town officials), resolution proved elusive. Kunelius filed the present suit against the Town, the Trust, an alleged partnership between the Town and Trust, and McDonnell in his individual capacity. [6]

> 6 On appeal, Kunelius has not advanced any developed argument in support of her claims against McDonnell in his personal capacity, and therefore those arguments have been waived. *Pomales v. Celulares Telefonica, Inc., 447 F.3d 79, 85 n.4 (1st Cir. 2006)*

After preliminary skirmishing, including the dismissal of one count not at issue here, and after the conclusion of discovery, the district court granted summary judgment **[**20]** to all defendants. [7] This appeal timely followed.

> 7 We note that during the pendency of discovery, all defendants jointly filed a motion to certify a central question of this suit to the Massachusetts Supreme Judicial Court. The defendants argued that "there is no controlling precedent in the decisions of the SJC or the Massachusetts Appeals Court" regarding whether a liquidated damages clause negotiated between the owner of Chapter 61 lands and a willing buyer should, by operation of law, become a provision that is applicable to a municipality or non-profit conservation organization exercising an ROFR. This motion was eventually withdrawn, subject to renewal.

II. Discussion

We review summary judgment rulings de novo, and the presence of cross-motions for summary judgment does not alter or dilute this standard. *Desrosiers v. Hartford Life and Accident Ins. Co., 515 F.3d 87, 92 (1st Cir. 2008)*. We will affirm entry of summary judgment if the record -- viewed in the light most favorable to the nonmoving party, including all reasonable inferences drawn in favor of the nonmoving **[*9]** party -- discloses no genuine issue of material fact, and the moving party is entitled to judgment as a matter of **[**21]** law. *Arroyo-Audifred v. Verizon Wireless, Inc., 527 F.3d 215, 218 (1st Cir. 2008).*

We apply the substantive law of the forum state, here Massachusetts, to claims invoking the court's diversity jurisdiction, *see Citibank Global Mkts., Inc. v. Rodriguez-Santana, 573 F.3d 17, 23 (1st Cir. 2009)* (citing *Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78, 58 S. Ct. 817, 82 L. Ed. 1188 (1938))*, but we of course apply federal law to the federal claims. Where no authoritative

decision from the state court of last resort resolves an issue of state substantive law, we must predict, as best as we can, that court's resolution of the issue before us. *Essex Ins. Co., 562 F.3d at 404* (citation omitted). Although we have no single Polaris to guide our prediction of the state court's resolution of such questions, we rely on analogous cases decided in the forum state, persuasive reasoning in cases from other states, and other secondary sources, such as Restatements and treatises. *Id*. (citing *Trans-Spec Truck Serv. v. Caterpillar Inc., 524 F.3d 315, 323 (1st Cir.), cert. denied, 129 S. Ct. 500, 172 L. Ed. 2d 359 (2008))*.

We will first discuss the appellant's claims that the original contract's liquidated damages provision does not apply to the Town or to TPL, **[**22]** and that the liquidated damages clause is in any event invalid. After that, we will address the Chapter 93A claim, the claim based on the covenant of good faith and fair dealing. Finally, we will briefly discuss Kunelius's remaining claims.

A. Applicability of the Liquidated Damages Clause to the Town and Trust

We begin with the question of whether the liquidated damages clause in Kunelius's contract with Cohousing is a term that inures to the benefit of the Trust and the Town. The district court noted that all parties agree that TPL breached the purchase and sale contract, but they disagree as to the proper remedy. Kunelius sought specific performance or full benefit-of-the-bargain damages, while the Trust claimed that Kunelius's remedy for breach was limited to the $ 19,000 in deposits and monthly payments that it had already paid and Kunelius has retained.

The district court observed, as the parties had, that it is unclear whether Massachusetts courts would find that an exercise of an ROFR requires the purchaser to "literally meet every last detail of the prior offer or only the essential terms, such as, for instance, the identity of the subject property, the price, the time for performance **[**23]** and the like, but not subsidiary agreements, such as, for instance, mortgage contingencies, rights to inspect . . . or pertinent to this controversy, provisions regarding remedies for breach." *Kunelius v. Town of Stow, No. 05-11697-GAO, 2008 U.S. Dist. LEXIS 72048, 2008 WL 4372752 at *2 (D. Mass. Sept. 23, 2008)* (footnote omitted). The district court determined that it did not need to answer this question because the parties agreed that the purchase and sale agreement "set[] forth the terms of their contract." As evidence of this agreement on the part of plaintiff, the district court cited paragraph 58 of her complaint which states, "The P & S is a valid and enforceable contract between Kunelius and Stow and TPL." *Id*.

Unlike the district court, we are not persuaded that Kunelius has admitted that the liquidated damages provision applied to the Town and the Trust. Paragraph 55 of her complaint specifically states that "The obligations of Stow and TPL under *Mass. Gen. Laws ch. 61* could not be avoided by relying on the liquidated damage[s] **[*10]** clause . . . since such liquidated damage[s] clause . . . was applicable *only* to Cohousing since it sought certain permits and approvals in connection with its [*Chapter] 40B* . . **[**24]** . Development." (emphasis added). In light of this paragraph, we think that the complaint is best read as asserting that the Town and the Trust's joint exercise of the ROFR, by operation of law, obliged them to purchase the property identified in the contract at the price stated.

The district court is, of course, correct that the Trust has consistently taken the position that it assumed the role of Cohousing in the contract and that the liquidated damages provision inured to its benefit. The plaintiff, however, claims that through her then-counsel, she communicated to the Town attorney her belief that the liquidated damages clause did not apply to the Town and the Trust. Moreover, the record also reveals that the Trust, in a communication to the Town, acknowledged that the question of which provisions of the P & S apply to the exercisor or assignee of an ROFR under Chapter 61 remains an open question. Ultimately, therefore, we are satisfied that the plaintiff adequately preserved this question below, and has properly raised it on appeal.

Ordinarily, in Massachusetts "contract interpretation is for the court, unless disputed issues of fact bear upon the interpretation of ambiguous language." **[**25]** *Liberty Mut. Ins. Co. v. Greenwich Ins. Co., 417 F.3d 193, 197 (1st Cir. 2005)* (citing *Fishman v. LaSalle Nat'l Bank, 247 F.3d 300, 303, 6 Fed. Appx. 52 (1st Cir. 2001))*. We have explained that "judges construe contracts, if only the words need be considered, and the jury does the job under instructions if evidentiary issues have to be resolved." *Fishman, 237 F.3d at 303* (citations omitted). Here, there are no evidentiary questions to resolve; rather, we must decide, as a matter of law, whether the liquidated damages provision, by operation of law, was made applicable to the Town and the Trust.

For the reasons that follow, we believe that the Supreme Judicial Court ("SJC") would hold that the liquidated damages provision inures to the benefit of the Trust and the Town. Although there is scant case law interpreting *Mass. Gen. Laws ch. 61 c 8*, we may look to case law decided under the nearly identically-worded ROFR provision of agricultural and horticultural lands, *Mass. Gen. Laws ch. 61A c 14. See Comm. v. Smith, 431 Mass. 417, 728 N.E.2d 272, 276 (Mass. 2000)* (noting that it is most appropriate to use construction of one statute to inform construction of another when the two stat-

utes relate to the same class of things **[**26]** or share a similar purpose) (citation omitted).

At the time that Kunelius entered into the transaction with Cohousing, the SJC had not decided any cases under either statute, but that court has since decided at least two cases under *ch. 61A c 14*. In *Town of Sudbury v. Scott*, a divided SJC, after reviewing the various features of Chapter 61A, including the conveyance tax, the rollback tax, and the ROFR, held that in order for parties to the sale of lands certified under Chapter 61A to avoid a municipality's ROFR, the putative purchaser must not have the intent to convert the land to non-agricultural or non-horticultural purposes at the time of purchase. *787 N.E.2d at 544*. The court therefore vacated summary judgment in favor of the purchaser and remanded the case for a determination of the purchaser's intent at the time of the purchase. *Id. at 546-47*. In *Town of Franklin v. Wyllie*, a unanimous SJC held that a developer's offer to purchase undeveloped land subject to Chapter 61A was bona fide, even though the final purchase price was contingent on the number of lots ultimately approved for development. *443 Mass. 187, 819 N.E.2d* **[*11]** *943, 948 (Mass. 2005)*. The court went on to conclude that since the offer **[**27]** was bona fide, had the Town of Franklin chosen to exercise its ROFR it would have been obliged to determine how many lots would be approved for development to fix the purchase price, in order to purchase the property "on substantially the same terms and conditions" as those struck between the non-municipal buyer and the seller. *Id. at 950* (citing *Stone v. W.E. Aubuchon Co., 29 Mass. App. Ct. 523, 562 N.E.2d 852 (Mass. App. Ct. 1990))*. [8]

> 8 The Massachusetts legislature has since abrogated the rule in *Wyllie*, and *Mass. Gen. Laws ch. 61A § 14* and *C. 61 § 8* now require that in order to be "bona fide," an offer must not be "dependent on potential changes to current zoning or conditions or contingencies relating to the potential for or the potential extent of subdivision of the property for residential use or the potential for, or the potential extent of development of the property for industrial or commercial use, made by a party unaffiliated with the landowner for fixed consideration payable upon delivery of the deed." St. 2006 C. 394 cc 18, 31.
>
> We apply the law as it was before the legislature amended it, effective March 22, 2007. *See Fleet Nat'l Bank v. Comm'r of Revenue, 448 Mass. 441, 862 N.E.2d 22, 28-29 (Mass. 2007)* (noting **[**28]** that retroactive application of statutes adjusting substantive rights, as opposed to remedies, is disfavored and thus the court employs a presumption against retroactive application that it uses to resolve uncertain cases)(citing *Austin v. Boston Univ. Hosp., 372 Mass. 654, 363 N.E.2d 515 (Mass. 1977))*; *see also City of Newburyport v. Woodman, No. 309692, 2007 Mass. LCR LEXIS 117, 2007 WL 3256964, at *3-4 (Mass. Land Ct. 2007)* (noting that General Court enacted C. 394 to overturn the decision in *Wyllie*, but that this enactment was not to be applied retroactively).

Thus, neither *Scott* nor *Wyllie* addresses the precise question at issue here. Nevertheless, the appellees make much of the fact that in both decisions the SJC suggested more broadly that the statutory ROFR conferred on a municipality under *C. 61A § 14* and *C. 61 § 8* "ripen[s] into an option to purchase according to the terms of the offer." *Wyllie, 819 N.E.2d at 949* (citing *Greenfield Country Estates Tenants Ass'n v. Deep, 423 Mass. 81, 666 N.E.2d 988, 993 n.14 (Mass. 1989))*; *see also Wyllie, 819 N.E.2d at 949* ("There is no indication, however, that the Legislature intended that a municipality's 'first refusal option' to purchase would encompass the right to purchase such land on **[**29]** *different terms and conditions* than [those] set forth in the 'bona fide offer.'" (emphasis added) (citing *Scott, 787 N.E.2d at 544 n. 14*))). From this language, the appellees argue that they should be obliged to take on no more risk or offer no more certainty that their transaction would close than Cohousing offered in its bona fide offer.

The plaintiff's position is that she was able to offer a streamlined liquidated damages clause to Cohousing because she had established a considerable amount of mutual trust and understanding with ScottHansen, and because she felt comfortable that Cohousing's development was properly financed and Chapter 40B approvals would be forthcoming. Consequently, the argument goes, it would be grossly unfair to give the Town and the Trust these same concessions, particularly in light of the fact that the Trust's ability to close was tenuous from the beginning and its statements to the contrary were disingenuous. Embedded in this argument is the policy concern that granting municipalities and nonprofits added leverage to disrupt transactions involving certified land would tilt the statutory structure too far toward the municipality and would therefore reduce **[**30]** the number of landowners willing to participate in the scheme.

These arguments are not without some appeal, although the most obvious response is that Kunelius understood herself to be bargaining in the shadow of the Town's ROFR. She therefore also should **[*12]** have understood the desirability of accounting for the fact that any deal she struck would be available to the Town, or to any non-profit conservation organization to which the Town might choose to assign the lease. She may well have been able to negotiate terms that would have better protected her in the event that less reliable counterpar-

ties, such as the Town and the Trust, would become parties to this transaction. Whether or not such terms ultimately would have protected her, we must decide the case on the facts as they are. Despite her knowledge that the ROFR lurked in the weeds, Kunelius in fact did not include any language in the contract to limit her risk in the event of the exercise of the known ROFR.

In addition to Kunelius's control over the drafting of her contract, the cases at common law (which applies to statutory ROFRs, *see Scott, 787 N.E.2d at 543 n.12*), cut against her legal position. Most common law courts do not **[**31]** appear to have focused carefully on this question, and thus have not addressed the specific concerns that the appellant identifies, but most have generally stated that once a seller receives a bona fide offer, the ROFR ripens into an option to purchase the property "at the price *and otherwise on the terms stated in the offer." T.W. Nickerson, Inc. v. Fleet Nat. Bank, 73 Mass. App. Ct. 434, 898 N.E.2d 868, 878 (Mass. App. Ct. 2009)* (quoting *Frostar Corp. v. Malloy, 63 Mass. App. Ct. 96, 823 N.E.2d 417 (Mass. App. Ct. 2005)* (emphasis added)); *see also Gleason v. Norwest Mortgage, Inc., 243 F.3d 130, 139 n. 5 (3d Cir. 2001)* (applying Minnesota law) (citing *Allison v. Agribank FCB, 949 S.W.2d 182, 186 (Mo. Ct. App. 1997)*); *Henry Simons Lumber Co v. Simons, 232 Minn. 187, 44 N.W.2d 726, 727 (Minn. 1950)*. As a result, the holder of an ROFR must have knowledge of the terms and conditions of the entire offer so that the holder may decide if she wishes to meet the offer. *T.W. Nickerson, 898 N.E.2d at 878* (citing *Gyurkey v. Babler, 103 Idaho 663, 651 P.2d 928 (Idaho 1982)*); *see also Uno Rest., Inc. v. Boston Kenmore Realty Corp., 441 Mass. 376, 805 N.E.2d 957, 962-63 (Mass. 2004)*; *Miller v. LeSea Broadcasting, Inc., 87 F.3d 224, (7th Cir. 1996)* (applying Wisconsin law) (noting that **[**32]** requirement that holder of ROFR exactly match a bona fide offer is in fact a protection for the grantor of the ROFR). Requiring that the holder of an ROFR have access to such terms would serve little purpose if the holder of the ROFR were not required to meet them.

Thus, the decisions interpreting the statutory ROFR at issue in this case (or more precisely, its twin), as well as decisions dealing with common law rights of first refusal more generally, all suggest that the holder of an ROFR must meet *all* of the terms and conditions of the offer, including subsidiary terms such as the liquidated damages clause at issue here. Many courts do, however, make an exception for immaterial terms with which the holder of an ROFR need not comply, [9] *e.g., W. Tex. Transmission, L.P. v. Enron Corp., 907 F.2d 1554, 1556 (5th Cir. 1990)*; *John D. Stump & Assocs., Inc. v. Cunningham Mem'l Park Inc., 187 W. Va. 438, 419 S.E.2d 699, 705 (W. Va. 1992)*; *Brownies Creek Collieries, Inc. v. Asher Coal Mining Co., 417 S.W.2d 249, 252 (Ky. 1967)*, and even those that do not make a materiality exception generally make three exceptions to the rule of exact matching. First, the grantor can waive exact matching by agreeing that certain **[**33]** terms should not apply to the holder of an ROFR. *Miller, 87* **[*13]** *F.3d at 227*; *see also State Dept. of Transp. v. Providence and Worcester R.R. Co., 674 A.2d 1239, 1243-44 (R.I. 1996)* (state, acting pursuant to a statutory ROFR, did not void the ROFR by pointing out that seller was not required to undertake onerous action that would have been required had the bona fide offer been accepted). Second, it is of course clear that the names of the parties will not exactly match the proper names contained in the bona fide offer when the holder of an ROFR exercises it. *Miller, 87 F.3d at 227*; *Providence and Worcester R.R. Co., 674 A.2d at 1243-44* (noting that name of buyer should be changed to "the state"). Finally, courts will relax the rule of perfect matching in the presence of bad faith. *Wyllie, 819 N.E.2d at 949 n. 8*; *Miller, 87 F.3d at 228* (citing *Or. RSA No.6, Inc. v. Castle Rock Cellular of Or., L.P., 76 F.3d 1003, 1007 (9th Cir. 1996))*. Aside from these exceptions, however, most courts hold that the terms of the bona fide offer become binding on the holder of an ROFR. This authority persuades us that the SJC likely would adopt a similar rule.

> 9 Alternatively, these courts permit the exercise **[**34]** of an ROFR even if there are insubstantial variations between the bona fide offer and the holder of the ROFR's offer, which is essentially the same thing. *See Miller, 87 F.3d at 226*.

In an argument faintly reminiscent of the third exception noted above, the appellant asserts that the Trust acted in bad faith such that the Trust should not be entitled to rely on the liquidated damages provision. As examples of that bad faith, the appellant points to the Trust's unwillingness to allow her to make a charitable donation of the 42.1 acres, its refusal to proceed under *Chapter 40B*, and its attempt to lower the purchase price. While declining to proceed with a Chapter 40B application was entirely proper, the Trust's other actions may suggest the possibility of a violation of *Chapter 93A*, a breach of the implied covenant of good faith and fair dealing, or the Trust's anticipatory breach of its contract with the appellant (the first two of which we address later, and the last being a cause of action that has not found much hospitality under Massachusetts law, *see generally Daniels v. Newton, 114 Mass. 530 (1874))*. We fail to see, however, in what way these action support an argument for varying **[**35]** the terms under which the Trust could accept the contract. Accordingly, this argument does not disturb our conclusion that the liquidated damages provision applies to the Trust and the Town.

B. Validity of the Liquidated Damages Provision

Having determined that the liquidated damages provision of Kunelius's contract with Cohousing formed a part of her relationship with the Town and the Trust, we turn to her argument that the provision is nevertheless invalid. In Massachusetts, whether a liquidated damages clause is valid and enforceable is a question of law, and therefore we review the issue de novo. *NPS LLC v. Minihane, 451 Mass. 417, 886 N.E.2d 670, 673 & n.5 (Mass. 2008)*. Although it was once unsettled, it is now clear that in Massachusetts, the party resisting the enforcement of the liquidated damages provision bears the burden of persuasion. *Id*. (citing *TAL Fin. Corp. v. CSC Consulting, Inc., 446 Mass. 422, 844 N.E.2d 1085, 1092 (Mass. 2006)*; *see also Honey Dew Assocs., Inc. v. M&K Food Corp., 241 F.3d 23, 27 (1st Cir. 2001)*.

Massachusetts courts have long accepted contracts with liquidated damages provisions, particularly those involved in the purchase and sale of real estate. *Kelly v. Marx, 428 Mass. 877, 705 N.E.2d 1114, 1116 (Mass. 1999)*. **[**36]** Generally, a contract containing a provision awarding liquidated damages to the seller of real property in the event of a buyer's breach will be enforced so long as "at the time the agreement was made, potential damages were difficult to determine and the [liquidated damages **[*14]** provision] was a reasonable forecast of damages expected to occur." *Perroncello v. Donahue, 448 Mass. 199, 859 N.E.2d 827, 831 (Mass. 2007)* (quoting *Kelly, 705 N.E.2d at 1115*). Under this rubric, Massachusetts courts have specifically eschewed the "second look" approach and evaluate both of these factors only at the time of contract formation. *Kelly, 705 N.E.2d at 1116*. Nevertheless, liquidated damages clauses will not be enforced if they provide for an amount that is "'grossly disproportionate to a reasonable estimate of actual damages' made at the time of contract formation." *Id*. (quoting *Lynch v. Andrew, 20 Mass. App. Ct. 623, 481 N.E.2d 1383, 1386 (Mass. App. Ct. 1985)*.

Interestingly, most cases challenging liquidated damages provisions do so on the theory that overly large liquidated damage awards impermissibly function as a penalty. [10] *See, e.g., NPS LLC, 886 N.E.2d at 673*. In this case, the appellant complains that the liquidated damages provision **[**37]** was inadequate because it vastly *underestimated* her damages and therefore functions as a penalty against her. [11]

> 10 There are good reasons to wonder whether worrying about whether liquidated damages take on a penal aspect is wise as a matter of contract law or economic policy. *See generally*, Charles J. Goetz and Robert E. Scott, *Liquidated Damages, Penalties, and the Just Compensation Principle*, 77 Colum. L. Rev. 554, 556 (1977) (arguing that uncritical application of the penalty doctrine "frequently induces a costly reexamination of the initial allocation of risks and may also deny the nonbreaching party either adequate compensation for the harm caused by the breach or the opportunity to insure more optimally against such harm").
>
> 11 In this regard, we note that the record suggests that the current, less favorable liquidated damages provision was not included among Cohousing's original offers but was made a part of the agreement that Kunelius's attorney ultimately drafted. While this fact is not dispositive of her claim, it is clear that the appellant was not stuck with this clause as the result of an adhesion contract, and the record further suggests that the appellant did not arrive **[**38]** at this particular clause due to a substantial inequality in bargaining power.

This theory is relatively novel, and the weight of authority is against it. *E.g., Margaret H. Wayne Trust v. Lipsky, 123 Idaho 253, 846 P.2d 904, 910 (Idaho 1993)*; *Mahoney v. Tingley, 85 Wn.2d 95, 529 P.2d 1068, 1070-71 (Wash. 1975)* ("Except where extraordinary circumstances are involved such as fraud or serious overreaching by the purchaser, a seller who chooses to utilize the device of liquidated damages in an earnest money agreement . . . cannot avoid the effect of that agreement."); *see also Nasco Inc. v. Pub. Storage, Inc., No. 92-CV-12731-RCL, 1995 U.S. Dist. LEXIS 7806, 1995 WL 337072 (D. Mass. May 20, 1995)*. Nevertheless, it appears that in *Kelly*, and contract formation. *See Kelly, 705 N.E.2d at 1116* (liquidated damages provision will not be enforced if it provides for an amount "grossly disproportionate to a reasonable damages made at the time of contract formation"); *Howard v. Wee, 61 Mass. App. Ct. 912, 811 N.E.2d 1050, 1052 (Mass. App. Ct. 2004)* (noting that $ 1,000 in liquidated damages was not "unreasonably low," but not questioning that unreasonably low liquidated damages can be set aside under *Kelly*).

We must therefore determine whether the liquidated damages provision **[**39]** at issue in this case was, as a matter of law, grossly disproportionate to a reasonable estimate of the damages Kunelius would incur in the event that the sale of her $ 1.16 million property was not successful. [12] **[*15]** Massachusetts courts have held that an earnest money deposit of 5% off the purchase price in a contract for the purchase and sale of real estate is reasonable as a matter law. *Kelly, 705 N.E.2d at 1117*; *see also NRT New England, Inc. v. Moncure, 24 Mass. L. Rptr. 599, 2008 WL 4739794, at *5 (Mass. Super. 2008)*; *Old Oxford Realty Partners LLC v. Shea, No. 305754, 2005 Mass. LCR LEXIS 67, 2005 WL 1323110, at *5 (Mass Land Ct. 2005)*. Although we have found one reported decision in which a Massachusetts court blessed a lower amount of liquidated damages, it was in a factual circumstance that differs materially from this case. In *Howard*, the court of appeals found that liquidated dam-

ages in the amount of $ 1000 was not "unreasonably low" considering that this amount was to cover damages incurred over a period of about eleven days. *811 N.E.2d at 1052.*

> 12 In order to uphold the liquidated damages provision, we also need to conclude that Kunelius's damages were difficult to measure at the time of contract formation. **[**40]** In light of the *Kelly* court's observation that such damages are often hard to value in transactions involving the purchase and sale of real estate, this is an easy threshold to clear.

Here, Kunelius was to receive $ 19,000 in liquidated damages. [13] This amount is approximately 2% of the total purchase price of $ 1.16 million, obviously less than the 5% that Massachusetts courts have upheld. But Kunelius failed to produce evidence or argue in the district court that the 2% liquidated damages clause was "grossly disproportionate" to a reasonable estimate of her actual damages at the time of contract formation, and therefore, this argument has been waived. *CoxCom, Inc., 536 F.3d at 110 n.11*. As a result, like the district court we too must conclude that the liquidated damages provision is enforceable in this case.

> 13 The Town and the Trust had six months to close. Closing had to occur on or before September 26, 2003 because the contract term granting an extension of the closing date was contingent on the "Chap. 40B approval process . . . proceeding forward." Although it could be argued that the pertinent time of contract formation for purposes of evaluating the liquidated damages clause **[**41]** was the time Kunelius negotiated the bona fide offer, evaluating the propriety of the damages clause at the time the Trust exercised its assignment is not a "second look" in the classic sense, because it was at that point that the Trust accepted the contract, and an agreement was formed between Kunelius and the Trust. *See T.W. Nickerson, Inc., 898 N.E.2d at 878*. Rather, a second look occurs when a court evaluates the propriety of a damages provision *at the time of breach. See Kelly, 705 N.E.2d at 1116* (explaining that under a so-called "second look" analysis, a court looks to the actual damages resulting from the breach) (emphasis added).

C. The Chapter 93A Claim

The appellant also presses a claim under the business-to-business provisions of the consumer protection statute, *Mass. Gen. Laws ch. 93A, § 11*. It is helpful here to review briefly the structure of the Massachusetts consumer protection statute. *Section 2* of this statute prohibits unfair and deceptive acts and practices, *see Mass. Gen. Laws ch. 93A § 2(a)*, and *sections 9* and *11* provide consumers and "businessmen" with private causes of action to enforce this prohibition. *Id. § 9, 11*; *see also Lantner v. Carson, 374 Mass. 606, 373 N.E.2d 973, 975-76 (Mass. 1978)*. **[**42]** [14]

> 14 We note that appellant's complaint did not specify whether she was proceeding under the consumer or business protection provisions of Chapter 93A. At summary judgment, counsel for the appellant specified for the first time that she was proceeding under the business-to-business provisions. We note that had the plaintiff proceeded on the consumer prong of Chapter 93A, summary judgment for the defendants would have been appropriate because the plaintiff did not serve the defendants with a demand letter as required by that section. *See Mass. Gen. Laws ch. 93A § 9.*

[*16] In order for a defendant to be liable under the statute for damages from unfair or deceptive practices, the transaction at issue must have occurred in the conduct of "any trade or commerce," *see Mass. Gen. Laws ch. 93A § 9, 11*, which the statute defines as including "the advertising, [or] offering for sale . . . of [selling] any property . . . real, personal, or mixed." *Id. § 1(b)*. Recognizing the potentially broad ambit of this statute, the SJC, relying on the statute's creation of a separate cause of action for "businessmen" who are harmed by unfair and deceptive practices, has made clear that "the proscription in [*Mass. Gen. Laws ch. 93A § 2*] **[**43]** of 'unfair or deceptive acts or practices in the conduct of any trade or commerce' must be read to apply to those acts or practices which are perpetrated in a business context." *Lantner, 373 N.E.2d at 976.*

In interpreting *section 11*, Massachusetts courts have looked not only at whether defendants were sufficiently involved in trade or commerce to be held liable under the statute, but also at whether plaintiffs were engaged in trade or commerce. This distinction is important because Massachusetts courts have understood that the private rights of action found in *sections 9* and *11* are mutually exclusive. *Frullo v. Landenberger, 61 Mass. App. Ct. 814, 814 N.E.2d 1105, 1112 (Mass. App. Ct. 2004)* (citing *Divenuti v. Reardon, 37 Mass. App. Ct. 73, 637 N.E.2d 234, 239 (Mass. App. Ct. 1994)*); *see also Milliken & Co. v. Duro Textiles, LLC, 451 Mass. 547, 887 N.E.2d 244, 259 (Mass. 2008)* (noting that ch. 93A *§ 11* is only available after satisfaction of dual threshold inquiries of whether a transaction was commercial in nature, and whether the parties to the transaction were engaged in trade or commerce "such that they were acting in a business context") (citing *Linkage Corp. v. Trs. of Boston Univ., 425 Mass. 1, 679 N.E.2d 191, 206-07*

(Mass. 1997))). Thus, in order **[**44]** for Kunelius to move past the threshold on her Chapter 93A claim, she must show (1) that the sale of the entire parcel, including her home and a horse farm, was a commercial transaction, and (2) that both she and the Trust were engaged in trade or commerce, such that this transaction occurred in a business context.

It is true that the Massachusetts courts have held that Chapter 93A does not "reach strictly private transactions such as the isolated sale of a private home." *Begelfer v. Najarian, 381 Mass. 177, 409 N.E.2d 167, 175 (Mass. 1980)*. In that case, the court noted that whether an isolated transaction takes place in a "business context" must be determined from the circumstances in each case, such as the frequency of similar transactions, the motivation behind the transaction, and the role of the participant in the transaction. *Id. at 176*. The SJC has made clear, however, that a commercial transaction need not "take place only in the ordinary course of a person's business or occupation before its participants may be subject to liability." *Id*.

Considering these factors, the record can be read to support, at least in the summary judgment posture of this case, an inference that the sale of the property **[**45]** was a commercial transaction. Whether a party is engaged in trade or commerce is a question of fact, *see Feeney v. Dell Inc., 454 Mass. 192, 908 N.E.2d 753, 770 (Mass. 2009)*, and thus our review on summary judgment is de novo, with all inferences drawn in favor of the nonmovant (here, the plaintiff). The record includes testimony from the appellant's real estate agent that he met Kunelius as a result of the need to move his horses to her farm. He further testified that as of May 24, 2007, the date of his deposition, his horse remained boarded on the appellant's property. The agent testified that Kunelius agreed to permit Cohousing (and eventually the **[*17]** Trust) to substitute a $ 50,000 deposit for a $ 10,000 deposit plus monthly payments of $ 1,500 to replace income she feared she would lose because "her boarding tenants would begin to leave" once they learned that her horse farm was for sale. [15] This **[**46]** evidence, combined with Kunelius's own affidavit stating that she rented stalls for horses on her property, harvested firewood, and was the barn manager, could permit a reasonable factfinder to conclude that Kunelius was not merely selling her home, but her business and the principal source of her livelihood.

> 15 The agent testified that he paid the appellant about $ 250 per month to board his horse at her farm. Thus, the record supports the inference that appellant likely received payment for boarding five horses at her farm at the time she entered the contract.

Massachusetts courts have held that the sale of a business or substantially all of the assets of a business can be a commercial transaction subject to the proscriptions of Chapter 93A. *Rex Lumber Co. v. Acton Block Co., Inc., 29 Mass. App. Ct. 510, 562 N.E.2d 845, 850 (Mass. App. Ct. 1990)*. In *Rex Lumber*, the defendant, Acton Block Co., proposed to sell the land and building on which its former business, which had been discontinued for two years, had once operated, in order to fund the retirement of the defendant's owner. *Id. at 846*. The appeals court nonetheless held that the transaction was a commercial one made in a business context, under *Lantner* **[**47]** and *Begelfer*, despite the fact that it was not made in the ordinary course of business. *Rex Lumber, 562 N.E.2d at 850*. Thus, while it is a close question, we believe that at this summary judgment stage it is possible to conclude that the sale of appellant's horse farm and other property, from which she derived significant income, was a commercial transaction. Similarly, there is enough evidence in the record to support the conclusion that Kunelius was engaged in trade or business with respect to the transaction in which she disposed of all of the assets that she harnessed to produce her income, and fund her retirement, if *Rex Lumber* is good law. Therefore, the district court was on shaky footing in determining that Kunelius was not engaged in trade or commerce generally or with respect to this particular transaction.

Relying on our authority to affirm the decision of the district court on any basis made manifest in the record, *States Res. Corp. v. The Architectural Team, Inc., 433 F.3d 73, 80 (1st Cir. 2005)* (citing *Uncle Henry's, Inc. v. Plaut Consulting Co., 399 F.3d 33, 41 (1st Cir. 2005))*, the Trust urges that summary judgment was appropriate because the Trust was not engaged in **[**48]** trade or commerce, based on its status as a nonprofit corporation. [16] We agree. In Massachusetts, a defendant's nonprofit status is not dispositive of whether it can be liable under Chapter 93A. *Compare Linkage Corp. v. Trs. of Boston Univ., 425 Mass. 1, 679 N.E.2d 191, 207 n.34 (Mass. 1997)* (noting that Massachusetts courts have held nonprofit corporations liable **[*18]** under Chapter 93A) (citing *Miller v. Risk Mgmt. Found. of the Harvard Med. Insts., Inc., 632 N.E.2d 841, 36 Mass. App. Ct. 411 (Mass. App. Ct. 1994))*, *with Poznik v. Mass. Med. Prof'l Ins. Ass'n., 417 Mass. 48, 628 N.E.2d 1, 3-4 (Mass. 1994)* (holding that MMPIA was not engaged in trade or commerce because of its character as a "statutorily mandated, nonprofit association" that was "motivated by legislative mandate not business or personal reasons" (citing *Barrett v. Mass. Insurers Insolvency Fund, 412 Mass. 774, 592 N.E.2d 1317, 1319 (Mass. 1992))), and All Seasons Servs., Inc. v. Comm'r of Health and Hosps. of Boston, 416 Mass. 269, 620 N.E.2d 778,779-80 (Mass. 1993)* (finding that hospital operated by Boston Board of Health and Hospitals, a municipal entity, was not en-

gaged in trade or commerce when it sought bids for operation of vending machines and canteen facility, as this operation was incidental **[**49]** to its charitable mission of providing medical services).

> 16 The district court dismissed the Chapter 93A claim against the Town because the Town assigned the ROFR to the Trust and never became a party to the appellant's contract with the Trust. *Kunelius, 2008 U.S. Dist. LEXIS 72048, 2008 WL 4372752 at *4 n.7*. The appellant has not challenged this ruling on appeal and it is therefore waived. *Stamp v. Metro. Life Ins. Co., 531 F.3d 84, 88 (1st Cir. 2008)*. The district court, however, did not have occasion to determine whether a partnership between the Town and the Trust existed because it found that any such partnership was entitled to summary judgment for the same reasons that the Trust was entitled to summary judgment. *Kunelius, 2008 U.S. Dist. LEXIS 72048, 2008 WL 4372752 at *1 n.1, *5*. As we, like the district court, conclude that the Trust was entitled to summary judgment on this count, we need not decide whether any such partnership existed because it too would be entitled to summary judgment.

Determining whether a nonprofit defendant is beyond the reach of Chapter 93A is a "fact-specific . . . inquiry," but a nonprofit defendant will not be considered engaged in trade or commerce when it "undertakes activities in furtherance of its core **[**50]** mission." *Linkage Corp., 679 N.E.2d at 209*. Nevertheless, when "an institution's business motivations, in combination with the nature of the transaction and the activities of the parties, establish a 'business context' as contemplated in [*Begelfer v. Najarian, 381 Mass. 177, 409 N.E.2d 167 (Mass. 1980)]*, G.L. c. 93A will apply because the institution has inserted itself into the marketplace in a way that makes it only proper that it be subject to rules of ethical behavior and fair play." *Id*.

In view of its conclusion that Kunelius was not engaged in trade or commerce, the district court did not evaluate whether the Trust was so engaged. In our view, the record viewed in the light most favorable to Kunelius, nonetheless requires the conclusion that TPL, undisputably a not for profit organization, was acting in pursuit of its core nonprofit charitable mission of preserving and conserving land. The fact that it planned to purchase Kunelius's property, renovate both houses, and resell one or possibly both of them on the open market was merely a means to an end, and not intended to turn a profit -- like a hospital providing limited commissary services -- and therefore not actionable under Chapter 93A. *See* **[**51]** *All Seasons Servs., Inc., 620 N.E.2d at 780*. In that vein, we note that even in its commercial transactions, the Trust planned to promote its core charitable mission of land conservation by including conservation covenants that ran with the parcels it sold on the open market. Thus, while it may be true that the record supports an inference that the Trust acted sharply in its dealings with Kunelius, the SJC has nonetheless made clear that where a nonprofit defendant is acting in furtherance of its core mission, Chapter 93A is not designed to reach such conduct. Accordingly, summary judgment as to this count was properly granted to the Trust, the Town, and a partnership between the Town and Trust, if any such partnership existed.

D. Covenant of Good Faith and Fair Dealing

The district court found that the plaintiff did not plead a violation of the covenant of good faith and fair dealing in her complaint, but instead raised it for the first time in connection with cross motions for summary judgment. *Kunelius, 2008 U.S. Dist. LEXIS 72048, 2008 WL 4372752 at *1 n.2*. The appellant argues that her complaint sets forth sufficient facts to state a claim for breach of the covenant and that the summary judgment record permits **[**52]** the inference that the covenant **[*19]** was breached; therefore, she should be permitted to pursue this claim. In support of this argument, Kunelius cites a number of Massachusetts cases explaining Massachusetts state pleading standards, but as we are in federal court, federal pleading standards apply. Jerry Smith and Jeffrey Parness, 2 *Moore's Fed. Practice* § 8.04[1][A] at 8-23 (3d ed. 2007); *see also In re Tower Air, Inc., 416 F.3d 229, 236-38 (3d Cir. 2005)* (noting that district court mistakenly applied heightened requirements for state notice pleading standard in federal case).

In federal court, when a plaintiff raises a claim for the first time in response to a summary judgment motion, it is possible to treat the claim as a motion to amend the complaint under *Rule 15(a) of the Federal Rules of Civil Procedure*. *Stover v. Hattiesburg Pub. Sch. Dist.., 549 F.3d 985, 989 n.2 (5th Cir. 2008)*. The plaintiff, however, made no such argument to the district court and has not advanced one here. Therefore, we need not linger over this question. *See Cook v. Gates, 528 F.3d 42, 62 n.13 (1st Cir. 2008)*; *Nieves-Vega v. Ortiz-Quinones, 443 F.3d 134, 137 n.1 (1st Cir. 2006)* (finding that claim raised for **[**53]** the first time at oral argument is, at best, forfeit). In any event, it was not likely an abuse of discretion -- and certainly not plain error -- for the district court to deny such a circuitous request for an amendment after summary judgment motions had been docketed. *See Brooks v. AIG SunAmerica Life Assur. Co., 480 F.3d 579, 590 (1st Cir. 2007)*(noting that party urging amendment of complaint at the eleventh hour to fend of summary judgment must demonstrate that the proposed amendments are supported by the record) (cit-

ing *Adorno v. Crowley Towing & Transp. Co., 443 F.3d 122, 126 & n.3 (1st Cir. 2006))*; *but see Gonzalez-Perez v. Hosp. Interamericano de Medicina Avanzada, 355 F.3d 1, 5-6 (1st Cir. 2004)* (declining to find that district court abused discretion in permitting defendant to interpose timeliness defense supported by the record for the first time at summary judgment). Consequently, we affirm the district court's refusal to consider the appellant's claim for relief under the covenant of good faith and fair dealing. We express no opinion whether this claim would have been meritorious if adequately pled, but we note that the covenant of good faith and fair dealing is implied **[**54]** in every contract, including those involving rights of first refusal. *Uno Rest., Inc., 805 N.E.2d at 964*.

E. Remaining Claims

In addition to these claims, the appellant has advanced a number of others, accusing the Town and the Trust of fraud and misrepresentation, intentional interference with her contractual relations with Cohousing, and through *42 U.S.C. § 1983*, a violation of the *Contracts Clause of the U.S. Constitution*. We have reviewed these claims and find them to be without merit.

1. Fraud and Misrepresentation

As to the fraud and misrepresentation claim, the district court correctly noted that Kunelius had produced enough evidence to permit an inference that TPL misrepresented both its ability and intent to purchase the property. *Kunelius, 2008 U.S. Dist. LEXIS 72048, 2008 WL 4372752 at *6*. The court, however, also correctly concluded that Kunelius did not prove her reliance on any material misrepresentations made by the Trust. The appellant's brief on appeal identifies no legally cognizable reliance. Accordingly, summary judgment was appropriate as to that count.

2. Intentional Interference with Contractual Relations

Kunelius's argument on appeal regarding the intentional interference claim is **[*20]** that it was **[**55]** "erroneous for the [district court] to apply the more traditional intentional interference requirements, as the [district court] did in the instant case." The appellant has cited no case law or other indication that the SJC would modify these causes of action in her favor to account for the wrinkle of the statutory ROFR. Accordingly, we, like the district court, are powerless to modify them. We discern no error in the district court's application of the traditional standards for intentional interference with contractual relations in this case, *see Kunelius, 2008 U.S. Dist. LEXIS 72048, 2008 WL 4372752 at *5* (citing *Draghetti v. Chmielewski, 416 Mass. 808, 626 N.E.2d 862, 868 (Mass. 1994))*, and therefore that decision is affirmed.

3. *Contracts Clause* Claim

In perhaps her most ambitious and overreaching claim, Kunelius claims that *Mass. Gen. Laws ch. 61, § 8* impermissibly impairs a contractual obligation and therefore violates the *Contracts Clause of the U.S. Constitution*. *U.S. Const. art. I, § 10 cl. 1*. ("No state shall . . . pass any . . . Law impairing the Obligation of Contracts."). We need not grapple with the question of whether a violation of the *Contracts Clause* is actionable under *§ 1983*, or as the district court did, with **[**56]** whether the Trust's actions constituted state action, because we conclude that under the circumstances of this case the exercise of the ROFR, even with the Trust's subsequent default, was not a violation of the *Contracts Clause*.

It has long been understood that the seemingly absolute prohibition in the Contracts clause "must be accommodated to the inherent police power of the State 'to safeguard the vital interest of its people.'" *Energy Reserves Group v. Kan. Power & Light Co., 459 U.S. 400, 410, 103 S. Ct. 697, 74 L. Ed. 2d 569 (1983)* (quoting *Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 434, 54 S. Ct. 231, 78 L. Ed. 413 (1934))*. Therefore, as the Supreme Court has made clear, the *Contracts Clause* is not implicated unless a change in state law impairs a contractual obligation, and such impairment is substantial. *Alliance of Auto. Mfrs. v. Gwadosky, 430 F.3d 30, 42 (1st Cir. 2005)*. In the present case, there was no change in state law, and further the ROFR at issue here, which allows a municipality -- or its chosen nonprofit -- to purchase land on the same terms as those in a bona fide offer, is not an impermissibly substantial impairment of a contractual right, if it is an impairment at all. *Id*. (citing *McGrath v. R.I. Ret. Bd., 88 F.3d 12, 16 (1st Cir. 1996)* **[**57]** (noting that even an impairment of contract that is substantial will be upheld if it is reasonable and necessary to fulfill an important public purpose). Accordingly, the grant of summary judgment as to the *Contracts Clause* claim was proper.

III. Conclusion

The district court's grant of summary judgment is ***affirmed***.

ONEX COMMUNICATIONS CORPORATION vs. COMMISSIONER OF REVENUE.

SJC-10623

SUPREME JUDICIAL COURT OF MASSACHUSETTS

457 Mass. 419*; *2010 Mass. LEXIS 478

April 7, 2010, Argued
July 30, 2010, Decided

PRIOR HISTORY: [1]**

Suffolk. Appeal from a decision of the Appellate Tax Board. After review by the Appeals Court, the Supreme Judicial Court granted leave to obtain further appellate review.

Onex Commun. Corp. v. Comm'r of Revenue, 74 Mass. App. Ct. 643, 909 N.E.2d 53, 2009 Mass. App. LEXIS 953 (2009)

DISPOSITION: Decision of the Appellate Tax Board affirmed.

COUNSEL: Kenneth W. Salinger, Assistant Attorney General, for Commissioner of Revenue.

Richard L. Jones (William E. Halmkin with him) for the taxpayer.

JUDGES: Present: Marshall, C.J., Ireland, Spina, Cowin, Cordy, Botsford, & Gants, JJ.

OPINION BY: COWIN

OPINION

[*419] COWIN, J. The plaintiff, a company engaged in the development and production of integrated circuits for data and voice transmissions for the telecommunications industry, sought an abatement of use tax from August 1, 1999, to September 21, 2001, pursuant to *G. L. c. 64I, § 7 (b)*, for equipment it purchased **[*420]** to develop a cutting-edge switching chip set. The Appellate Tax Board (board) determined that the plaintiff was engaged in manufacturing as defined in *G. L. c. 63, § 42B*, and that the disputed assessment pertained to items used in research and development by a manufacturing corporation. Therefore, the board concluded that the plaintiff was entitled to the abatement. The Commissioner of Revenue (commissioner) appealed on the ground that, at the time of **[**2]** the purchases, the plaintiff was engaged in development and not manufacturing and therefore did not qualify for the abatement. We affirm the decision of the board.

1. *Background and prior proceedings*. The essential facts are not disputed. We recite some of them here, leaving the remainder for discussion with the issues presented. The plaintiff, Onex Communications Corporation (Onex), was a Delaware corporation with a principal place of business in Bedford, Massachusetts. [1] It was incorporated in May, 1999, for the purpose of bringing to market a then cutting-edge telecommunications switching chip set, known as the OMNI chip, which was able to perform work previously requiring ten separate chips. [2] This advancement produced significant space and cost savings for the telecommunications industry. The OMNI chip had been designed and concept tested, and patent applications had been filed by engineers at Transwitch Corp. (Transwitch) prior to the formation of Onex; Onex was founded by former employees of Transwitch and several venture capital firms.

1 Onex Communications Corporation (Onex) was acquired by and merged into Transwitch Corp. (Transwitch) in September, 2001, and subsequently operated **[**3]** under the name Opal Acquisition Corporation. For convenience, we refer to both entities as Onex. See *infra*.

2 The OMNI chip-set consisted of two separate "application software specific circuit" (ASSC) silicon microchips containing ten million interconnections; one chip acted as a switch and the other as a network processor. Onex's complex software for the switching and routing of different types of data was embedded in both chips.

From August 1, 1999, to September 21, 2001, the period for which the Department of Revenue (department) audited Onex's purchases of personal property [3] and issued an assessment for nonpayment of use tax, Onex devoted most of its efforts to **[*421]** creating a "blueprint" for the production of the OMNI chip. The "blueprint" was "a computer-edited design that included technical specifications of the hardware and software components" of the two chips that made up the OMNI chip-set and "included detailed manufacturing instructions."

3 The property in question consisted largely of computer software and hardware, laboratory equipment, and furniture and fixtures. Onex did not pay use tax for the purchases at issue when it filed its annual tax returns.

Early in the audit period, **[**4]** on September 17, 1999, Onex entered into a barter marketing contract with Transwitch whereby Transwitch would market the OMNI chip as one of its own technologies. During the audit period, Onex executed a contract with IBM to produce the OMNI chip. IBM produced sample chips by early 2001; these chips were delivered to Onex for analysis and testing, after which the "blueprint" was further refined and a modified "blueprint" was given to IBM in "mid-2001." In September, 2000, Onex secured its first "beta" customer, Polaris Networks (Polaris). [4] Onex delivered a small number of chips to Polaris in 2001, and significantly larger quantities in early 2002 when the OMNI chip became generally available. Onex was acquired by and merged into Transwitch on September 21, 2001, the date on which the commissioner chose to terminate the audit period. The board concluded that "[p]roduction in commercial quantities followed seamlessly from Onex's ongoing activities begun in 1999 and was unaffected by the corporate reorganization which happened in September, 2001."

4 A "beta" customer is one whose use of the chip is considered the last step in testing the product before a formal commercial roll-out.

The **[**5]** department began an audit of Onex in July, 2001, for nonpayment of use tax. As a result of the audit, the commissioner concluded that Onex was not exempt from the requirement to pay use tax on its purchases of personal property in the amount of $ 2,723,510. The commissioner determined that the purchases at issue qualified as purchases for research and development purposes pursuant to *G. L. c. 64H, § 6 (r)* and *(s)*, as well as *G. L. c. 64I, § 7 (b)*, but that Onex was not entitled to a use tax exemption since it did not qualify as either a research and development (R&D) corporation or a manufacturing corporation under the statute. [5] The commissioner issued a notice of failure to file for the period from August 1, 1999, through September 30, **[*422]** 2001. Onex did not pay the use tax in question and, in December, 2002, the commissioner issued a notice of intent to assess. A notice of assessment for tax, interest, and penalties in the amount of $ 179,838.54 was issued in July, 2003.

5 For purposes of the use tax, either a research and development (R&D) corporation or a manufacturing corporation would have been entitled to the same exemption. See *G. L. c. 64H, § 6 (r), (s)*; *G. L. c. 64I, § 7 (b)*. **[**6]** A manufacturing corporation may be entitled also to other exemptions, not at issue here, for which an R&D corporation would not qualify. See, e.g., *G. L. c. 59, § 5*; *G. L. c. 63, § 31A*. A corporation engaged in R&D, but without adequate R&D receipts under *G. L. c. 63, § 42B*, and 830 Code Mass. Regs. § 64H.6.4(4) (2007), might not qualify for the R&D exemption.

Onex filed an application for abatement of use tax in July, 2003, seeking abatement of the entire amount assessed. The commissioner denied the application and Onex filed a petition under formal procedure, see *G. L. 58, § 2*, with the board. A hearing was held at which three witnesses testified for Onex; the commissioner presented no witnesses. The hearing officer found that Onex's witnesses were "credible, consistent, and probative." The board adopted this determination and concluded that Onex was entitled to an abatement because it had been engaged in manufacturing during the relevant period [6] and the purchases qualified for exemption from use tax. The commissioner appealed to the Appeals Court. The Appeals Court affirmed the board's decision, see *Onex Communications Corp. v. Commissioner of Revenue, 74 Mass. App. Ct. 643, 909 N.E.2d 53 (2009)*, **[**7]** and we allowed the commissioner's petition for further appellate review.

6 The board declined to decide whether Onex was also an R&D corporation during the audit period. As stated, see note 5, *supra*, both R&D corporations and manufacturing corporations are entitled to the use tax exemption. Therefore, once the board concluded that Onex was a manufacturing corporation during the audit period, for purposes of the purchases at issue here, it was irrelevant whether Onex was also an R&D corporation during that time.

2. *Discussion*. Purchases of personal property are generally subject to sales tax under *G. L. c. 64H, § 2*, or use tax under *G. L. c. 64I, § 2*, at the time the sale is made. See *G. L. c. 64H, § 5*; *G. L. c. 64I, § 6*. Taxpayers engaged in R&D or manufacturing, [7] however, may be exempt from payment of use tax for materials, tools, fuel, machinery, and replacement parts that are **[*423]** used "directly and exclusively" in R&D and manufacturing. See *G. L. c. 63, §§ 38C, 42B*; [8] *G. L. c. 64H, §§ 6 (r)* & *(s)*, 7; *G. L. c. 64I, § 7 (b)*. With limited exceptions, the exemptions for use tax, see *G. L. c. 64I, § 7* (*b*), are the same as those for sales tax; the provision setting forth the use tax exemptions **[**8]** refers to and incorporates the statutory exemptions for sales tax. See *id*. ("The tax imposed by this chapter shall not apply to: . . . [*b*] Sales

exempt from the taxes imposed under chapter sixty-four H [with certain exceptions for motor vehicles, boats, and airplanes] . . ."). *General Laws c. 64H, § 6 (r)*, exempts from use tax tools and materials that are consumed during the manufacturing process. Section 6 (*s*) exempts machinery and tools that serve an integral and essential part in the manufacture, converting, or processing of tangible personal property to be sold.

> 7 A taxpayer may be both a manufacturing corporation and an R&D corporation. See *The First Years, Inc. v. Commissioner of Revenue*, 33 Mass. App. Tax Bd. Rep. 208, 213 (2007); *Duracell, Inc. v. Commissioner of Revenue*, 33 Mass. App. Tax Bd. Rep. 166, 172-173 (2007).
>
> 8 At all times relevant to this appeal, *G. L. c. 63, § 38C*, applied to domestic corporations and *G. L. c. 63, § 42B*, contained the same provisions for foreign corporations. Effective July 3, 2008, *G. L. c. 63, § 38C*, was repealed and *G. L. c. 63, § 42B*, now applies to both domestic and foreign corporations. See St. 2008, c. 173, § 66; St. 2003, c. 141, § 29. In discussing **[**9]** *G. L. c. 63, § 42B*, we refer to the provisions in effect during the pertinent period from August, 1999, through September, 2001. The relevant language in the two versions of the statute is the same.

Onex asserts that it was exempt from use tax for purchases made during the period from August 1, 1999, through September 21, 2001, because it was "engaged in manufacturing." The commissioner argues that Onex did not manufacture any production-quality chips during this period, and that, when it made the purchases at issue, Onex was engaged only in R&D and the production of prototypes. The commissioner maintains that an intent to manufacture does not suffice. She contends that, to be engaged in manufacturing, a company must have produced at least one finished product, or the company's inputs must have "resulted in the fabrication of a finished product by some other entity," and contends that Onex did not make any marketable chips during the audit period.

a. *Standard of review*. "We review questions of statutory interpretation de novo, . . . giving 'substantial deference to a reasonable interpretation of a statute by the administrative agency charged with its administration enforcement.'" *Attorney Gen. v. Commissioner of Ins., 450 Mass. 311, 319, 878 N.E.2d 554 (2008),* **[**10]** quoting *Commerce* **[*424]** *Ins. Co. v. Commissioner of Ins., 447 Mass. 478, 481, 852 N.E.2d 1061 (2006).* Because the board is authorized to interpret and administer the tax statutes, its decisions are entitled to deference. See *Bell Atl. Mobile of Mass. Corp. v. Commissioner of Revenue, 451 Mass. 280, 283, 884 N.E.2d 978 (2008).* Ultimately, however, the interpretation of a statute is a matter for the courts. See *Duarte v. Commissioner of Revenue, 451 Mass. 399, 411, 886 N.E.2d 656 (2008)* (deference is not abdication).

b. *Statutory use tax exemptions*. The board concluded that, pursuant to *G. L. c. 64H, § 6(r)* and *(s)*, and *G. L. c. 64I, § 7(b)*, Onex was exempt from use tax for the period from August 1, 1999, through September 21, 2001, because it was engaged in manufacturing; Onex asserts that the board's conclusion was correct.

To be a "manufacturing corporation," a company must be "engaged in manufacturing." See *G. L. c. 58, § 2*; *G. L. c. 63, § 42B*. Since this statutory language is "less than illuminating," see *Commissioner of Revenue v. Houghton Mifflin Co., 423 Mass. 42, 44, 666 N.E.2d 491 (1996)*, quoting *William F. Sullivan & Co. v. Commissioner of Revenue, 413 Mass. 576, 579, 602 N.E.2d 188 (1992)*, the definition of a manufacturing company has been developed through **[**11]** decades of case law. See *Commissioner of Revenue v. Houghton Mifflin Co., supra*; *William F. Sullivan & Co. v. Commissioner of Revenue, supra at 581*; *Joseph T. Rossi Corp. v. State Tax Comm'n, 369 Mass. 178, 179-180, 338 N.E.2d 557 (1975)*; *Boston & Me. R.R. v. Billerica, 262 Mass. 439, 444-445, 160 N.E. 419 (1928)*. Manufacturing has been defined as "change wrought through the application of forces directed by the human mind, which results in the transformation of some pre-existing substance or element into something different, with a new name, nature or use." [9] *Boston & Me. R.R. v. Billerica, supra.*

> 9 In her regulations interpreting the qualifications necessary to be deemed a manufacturing company, the commissioner has further defined manufacturing as "the process of substantially transforming raw or finished materials by hand or machinery, and through human skill and knowledge, into a product possessing a new name, nature and adapted to a new use." See *830 Code Mass. Regs. § 58.2.1(6)*(*b*) (1999).

Under our traditional test, to qualify as a manufacturing company, a company's activities must be an "essential and integral" part in the manufacturing process. See *Joseph T. Rossi Corp. v.* **[*425]** *State Tax Comm'n, supra at 181-182*. **[**12]** We have construed the phrase "engaged in manufacturing" as having a flexible meaning that should not be narrowly restricted. See *William F. Sullivan & Co. v. Commissioner of Revenue, supra at 579*; *Commissioner of Corps. & Taxation v. Assessors of Boston, 324 Mass. 32, 36, 84 N.E.2d 531 (1949)*.

c. *Proposed "finished product" test*. The commissioner maintains that Onex was not engaged in manufacturing when it made the purchases at issue, because, at

that point, Onex had not yet produced a final version of the OMNI chip, and that, to be engaged in manufacturing, a company must have produced at least one finished product. [10] The commissioner's contention that to be engaged in manufacturing requires a company to have built and distributed a finished product is not consistent with established case law, recent positions taken by the commissioner, and the statutory purpose. We agree with the board that the proper test for determining whether a company is engaged in manufacturing continues to be whether the company was engaged in an "essential and integral" step in the manufacturing process.

10 The commissioner contends that the small volume of OMNI chips produced by Onex during the audit period were prototypes **[**13]** or samples and were not produced in quantities sufficient to indicate that Onex was manufacturing a final product.

In support of her argument that, to be engaged in manufacturing, a company must have manufactured at least one finished product, the commissioner relies heavily on *Commissioner of Revenue v. Houghton Mifflin Co., supra at 47*. In that case, the company, a book publisher, developed computer discs and tapes containing text, graphics, and layout information that were designed to be distributed to third parties who would use the discs to print and bind new books or to create marketable CD-ROM tapes. *Id. at 44*. Observing that the company "transform[ed] ideas, art, information, and photographs, by application of human knowledge, intelligence, and skill, into computer dis[cs]," *id. at 48*, we held that creation of the computer discs was sufficient to establish that the company was engaged in manufacturing. *Id. at 49-50*. We stated also that "[w]e have never required that source materials be tangible." *Id. at 48*.

Although, as the commissioner asserts, the company in that **[*426]** case was also producing other books while it was manufacturing the computer discs, those books were not material **[**14]** to the determination that the company was engaged in manufacturing. The creation of the computer discs alone was sufficient because the discs were an integral step in the manufacturing process. *Id. at 49-50*. See *Commissioner of Revenue v. Fashion Affiliates, Inc., 387 Mass. 543, 545-546, 441 N.E.2d 520 (1982)* (although established company also produced dresses, because dress markers played integral role in cutting cloth for producing finished dress, making markers was itself manufacturing, even though markers were destroyed during cutting process).

In this case, unlike the circumstances in *Commissioner of Revenue v. Houghton Mifflin Co., supra*, and *Commissioner of Revenue v. Fashion Affiliates, Inc., supra*, we are faced with a start-up company that had not previously produced any finished product, and that produced only limited quantities of the OMNI chip before the end of the audit period. Nonetheless, we conclude that this is a distinction without a difference. Notwithstanding the commissioner's argument that Onex had produced only prototypes, the board held, consistent with the record, that during the audit period Onex had moved beyond production of prototypes and was making production chips that **[**15]** had been sold to a third-party client and marketed to other potential clients.

The commissioner and her predecessors have asserted on a number of prior occasions some form of the argument she makes here concerning the necessity of a finished, marketable product. See, e.g., *William F. Sullivan & Co. v. Commissioner of Revenue, supra at 579-581*. See also *Boston & Me. R.R. v. Billerica, supra at 444-446* (railroad fabricating parts for use in repair of its own equipment was engaged in manufacturing). Our decisions in earlier cases, however, have not adopted this interpretation of the statute. We have held consistently that to be engaged in manufacturing, it is not necessary that a company produce a finished product. See *William F. Sullivan & Co. v. Commissioner of Revenue, supra at 579-580*, quoting *Joseph T. Rossi Corp. v. State Tax Comm'n, supra at 181-182* ("processes which themselves do not produce a finished product for the ultimate consumer should still be deemed 'manufacturing' . . . so long as they constitute an essential and integral part of a total manufacturing process").

[*427] Thus, when a company performs some type of transformative process on raw materials, we have concluded that the **[**16]** company was engaged in manufacturing. See *William F. Sullivan & Co. v. Commissioner of Revenue, supra at 577, 579-580* (company purchased scrap metal from other businesses, cut metal into specified lengths or formed it into cubes, and sold it to steel mills and foundries); *Joseph T. Rossi Corp. v. State Tax Comm'n, supra at 182* (company cut down raw timber and, with specialized machinery and the "application of human skill and knowledge," made cut lumber of particular sizes, producing "new product, different in character and more useful and marketable than the raw material"); *Assessors of Boston v. Commissioner of Corps. & Taxation, 323 Mass. 730, 736-737, 84 N.E.2d 129 (1949)* (company performed wool scouring of raw wool that is essential and integral part of manufacture of textiles). Similarly, we have held that a company may be engaged in manufacturing where the company produces no final product itself, but generates blueprints or plans that are sent to third parties for ultimate production. See *Commissioner of Revenue v. Houghton Mifflin Co., supra at 48-50*. We have concluded also that a company may be engaged in manufacturing where the item never will be sold on the open market, but is designed **[**17]** to be

used and consumed by the company in the production of other products. See *Commissioner of Revenue v. Fashion Affiliates, Inc., supra at 546*; *Courier Citizen Co. v. Commissioner of Corps. & Taxation, 358 Mass. 563, 567, 571-573, 266 N.E.2d 284 (1971)* (printing plates that are made and discarded after each press run "are made as the necessary first stage of a long process, culminating in a specifically ordered finished printed product," and therefore materials to manufacture plates, which are never sold to third parties, are exempt from use tax).

Notwithstanding the commissioner's arguments in this case, in other recent cases, the board and the commissioner have concluded that a company is engaged in manufacturing in circumstances that are inconsistent with the finished product test. See *The First Years, Inc. v. Commissioner of Revenue*, 33 Mass. App. Tax Bd. Rep. 208, 214 (2007) (creation of computer aided designs for child-care products, building of models, and development of specifications for molds produced by third parties and **[*428]** returned to company for testing, then transmitted to plants in other countries for production); *Duracell, Inc. v. Commissioner of Revenue*, 33 Mass. App. Tax Bd. Rep. **[**18]** 166, 172-173 (2007) (research and development of methods to improve batteries made in company's other plants, where such research was incorporated into new products, and testing of existing products to ensure adequate performance constituted manufacturing). See also Technical Information Release 08-2 (February 1, 2008), 1 Official MassTax Guide at 229 (West 2010) (commissioner adopts and will apply in future cases holdings of *Duracell* and *The First Years* on question of manufacturing); Letter Ruling 05-05 (June 7, 2005) (computer-aided design of network host bus adaptors and embedded storage switches, transmitted electronically to plants elsewhere in United States and other countries for production, was manufacturing).

Moreover, the commissioner's argument that, to be engaged in manufacturing, a company must have produced at least one finished product is contrary to the statutory purpose of encouraging new manufacturing industries to locate in Massachusetts and encouraging existing companies to develop and expand within the Commonwealth. See *Commissioner of Revenue v. Houghton Mifflin Co., supra at 46-47*. Indeed, such a policy, which would place new companies in a disadvantageous tax **[**19]** position compared to existing companies, would tend to discourage the location of start-up companies in Massachusetts. In addition, imposing a finished product rule would allow the commissioner to set audit periods arbitrarily so that the period reviewed could exclude, even by one day, the time at which the final product was distributed and sold. Such arbitrary enforcement periods would create the possibility of abuse of discretion and unequal treatment of individual taxpayers. Cf. *Courier Citizen Co. v. Commissioner of Corps. & Taxation, supra at 567, 571-572* (statute authorizing use tax exemption "should not be construed to require the division into theoretically distinct stages of what is in fact continuous and indivisible"). Many high technology items, such as the one at issue here, may require years of effort to create a market-ready product.

The commissioner claims that it will be impossible to administer the statute if no final product rule is required; that the board's **[*429]** holding to the contrary eviscerates the distinction between R&D and manufacturing companies; and that the holding will generate uncertainty as to the timing of manufacturing exemptions. These arguments are unavailing. **[**20]** Our existing interpretation of the statute has been in place and administered without significant difficulty for many years; during that time, a determination whether a company is engaged in manufacturing has not been based on a final product theory.

The commissioner argues also that, without a final product rule, it will be difficult or impossible to administer the manufacturing company exemption for local property taxes. She makes this argument based on her assertion that Onex was engaged in manufacturing only subsequent to, not during, the audit period, and asserts that a determination of eligibility for the property tax exemption cannot depend on a prediction of future events. As stated, the assertion that Onex was engaged in manufacturing only after the audit period is inaccurate. The requirement of a local property tax exemption for manufacturing companies is governed by a separate statute that requires the taxpayer to make specific application for a particular tax year. See *G. L. c. 59, § 5*. Consistent with that statute, the taxpayer must demonstrate that it is engaged in manufacturing, i.e., an essential step in the manufacturing process, during the tax year at issue. Such a **[**21]** demonstration will necessarily require a showing of the company's current activities. We discern no administrative difficulty.

Finally, the commissioner argues that *830 Code Mass. Regs. § 58.2.1(6)*(*b*)(5) (1999) ("research and development, and design and creation of a prototype, although prerequisites to manufacturing, are not manufacturing") precludes a finding that Onex was engaged in manufacturing. This argument is contrary to the board's finding, supported by the record, that Onex was producing more than prototypes, and does not take into account the provisions of *830 Code Mass. Regs. § 58.2.1(6)*(*b*)(7) (process that is "practical and necessary step in the production of a finished product for sale" is generally considered essential and integral part of manufacturing process). The board held correctly that § 58.2.1(6)(*b*)(7) was

applicable here; its holding is consistent with our case law and legislative intent.

[*430] d. *Abatement as manufacturing corporation*. Having decided the question of the test to be applied, we turn to the issue whether Onex was entitled to its requested abatement as a manufacturing corporation. A determination whether a particular company is engaged in manufacturing **[**22]** is a fact-based inquiry. See *William F. Sullivan & Co. v. Commissioner of Revenue, 413 Mass. 576, 581, 602 N.E.2d 188 (1992)* ("undefinable nature of the operative terms in these exemption cases necessitates case-by-case, analogical development of their meaning"). The board made factual findings and determined that, at the time it made the purchases at issue, Onex was a manufacturing corporation pursuant to *G. L. c. 63, § 42B*. The board concluded that Onex was founded to take a "new product from abstract concept to production" and that it had been engaged in manufacturing during the audit period. The record supports the board's findings.

As evident from Onex's audited financial statements, business plans, and initial funding, the production, distribution, and enhancement of the OMNI chip was Onex's sole purpose. Onex was incorporated at the point at which design of the OMNI chip had been completed and patent applications for the design had been filed. At that time, the OMNI chip was a revolutionary device far more advanced than any other device available to the telecommunications industry. The technical specifications for its design were included in product brochures, a "data sheet," and a user manual **[**23]** developed during the summer of 1999 before the purchases for which Onex claimed use tax exemptions.

Pursuant to business plans created prior to any of the purchases at issue, Onex obtained venture capital funding to bring the OMNI chip to market. In all, Onex received three rounds of venture capital funding in 1999 and 2000, totaling $ 30 million, for development, manufacture, and sale of the OMNI chip. The $ 20 million from the third round of funding was received because of Onex's progress in developing the OMNI chip.

Furthermore, Onex entered into several contracts involving creation and distribution of the OMNI chip prior to and during the audit period. As stated, in September, 1999, prior to the first purchase at issue, Onex executed a contract with Transwitch to market and distribute the chip. In 2000, Onex contracted with IBM to produce the chip at IBM's facilities and, in September, 2000, Onex executed agreements with its first customer, Polaris. **[*431]** Polaris's licensing agreement as a "beta" customer provided for a reduced per chip price in return for final testing of the production chips prior to full-scale production. IBM began producing OMNI chips on July 1, 2000. In early 2001, **[**24]** IBM produced fifty to one hundred production-quality chips which were tested and analyzed by Onex. After testing, Onex modified the computer-aided "blueprint" and sent the amended specifications to IBM for subsequent production by mid-2001. This process of testing and improving the product design is similar to the processes followed for the development of infant products in *The First Years, Inc. v. Commissioner of Revenue*, 33 Mass. App. Tax Bd. Rep. 208, 214 (2007), and the development of improved batteries in *Duracell, Inc. v. Commissioner of Revenue*, 33 Mass. App. Tax Bd. Rep. 166, 172-173 (2007). During the same period, Onex sold small numbers of chips to Polaris as a "beta" customer, which the board determined was "the last step in testing the product before a formal commercial roll-out."

The board concluded correctly that creation of the "blueprint" for release to IBM was an essential and integral step in the manufacture of the OMNI chip. Although the OMNI chip was to be produced by means of the third-party contract with IBM, production of the chip was entirely dependent on the "blueprint," and IBM was required to follow precisely the computer-aided design encoded in the "blueprint." **[**25]** Development of the "blueprint" for production of the OMNI chip by IBM is virtually identical to the development of the compact discs containing the information for creating the physical books in *Commissioner of Revenue v. Houghton Mifflin Co., 423 Mass. 42, 43-44, 48, 666 N.E.2d 491 (1996)*. Creation of the first fifty to one hundred production chips in early 2001, and refinement of the "blueprint" and the manufacturing process after analysis of the chips' quality, were also essential and integral steps in testing the new chip before full-scale production, as was its use by Polaris, the "beta" customer. See *Duracell, Inc. v. Commissioner of Revenue, supra*.

To be entitled to the exemption as a manufacturing corporation, Onex must demonstrate also that manufacturing was a "substantial" portion of its business during the relevant period. See *RCN-BecoCom, LLC v. Commissioner of Revenue, 443 Mass. 198, 202, 820 N.E.2d 208 (2005)*. The distribution of Onex's employees, office space and equipment, budget, and expenses supports the **[*432]** board's conclusion that Onex was engaged in manufacturing the OMNI chip and that such manufacturing was a substantial portion of its business. Ninety per cent of its employees and seventy-five per **[**26]** cent of its floor space were dedicated to development of the "blueprint" for the OMNI chip. Approximately ninety-five per cent of Onex's computer hardware and software was used in creating the "blueprint" for production of the OMNI chip.

The audit period ended in September, 2001, at the point at which Onex was acquired by Transwitch. A few

months later, in early 2002, Onex began larger-scale production of the chip. The time period of this audit demonstrates the difficulties, discussed *supra*, inherent in the arbitrary setting of audit periods so that the period reviewed may not be "coextensive" with final production. For high technology products such as the one involved here, production of an acceptable quality product may require, as it did in this case, several years of effort to complete the manufacturing process.

The commissioner contends that the board's holding is based improperly on the "possibility of the occurrence of future events." See *Northgate Constr. Co. v. State Tax Comm'n, 377 Mass. 205, 208, 385 N.E.2d 967 (1979)*. The commissioner's argument that the board determined incorrectly that Onex was entitled to a use tax exemption for manufacturing that took place at a later period is without **[**27]** merit. As stated, the board found that, throughout the audit period, Onex was engaged in creation of the "blueprint," an essential and integral step in the manufacturing process, and also that Onex produced limited quantities of a finished product.

e. *Abatement as R&D corporation.* Onex sought also to obtain abatement of use taxes as an R&D corporation. Relying on the "receipts" test, Onex argues that its initial venture capital funding, as well as income from "barter" exchanges, constituted "receipts." [11] The board did not make any finding whether Onex was also an R&D corporation during this period. Onex cross-appealed **[*433]** on the ground that it qualified as an R&D corporation. Because of our conclusion that Onex was engaged in manufacturing during the relevant period and was therefore entitled to the abatement it sought, we need not determine whether Onex was also an R&D corporation as defined in *G. L. c. 63, § 42B,* entitled to the same abatement during that period.

> 11 At the time at issue, an R&D corporation was defined as one whose principal activity was R&D and which "derive[d] more than two thirds of its receipts assignable to the [C]ommonwealth from such activity and which derive[d] **[**28]** more than one third of its receipts assignable to the [C]ommonwealth from the research and development of tangible personal property capable of being manufactured in this [C]ommonwealth." See *G. L. c. 63, § 42B,* as appearing in St. 1970, c. 534, § 25.

Decision of the Appellate Tax Board affirmed.

KEITH RUDY, JR., THERESE COOPER, JOHN DAVIS, FRANCIS AUBREY, DENNIS DALEY, ANGELA MAILLE, DENISE PELLETIER, SEAN O'CONNELL, TIMOTHY LEKITES, STEPHEN PARIS, ERIN DALTON, MILDRED BADILLO, et al., Plaintiffs, v. CITY OF LOWELL, Defendant.

Civil Action No. 07-11567-NMG

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

2010 U.S. Dist. LEXIS 57046
June 7, 2010, Decided

COUNSEL: [*1] For City of Lowell, Defendant: Brian W. Leahey, LEAD ATTORNEY, Ciy of Lowell Law Department, Lowell, MA.

For Angela Maille, Plaintiff: Daniel W Rice, LEAD ATTORNEY, Glynn, Landry & Rice, LLP, Boston, MA.

JUDGES: Nathaniel M. Gorton, United States District Judge.

OPINION BY: Nathaniel M. Gorton

OPINION

MEMORANDUM & ORDER

GORTON, J.

The named plaintiffs brought suit on behalf of themselves and others similarly situated against the City of Lowell ("the City") for violating the Fair Labor Standards Act ("FLSA"), *29 U.S.C. § 207*, by undercalculating the "regular rate" of pay used to determine overtime wages. Before the Court are cross-motions for summary judgment.

I. *Background*

A. Factual Background

This case involves a technical dispute with respect to the calculation of overtime pay under the FLSA. All of the plaintiffs are or, at the time of the complaint, were employed by the City and members of the American Federation of State, County and Municipal Employees, AFL-CIO State Council 93, Local 1705. A collective bargaining agreement ("CBA") sets forth the terms and conditions of plaintiffs' employment.

Two sections of the CBA are relevant here. First, the CBA provides that employees may receive augmentations to their pay **[*2]** under certain circumstances such as driving a snowplow or working undesirable night shifts. Second, the agreement allows employees to earn overtime pay if they work in excess of eight hours in one day and forty hours in one week. Overtime pay is calculated as one-and-a-half times an employee's regular pay. The crux of this dispute concerns whether various pay augmentations identified in plaintiffs' complaint should be included in their regular rate of pay for the purposes of calculating overtime wages.

The parties recently informed the Court that they have agreed on the resolution of all but one such augmentation: so-called standby pay. The City's Water Department used to run a voluntary standby program. Department employees could sign up for the program and one employee would be assigned standby duty each week on a rotating basis. After no employee volunteered in July, 2008, however, the program was terminated.

During the program's operation, an employee on standby duty was on-call during all hours not worked. The employee was required 1) to carry a beeper, 2) to stay within five miles of the City or any contiguous town and 3) to be able to respond to a call within about one hour. Otherwise, **[*3]** the employee was free to use the standby time as he or she pleased. Everyone who ever volunteered for standby duty lived in the City or a contiguous town and, under the CBA, was therefore also entitled to take a service truck home for the week. Employees on standby duty received additional compensation for their commitment: a weekly stipend of $ 150 for agreeing to be available for work and, upon responding to a call, a minimum of two hours at one-and-a-half times his base pay.

B. Procedural History

Plaintiffs filed their complaint on August 22, 2007 and filed an amended complaint two months later identifying 88 plaintiffs. After a scheduling conference in August, 2008, this case proceeded routinely through discovery. In November, 2009, the parties filed cross-motions for summary judgment with respect to liability and plaintiffs opposed defendant's motion the following month.

In April, 2010, the parties filed a joint motion for entry of a scheduling order setting forth dates for the liability and damages phases of the case. [1]

1 The parties also filed an identical "joint" motion in March, 2010 but it was only signed by the plaintiffs.

II. *Analysis*

A. Legal Standard

1. [*4] Summary Judgement Standard

The role of summary judgment is "to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." *Mesnick v. General Elec. Co., 950 F.2d 816, 822 (1st Cir. 1991)* (quoting *Garside v. Osco Drug, Inc., 895 F.2d 46, 50 (1st Cir. 1990))*. The burden is upon the moving party to show, based upon the pleadings, discovery and affidavits, "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Fed. R. Civ. P. 56(c)*.

A fact is material if it "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. "Factual disputes that are irrelevant or unnecessary will not be counted." *Id*. A genuine issue of material fact exists where the evidence with respect to the material fact in dispute "is such that a reasonable jury could return a verdict for the nonmoving party." *Id*.

Once the moving party has satisfied its burden, the burden shifts to the non-moving party to set forth specific facts showing that there is a genuine, triable issue. *Celotex Corp. v. Catrett, 477 U.S. 317, 324, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. The Court must view **[*5]** the entire record in the light most hospitable to the non-moving party and indulge all reasonable inferences in that party's favor. *O'Connor v. Steeves, 994 F.2d 905, 907 (1st Cir. 1993)*. If, after viewing the record in the non-moving party's favor, the Court determines that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law, summary judgment is appropriate.

2. Regular rate

Calculation of the "regular rate" is significant because an employee who works overtime hours is entitled to earn one and one half times that "regular rate" for any such hours worked in the subject week. The FLSA defines the regular rate generally to include "all remuneration for employment paid to, or on behalf of, the employee". *29 U.S.C. § 207(e)*. The statute lists eight exceptions under which certain pay is not to be included in the regular rate (and thus is not subject to multiplication for overtime pay). The First Circuit instructs that

> the list of exceptions is exhaustive, . . . the exceptions are to be interpreted narrowly against the employer . . . and the employer bears the burden of showing that an exception applies.

O'Brien v. Town of Agawam, 350 F.3d 279, 294 (1st Cir. 2003) **[*6]** (citations omitted).

B. Application

In their April, 2010 joint motion, the parties indicate that the only issue that this Court must decide is "whether the 'standby pay' called for under the [CBA] must also be included in the regular rate". Plaintiffs argue that it should be and the City that it should not be. The Court understands that the dispute relates only to overtime worked in weeks during which the subject employee volunteered for standby duty.

The burden lies with the City. It contends that the standby pay should be excluded from the regular rate pursuant to *29 U.S.C. § 207(e)(2)* which exempts

> payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause; reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's interests and properly reimbursable by the employer; and other similar payments to an employee which are not made as compensation for his hours of employment.

The City contends that the "clear language" of that provision applies because it excludes

> payments made for occasional periods when no work **[*7]** is performed [and] other similar payments to an employee which are not made as compensation for his hours of employment.

Having quoted only the provision's more generic terms, the City maintains that, here, the $ 150 stipend is paid for voluntary "occasional periods" (rotating weeks of duty) and for "non-work" time (paid for being available, not as compensation for hours worked, because employees are paid more if they actually respond to a call). Thus, the stipend should be excluded from the regular rate.

This case presents a statutory interpretation question of first impression in the First Circuit. Despite a dearth of authority, however, it seems clear that the plaintiffs have the better argument and that the standby pay should be included in the regular rate of those employees who worked overtime in weeks during which they volunteered for standby duty. The gloss provided by the case law instructs that *§ 207(e)* must be interpreted narrowly. Standby pay appears nowhere in its exclusions and the City's selective quotations from *§ 207(e)(2)* are disingenuous. Standby pay is distinct from payments made,

for example, for vacation or sick time or similar non-routine absences that encompass **[*8]** compensation for time spent completely disconnected from the job. *See 29 C.F.R. §§ 778.218, 778.224*.

Instead, federal regulations and Department of Labor opinion letters have consistently found that payments for standby or on-call duty should be included in the regular rate. [2] *29 C.F.R. § 778.223*. As one opinion letter explained:

> [P]ayments received by employees for being "on call," while not allocable to any specific hours of work, are clearly paid as compensation for performing duties involved in the employees' jobs and are not of a type excludable under *section 7(e)(2) of FLSA*. The payment for standby time must, therefore, be included in the regular rate for computing overtime compensation under FLSA.

Dep't of Labor, Wage and Hour Div., FLSA Opinion Letter, 1986 WL 1171137 (Mar. 25, 1986). *See also* Dep't of Labor, Wage and Hour Div., FLSA Opinion Letter 2008-6, 2008 WL 4906278 (Sept. 22, 2008); Dep't of Labor, Wage and Hour Div., FLSA Opinion Letter, 1998 WL 852812 (June 23, 1998). The fact that employees volunteered for the Water Department's standby program does not alter that conclusion. Dep't of Labor, Wage and Hour Div., FLSA Opinion Letter, 1987 WL 1369166 (Sept. 16, 1987) (applying **[*9]** the same interpretation under facts similar to this case in which employees volunteered for one week rotations of on-call duty).

> 2 Although such opinions are not controlling, they "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Skidmore v. Swift & Co., 323 U.S. 134, 140, 65 S. Ct. 161, 89 L. Ed. 124 (1944)* (noting that their weight in a particular case depends upon factors such as the consistency with earlier and later pronouncements).

A final observation is warranted. Much of the City's argument focuses on the contention that the standby stipend is for "non-work" time and that the employees were relatively free during their on-call time. As the plaintiffs correctly note, however, the City seems to confuse the concept of "hours worked", for which those arguments would be important, with the calculation of the "regular rate". As each of the cited opinion letters and regulations makes clear, although time spent on-call or on standby duty may or may not qualify as "hours worked" under the *FLSA, § 207* has nonetheless been interpreted to require that payments for such time be included in the regular rate.

Accordingly, the Court finds that the Water **[*10]** Department's $ 150 standby stipend should be included in the regular rate at which employees are to be compensated in weeks during which they volunteered for standby duty.

ORDER

In accordance with the foregoing,

> 1) defendant's motion for summary judgment (Docket No. 18) is, with respect to standby pay, **DENIED** and, with respect to the remaining claims, **DENIED** as moot;
>
> 2) plaintiffs' motion for summary judgment (Docket No. 20) is, with respect to standby pay, **ALLOWED** and, with respect to the remaining claims, **DENIED** as moot; and
>
> 3) the parties' first joint motion to adopt a schedule (Docket No. 32) is **DENIED** as moot and their second joint motion (Docket No. 33) is **ALLOWED** with the following adjustments to the proposed dates:
>
> > a) the parties will consider and resolve issues related to the calculation of back pay (Phase II) and the calculation of damages (Phase III) on or before August 15, 2010; and
> >
> > b) if the parties thereafter need further intervention of the Court, they will submit memoranda in support of their respective positions (not to exceed 10 pages in length) on or before August 31, 2010.

So ordered.

/s/ Nathaniel M. Gorton

Nathaniel M. Gorton

United States District Judge

Dated June 7, 2010

KAREN SIKORSKI'S CASE.

SJC-10481

SUPREME JUDICIAL COURT OF MASSACHUSETTS

455 Mass. 477; 918 N.E.2d 30; 2009 Mass. LEXIS 905

October 5, 2009, Argued
December 11, 2009, Decided

PRIOR HISTORY: [*1]**

Suffolk. Appeal from a decision of the Industrial Accident Reviewing Board. The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

COUNSEL: Brian P. Barrett Assistant City Solicitor, for the self-insurer.

Alan S. Pierce for the employee.

J. Michael Conley & Chris A. Milne, for Massachusetts Academy of Trial Attorneys, amicus curiae, submitted a brief.

John J. Canniff, for Massachusetts Municipal Association, amicus curiae, submitted a brief.

JUDGES: Present: Marshall, C.J., Ireland, Spina, Cowin, Cordy, Botsford, & Gants, JJ.

OPINION BY: COWIN

OPINION

[31] [*477]** COWIN, J. While serving as a chaperone for a Peabody High School (school) ski club trip, Karen Sikorski (employee), a mathematics teacher at the school, was injured in a skiing accident. She sought workers' compensation coverage for her medical expenses. Her employer, the city of Peabody (city), a self-insurer, **[*478]** contends that her injury is noncompensable because it occurred while she participated voluntarily in a recreational activity. See *G. L. c. 152, § 1 (7A)*. [1] The reviewing board of the Department of Industrial Accidents (board), in a divided decision, awarded benefits to the employee, concluding that the recreational aspect of serving **[***2]** as a chaperone was incidental to her duties in monitoring student safety and behavior. We affirm the board's decision because we conclude that a teacher who acts as a chaperone to students participating in a school-sponsored activity is acting in the course of her employment and is not engaged in "recreational" activity within the meaning of *§ 1 (7A)*. [2]

1 *G. L. c. 152, § 1 (7A)* provides, in relevant part, that "any injury arising from an employee's purely voluntary participation in any recreational activity, including but not limited to athletic events, parties, and picnics," is not compensable under the workers' compensation statute, "even though the employer pays some or all of the cost thereof."

2 We acknowledge the amicus brief in support of the employee submitted by the Massachusetts Academy of Trial Attorneys, as well as the amicus brief in support of the city submitted by the Massachusetts Municipal Association.

1. *Facts and procedural history*. We summarize the facts found by the administrative judge supplemented by uncontested evidence from the hearing he conducted. Since the late 1980's, the school has sponsored a student ski club. The ski club is officially sanctioned by the **[***3]** school committee of Peabody. Each year students participating in the ski club take four day-long ski trips and one overnight ski trip. An electronics teacher at the school, Mark Metropolis, receives a stipend from the city for serving as the ski club's adviser, but the city provides the ski club with no other financial support. The ski club's other expenses are covered by independent fund raising and fees paid by participating students.

Supervising the students participating in the trips requires additional chaperones besides Metropolis. Teachers serving as chaperones are not paid for their services, but the ski club pays their trip expenses. During the trips, chaperones are expected to supervise the students while they ride on the bus to and from the ski area, while they ski, and while they stay overnight in the lodge. Although no teacher can be forced to serve as a chaperone, the school administration has expected teachers to become involved with the school's extracurricular activities and Metropolis has encouraged teachers to serve as ski club chaperones.

[*479] The employee was hired by the city's school department as a high school mathematics teacher in 1996. She enjoyed skiing and volunteered **[***4]** to serve as a chaperone for nearly all of the ski club's trips

from **[**32]** the date she was hired until January, 2004. On January 24, 2004, while acting as a chaperone for one of the ski club's trips, the employee skied with Metropolis, other chaperones, and students who attended the school. While skiing, she fell and injured her shoulder. Her injury required two surgeries and a physical therapy regimen.

The employee filed a claim for medical benefits under the workers' compensation statute. See *G. L. c. 152, § 30*. The city contended that it was not liable. At a conference conducted pursuant to *G. L. c. 152, § 10A (1)*, an administrative judge denied the employee's claim. A hearing was then conducted before a different administrative judge, and the employee's claim was again denied. [3] The second administrative judge held that the employee's injury was not covered because it occurred during the employee's "purely voluntary participation in [a] recreational activity." *G. L. c. 152, § 1 (7A)*. The employee appealed to the board, which, in a divided decision, reversed the administrative judge and awarded benefits. A majority of the board held that even though the employee's participation as a **[***5]** chaperone was purely voluntary, she was entitled to receive benefits because the recreational aspect of serving as a chaperone was incidental to its work-related components. The city appealed, and we transferred the case here on our own motion.

> 3 Any party aggrieved by an administrative judge's initial benefits decision may appeal for a hearing. *G. L. c. 152, § 10A (3)*. In this case the hearing was scheduled to take place before the administrative judge who entered the initial order, but he was reassigned to a different office and a new judge conducted the hearing.

2. *Standard of review*. An aggrieved party may seek judicial review of a decision of the board regarding workers' compensation benefits. *G. L. c. 152, § 12 (2)*. We review the board's decision in accordance with the standards set forth in *G. L. c. 30A, § 14 (7) (a)-(d), (f)* and *(g)*. *Scheffler's Case, 419 Mass. 251, 257-258, 643 N.E.2d 1023 (1994)*. This court may reverse or modify the board's decision when it is "[i]n violation of constitutional provisions," "[i]n excess of the statutory authority or jurisdiction of the agency," "[b]ased upon an error of law," "[m]ade upon **[*480]** unlawful procedure," "[u]nwarranted by facts found . . . where the court **[***6]** is constitutionally required to make independent findings of fact," or is "[a]rbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law." *G. L. c. 30A, § 14 (7) (a)-(d), (f), (g)*. In this case we must determine whether the board correctly applied the workers' compensation statute and whether the board's decision was arbitrary or capricious. See *Scheffler's Case, supra at 258*. The board, as the agency charged with administering the workers' compensation law, is entitled to substantial deference in its reasonable interpretation of the statute. *Gateley's Case, 415 Mass. 397, 399, 613 N.E.2d 918 (1993)*.

3. *Discussion*. The city argues that the employee is statutorily barred from receiving workers' compensation benefits because her injury occurred during her voluntary participation in a recreational activity, skiing. See *G. L. c. 152, § 1 (7A)*. It contends that the board, once it accepted the administrative judge's finding that the employee participated in the ski trip voluntarily, should have denied the claim rather than analyze how closely the activity of chaperoning students on the ski trip was connected to her duties as a teacher. In determining whether the employee is entitled **[***7]** to benefits, we examine first whether the employee suffered "a personal injury arising out of and in the course of [her] employment." *G. L. c. 152, § 26*. If **[**33]** the first question is answered affirmatively, we evaluate whether the employee's injury is excluded from compensation as purely voluntary participation in recreational activity. See *G. L. c. 152, § 1 (7A)*. Because we conclude that the employee's injury arose out of and in the course of her employment and does not fall within the *§ 1 (7A)* exclusion, we hold that the board properly awarded benefits.

a. *Compensability*. A personal injury is compensable in workers' compensation when it "aris[es] out of and in the course of . . . employment." *G. L. c. 152, § 26*. Historically, in determining whether injuries sustained during an employee's recreation fit within this definition of compensability, this court has applied the five-factor test set forth in *Moore's Case, 330 Mass. 1, 4-5, 110 N.E.2d 764 (1953)*. Under this test, we weigh the customary nature of the activity, the employer's encouragement or subsidization of the activity, the extent to which the employer managed or directed the activity, the presence of pressure or compulsion to participate, **[*481]** and **[***8]** the employer's expected or actual benefit from the employee's participation. *Id*. The five factors are not exclusive, and the weight of each factor may vary from case to case. *Id. at 5*.

In 1985, the Legislature added a provision to the workers' compensation statute that excluded from workers' compensation "any injury resulting from an employee's purely voluntary participation in any recreational activity, including but not limited to athletic events, parties, and picnics, even though the employer pays some or all of the cost thereof." *G. L. c. 152, § 1 (7A)*, inserted by St. 1985, c. 572, § 11. Despite the amendment, the test set forth in *Moore's Case* remains authoritative for the purpose of determining whether an injury arises out of and in the course of a worker's employment. See *Bengtson's Case, 34 Mass. App. Ct. 239,*

246, 609 N.E.2d 1229 (1993). After the amendment, for an injury to be compensable, it must both arise in the "course of employment," see *G. L. c. 152, § 26*, and not result from voluntary participation in a recreational activity, see *G. L. c. 152, § 1 (7A)*. The amendment neither removes the need for the course of employment analysis nor contains language prescribing new standards for conducting **[***9]** that analysis. The test from *Moore's Case* was designed to determine whether an employee's injury arises out of and in the course of employment, *Moore's Case, supra at 3-4*, and its five factors remain helpful in evaluating the connection between employees' injuries and their employment. [4] Accordingly, we apply the test from *Moore's Case*to the employee's case.

4 The Appeals Court has suggested that the 1985 amendment regarding recreational activity "replaced" the approach adopted in *Moore's Case, 330 Mass. 1, 4-5, 110 N.E.2d 764 (1953)*. See *Cornetta's Case, 68 Mass. App. Ct. 107, 115, 860 N.E.2d 687 (2007)*. However, this statement was dictum because the only issue presented in that case was the interpretation of an unrelated portion of *G. L. c. 152, § 1 (7A)*, regarding mental or emotional disability. *Id. at 113*. For the reasons set forth in this opinion, we conclude that the Appeals Court was correct when it held earlier that *Moore's Case*remains authoritative. See *Bengtson's Case, 34 Mass. App. Ct. 239, 246, 609 N.E.2d 1229 (1993)*.

Weighing these factors, it is clear that the employee's skiing as a chaperone arose out of and in the course of her employment as a teacher, even though her participation as a chaperone was voluntary. First, **[***10]** it was customary for teachers to serve as chaperones for the ski club's trips and to perform many of their functions as teachers while they did. The chaperones were responsible for supervising **[**34]** student behavior, enforcing school **[*482]** rules, and monitoring student safety. [5] These supervisory responsibilities are essentially the same ones teachers must exercise while working in the school building during school hours. In order to fulfil these responsibilities while the students were skiing, the chaperones were expected to ski with the students. Indeed, accompanying the students on the ski slopes was the only effective way to monitor the students while they skied. Furthermore, at the time of the employee's injury, she was skiing with the students she was charged with monitoring, rather than skiing recreationally on her own. Cf. *Hammond's Case, 62 Mass. App. Ct. 684, 685-686, 819 N.E.2d 191 (2004)*.

5 The ski club adviser explained these expectations to the chaperones. He also provided them with walkie-talkies to carry while skiing for use in case of an injury to a student.

Second, the city encouraged teachers to participate as ski club chaperones. Both the school principal and the ski club adviser solicited teachers **[***11]** to serve as chaperones.

Finally, the ski club's trips benefited the city by furthering the school's educational mission. "Education is a broad and comprehensive term." *Mount Hermon Boys' Sch. v. Gill, 145 Mass. 139, 146, 13 N.E. 354 (1887)*. This broad definition of education includes school-sponsored extracurricular activities. *Missett v. Cardinal Cushing High Sch., 43 Mass. App. Ct. 5, 10-11, 680 N.E.2d 563 (1997)*. The testimony at the hearing indicated that the school's teachers and administrators shared the belief that extracurricular activities are an important part of the school's operations. The school committee of Peabody officially sponsored some clubs (including the ski club), paid club advisers, and sometimes provided clubs (other than the ski club) with operating funds. The school's principal and teachers believed faculty involvement in student activities to be a valuable service to the school and its students. Thus, the city benefited from the employee's service as a ski club chaperone.

After examining these factors, we agree with the board's conclusion that the duties the employee performed while participating in the ski trip arose out of and in the course of her duties as a teacher at the school. See **[***12]** *G. L. c. 152, § 26*. Even though she volunteered to be a chaperone, the activities involved constituted work connected to her employment; accordingly, the injury she suffered is compensable under *§ 26*.

[*483] b. *G. L. c. 152, § 1 (7A), exclusion.* We next address whether the employee is nonetheless barred from receiving workers' compensation because her injury resulted from voluntary participation in a recreational activity, see *G. L. c. 152, § 1 (7A)*, and conclude that she is not.

The amendment does not define "recreational activity," but it lists "athletic events, parties, and picnics" as nonexclusive examples of the type of recreational activity that is excluded from workers' compensation. *Id*. Serving as a chaperone on a school-sponsored ski club trip is substantially different from playing softball or attending a company picnic outside of work hours. Unlike those activities, the employee's service as a chaperone substantially benefited her employer and required her to perform her regular job duties of supervising students. When playing on an athletic team or attending a social gathering, employees rarely perform any of their regular duties and the employer receives only minor benefits from **[***13]** improved employee good will and morale. See *Kemp's Case, 386 Mass. 730, 732-734, 437*

N.E.2d 526 (1982). It is this type of activity that has been held noncompensable under **[**35]** *§ 1 (7A)*. See *Gateley's Case, 415 Mass. 397, 400-401, 613 N.E.2d 918 (1993)*. In contrast, we have never held that the *§ 1 (7A)* exclusion applies to injuries suffered while performing the employee's normal job duties at an event substantially benefiting the employer. In this case, the employee's responsibilities as a chaperone, though voluntarily undertaken, were an extension of her employment duties as a teacher, not recreation.

The city's reliance on *Hammond's Case, 62 Mass. App. Ct. 684, 819 N.E.2d 191 (2004)*, is unavailing, because in that case, the employee was not performing her work duties at the time of her injury. In *Hammond's Case*, Hammond organized a ski trip for her employer's clients. Her duties included providing the clients' ski lift tickets; coordinating their transportation, hotel arrangements, snacks and entertainment; and checking to make sure the clients' skiing "went well." *Id. at 685*. Hammond injured herself while she and a friend skied by themselves after she had finished checking in on the clients to assure they were all skiing. *Id. at 685-686*. **[***14]** The court held that her injury fell within the *§ 1 (7A)* exclusion, because even though her job required her to be at the ski resort, it did not require her to ski. *Id. at 687*. In contrast, in the present case, the employee was required to be on **[*484]** the ski slopes supervising the students while the students skied, and her injury occurred during her performance of that function.

For these reasons, we conclude that the Legislature, in amending *G. L. c. 152, § 1 (7A)*, did not intend to exclude a teacher's voluntary service as a chaperone from coverage. Thus, the board was correct in reversing the administrative judge's decision that *§ 1 (7A)* precluded a workers' compensation award.

c. *Findings of the administrative judge*. The city argues that the board's conclusions are contrary to the record and the administrative judge's findings. Although *G. L. c. 152, § 12 (2)*, does not authorize this court to overturn a board decision on the ground that it is unsupported by substantial evidence, see *Scheffler's Case, 419 Mass. 251, 257-258, 643 N.E.2d 1023 (1994)*, we review the board's decision to ensure that its factual basis is sufficient to prevent it from being arbitrary or capricious. *Robinson's Case, 416 Mass. 454, 457, 623 N.E.2d 478 (1993)*. **[***15]** We determine that the board's conclusions find adequate support in both the administrative judge's findings and the record. The judge found that the employee's duties included "being on the ski slopes throughout the day monitoring high school aged children" and that without teacher chaperones, "no after school activities would be possible and an important part of the high school curriculum would be missing." Finally, the judge found that the employee was skiing with the ski club's students at the time of her injury.

The findings reflect accurately the testimony of the witnesses at the hearing. They form an adequate basis on which the board could conclude that the employee's duties as a chaperone were connected to her employment as a teacher; that the recreational aspect of serving as a chaperone was incidental to her employment duties; and that she was performing those employment duties at the time of her injury.

4. *Conclusion*. Because the recreational aspects of the employee's service as a ski club chaperone were subordinate to the work-related duties she performed, *G. L. c. 152, § 1 (7A)*, does not bar her from receiving workers' compensation for her injury. Accordingly, we affirm the **[***16]** board's **[**36]** decision to award the employee medical benefits pursuant to *G. L. c. 152, § 30*.

So ordered.

RICHARD J. SPILLANE & another [1] vs. SAMUEL ADAMS & others. [2]

1 Christine E. Spillane.
2 James O. Welch, Jr., the town of Manchester-by-the-Sea, and the Commonwealth of Massachusetts.

No. 08 P 2133.

APPEALS COURT OF MASSACHUSETTS

76 Mass. App. Ct. 378; 922 N.E.2d 803; 2010 Mass. App. LEXIS 231

November 9, 2009, Argued
March 2, 2010, Decided

SUBSEQUENT HISTORY: Review granted by *Richard J. Spillane v. Adams, 456 Mass. 1108, 925 N.E.2d 865, 2010 Mass. LEXIS 248 (Mass., Apr. 28, 2010)*

PRIOR HISTORY: [*1]**

Suffolk. Civil action commenced in the Land Court Department on December 22, 2005. The case was heard by Karyn F. Scheier, J., and postjudgment motions were heard by her.
Spillane v. Ervin, 2008 Mass. LCR LEXIS 105 (2008)

DISPOSITION: Judgment affirmed. Order denying motion to amend judgment and findings affirmed.

COUNSEL: Donald R. Pinto, Jr., for the plaintiffs.

John Michael Donnelly, Assistant Attorney General, for the Commonwealth.

Robert J. Moriarty, Jr., for James O. Welch, Jr.

Jackie Cowin for town of Manchester-by-the-Sea.

JUDGES: Present: Cohen, Vuono, & Grainger, JJ.

OPINION BY: GRAINGER

OPINION

[805] [*379]** GRAINGER, J. The plaintiffs, Richard and Christine Spillane (Spillanes), objected to the presence of two small boats moored on tidal flats within sight of their house located on Black Beach in the town of Manchester-by-the-Sea (town). Confident of their right to do so and exercising self-help, they had the moorings removed. Thereafter they sought a declaration under *G. L. c. 231A* in the Land Court to establish their ownership of the tidal flats, as well as a declaration that they are entitled to the exclusive use and control of the flats to the low water mark. [3] As defendants, they named Samuel Adams, James O. Welch, Jr., and the town. [4] The Spillanes subsequently amended their complaint **[***2]** to add the Commonwealth as a defendant. [5] The offending vessels, a fourteen-foot sailboat and a seventeen-foot motor boat, were owned by Adams and Welch respectively.

3 The Spillanes contend they are the owners of four contiguous parcels in the town: parcel 1, on which their home is located; parcel 2, which includes both upland and tidal flats on Black Beach; parcel 3 (upland), a portion of Black Beach directly south of parcel 1 and extending to the mean high water mark; and parcel 4 (the flats), consisting of tidal flats south of parcel 3. A sketch of the area is attached to this opinion as an Appendix.

4 The complaint originally included as defendants Adele Q. Ervin and Catherine C. Lastavica. Lastavica did not participate in the case below, and a motion to dismiss the case against Ervin was allowed by the Land Court on June 8, 2007. Neither is a party to this appeal.

5 The Commonwealth sought to protect the rights of the public pursuant to the public trust doctrine, "an age-old concept with ancient roots . . . expressed as the government's obligation to protect the public's interest in . . . the Commonwealth's waterways." *Trio Algarvio, Inc. v. Commissioner of the Dept. of Envtl. Protection, 440 Mass. 94, 97, 795 N.E.2d 1148 (2003).* **[***3]** Under the public trust doctrine, the Commonwealth holds tidelands in trust for traditional public uses of fishing, fowling, and navigation. *Fafard v. Conservation Commn. of Barnstable, 432 Mass. 194, 198, 733 N.E.2d 66 (2000).*

In response to the complaint, Adams filed a counterclaim seeking costs to replace his mooring. Welch filed a counterclaim alleging that the plaintiffs had no ownership rights in the flats or, alternatively, asserting the exis-

tence of a prescriptive easement permitting him to moor his boat. Finally, the Commonwealth **[*380]** counterclaimed, seeking a declaration of the boundaries of the flats under *G. L. c. 240, § 19*.

At trial, the Spillanes' claim of ownership was based on a deed dated November 3, 2003, from Wendell Weyland, trustee of the ACK Trust. Their evidence traced **[**806]** their chain of title in the upland and flats to a deed into Elizabeth H. Dewart dated May 13, 1902. [6]

> 6 While there was additional evidence tracing the Spillanes' chain of title to the mid-nineteenth century, they did not rely on any proof of ownership prior to 1902 for purposes of this case. In any event, that evidence does not affect our analysis.

In opposition the town proffered evidence of a 1640 grant of land, originally **[***4]** part of Salem and now comprising the town, which established the town and vested it with title to the transferred land (1640 grant). The town asserted that the 1640 grant included the upland tract, now designated as parcel 3. Because the 1640 grant was followed closely in time by the Colonial Ordinance of 1641-1647 (Colonial Ordinance) extending ownership of all upland parcels into the corresponding tidal flats, the town asserted that the Spillanes' predecessors in title were not the rightful owners of the flats. As described below, the town further supported its claim with additional evidence, including a 1919 title examiner's report (1919 report) prepared for a Land Court registration case originally intended to quiet title to the parcel here at issue, among others. The judge determined that (1) the town, rather than the Spillanes, owned the flats, (2) the boundary of the flats was the mean low water mark in accordance with the National Geodetic Vertical Datum (NGVD) standards, and (3) the Spillanes were liable to Adams for $ 145 in damages for the removal of his mooring. [7]

> 7 The trial judge explicitly indicated that her decision concerned the ownership and location solely of the **[***5]** flats, noting that "the upland is not at issue."

Subsequently, the town filed two postjudgment motions. The first, pursuant to *Mass.R.Civ.P. 15(b)*, 365 Mass. 761 (1974), sought to amend the town's responsive pleading to assert a counterclaim against the Spillanes to quiet title to the upland in the town. The second, pursuant to *Mass.R.Civ.P. 52(b)*, as amended, 423 Mass. 1402 (1996), and *Mass.R.Civ.P. 59*, 365 Mass. 827 (1974), requested an amendment to the findings and **[*381]** judgment to reflect the town's ownership of the upland. The judge denied both motions.

The Spillanes timely appealed the Land Court judge's decision; [8]

> 8 Specifically, the Spillanes allege on appeal that the judge erred in (1) ruling that the town owned the flats, (2) employing the NGVD mean low water mark as the seaward boundary of the flats, and (3) finding that they were liable to defendant Adams for $ 145.

Discussion. 1. *Ownership of the flats*. a. *The Spillanes' claim*. We turn first to the Spillanes' contention that the judge erred in rejecting their claim to ownership of the flats. They assert principally that the judge's ruling is based on an incorrect interpretation of *Tappan v. Burnham, 90 Mass. 65, 8 Allen 65 (1864)*, and, alternatively, **[***6]** that the judge improperly took judicial notice of the conclusions set forth in the 1919 report.

We accept a judge's findings of fact unless they are "clearly erroneous." *Mass.R.Civ.P. 52(a)*, as amended, 423 Mass. 1402 (1996). Because a trial judge is in the best position to judge the weight and credibility of the evidence, a finding of fact "will not be deemed 'clearly erroneous' unless the reviewing court on the entire evidence is left with the firm conviction that a mistake has been committed." *New England Canteen Serv., Inc. v. Ashley, 372 Mass. 671, 675, 363 N.E.2d 526 (1977)*. In evaluating the judge's decision, we are mindful that the plaintiffs bore the burden of affirmatively establishing title, and that simply "demonstrating the weaknesses or nonexistence **[**807]** of the defendants' title" is insufficient. *Sheriff's Meadow Foundation, Inc. v. Bay-Courte Edgartown, Inc., 401 Mass. 267, 269, 516 N.E.2d 144 (1987)*.

As stated, the Spillanes traced their title to 1902. They contend that this lineage is more than adequate to establish ownership, citing *G. L. c. 93, § 70*, and the title requirements of the Real Estate Bar Association. [9] In the absence of countervailing **[*382]** evidence they would be correct, but here they were confronted **[***7]** with a claim predating theirs by several centuries. See *Sheriff's Meadow Foundation, Inc. v. Bay-Courte Edgartown, Inc., supra at 269-270* (the length of a chain of title holds no weight where a prior, superior title exists).

> 9 *General Laws c. 93, § 70*, as amended by St. 1994, c. 350, § 3, establishes a requirement of a title examination "which covers a period of at least fifty years with the earliest instrument being a warranty or quitclaim deed," for purposes of title certification to mortgaged premises. Title Standard No. 1 of the Real Estate Bar Association for Massachusetts states that "[i]t is sufficient if the title examination covers a period of fifty years and the starting point is a warranty, quitclaim, or

duly authorized or empowered fiduciary's deed which on its face does not suggest any defects." Eno & Hovey, Real Estate Law c. 58 (4th ed. 2004).

The town's evidence was that in 1640 Salem vested title through the grant in all land that comprises the present-day town. [10] See *Tappan v. Burnham, supra at 71*. The Spillanes contest the judge's application of *Tappan* to this case because *Tappan* does not preclude explicitly the possibility that parcel 3 in the instant case had been **[***8]** conveyed to another party before the 1640 grant by Salem. There is simply no evidence in the record to support this speculation, and the judge was entitled to draw the inference that parcel 3 was part of the 1640 grant.

10 The 1640 grant covered land in a settlement then named Jeffryes Creeke, now known as Manchester-by-the-Sea.

Subsequent to the 1640 grant, as stated, the Massachusetts Bay Colony passed the Colonial Ordinance extending the town's interest in shore-front property to the tidal flats. [11] *Id. at 71-72*. As described below, the town also demonstrated the continuation of title established by the 1640 grant and Colonial Ordinance into the twentieth century. Thus, in the absence of evidence that the flats were transferred out of the land subject to the 1640 grant before the grant was made, or that the town alienated or lost title to either the upland or the flats prior to 1902, we recognize a presumption that title continues in the town. *Id. at 72*. See *Porter v. Sullivan, 73 Mass. 441, 7 Gray 441, 445 (1856)* ("[I]n the absence of any proof of the alienation of the one without the other, the presumption of law is, that the title to the flats follows that of the upland on which they lie, and **[***9]** proof of title to the upland establishes a title to the flats"). In sum, to defeat the presumption and satisfy their burden, the Spillanes were required to provide evidence of a transfer by Salem of the upland prior to 1640 or a transfer of the **[*383]** flats prior to 1641 (so that the 1640 grant or the Colonial **[**808]** Ordinance can be ruled out of the chain of title) or, alternatively, a transfer of either out of the town's ownership after the year 1640 and before 1902.

11 Specifically, the Colonial Ordinance provided shore front owners with title to the "low water mark" or 100 rods below high water, whichever was higher: "It is Declared, That in all *Creeks, Coves* and other places, about and upon *Saltwater*, where the Sea ebbs and flowes, the proprietor of the land adjoyning, shall have propriety to the low-water mark, where the Sea doth not ebb above a hundred Rods, and not more wheresoever it ebbs further." *Opinion of the Justices, 365 Mass. 681, 685, 313 N.E.2d 561 (1974)*, quoting from The Book of General Lawes and Libertyes 50 (1649).

The town presented additional evidence from previous Land Court filings; we consider the two principal cases.

(i) *Registration case no. 7143*. The town initiated case no. 7143 in 1919 **[***10]** to establish title to various parcels of property, including upland parcels on Black Beach, of which parcel 3 was one. The sole objection to the town's claims was lodged by Elizabeth Dewart, a predecessor in interest to the Spillanes. Accordingly, the town's claim to parcel 3 was severed from case no. 7143, [12] which then proceeded to judgment based on the 1919 report supporting the town's claims. The 1919 report concluded that the town owned the upland parcels under review. At the time it was submitted, the 1919 report included parcel 3, but as noted that parcel was subsequently severed from the original registration case.

12 A separate case (no. 8537), established to resolve ownership of parcel 3, was not pursued by the town and eventually was dismissed without prejudice.

In the proceeding below, the town pointed to the rational inference, adverse to the Spillanes, permissibly derived from the 1919 report in case no. 7143 which applied factually, albeit not legally binding, to parcel 3. The Spillanes, by contrast, emphasized that registration case no. 7143 did not decide the question of title to parcel 3, and the judge below acknowledged as much, stating that case no. 7143 "no more determined **[***11]** title [to parcel 3] than if that parcel were not part of the original case." The judge nevertheless considered the conclusions contained in the 1919 report as pertinent to ownership of parcel 3, and we conclude that she was correct in so doing. Although the 1919 report lacks direct legal applicability to parcel 3, resulting as it does from a procedural history that simply left the town's claim to that tract unresolved, that fact does not preclude consideration here of the research the report contains.

The Spillanes also object to the judge's use of the 1919 report on the separate ground that it was not properly admitted in evidence in the instant case for the truth of its contents, but **[*384]** only to demonstrate the fact that it had been performed. [13] To the extent this is an assertion that the Spillanes are not collaterally estopped by the conclusions contained in the 1919 report, it is correct, but unavailing. A copy of the case file was admitted in evidence by agreement of all parties; no conditions were attached. The judge was entitled to examine the evidence -- including the 1919 report -- and make findings based

on that evidence. The record, including the fact that parcel 3 was not severed **[***12]** from the registration case until three months after the 1919 report was submitted, generously supports her finding. The record contains no objection by counsel for the Spillanes, or for that matter by any party, setting forth an articulated basis to limit the relevance of the evidence. [14] We note as well that counsel for **[**809]** the Spillanes cross-examined the town's expert on the applicability of the 1919 report to parcel 3, thereby placing the issue in factual, not just legal, contention and opening the door to testimony that the title report supports the town's position. [15]

13 The judge stated that she accepted "the conclusion embodied in the title abstract in Registration Case 7143, which was reintroduced as evidence in this case."

14 Counsel for the Spillanes conceded that the judge was entitled to take judicial notice of case no. 7143 "so long as there's a relevance to it." By contrast, counsel objected to testimony introduced by opposing counsel on more than 160 occasions during a time span totaling slightly in excess of one trial day, and in the face of conscientious efforts by the judge to preserve a coherent flow to the proceedings. In this context we do not view the failure to register **[***13]** an objection to any particular use of case no. 7143 as insignificant.

15 The town's expert stated, "I believe the petition described the entirety of Black Beach when the petition was first initially filed which included parcel three," and in answer to continued questioning, "[w]hat [the report] does do, by filing the petition and describing all the lots, including parcel three, the inference is that it is included."

(ii) *Registration case no. 24523*. Russell Dewart, the son of Elizabeth Dewart, initiated registration case no. 24523 in 1953 to establish title to parcel 1, claiming appurtenant rights in Black Beach and the accompanying flats (parcels 3 and 4). After receiving the title examiner's abstract, the Land Court judge assigned to the case wrote to Dewart's counsel suggesting that documents in the record indicated that ownership "between low water mark and high water mark and perhaps up to the beach is in the Town." In fact, numerous plans introduced below **[*385]** contained notations reflecting the probable ownership of the beach and flats in the town. For example, the judge could properly draw an inference from Plan 24523B, which lists Black Beach as belonging to the "inhabitants of Town **[***14]** of Manchester." Likewise, registration plans for case no. 1398, [16] referenced in the letter to Dewart's counsel, when read together, suggest ownership in the town. The final decree issued in case no. 24523, though limited to registration of parcel 1, described the parcel as bounded southwesterly "by land now or formerly in the Inhabitants of Town of Manchester (Black Beach)."

16 Registration case no. 1398 sought to register land abutting parcel 1, a tract to the east of the upland.

Again, the town emphasized the inferences adverse to the Spillanes to be drawn from the title examiner's report in case no. 24523 and from the judge's accompanying letter to counsel. The Spillanes highlight the qualified nature of the title examiner's report and, as with case no. 7143, point to the case's lack of conclusive legal application to the case at bar. The trial judge acknowledged the equal import of all submitted Land Court case filings on the issue of title. [17] As with case no. 7143, the entirety of case no. 24523 was admitted in evidence by agreement, and the judge properly could rely on its contents. While the inferences to be drawn from the documents contained in case no. 24523 are more tenuous **[***15]** than those in case no. 7143 (in which title to parcel 3 was directly before the court, at least at the outset of the proceedings) their probative admissibility is no less apparent.

17 The judge stated that "[a]nything in the Land Court records of any of these registration cases that involve any piece of [the] property [at issue], in my view, is relevant to the issue of title that is in front of me in this case."

In sum, there was ample evidence to support the judge's finding that the Spillanes had failed to establish their ownership of the tidal flats. [18]

18 We note that the record contains various additional deeds and registration plans from which the judge could also draw an inference of the town's ownership; these are largely duplicative of the evidence described *infra*, and we do not discuss them separately.

b. *The town's title to the tidal flats*. Based on the evidence recited above, the judge ruled that the Spillanes had failed to establish title to the flats; she also concluded that title is in the **[**810]** town. [19] There was no error in these determinations.

19 The town initially asserted that its position was limited to opposing the Spillanes and did not include establishing its own right to **[***16]** title. It then reversed course by filing postjudgment motions seeking to quiet title to the upland in the town and now appeals from the denial of those motions. See part 3, *infra*.

[*386] "One of the principal purposes of the declaratory judgment law, *G. L. c. 231A*, is to settle completely the controversy submitted for decision." *Kilroy v. O'Connor, 324 Mass. 238, 242, 85 N.E.2d 441 (1949)*. Where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceedings, or for other sufficient reasons, the court may refuse to render or enter a declaratory judgment or decree. *G. L. c. 231A, § 3*. But "when an action for declaratory relief is properly brought, even if relief is denied on the merits, there must be a declaration of the rights of the parties." *Boston v. Massachusetts Bay Transp. Authy., 373 Mass. 819, 829, 370 N.E.2d 1359 (1977)*. See *Dupont v. Dracut, 41 Mass. App. Ct. 293, 297, 670 N.E.2d 183 (1996)*. In sum, the Spillanes put ownership of the flats in issue, and the judge had ample latitude to establish the town's title.

2. *Low water mark*. The Spillanes also claim error in the judge's determination that the low water mark should be measured by reference to mean low water **[***17]** as established by the NGVD. Having established which party had rightful title to the flats, it was appropriate under *G. L. c. 231A* for the judge to adjudicate the boundaries to which the title applied, especially where it was disputed by the parties. See *Boston v. Massachusetts Bay Transp. Authy., supra; Dupont v. Dracut, supra.*

No definitive standard for tidal marks has been adopted in our appellate case law, and we take this opportunity to do so. Indeed, for several centuries the use of the term "low water mark" to establish property rights has been emblematic of the difficulty we encounter in seeking to apply legal precision to natural forces. [20] This problem has had greater consequence in Massachusetts than elsewhere because our law gives waterfront property owners extended rights to the coastline and to tidal areas, more so than the laws of most States. In order to encourage what was deemed the productive use of waterfront property, i.e., the construction of wharves and piers, [21] the Colonial Ordinance assigned rights in **[*387]** tidal flats to the owners of the adjoining uplands. [22] Those rights extended to the "low water mark" or to 100 rods below high water, whichever was the shorter **[***18]** distance.

20 This observation of course applies equally to "high water mark" which is, however, not at issue here.

21 "[T]he king held the sea shores as well as the land under the sea . . . for the use and benefit of all the subjects, for all useful purposes, the principal of which were navigation and the fisheries." *Commonwealth v. Roxbury, 75 Mass. 451, 9 Gray 451, 483 (1857)*.

22 The Colonial Ordinance, now in existence for some 370 years, continues to affect current and conflicting interests of waterfront property owners and the general public. See, e.g., Ebbert, Hidden Shorelines, Boston Globe, June 25, 2006.

As the parties recognize, tidal range is inconstant and unpredictable. See, e.g., Eldridge, Tide and Pilot Book 10 (136th ed. 2010) ("[V]igilance and prudence should govern the decisions of the navigator, and . . . experience shows that tide and current predictions are approximate to begin with"). See also *Commonwealth v. Roxbury, 75 Mass. 451, 9 Gray 451, 482-483* **[**811]** *(1857)* (extensive discussion of English common-law principles holding that "the title to flats was in the king," and defining flats as bounded landward by "the medium line between the ordinary line of high water in ordinary spring tides at the full **[***19]** and change of the moon, and the ordinary line of high water at neap tides, at about midway in time between the full and change of the moon").

The difficulty (effectively conceded in the language of *Commonwealth v. Roxbury*, quoted above) of establishing boundary lines for irregular and continually shifting shorelines resulted historically in the forensic use of three separate semantic formulations to locate the "low water mark": (1) "extreme low water line," (2) "the low water mark that results from usual causes and conditions," and (3) "the mean low water mark." See generally *Rockwood v. Snow Inn Corp., 409 Mass. 361, 566 N.E.2d 608 (1991)*, and cases cited therein. These terms were, in turn, subjected to further semantic refinement in repeated efforts, reminiscent of King Canute, to stop the tide in one place. [23] As one judge of the Land Court succinctly stated in reference to tides, "[a]ll of this may **[*388]** sound precise, but it is not. 'The tide is an alternating rise and fall in sea level produced by the gravitational force of the moon and sun. Other non-astronomical factors, such as meteorological forces, ocean floor topography, and coast line configuration, also play an important role in shaping the **[***20]** tide.'" [24] *Houghton v. Johnson, 14 Mass. Land Court Rptr. 442, 446 (Land Court No. 308323 [KCL] (Aug. 9, 2006), S.C., 71 Mass. App. Ct. 825, 887 N.E.2d 1073 (2008)*, quoting from Brown, Boundary Control and Legal Principles 184 (4th ed. 1995).

23 See, e.g., *Storer v. Freeman, 6 Mass. 435, 439 (1810)* (referring to the "margin of the sea, in its usual and ordinary state"); *Sparkhawk v. Bullard, 1 Met. 95, 1 Metc. 95, 108 (1840)* (employing "low-water mark at such times when the tides ebb the lowest"); *East Boston Co. v. Commonwealth, 203 Mass. 68, 70, 72, 89 N.E. 236 (1909)* (attempting to distinguish between "the present

line of mean low water, or to some other line of mean low water," and stating that an order emanating from the General Court in 1640 that referred to "ordinary" low water "suggest[s] at once a distinction between the line indicated and absolute low water mark, or extreme low water mark").

24 To which we might add, among other factors, seismic disturbances and changes in climate.

The most recent case to address the issue is *Rockwood v. Snow Inn Corp., supra.* Referring to the case law cited above, see note 23, *supra*, the court in *Rockwood* acknowledged that there is no "recognized line to which the tide usually ebbs. . **[***21]** . . The line of low water, like the line of high water, is gradually and constantly changing from day to day in different parts of the month, and in different parts of the year, from the highest spring tides to the lowest neap tides." *Id. at 369.* The court in *Rockwood*, however, took the first step toward simplification by eliminating one approach, concluding that the waterfront property in question did "not extend to the 'extreme low water line' as that term is used in modern tidal charts to reflect the lowest level ever reached by the sea at that location, and we overrule any of our prior cases to the extent, if any, that they may imply that our law is otherwise." *Id. at 370*. We are left therefore with two remaining options for locating the mark: "the low water mark that results from usual causes and conditions," and "the mean low water mark."

In this case the option we select not only marks the boundary of the disputed flats, it also determines whether Adams's mooring **[**812]** was within the area of the flats or seaward of them. The Spillanes presented testimony from an expert witness who had determined the low water mark by planting poles at the water's edge as the tide retreated until it **[***22]** reached its lowest point during a period the witness characterized as subject to "usual causes and conditions." In defense of this methodology (which unsurprisingly placed the mooring within the flats) the Spillanes point to the fictional nature of "mean low water" in the sense **[*389]** that low tide may never actually be found at that level. [25] They point out that their expert's use of poles, by contrast, provides a location for low water that has been demonstrated to exist on at least one occasion.

25 While "mean" is not always synonymous with "average," it is used interchangeably in this context. See *Rockwood v. Snow Inn Corp., 409 Mass. at 363* (defining "mean low water mark" as "a line established by an average of the low tides"). Thus the Spillanes' argument is perfectly logical, akin to asserting that the average height of a group of persons need not correspond to the actual height of any person in the group.

The town, in opposition, proposes the use of "mean low water" as determined by the NGVD. "Mean low tide" is defined as "[t]he average of all low tides -- both low and lower low -- over a fixed period." Black's Law Dictionary 1619 (9th ed. 2009). The two approaches remaining after *Rockwood* **[***23]** thus provide a distinct contrast between a real, but continually changing, position on the one hand, and a fictional location that will be relatively constant on the other.

Faced with this choice, we conclude that the Spillanes' reliance on a particular measurement taken at one point in time is contrary to a basic purpose of property law. Boundaries should be capable of determination with relative ease, rather than greatly subject, as here, to weather and the phases of the moon.

This is not the first occasion on which a judge of the Land Court has determined that "mean low water," as established by the NGVD, is the appropriate standard:

"For purposes of setting boundaries, the greatest need is certainty. The best way to establish a clear line which will be: (a) respected by the parties (because it is based on objective data), and (b) easiest to enforce (because its results are repeatable), is to use the Mean High Water Elevation and Mean Low Water Elevation lines, placed according to NGVD data . . . . While I am not aware of any appellate court decision that has yet adopted this standard, I believe it is the standard that those courts will adopt when it is presented to them."

Houghton v. Johnson, 14 Mass. Land Court Rptr. at 447 (Land Court No. 308323 [KCL]) **[***24]** (footnote omitted). [26]

26 The use of the NGVD in *Houghton* was not an issue on appeal. We noted that "[n]one of the parties . . . complains about [the judge's] determination, based upon his consideration of precedent, scholarly articles, and the testimony of an expert, that the 'high water mark' and 'low water mark' were to be measured in accordance with the objective, relevant, standardized, and publicly available data compiled from survey stations established by the Federal government and located throughout the country, that is, National Geodetic Vertical Datum (NGVD)." *Houghton v. Johnson, 71 Mass. App. at 829.*

[*390] In sum, the certainty provided by the NGVD is as desirable for the landowner as for the navigator. Mean water level is a commonly employed reference and is the basis for datum printed on nautical charts issued by the National Oceanic and Atmospheric Ad-

ministration. [27] By contrast, use **[**813]** of the much more subjective "usual causes and conditions" advocated by the Spillanes provides little predictive value, and creates the need for case-by-case adjudication. The judge properly exercised her discretion in her **[***25]** use of the NGVD mean low water datum as the "low water mark," hence the seaward boundary of the flats. [28]

27 Mean water level (usually expressed as "mean lower low water") is the tidal datum displayed on charts of the east, west and gulf coasts as well as the coasts of Alaska, Hawaii, the West Indies and other United States and United Nations Islands of the Pacific. United States Coast Pilot, Atlantic Coast (39th ed. 2009).

28 We note that the mean water levels measured by the NGVD will reflect average changes ("accretion" and "reliction") over time; additionally we do not intend to preclude the use of other reliable and predictable techniques made possible by scientific advances in the future.

3. *Motions to amend answer and judgment*. As we noted earlier, the town has cross-appealed, alleging that the trial judge abused her discretion in denying several posttrial motions, the purpose of which was to assert an affirmative claim of ownership to the upland. We review the judge's decision for an abuse of discretion, though consistent with the axiom that "a motion to amend should be allowed unless some good reason appears for denying it." *Afarian v. Massachusetts Elec. Co., 449 Mass. 257, 269, 866 N.E.2d 901 (2007)*, **[***26]** quoting from *Castellucci v. United States Fid. & Guar. Co., 372 Mass. 288, 289, 361 N.E.2d 1264 (1977)*. "[P]rejudice to the non-moving party is the touchstone for the denial" of such motions. *Hamed v. Fadili, 408 Mass. 100, 105, 556 N.E.2d 1020 (1990)*, quoting from *Goulet v. Whitin Mach. Works, Inc., 399 Mass. 547, 550 n.3, 506 N.E.2d 95 (1987)*.

The judge did not err in denying the motions. Title to the upland was not placed in issue by any party prior to judgment; **[*391]** to the extent that title to the flats implies title to the upland, the town explicitly rejected any such claim in open court. See, e.g., *Jones v. Wayland, 374 Mass. 249, 253 n.3, 373 N.E.2d 199 (1978)*, quoting from *Kagan v. Levenson, 334 Mass. 100, 106, 134 N.E.2d 415 (1956)* ("The theory of law on which by assent a case is tried cannot be disregarded when the case comes before an appellate court for review of the acts of the trial judge").

All of the evidence ties ownership of the flats to ownership of the uplands. [29] Accordingly, it remains unclear on this record why the town now appeals the denial of its posttrial motions which unnecessarily sought a result that had already been impliedly achieved, albeit in the face of initial protestations of disinterest. [30]

29 The Spillanes link ownership through their **[***27]** chain of title; the town makes the connection through the 1640 grant. The result, however, is the same.

30 *Court*: "I'm going to ask you, in terms of the town's claim, to the extent there's a claim of ownership here or the evidence by which you would contest plaintiffs' claim to the flats, is it by way of taking?"

Town Counsel: "No . . . . Just to clarify for the record, *we're not making an affirmative claim for ownership*, but simply offering rebuttal evidence to [plaintiffs'] claim" (emphasis supplied).

In denying the motions, the trial judge emphasized the town's repeated assertions throughout the pretrial stages that it was not affirmatively seeking to quiet title, but rather was challenging the Spillanes' claim to title. The Spillanes allege that the town's contentions on this point altered their trial strategy. While we reserve judgment on the potential success of any additional claims or evidence the Spillanes might have presented, we conclude that the trial judge did not err in denying the town's motions based on its repeated assurances **[**814]** that it was not seeking to quiet title. The town had ample opportunity to raise an affirmative claim of ownership to the upland and declined to do **[***28]** so on multiple occasions. [31] We have no basis to know whether evidentiary submissions would support a finding that severs title to the upland from title to the flats, and we offer no opinion on the town's ability to bring an action to quiet title in the future.

31 The town did not formally assert an affirmative claim to quiet title until August 3, 2007, the final day of trial.

4. *Damages*. Given our conclusion that title to the tidal flats **[*392]** was properly found to reside in the town, we find no error in the ruling below that the Spillanes are liable to defendant Adams for damages in the amount of $ 145.

Judgment affirmed.

Order denying motion to amend judgment and findings affirmed.

[815]** **[*393]** [SEE APPENDIX IN ORIGINAL]

TOWN OF NORWELL vs. MASSACHUSETTS SCHOOL BUILDING AUTHORITY.

09-P-784

APPEALS COURT OF MASSACHUSETTS

76 Mass. App. Ct. 1125, 2010 Mass. App. Unpub. LEXIS 404

April 16, 2010, Entered

SUBSEQUENT HISTORY: Reported at *Town of Norwell v. Mass. Sch. Bldg. Auth., 2010 Mass. App. LEXIS 478 (Mass. App. Ct., Apr. 16, 2010)*

DISPOSITION: [*1] Judgment affirmed.

JUDGES: Lenk, Duffly & McHugh, JJ.

OPINION

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

In 1999 and 2000, the town of Norwell (town) applied for and received approval from the Department of Education for funding pursuant to G. L. c. 70B to build a new middle school and a new high school. Following an audit of the finished project in 2006, the Massachusetts School Building Authority (authority), which had since replaced the Department of Education as the agency in charge of administering the school building assistance program, denied reimbursement of certain legal fees the town had incurred in connection with construction of the schools. [1] The town's Superior Court complaint, requesting review pursuant to *G. L. c. 30A, § 14*; petitioning in the nature of certiorari; seeking declaratory judgment; and claiming equitable estoppel, was dismissed on motion of the authority. The town appeals.

1 In July, 2004, the Legislature enacted St. 2004, c. 208, which created the authority, and transferred to it all administrative duties for the school building assistance program.

Background. During the building phase of the schools, the town incurred $ 343,419 in legal expenses related to enforcing its construction **[*2]** contract rights for the two projects. At the time the town applied for the grants and during the construction phase, legal costs were reimbursable under the school building assistance program, *G. L. c. 70B, § 5*(*a*), inserted by St. 2000, c. 159, § 140. That statute provided in relevant part as follows:

> "Any eligible applicant may apply . . . for a school facilities grant to meet in part the cost of an approved school project. Such cost shall include the entire interest paid or payable by such city, town or regional school district on any bonds or notes issued to finance such project, as well as any premiums, fees or charges for credit or liquidity enhancement facilities or services issued or rendered to any such city, town or regional school district. *Such costs shall also include all costs and legal fees to enforce rights on any contracts for the construction of an approved school project*. Such application shall be in the form prescribed . . . and shall be accompanied or supplemented by drawings, plans, estimates of cost and proposals for defraying such costs or any such additional information as . . . may [be] require[d], before construction is undertaken. . . ." (Emphasis supplied.) **[*3]** [2]

2 In June, 2006, the Legislature essentially rewrote *§ 5*, and removed the language allowing for the reimbursement of legal fees related to con-

struction contracts was removed. See St. 2006, c. 122, §§ 30. Later that same year the authority also promulgated regulations deeming legal fees ineligible for reimbursement unless directly related to bond issuance costs. See *963 Code Mass. Regs. §§ §§ 2.00 et seq.* Neither the rewritten statute nor the new regulations apply to the present dispute apply.

In May, 2006, the authority transmitted to the town a draft audit report of the school building projects, listing as ineligible certain costs including the legal costs at issue here. The town objected; at a meeting with the authority, the authority declined to restore the legal costs. In a November 3, 2006, letter finalizing its decision, the authority noted that the legal costs "were listed as ineligible in the draft audit report based on [Department of Education] and [authority] policies. These policies dictate that . . . legal fees are not eligible for reimbursement unless they are directly related to bond issuance costs." The town thereafter filed its complaint and the authority filed its motion **[*4]** to dismiss under *Mass.R.Civ.P. 12(b)(6)*, 365 Mass. 754 (1974). The motion judge ruled that the authority's funding decisions are discretionary and not subject to judicial review under any of the theories proposed by the town, citing *School Comm. of Hatfield v. Board of Educ., 372 Mass. 513, 363 N.E.2d 237 (1977)*, and *Attleboro v. Massachusetts Sch. Bldg. Authy., 68 Mass. App. Ct. 1117, 864 N.E.2d 42 (2007)* (issued pursuant to this court's *rule 1:28*).

Discussion. Under *rule 12(b)(6)*, "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Nader v. Citron, 372 Mass. 96, 98, 360 N.E.2d 870 (1977)*, quoting from *Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)*. [3]

3 Because the authority filed its motion to dismiss before the Supreme Judicial Court, in *Iannacchino v. Ford Motor Co., 451 Mass. 623, 625 n.7, 635-636, 888 N.E.2d 879 (2008)*, refined the standard of review enunciated in *Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)*, we apply the earlier, less strict standard. See *Flomenbaum v. Commonwealth, 451 Mass. 740, 751 n.12, 889 N.E.2d 423 (2008)*, quoting from *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. The outcome would **[*5]** be the same under either standard, however.

General Laws c. 30A, § 14, inserted by St. 1954, c. 681, § 1, provides to an aggrieved party judicial review of a "final decision of any agency in an adjudicatory proceeding." An adjudicatory proceeding is defined by *G. L. c. 30A, § 1(1)*, inserted by St. 1954, c. 681, § 1, as "a proceeding before an agency in which the legal rights, duties or privileges of specifically named persons are required by constitutional right or by any provision of the General Laws to be determined after opportunity for an agency hearing." Because the authority is not required to hold a hearing with regard to its c. 70B grant determinations, "[t]he question thus becomes whether [the town] had a property interest [in the school grants] which would invoke the protection of the *due process clause of the Fourteenth Amendment to the United States Constitution*, and of *art. 10 of the Declaration of Rights of the Massachusetts Constitution*." *General Chem. Corp. v. Department of Envtl. Quality Engr., 19 Mass. App. Ct. 287, 290, 474 N.E.2d 183 (1985)*, quoting from *School Comm. of Hatfield v. Board of Educ., supra at 514-515*. "Property interests 'are created and their dimensions are defined **[*6]** by existing rules or understandings that stem from an independent source such as state laws -- rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.'" *Madera v. Secretary of the Executive Office of Communities & Dev., 418 Mass. 452, 459, 636 N.E.2d 1326 (1994)*, quoting from *Haverhill Manor, Inc. v. Commissioner of Pub. Welfare, 368 Mass. 15, 23, 330 N.E.2d 180*, cert. denied, *423 U.S. 929, 96 S. Ct. 277, 46 L. Ed. 2d 257 (1975)*. As a threshold issue we decide that c. 70B, *§ 5*, as existing during the pendency of the town's application, conferred no entitlement to school funding grants. The language of *§ 5* on which the town relies states that reimbursable costs "shall . . . include all costs and legal fees to enforce rights on any contracts for the construction of an approved school project." However, that section also provides that an application for funds is subject to approval, which requires the exercise of discretion on the part of the authority. Thus, any subsidiary decisions regarding specific reimbursements also are discretionary. Read in the context of the entire section, the language relied upon by the town is a directive that expenditures subject to potential reimbursement are to be **[*7]** included on an application for funds. The language does not create an entitlement to such funds and the motion judge was correct to conclude that the town's claim was therefore not reviewable under *G. L. c. 30A, § 14*. Cf. *School Comm. of Hatfield v. Board of Educ., 372 Mass. at 516* (no entitlement where determination whether proposed construction would be in town's best interests was discretionary with State board of education).

In large part for the reasons given above, we also affirm the dismissal of the claims for certiorari review, declaratory judgment, and equitable estoppel.

A requisite element for the availability of certiorari review pursuant to *G. L. c. 249, § 4*, is "a judicial or

quasi judicial proceeding." *Walpole v. Secretary of the Executive Office of Envtl. Affairs, 405 Mass. 67, 72, 537 N.E.2d 1244 (1989)*, quoting from *Boston Edison Co. v. Selectmen of Concord, 355 Mass. 79, 83, 242 N.E.2d 868 (1968)*. Because the authority's funding decision was a discretionary action requiring no hearing or formal procedure, it was not a judicial or quasi judicial proceeding. See *id. at 72-73*. See also *School Comm. of Hudson v. Board of Educ., 448 Mass. 565, 575-577, 863 N.E.2d 22 (2007)*. Declaratory relief pursuant to G. L. c. 231A **[*8]** is likewise unavailable due to the discretionary nature of the authority's decision. See *School Comm. of Hatfield v. Board of Educ., supra at 516-517*. Cf. *Attleboro v. Massachusetts Sch. Bldg. Authy., 68 Mass. App. Ct. 1117, 864 N.E.2d 42 (2007)*.

As to the town's estoppel argument, "'[g]enerally, the doctrine of estoppel is not applied against the government in the exercise of its public duties, or against the enforcement of a statute.' . . . Estoppel is not applied to governmental acts where to do so would frustrate a policy intended to protect the public interest." *Risk Mgmt. Foundation of Harvard Med. Insts., Inc. v. Commissioner of Ins., 407 Mass. 498, 509-510, 554 N.E.2d 843 (1990)*, quoting from *LaBarge v. Chief Administrative Justice of the Trial Ct., 402 Mass. 462, 468, 524 N.E.2d 59 (1988)*. Because the authority's review of c. 70B grant applications requires it to make decisions affecting the public interest, it is not a proper party to an estoppel claim.

Judgment affirmed.

By the Court (Lenk, Duffly & McHugh, JJ.)

Entered: April 16, 2010

MARC J. GARRETT, MALCOLM A. MacGREGOR, LARRY ROSENBLUM, PAUL F. McALDUFF, and WILLIAM S. WENNERBERG III, as Members of the PLYMOUTH PLANNING BOARD v. PETER CONNER, DAVID PECK, MICHAEL BUSTER MAIN, EDWARD C. CONROY, and RYAN J. MATTHEWS, as Members of the PLYMOUTH ZONING BOARD OF APPEALS, and SUNNA, LLC

09 MISC 414930

MASSACHUSETTS LAND COURT

18 LCR 16*; *2010 Mass. LCR LEXIS 18

January 7, 2010, Decided

HEADNOTES

Planning Board-Authority to Retain Counsel-Appeal of ZBA Decision

SYLLABUS
[1]**

An appeal by the Plymouth Planning Board of a ZBA decision according a zoning permit for a car dealership was dismissed by Justice Alexander H. Sands III, where the Planning Board had not been authorized by the Board of Selectmen to initiate this action or retain counsel. The Planning Board had argued that its appeal would have no financial impact on the Town since its counsel was appearing pro bono, but this position was rejected given the clear authority accorded the Selectmen in Plymouth's charter to appoint counsel, and given the absence of extraordinary circumstances.

COUNSEL: Francis Joseph Veale, Jr., Esq. for the Plaintiff.

Elizabeth Ann Lane, Esq., Kopelman and Paige, P.C. for the Defendant.

Edward T. Angley, Esq., Gillis & Angley for the Defendant.

JUDGES: Alexander H. Sands III, Justice.

OPINION BY: SANDS

OPINION

[*16] DECISION

Plaintiff Plymouth Planning Board (the "Planning Board") filed its unverified Complaint on October 27, 2009, appealing pursuant to *G. L. c. 40A, § 17* a decision of Defendant Plymouth Zoning Board of Appeals (the "ZBA") approving a zoning permit application filed by Defendant Sunna, LLC ("Sunna") to construct a car dealership on Sunna's property located at 9 Long Pond Road, Plymouth ("Locus").On November **[**2]** 19, 2009, the ZBA filed a Motion to Strike Appearance of Counsel for the Planning Board and Dismiss Complaint. The Planning Board filed its Opposition to the Motion to Dismiss on December 14, 2009. [1] A hearing was held on the motion on December 22, 2009, and continued to the case management conference which took place on December 30, 2009. At such time the motion was taken under advisement.

1 A Corrected Copy of the Opposition was filed on December 18, 2009.

The following facts are not in dispute:

1. On June 9, 2009, Sunna filed a zoning permit application with the Plymouth Director of Inspectional Services ("DIS") to construct a car dealership on Locus. On July 1, 2009, the DIS denied the application (the "DIS Decision").

2. On July 29, 2009, Sunna filed an appeal of the DIS Decision to the ZBA. As part of such appeal, the Planning Board recommended that the ZBA uphold the DIS Decision. On September 30, 2009, the ZBA voted to overturn the DIS Decision (the "ZBA Decision").

[*17] 3. On October 27, 2009, the Planning Board appealed the ZBA Decision to this court. By Affidavit dated December 9, 2009, and filed with this court on December 14, 2009, Francis J. Veale, Jr. stated that "I am representing **[**3]** the Plymouth Planning Board pro bono in this action."

4. Pursuant to *G. L. c. 4, § 7*, the "chief executive officer," in context of "the operation of municipal governments," "shall include the mayor in a city and the board of selectmen in a town unless some other municipal office is designated to be the chief executive officer under the provisions of a local charter." Section 3-2-1 of the Town of Plymouth Charter (the "Charter") states that "[t]he Board of Selectmen shall be the chief executive body of the town."

5. Section 3-2-6 of the Charter states that "[t]he Board of Selectmen shall be responsible, through the Town Manager, for the efficient and orderly operation of all agencies of the town except those under the direction of another elected town agency." [2]

> 2 The record before this court does not state the identity of the Town Manager.

6. Section 3-3-1 of the Charter states that "The Board of Selectmen shall appoint . . . town counsel . . . except as otherwise provided in this Charter and/or the town by-laws."

7. Section 3-14-5 of the Charter states that "[t]he Planning Board shall make recommendations to... the Board of Selectmen on all matters concerning the planning of the physical, **[**4]** environmental, community, and economic development of the town as prescribed by general law, this Charter, and applicable town by-laws...."

8. At a meeting on December 29, 2009, the Plymouth Board of Selectmen (the "Board of Selectmen") voted unanimously (the "Board of Selectmen Vote") "to deny the request of the Planning Board for permission to retain counsel, pro bono or otherwise, for the purpose of appealing the [ZBA Decision]."

* * *

The ZBA argues that the Planning Board has not been authorized by the Board of Selectmen to initiate this action or to retain counsel in this action, and relies on the Board of Selectmen Vote. The ZBA cites *Board of Public Works of Wellesley v. Board of Selectmen of Wellesley, 377 Mass. 621, 624 (1979)*, which states,

> It is conventional learning that a municipal department is not permitted to bring suit for the town without specific authorization from the town or from agents entitled to act for it - unless, indeed, there is governing legislation conferring the power on the department. The rule serves to prevent confusion or conflict in the direction and management of municipal litigation.

See O'Reilly v. Scituate, 328 Mass. 154, 155 (1951) ("In the absence **[**5]** of legislative authority, it is settled that a department of a city or town has no authority to employ counsel."). [3]

> 3 The ZBA also cites an Order of this court (Trombly, J.) in *Town of Rehoboth v. Town of Rehoboth Zoning Board of Appeals, Land Court 09 Misc. 405262 (November 2, 2009)*, which held that even though a local board hired its own attorney pro bono, such board did not have the authority to direct the legal interests of the Town of Rehoboth.

As evidence that it has standing to bring this action, the Planning Board relies on *G. L. c. 40A, § 17*, which states that

> [a]ny person aggrieved by a decision of the board of appeals . . . or any municipal officer or board may appeal to the land court department . . . by bringing an action within twenty days after the decision has been filed in the office of the city or town clerk.

The ZBA responds that the third paragraph of this statute states that "[a] city or town may provide any officer or board of such city or town with independent legal counsel for appealing, as provided in this section, a decision of a board of appeals . . ." and argues that the Town did not do this. The Planning Board argues that where it hired its own attorney pro **[**6]** bono, such hiring did not affect the Town financially. This position was recently commented on in *Twenty Wayland, LLC v. Wayland Historic District Commission*, Middlesex Superior Court, Civil Action No. 2009-02967 (November 17, 2009) (Kern, J.), which was upheld by a single justice of the Massachusetts Appeals Court on December 21, 2009. In that case, the Appeals Court pointed out that "extraordinary circumstances" prevailed. [4] In the case at bar, there are no "extraordinary circumstances," as the ZBA has counsel hired by the Board of Selectmen, and the Planning Board, which by Charter is authorized to report to the Board of Selectmen in an advisory capacity, has hired its own counsel in direct violation of the Board of Selectmen Vote.

> 4 In *Twenty Wayland*, the Wayland Historic District Commission, as defendant in a case brought by a private party, had no attorney as the Town Counsel had a conflict, and the Town Administrator refused to appoint special counsel. The Appeals Court points out that such extraordinary circumstances were contemplated by a footnote in *Board of Public Works of Wellesley*.

As a result of the foregoing, this court ALLOWS the ZBA's Motion to Strike Appearance of Counsel **[**7]** for the Planning Board and Dismiss Complaint.

Judgment to enter accordingly.

LEE PARKER, et al. v. STEPHEN M. DUNGAN, ELLEN S. STURGIS JASON S. ROBART, THOMAS H. RUGGIERIO, and KATHLEEN KING FERREL in their capacity as the BOARD OF SELECTMEN of the TOWN OF STOW

Docket No. 346915

MASSACHUSETTS LAND COURT

18 LCR 1; 2009 Mass. LCR LEXIS 148

December 31, 2009, Decided

HEADNOTES

Conservation Restriction-Recreational Use-Public Trust Doctrine

SYLLABUS
[1]**

The bargain conveyance in 1975 of 31 acres to the Town of Stow, subject to the restriction that part of the property be kept in a natural state and for recreational use, established a public trust, and not a conservation restriction, with contractual obligations arising upon the Town's acceptance of the deed. As such, the restriction was enforceable and not subject to expiration under *G.L. c.184, § 23*. Justice Harry M. Grossman further ruled that the conveyance did not limit the use of the property to purely "passive" recreational activities or preclude the construction of athletic fields with appurtenant parking.

COUNSEL: Michelle J. Blair, Esq., Blair Legal for Plaintiff.

Robert F. Dionisi, Jr., Esq., Dionisi/O'Rourke, LLP for the Plaintiff.

Jonathan D. Witten, Esq., Barbara M. Huggins, Esq., Daley and Witten, LLC for the Defendant.

JUDGES: Harry M. Grossman, Justice.

OPINION BY: GROSSMAN

OPINION

[*1] ORDER ALLOWING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IN PART AND DENYING IT IN PART

Introduction

This action primarily concerns the interpretation to be given certain language appearing in a deed dated December 15, 1975 from Lloyd L. Parker (Parker) to "the Inhabitants of the Town of Stow," Massachusetts. For a consideration of $ **[**2]** 230,000.00, Parker conveyed "an area of approximately thirty-one acres" known as Pine Bluff (Parker Property / Locus), subject however, to the following language (Language):

> Said land is conveyed subject to the restriction that a one hundred (100) foot buffer zone, as measured at the perimeters of the property conveyed as bound by the lands of others and Sudbury Road, expressly excepting the lake frontage on Lake Boon from any such restriction, to be kept in a natural state except as changes, modifications, alterations, construction, additions or any other actions may be necessary, required or beneficial in the judgment of the Town for access and egress for any purpose, including but not limited to maintenance and construction of ways and any or all utility easements for the intended use for recreational, playground and swimming facilities.

Plaintiffs, who own parcels abutting the Parker Property, [1] initiated this lawsuit on May 8, 2007 [2] by naming the members of the Stow Board of Selectmen as the Defendants (Board/Defendants) herein. The Plaintiffs sought, pursuant to G.L. c. 240, s.10A, [3] "to enforce a restriction on real property." Perhaps more critically, the Plaintiffs seek declaratory **[**3]** relief. [4] To this end, they ask the court to determine, inter alia, that "the language in the [Parker] Deed creates a conservation restriction" pursuant to G. L. c. 184, s. 31; that the twenty-one acre undeveloped portion of the Parker Property is to remain in its natural state and to be used for no more than passive recreational purposes; [5] that the installation by the Town in 1994 of soccer fields and an appurtenant parking area

was a violation of a public trust, which they argue was set forth in the Parker Deed and in an Order of Taking by the Town (Order). [6]

1 The Parker Property, in turn, abuts Lake Boon.

2 A First Amended Complaint was filed on June 1, 2007.

3 *G.L. c. 240, § 10A*: The...land court shall have...jurisdiction of a civil action by any person or persons claiming an estate of freehold, or an unexpired term of not less than ten years, in land subject to a restriction described in [c.184, § 26], to determine and declare whether and in what manner and to what extent and for the benefit of what land the restriction is then enforceable, whether or not a violation has occurred or is threatened.

4 See Plaintiffs' First Amended Verified Complaint, P 105: "A declaration of the parties' **[**4]** rights and interest in the Pine Bluff property will resolve the entire conflict."

5 Plaintiffs also seek a reformation of the Parker Deed "by stating that...all recreational use be strictly passive in nature...." Additionally, they seek declarations that the Parker Property is not to be converted into an athletic complex, and that no further athletic fields are to be constructed thereon.

6 On December 16, 1975, the Town of Stow, through its Board of Selectmen and Recreation Commission executed a document styled "Order of Taking" with regard to the Parker Property. It included the Language recited in the Parker Deed.

For its part, by means of the instant Motion for Summary Judgment (Motion), the Defendants seek, inter alia, declarations that:

(1) The restriction contained in the Parker Deed "has expired pursuant to G.L. c. 184, s. 23;" [7]

(2) No conservation restriction was created under the Parker Deed; [8]

(3) No public trust or public charitable trust was created under the said Deed;

(4) The Town was not in violation of the Deed when it constructed a parking lot and soccer fields on the locus;

(5) With the exception of the buffer zone referenced in the Deed, the Locus need not remain in a natural **[**5]** state;

(6) With the exception of the buffer zone, the Deed does not prohibit the construction of athletic fields or parking lots at the Locus; and that except for the buffer zone, the Town may construct athletic facilities, as well as appurtenant or incidental parking lots and structures, on any portion of the Locus;

(7) With the exception of the buffer zone, the Deed does not prohibit the cutting of trees, demolition, construction and alteration on any portion of the Locus;

(8) Within the buffer zone, the Town my effect any changes, alterations, construction, additions or other actions needed or required for access and egress including maintenance or **[*2]** construction of ways and any utility easements for the intended use for recreational, playground and swimming facilities.

7 *G.L. c. 184, § 23*: Conditions or restrictions, unlimited as to time, by which title or use of real property is affected, shall be limited to a term of thirty years after the date of the deed or other instrument... creating them, except in the case of gifts or devises for public, charitable or religious purposes. This section shall not apply to conditions or restrictions...having the benefit of section thirty-two [of chapter **[**6]** 184].

8 *See G.L. c. 184, §§ 31*: A conservation restriction means a *right*...whether or not stated in the form of a restriction, easement, covenant or condition, in any deed...executed by or on behalf of the owner of the land or in any order of taking, appropriate to retaining land or water areas predominantly in their natural, scenic or open condition...to permit public recreational use, or to forbid or limit any or all...construction or placing of buildings, roads, signs...utilities or other structures on or above the ground.... (emphasis added)

See also, *G.L. c. 184, § 32*: No conservation restriction... as defined in section thirty-one, held by any governmental body or by a charitable corporation or trust whose purposes include conservation of land or water areas...shall be unenforceable on account of lack of privity of estate or contract or lack of benefit to particular land on account of the benefit being assignable or being assigned to any other governmental body or to any charitable corporation or trust having received the

> right to enforce the restriction by assignment, provided...in the case of a restriction held by a city or town or a commission, authority or other instrumentality thereof it is **[**7]** approved by the secretary of environmental affairs....

In their Memorandum in Opposition to Defendants' Motion for Summary Judgment (Plaintiffs' Memorandum), the Plaintiffs pose the following questions:

> (a) Whether the grantor created a conservation restriction that complies with the statutory requirement;
>
> (b) Whether the grantor created a restriction that expired within thirty years because it does not fall within one of the exceptions to *G.L. c. 184, § 23*;
>
> (c) Whether the correct interpretation of the Parker Deed restricts use of the one hundred foot buffer zone to passive recreational use only;
>
> (d) Whether the correct interpretation of the Parker Deed restricts the use of the entire property to passive recreational use only.

For the reasons that follow, I conclude that the Parker Deed served as the basis of a public trust for the benefit of the Inhabitants of the Town of Stow, and that, with the exception of the buffer zone, the recreational uses thereunder are not limited to those of a purely passive nature.

Background

By Deed (Parker Deed) dated December 15, 1975 and recorded on December 18, 1975 with the Middlesex South District Registry of Deeds (Registry) at Book 12910, Page 496, Lloyd **[**8]** L. Parker (Parker) conveyed the subject property to the "Inhabitants of the Town of Stow" for $ 230,000.00. The conveyance included "[t]he land with the buildings and improvements thereon, situated on the Southwesterly side of Sudbury Road in Stow" [9] and bounded Westerly "by Lake Boon...by four distances, 335 feet, 326 feet, 10 feet and 922 feet respectively...." This conveyance was expressly made subject to the Language quoted above. [10]

> 9 As shown "as Lots 1,2,3 and 4 on a plan of land entitled 'Plan of land Stow, Mass., owned by Emma M. Scott et al,' Survey by Clyde R. Wheeler, Inc., Bolton, Mass., dated January 5, 1975, revised August 25, 1975, which plan is to be recorded herewith...."
>
> 10 *See supra, pp. 1-2.*

While the Language in question derives from a single lengthy sentence, this court is of the view that it will admit of but a single cogent meaning, *i.e.* one that is fully consistent with the intent of the Grantor and other relevant parties.

Consequently, this court construes the Language at issue, as follows:

> (a) The intended use of the Locus, as conveyed to the "Inhabitants of the Town of Stow," was for "recreational, playground and swimming facilities."
>
> (b) The Locus was conveyed subject **[**9]** to the express restriction or condition that there is to be a one hundred foot buffer zone that is to be maintained in its natural state.
>
> (c) There are two exceptions to the requirement that the buffer zone be maintained in its natural state:
>
> > (1) The first expressly exempts from the restriction that portion of the Locus fronting on Lake Boon.
> >
> > (2) The second permits "changes, modifications, alterations, construction, additions or any other actions *with regard to the buffer zone*, as may be necessary, required or beneficial in the judgment of the Town for access or egress for any purpose, including but not limited to maintenance or construction of ways and any or all utility easements [necessary] for the intended use" of the whole, such use being for recreational, playground and swimming purposes.

(Emphasis added.)

The foregoing construction gains support from a near contemporaneous [Confirmatory] Order of Taking (Order) dated December 16, 1975 and recorded with the Registry on December 18, 1975 at Book 12910, Page

498. On December 16th, it was voted [11] that the land described in Article 2 [of a Special Town Meeting [12] Warrant] [13] "be purchased *or* [in the alternative] taken by eminent domain **[**10]** for a Town swimming and recreational area, *to include a public playground, and other recreational facilities and to conduct and promote recreation, play, sport and physical education thereon*...." (Emphasis added.)

> 11 The Order of Taking was adopted by vote of both the Board of Selectmen and the Recreation Commission of the Town of Stow, on December 16, 1975.
> 12 The Special Town Meeting was held on November 10, 1975.
> 13 Described as "approximately thirty-one (31) acres of land, more or less, bounded generally by Lake Boon and Sudbury Road in Stow...." Article 3 of the Special Town Meeting Warrant established a $ 12,000.00 fund for purposes of "developing the Lake Boon swimming and recreational land...."

The Order of Taking continued as follows:

> [I]n accordance with said vote under Article 2 *the Town has proceeded to purchase said land and to pay therefore the sum appropriated for such purpose*... [14]
>
> Now Therefore, the Selectmen and Recreation Commission of said Town of Stow, desiring to make a confirmatory taking... Do Hereby Take In Fee, free from all easements, proposed streets or rights of way, privileges and appurtenances existing with the land here described... [Emphasis added.]

> 14 The $ 230,000.00 expended **[**11]** by the Town for acquisition was derived in large measure from "a gift of $ 200,000.00 to the Town for the purchase or taking thereof."

[*3] There follows a description of the Locus which tracks that appearing in the Parker Deed, accompanied by the above quoted Language.

Summary Judgment Standard

Summary judgment is appropriate when "pleadings, depositions, answers to interrogatories, and responses to requests for admission... together with affidavits...show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." *Mass. R. Civ. P. 56(c)*. The moving party bears the burden of proving the absence of controversy as to material facts and that he or she deserves a judgment as a matter of law. *See Highlands Ins. Co. v. Aerovox Inc., 424 Mass. 226, 232 (1997)*. The substantive law which controls the outcome of the issue determines which facts are material for purposes of summary judgment. *Houghton v. Johnson*, 2006 WL 2304036 (Mass. Land Ct.) (Long, J.), citing, *e.g., Hogan v. Riemer, 35 Mass.App.Ct. 360, 364 (1993)*.

To meet its burden, the moving party is not required to submit affidavits or other similar materials negating the opponent's claim. **[**12]** *Kourouvacilis, 410 Mass. at 713*, citing *Celotex Corp., 477 U.S. at 323*. "The burden on the moving party may be discharged by showing that there is an absence of evidence to support the non-moving party's case." *Kourouvacilis, 410 Mass. at 711*, citing *Celotex Corp., 477 U.S. at 322*. Thus, "regardless of whether the moving party accompanies its summary judgment motion with affidavits, the motion may, and should, be granted so long as whatever is before the...court demonstrates that the standard for the entry of summary judgment is satisfied." *Kourouvacilis, 410 Mass. at 713*, quoting *Celotex Corp., 477 U.S. at 323-324*. [15]

> 15 "One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses, and we think it should be interpreted in a way that allows it to accomplish this purposes." *Kourouvacilis, 410 Mass. at 713*, citing *Celotex Corp., 477 U.S. at 323-324*.

A corollary to the moving party's burden is that the court is to "make all logically permissible inferences" from the facts in the non-moving party's favor. *Willitts v. Roman Catholic Archbishop of Boston, 411 Mass. 202, 203 (1991)*. That said, "the right of a party facing summary **[**13]** decision to have the facts viewed in a favorable light,...does not entitle that party to a favorable decision" and reliance upon mere "bald conclusions" is an inadequate means of defeating the motion. *Catlin v. Bd. of Registration of Architects, 414 Mass. 1, 7 (1992)*.

The possibility that the non-movant could elicit material evidence on cross-examination of witnesses is not grounds for denying summary judgment. *Thompson v. Commonwealth, 386 Mass. 811 (1982)*. Once the moving party has met its burden, to withstand summary judgment the non-movant must allege specific facts showing that there is a genuine issue of material fact. *Baldwin v. Mortimer, 402 Mass. 142, 143-144 (1988)*, citing *Godbout v. Cousens, 396 Mass. 254, 261 (1985)*. "In determining whether a factual dispute is 'genuine,' the Court must determine whether the evidence is such that a rea-

sonable [fact finder] could return a verdict for the nonmoving party." *Steffen v. Viking, 441 F.Supp.2d 245, 250 (2006)*, citing, *e.g., Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)*. The function of the court, at summary judgment, is not to determine the credibility of witnesses or weigh the evidence. *Atty. Gen. v. Brown, 400 Mass. 826, 832 (1987)*. **[**14]** However, *Mass R. Civ. P. 56(c)* permits the disposition of controversies if in essence there is no real dispute as to the salient facts, or resolution of the matter depends solely upon judicial determination of a question of law.

The record before the court reflects no genuine factual dispute, material under the relevant law, which would preclude a legal determination as to whether the Town of Stow holds the Parker Property subject to restriction, and if so, the nature and scope of such restriction(s). Consequently, the case is ripe for summary judgment.

Discussion

In proceeding with its analysis, this court has determined that two decisions of the Supreme Judicial Court are instructive. The first case, that of *Nickols v. Commissioners of Middlesex County, 341 Mass. 13 (1960)*, concerned gifts of land on the shores of Walden Pond in Concord, Massachusetts. In *Nickols*, by deeds recorded June 9, 1922, several parties donated land to the Commonwealth which constituted substantially all the shores of Walden Pond. The deeds in question contained language indicating that:

> [the] parcels are...*subject to the restriction and condition* that no part of the premises shall be used for games, athletic contests, **[**15]** racing, baseball, football, motion pictures, dancing, camping, hunting, trapping, shooting, making fires in the open, shows or other amusements such as are often maintained at or near Revere Beach and other similar resorts, *it being the sole and exclusive purpose of this conveyance to aid the commonwealth in preserving the Walden of Emerson and Thoreau*, its shores and nearby woodlands for the public who wish to enjoy the pond, the woods and nature, including bathing, boating, fishing and picnicking. [16] [Emphasis added.]

16 *Nickols, 341 Mass. at 15*.

In 1957, a lawsuit was filed seeking a writ of mandamus compelling the defendants to observe the terms of the deeds, and to refrain from conduct violative of those terms.

The defendant commissioners contended that the statement of purpose in the deeds was not "a restriction, condition, trust, obligation or burden with respect to the granted property." They argued further that the purpose of such language was not to preserve the pond or nearby woodlands in their natural state.

The Court observed at the outset that "[p]roperty conveyed to a governmental body...for a particular public purpose may be subject to an enforceable public obligation or trust **[**16]** to use the property for those purposes." It cited *Codman v. Crocker, 203 Mass. 146, 150 (1909)* for the proposition that "where property is dedicated **[*4]** ...to a public use for a particular purpose, it cannot...without the exercise of ...eminent domain..., be...[put] to a use of a different character, in disregard of the trust...and...the rights of the donors." [17]

17 *Nickols, 341 Mass. at 19*.

The Court continued:

> [I]t is apparent that whether a gift, subject to a "condition" or stating a "purpose," imposes a trust or obligation is a matter of interpretation of the particular instrument and determination of the particular donors' intent. The intention of these grantors...is to be ascertained from a study of the instrument[s] as a whole in the light of the circumstances attending...[their] execution. *Search should be made for a general plan...designed to express a consistent and harmonious purpose.... The facts relating to the gifts and their background...are of great assistance in interpreting the deeds*. [18] [Internal citations omitted.] [Emphasis added.]

18 *Id., pp. 19-20*.

As to those specific restrictions and conditions appearing in the *Nickols* deeds which precluded the use of the premises for certain athletic and **[**17]** other activities, the Court had this to say:

> The "restriction and condition" of the deed *against* certain sports, amusements, and other activities were appropriate

> methods of preserving the pond as nearly as possible in its state and accomplishing the "sole and exclusive" purpose. That purpose we construe not only as part of the condition to which it is attached, but also as defining the terms of a public trust or obligation.... A purpose defined as "sole and exclusive" was not merely precatory, but was what the donors said it was. [19] [Emphasis added.]

19 Id.

Lastly, the Court's holding, together with its other conclusions, bear relevance to the case at hand:

> We hold that the predominant obligation imposed by the deeds was the preservation of the pond area as closely as practicable in its state of natural beauty. Nevertheless, we do not forget that the deeds authorized "bathing, boating, fishing, and picnicking." These words also must be given some significance and reconciled, so far as possible, with the donor's dominant purpose. Although the principal concern of the donors was the preservation of the Walden of Emerson and Thoreau, they plainly did not intend Walden Pond to be only an outdoor **[**18]** museum.... As we read the deeds, bathing, boating, fishing and picnicking may be encouraged *and facilities for such uses and for the comfort, safety, and convenience of bathers, fishermen and other visitors, may be provided and improved*, so long as the physical aspect, character, and appearance of the shores and woodland, as seen from the pond and its shores are not essentially changed, *and there is no interference with the dominant objective*. This interpretation permits necessary maintenance, policing, removal of fallen trees, planting of new trees, repair of erosion and damage by visitors, and carefully planned and placed, well concealed, inconspicuous construction of essential structures. On the other hand, this interpretation requires that the structures, roads, vehicles, and concessions shall not be placed on the shores and adjacent woodland area in a manner... inconsistent with the donor's primary purpose. This interpretation of the deeds gives appropriate significance to all of the words stating conditions and purposes of the conveyances and the obligations thereby imposed. [20] [Emphasis added.]

20 *Id., pp. 23-24.*

The second noteworthy case is that of *Cohen v. City of Lynn, 33 Mass. App. Ct. 271 (1992).* **[**19]** It too concerned the public trust doctrine and the imposition of a trust upon a 17, 238 square foot parcel adjacent to Lynn Shore Drive in Lynn, Massachusetts. The plaintiffs claimed that the conveyance of the parcel to a private developer violated the terms of a public charitable trust which, they asserted, arose in 1893 when the land was acquired by the City of Lynn to be used "forever for park purposes." [21] The Court determined that despite the passage of many years, the parcel was still impressed with the trust that was first established in 1893.

21 *Cohen, 33 Mass. App. Ct. at 272.*

The property in *Cohen* had been acquired by two deeds and conveyed "to the City of Lynn to its own use and behoof forever for park purposes." The City argued that since the grantors had received substantial consideration for the land in 1893, the conveyance was not a gift and therefore no trust could be established. [22]

22 *Id., p. 276.*

The Court noted that of the $ 20,000.00 purchase price, $ 12,000.00 had been appropriated on condition that the remaining $ 8,000.00 was to be raised through public subscription. The *Cohen* decision continued:

> The latter amount [the $ 8,000.00] was obtained from property owners...and **[**20]** from certain public spirited citizens and included $ 1,500.00 donated by the grantors. *We have found no authority, nor is any cited to us, to the effect that the receipt of substantial consideration prevents a grantor from conveying property to a municipality in such manner as to establish a public charitable trust*. Generally, the creation of a trust may be supported by consideration in the sense that the beneficiary confers a benefit upon the settlor in order to obtain from him the creation of the trust. Moreover, the grantors' monetary contribution in effect establishes that the conveyance, in part, was a gift. *In any event, the record does not in-*

dicate that the payment to grantors represented fair market value. [23] [Emphasis added.]

23 Id.

With the foregoing as a backdrop, this court turns to the issues raised by the Defendant in its Motion for Summary Judgment. Defendant seeks a declaration to the effect that no public trust was created under the Parker Deed, while the Plaintiffs argue that Parker intended to convey the Locus in the form of a "public trust for the benefit of the public." [24]

24 Plaintiff's Memorandum, p. 8-9.

a. Public Trust Doctrine

We observed that in *Nickols, supra,* **[**21]** the "restriction and condition" set forth in the relevant deeds served to accomplish the underlying purpose of the public trust. For example, the *Nickols* Court viewed the restriction against certain sports, amusements and other activities as elements which served to define the terms **[*5]** of the public trust or obligation. [25] In the case at hand, this court views words of restriction or condition, including the usage limitation, in a similar light. These words serve to accomplish the Grantor's clear intention [26] to preserve the Locus for public recreational purposes. Thus, the bulk of the property is to be preserved for active recreational use, while the buffer zone is to be preserved in its natural state, available for no more than passive recreational use.

25 *Nickols, 341 Mass. at 23*. "The 'restriction and condition' of the deed against certain sports, amusements and other activities were appropriate methods of preserving the pond ...in its then state and of accomplishing the 'sole and exclusive' purpose. That purpose we construe not only as part of the condition to which it is attached, but also as defining the terms of [the] public trust or obligation..."

26 Indeed, the Grantor uses the phrase **[**22]** "*intended* use."

We have seen that "[p]roperty conveyed to a governmental body . . . for particular public purposes may be subject to an enforceable general public obligation or trust to use the property for those purposes." [27] While public trusts may well be created through *gifts* of property, the grantor's "receipt of substantial consideration," does not prohibit the creation of a public trust. [28] In *Cohen*, the Court noted that of the $ 20,000.00 acquisition price, the Town had appropriated 60% or $ 12,000.00 of its own funds, with the remaining sum of $ 8,000.00 being raised through public subscription. [29] This latter amount included $ 1,500.00 donated by the grantors themselves. But for the specific amounts, these facts compare favorably to those in the case at bar.

27 *Nickols, 341 Mass. at 18*.

28 Consideration may be given to induce the grantor to create the public trust. *Cohen, 33 Mass. App. Ct. at 276*.

29 *Cohen, 33 Mass. App. Ct at 276*.

Here, the purchase price was set at $ 230,000.00, an amount substantially less than the property's $ 312,000.00 assessed value. Of the $ 230,000.00 total consideration, $ 200,000.00 [30] was derived from a gift to the Town by an anonymous donor (Donor) on **[**23]** the express condition that it be used for the acquisition of the Parker Property. According to the Minutes of the Special Selectmen's Meeting of June 12, 1975, [31] the $ 200,000.00 gift was also contingent upon "Mr. Parker's willingness to sell for $ 230, 000.00." To paraphrase the *Cohen* Court, there is no indication whatever, that the $ 230, 000.00 represented fair market value of the Locus. [32] Indeed, these available facts, together with the reasonable inferences that may be drawn therefrom, suggest otherwise. [33]

30 An amount comprising in excess of 85% of the purchase price.

31 Plaintiffs' Supplemental Opposition, Exhibit A.

32 *See Cohen, 33 Mass. App. Ct. at 276*.

33 *I.e*. that the $ 230,000.00 represented an amount *less* than the fair market value.

I conclude therefore, that the payment of substantial consideration for the Parker Property by the Town does not constitute an impediment to the establishment of a public trust. In order to determine whether a conveyance of property has actually resulted in a public trust, the court should look to the "particular instrument" as well as the "particular donors' intent." *Nickols, 341 Mass. at 19*. The intent of the grantor should, in turn, be "ascertained **[**24]** from a study of the instrument[s] as a whole in the light of the circumstances attending . . . [their] execution" and a "search for a general plan . . . designed to express a consistent and harmonious purpose." *Id. (quoting Jewett v. Brown, 319 Mass. 243, 248)*. If the Grantor's intent was that the land be used for a particular purpose in perpetuity, "it almost necessarily follows that he intended to establish a trust to effect this purpose." *Salem v. Attorney General, 344 Mass. 626, 630 (1962)*.

It is the view of this court that the documentary evidence appearing in the Summary Judgment record defines, in the aggregate, a general plan of the sort referenced by the *Nickols* Court. [34] Moreover, such documentary evidence also provides a rich evidentiary base from which this court may further ascertain the intent of the Grantor.

> 34 *See Nickols, 341 Mass. at 19*. *See* also, *Cohen 33 Mass App. Ct. at 275*. Drawing upon the language appearing in *Nickols*, the Court in *Cohen* observed as follows:
>
> > Whether a trust or obligation is imposed is a "matter of interpretation of the particular instrument and determination of the particular donors' intent [,]" and "is to be ascertained from a study of the instrument[s] **[**25]** as a whole in the light of the circumstances attending...[their] execution. Search should be made for a general plan... designed to express a consistent and harmonious purpose. [Internal citations omitted.]

As has been seen, the Parker Deed provided for an extensive one hundred foot buffer zone. [35] That buffer is to be retained, with specified exceptions, in a relatively pristine or natural state. The remainder of the Locus is to be utilized for swimming, playground and recreation purposes. The Parker Deed contains an express, unambiguous declaration of intent to convey the Locus to the Town for such purposes. [36] The circumstances surrounding the execution of the Parker Deed, which this court is free to consider, [37] further support the argument that the Grantor's declaration was more than mere precatory language. In *Cohen*, the Court relied, in part, upon an annual report of the City's Park Commissioners in support of its conclusion that there was a "general plan" to create a public trust. *Cohen, 33 Mass. App. Ct. at 277* (*citing* 1891 Report of the Lynn Park Commissioners to the effect that the owners were willing to sell land to the city if it were "dedicated to public use"). In the case **[**26]** at hand, the Plaintiffs have introduced Minutes from the Special Selectmen's Meeting of June 12, 1975, undisputed by the Defendants, which indicate that both Parker and the Donor were "concerned that the property be kept as strictly recreation and conservation." The Minutes recite as follows:

> Mr. Parker will probably insert something into the sale agreement that it be used only for recreation and conservation. The Parkers do not wish to see the property become another Lake Walden and do not wish to tie the Town's hands, but they do wish it to be used for recreation-conservation exclusively. It was agreed at the end of the meeting that the Parkers were willing to sell to the Town under those terms....

> 35 *See* Parker Deed, p.1: "[A]s measured at the perimeters of the property conveyed as bound by the lands of others and Sudbury Road."
> 36 *Id*.
> 37 *See Nickols, 341 Mass. at 19*.

[*6] Thereafter, on September 29, 1975, an Escrow Agreement [38] was executed by the members of the Stow Board of Selectmen, and by the Donor's agent. That Agreement provided in relevant part as follows:

> [T]he Grantors [39] intend to make a gift to the [Town] of $ 200,000 as a contribution toward the purchase of certain land for use **[**27]** as a *town swimming and recreational area* on Lake Boon in Stow, Massachusetts.... The Grantors hereby pledge to donate to Grantee $ 200,000 as a contribution towards the purchase of the land for use by the Grantee as a *town swimming and recreational facility*. [Emphasis added.]

> 38 Plaintiffs' Supplemental Opposition, Exhibit C.
> 39 The term *Grantors* as used in the Escrow Agreement is used to describe the Anonymous *Donor* of the $ 200,000.00 gift to the Town. At the same time, the term *Grantee*, is a reference to the Town itself.

The Escrow Agreement provided further that the funds were to be paid over to the Town *only* in the event that certain conditions were fulfilled. Among them, that "Grantee [Town] at a duly authorized special town meeting...shall have validly adopted [a vote]...to purchase or otherwise acquire the Land pursuant to ...Chapter 40, s 14, [40] *for use as a town swimming and recreational area*." [Emphasis added.]

40 *G.L. c. 40, § 14*: [T]he selectmen of a town may purchase, or take by eminent domain under chapter seventy-nine, any land....within the...town not already appropriated to public use, for any municipal purpose for which the purchase or taking of land...is not otherwise authorized or **[**28]** directed by statute; but no land... shall be taken or purchased under this section unless the taking or purchase thereof has previously been authorized by...vote of the town.

This documentary record [41] discloses that Lloyd L. Parker, the Town of Stow [42] and the anonymous Donor worked together on a carefully coordinated arrangement to convey the Parker Property for purposes that are clearly public in nature. The components of this plan permitted the Town to acquire the Locus with a minimum of taxpayer funding. In return, the Town contractually agreed that the Property would be used for those limited municipal purposes stipulated in the Parker Deed. By all indications, the parties understood and intended not only that the Locus be put to a specific use, but that such use was to remain in perpetuity for the benefit of the "Inhabitants of the Town of Stow," to whom the Locus was explicitly conveyed. There is nothing on the record that remotely suggests otherwise.

41 Including, without limitation, the language appearing in the Parker Deed itself, in the confirmatory Order of Taking, in the Escrow Agreement and the Selectmen's Minutes. When viewed in the aggregate, these resources serve to elucidate **[**29]** the collective intent of the relevant parties, including that of the Grantor, Lloyd L. Parker.

42 Through its Board of Selectmen, Town Meeting and Recreation Commission.

Moreover, the acceptance of the purchase money on the terms set forth by the Donor evinced a willingness and intent on the part of the Town to abide by the requirements [43] enumerated in the Deed. Indeed, in the Order of Taking issued by the Town the day following the execution of the Parker Deed, the Town declared that the Locus was to be dedicated as a "swimming and recreational area, to include a public playground, and other recreational facilities . . . and to conduct and promote recreation, play, sport, and physical education thereon . . . ."

43 *See*, for example, terms of the Escrow Agreement referenced above at p. 15.

Based upon the Summary Judgment record and the relevant decisional law, I find that the conveyance of the Parker Property to the Town of Stow established a public trust with contractual obligations arising therefrom upon acceptance of the Deed by the Town. [44] Moreover, the language in the Parker Deed together with surrounding circumstances amply demonstrate an unequivocal intent that the Parker Property **[**30]** be retained and used by the Town of Stow for the purposes enumerated therein. I conclude further that the acceptance of the Parker Deed by the Town of Stow constituted a contract between Parker and the Town "which must be observed and enforced." [45]

44 It is well to remember that even if there were no public trust, the Locus in its entirety would be subject to Article 97 of the Articles of Amendment to the Constitution of the Commonwealth. As a consequence, the Locus could not be used for other purposes or otherwise disposed of, absent a two-thirds roll call vote of each branch of the General Court.

45 *Cohen, 33 Mass. App. Ct. at 277*. The *Cohen* Court observed that the contractual obligation of the parties was such that it could not be disturbed by the Legislature itself without violating Article 1, § 10 of the Constitution of the United States. [No state shall... pass any...Law impairing the Obligation of Contracts....] *Id. at 279*.

b. Additional Issues

Notwithstanding this court's determination regarding the existence of a public trust, significant questions remain as to the permissible use of the Locus under that trust. This court turns now to the specific issues raised by the Defendants in their **[**31]** Motion for Summary Judgment, to the extent such issues have not previously been addressed herein.

The Defendants first seek a declaration that the restriction referenced in the Parker Deed has expired pursuant to *G.L. c. 184, § 23*. However, this court has determined that such restriction constituted a condition of the public trust which had been established upon the Town's acceptance of the Parker Deed. [46] Consequently, I conclude that any restriction or condition in the Parker Deed became part and parcel of the trust at the time of its formation, and is not therefore subject to expiration under *§ 23*. [47]

46 *See* in this regard, *Nickols at p. 23*. "The 'restriction and condition' of the deed against ...certain ...activities were appropriate methods of preserving the pond ...and of accomplishing the 'sole and exclusive' purpose. That purpose we construe not only as part of the condition to which it is attached, *but also as defining the public trust or obligation*...." [Emphasis added.]

47 In somewhat similar fashion, Plaintiffs have argued the presence of a statutory conservation

restriction. Even if this issue had not been rendered moot, however, it would appear that as a matter of law, no conservation **[**32]** restriction has been created under the Parker Deed. *See* in this regard, *G. L. c. 184, §§ 31&32*. Moreover, while there is little relevant discussion or analysis in the Summary Judgment record, to the extent a *right* as contemplated under *§ 31* has been conveyed, it is not clear that plaintiffs are the appropriate parties to seek enforcement of same under *§ 32*.

Defendants next seek a ruling that "the Town was not in violation of the [Parker] Deed when [in 1994] it constructed a parking lot and soccer fields on the locus." Beyond that, the Defendants seek a declaration that would, with the exception of the buffer zone, **[*7]** permit the Town to construct athletic fields, parking lots and "appurtenant structures on any portion of the locus." The Plaintiffs, for their part, argue that *any* recreational use at the Locus must be wholly passive in nature. [48]

48 The meaning of the term "passive" is not made abundantly clear by the Plaintiffs. Suffice it to say that they do not believe that athletic fields and a parking area of the sort that currently exist or that may be contemplated at the Locus constitute a "passive" use.

There is no language, however, either in the Parker Deed or in other relevant documents **[**33]** in the Summary Judgment record, that would in the view of this court, limit the Locus [49] to purely passive uses. In this regard, the Order of Taking [50] may be likened to the Commissioners' Report relied upon by the *Cohen* Court. The Order of Taking comprises one of the circumstances that, in the aggregate, constitute a plan that is of assistance in ascertaining the Grantor's purpose and intent. [51] The so-called confirmatory Order of Taking [52] is virtually contemporaneous with, and so is of value in construing, the Parker Deed. At the same time, it provides useful insight into the parties' understanding and intent. Thus, the Town wished to purchase or take the property for a municipal swimming and recreation area, to include a playground as well as other recreational facilities "to conduct and promote" recreation, play, sport and physical education. Given such language, one would be hard pressed to sustain an argument that athletic fields lie beyond the realm of permissible uses under the Parker Deed. Further, it is well to note that the Parker Deed provides that the buffer is to be kept predominantly in a natural state. If the Plaintiffs were correct that the Locus, as a whole, is to **[**34]** be maintained in a predominantly natural state, suitable for passive athletic uses at best, that fact would likely obviate the need for a buffer zone. Moreover, the Grantor indicated that he did not "wish to see the property become another Lake Walden and [did] not wish to tie the Town's hands...." [53] This sentiment cuts heavily against the Plaintiffs' argument that the use of the Locus was to be limited to "passive" recreational activities that would not affect the "natural state" of the land. This court explicitly finds that the public trust places no such constraints upon the recreational use of the Locus by the Town.

49 With the exception of the buffer zone.

50 Together with other documentary evidence in the Summary Judgment record, cited herein.

51 *See Cohen, at 277*. In speaking of the 1892 Annual Report of the City Park Commissioners, the *Cohen* Court stated as follows:

> In their...annual report, the commissioners stated the land was to be "secured for public enjoyment forever." The "general plan" and expression of a "consistent and harmonious purpose" are evident.

52 It should be noted that the Locus had been deeded to the Town on the day *prior* to the Order of Taking, and that the Parker Deed **[**35]** was recorded immediately *prior* to the recordation of the Order. Given theses circumstances, this court believes that the taking came at a time when the Town had already acquired the Locus by purchase from Lloyd Parker. It is relevant in this regard that the authorizing Town Meeting vote permitted the acquisition by purchase or taking, not both. Moreover, the Order itself speaks in terms of a *confirmatory* taking. It is presumed that this term is an implicit reference to the earlier acquisition by purchase. Critically, the second WHEREAS clause of the Order, recites as follows:

> [I]n accordance with said vote under said Article 2 [of the special town Meeting Warrant] the Town has proceeded to purchase said land and to pay therefore the sum appropriated for such purpose.
>
> Thus, the Order of Taking itself expressly acknowledges a previous acquisition of the Parker Property by purchase.

53 *See supra, p. 14. See* also references to *Nickols, supra*, p. 8 where donations were made of land "constituting substantially all the shores of Walden Pond....subject to the restriction and condition that *no part of the premises* shall be used for games, athletic contests, racing, baseball, football.... [Emphasis **[**36]** added.]

CONCLUSION

Predicated upon the foregoing, this court concludes as follows:

1. A public trust was created by the Parker Deed for the benefit of the Inhabitants of the Town of Stow. Said trust limits the use of the property [54] described therein to recreational purposes and facilities, including playground and swimming facilities, together with any incidental parking areas and structures. Any such facilities, appurtenant parking areas and structures, are to be reasonable in relation and scope to the said recreational uses;

54 With the exception of the buffer zone.

2. For the reasons set forth above, any restriction contained in the Parker Deed is neither subject to nor has it expired pursuant to MGL c.184, s. 23;

3. No conservation restriction was created by the Parker Deed; [55]

55 Refer to Note No. 47, *supra*.

4. Within the buffer zone, the said public trust does *not* prohibit changes, modifications, alterations, construction, additions or any other actions that may be necessary, required, or beneficial in the judgment of the Town, for access and egress for any purpose, including but not limited to maintenance or construction of ways and any or all utility easements, *but only* however, in **[**37]** furtherance of the recreational, playground and swimming purposes that are permitted pursuant to the public trust;

5. Beyond the buffer zone, the Town may take such reasonable measures as necessary for the implementation of the recreational, playground and swimming uses permitted pursuant to the public trust. Such measures may include the cutting of trees to the extent required, as well as the construction, alteration or replacement of appropriate facilities.

6. With the exception of the buffer zone, [56] the said public trust does *not* limit recreational activity to that of a purely "passive" nature or that which is "incidental to swimming;"

56 The buffer zone is to be maintained in a "natural state" and thus may be rendered suitable for purely passive recreational pursuits that are not inconsistent with its natural state.

7. With the exception of the buffer zone, it is not necessary that the Locus be maintained in its "natural state;"

8. The Town did *not* violate the Parker Deed or the resultant public trust by previously constructing soccer fields and an appurtenant parking lot on the property;

9. With the exception of the buffer zone, and in furtherance of the recreational uses permitted **[**38]** under the public trust, the Town is not **[*8]** precluded from constructing athletic fields, together with appurtenant or incidental parking lots and structures, on the Locus. [57]

57 *See Nickols, 341 Mass. at 23-24*, quoted above at p.10. As per the *Nickols* Court it appears that concessions may be among those permitted structures. Presumably, public restrooms would also count among such appurtenant or incidental structures.

In view of the foregoing, it is hereby

ORDERED that Defendant's Motion for Summary Judgment be, and hereby is, **ALLOWED IN PART**, and **DENIED IN PART**.

Judgment to issue accordingly.

SO ORDERED.

By the Court.

CITY OF SPRINGFIELD v. MASJID AL-TAWHEED

01 TL 126786

MASSACHUSETTS LAND COURT

18 LCR 119*; *2010 Mass. LCR LEXIS 10

February 22, 2010, Decided

HEADNOTES

Tax Title-Foreclosure of Right of Redemption-Failure to Appeal Tax Abatement Denials

SYLLABUS
[1]**

Where the City of Springfield had taken property for tax arrearages for the 1995 fiscal year, and that property belonged to a mosque qualifying for a federal *Section 501(c)(3)* exemption as a religious entity, a 2001 petition seeking to foreclose the right of redemption was nevertheless granted by Justice Alexander H. Sands III because the mosque had repeatedly failed to appeal the denial of its tax-exempt status by Springfield assessors to either the Appellate Tax Board or the County Commissioners.

COUNSEL: Melvyn W. Altman, Esq., City Of Springfield - Law Dept. for the Plaintiff.

Mark Edward Blakeman, Esq., Michelson, Kane, Royster & Barger, P.C. for the Defendant.

JUDGES: Alexander H. Sands III, Justice.

OPINION BY: SANDS III

OPINION

[*119] DECISION

Plaintiff filed its unverified Complaint on November 21, 2001, seeking to foreclose a right of redemption in property located at North Side Walnut Street and West Side Oak Street, Springfield, Massachusetts ("Locus"). [1] A Report was filed by title examiner Dennis E. Tully on April 4, 2002. A citation was issued on June 28, 2002, with a return day of July 29, 2002. Defendant Masjid Al-Tawheed ("Al-Tawheed") filed its Appearance on October 15, 2002. [2] Defendant filed its Motion to Dismiss **[**2]** on September 18, 2006. [3] Plaintiff filed its Motion for Summary Judgment on July 31, 2009, together with Affidavits of Stephen P. O'Malley (Chairman of the Board of Assessors of Springfield) and Ehsanul H. Bhuiya (Springfield Treasurer and Collector of Taxes). Defendant filed its Objection to Motion for Summary Judgment on September 30, 2009, together with Affidavit of Ishmael Ali. On October 15, 2009, Plaintiff filed its Reply Brief. A hearing was held on the summary judgment motion on December 29, 2009, at which time the motion was taken under advisement.

1 In various documents filed with this court, Locus has been identified as both 115 Walnut Street and 171-173 Walnut Street.

2 Ishmael Ali ("Ali"), who is not an attorney licensed to practice law, attempted to represent Al-Tawheed pro se by filing his appearance even though he was advised that a corporation could not represent itself. Ali is the Imam (spiritual leader) of Al-Tawheed. Al-Tawheed eventually hired an attorney who filed an appearance on June 17, 2009.

3 The Motion to Dismiss was not filed in compliance with Rule 4 of the Rules of the Land Court and was never heard. Defendant appeared in court approximately one month after **[**3]** filing the motion and did not request that it be scheduled to be heard. Even so, the issues raised in the Motion to Dismiss are fully addressed in the parties' summary judgment briefs.

Summary judgment is appropriate where there are no genuine issues of material fact and where the summary judgment record entitles the moving party to judgment as a matter of law. *See Cassesso v. Comm'r. of Corr., 390 Mass. 419, 422 (1983)*; *Cmty. Nat'l. Bank v. Dawes, 369 Mass. 550, 553 (1976)*; *Mass. R. Civ. P. 56(c).*

This court finds that the following facts are not in dispute:

[*120] 1. Locus (Map ID number 119520195) is a parcel of vacant land containing 9737 square feet with a current assessed value of $ 28,100. Locus is zoned Business 1.

2. By letter dated June 1986, Al-Tawheed obtained tax exempt status from the Internal Revenue Service,

Department of the Treasury, pursuant to *Section 501(c)(3) of the Internal Revenue Code*. [4]

4 Al-Tawheed was incorporated in the Commonwealth of Massachusetts as a nonprofit corporation on October 15, 1979.

3. By letter dated June 16, 1994, the Springfield Board of Assessors (the "Assessors") stated that property owned by Al-Tawheed and located at 4-10 Tyler Street and 107-111 **[**4]** Oak Street in Springfield "is exempt from local property taxes." [5]

5 It is this court's understanding that this property is the location of the religious building used by Al-Tawheed. This classification was given six months prior to Al-Tawheed's purchase of Locus.

4. Al-Tawheed purchased Locus from Pride Plazas Inc. by deed dated December 28, 1994, and recorded with the Hampden County Registry of Deeds (the "Registry") at Book 9028, Page 313. This deed stated Locus's property address as 115 Walnut Street, Springfield, Massachusetts.

5. By Application for Statutory Exemption for Locus filed with the Assessors in 1995 for calendar year 1996, Al-Tawheed applied for a real estate tax abatement for Locus "to put into effect the statutory exemption authorized by *General Laws, Chapter 59, Section 5*, Clause 3." [6] The stated purpose for the exemption was "the lot will be for use of parking." This application was never acted on by the Assessors.

6 Clause 3 provides an exemption for, in part, "personal property of a charitable organization, which term, as used in this clause, shall mean (1) a literary, benevolent, charitable or scientific institution or temperance society incorporated in the commonwealth, **[**5]** . . ." Clauses 10 and 11 of *G. L. c. 59, § 5* relate to exemptions for religious organizations.

6. By Instrument of Taking (the "Taking") dated November 19, 1996, Plaintiff made a taking of Locus for nonpayment of fiscal year 1995 real estate taxes. [7] The Taking was recorded with the Registry on January 16, 1997, at Book 9743, Page 167.

7 The Instrument of Taking states that demand in the amount of $ 236.17 was made on Pride Plaza Inc. on July 26, 1996.

7. By letter from the Mayor of Springfield's Office to Al-Tawheed dated July 11, 2000, Plaintiff indicated its interest in purchasing or leasing Locus. [8]

8 The summary judgment record includes numerous correspondence between the parties relative to this letter, commencing on August 31, 2000, and including a letter dated December 27, 2006, by which Al-Tawheed offered to give Locus to the City in return for the right to park there.

8. Al-Tawheed obtained a Certificate of Exemption from the Massachusetts Department of Revenue on August 28, 2001. [9]

9 The Certificate of Exemption states that Al-Tawheed is an exempt purchaser under *G. L. c. 64H, §§ 6(d)* and *(e)*.

9. On November 21, 2001, Plaintiff filed a petition in Land Court to foreclose the rights **[**6]** of all persons entitled to redeem Locus. Notice of such action was filed with the Registry on November 30, 2001, at Book 12006, Page 189.

10. Al-Tawheed filed a Preliminary Questionnaire with the Assessors relative to a *G. L. c. 58, § 8* request for abatement of real estate taxes for Locus by document dated August 28, 2006, stating as a reason that it was not aware of the Taking prior to 2006. [10] By letter dated October 13, 2006, the Assessors informed Al-Tawheed that it "voted not to proceed on a request to abate under MGL C. 58, s. 8." [11]

10 *G. L. c. 58, § 8* states in part as follows:

> If, at any time after any tax, assessment, rate or other charge has been committed to a collector such tax, assessment, rate or charge, or any interest thereon or costs relative thereto, remains unpaid and the commissioner is of the opinion that such tax, assessment, rate, charge, costs or interest should be abated, he may, in writing, authorize the assessors or the board or officer assessing such tax, assessment, rate, charge, costs or interest, whether or not the same is secured by a tax title held by the town.

11 This letter included the following language:

> We have viewed the property at various times and **[**7]** have not witnessed any parking use. In fact,

> on one viewing the surface was encumbered with piles of dirt and debris.
>
> By statute, a religious organization has a two year limit to put newly acquired property to religious use. The property was acquired 12/29/94. To the best of our knowledge, that religious use has never been initiated by your organization.

11. At a hearing before this court, with both parties present, on October 17, 2006, this court made a finding (the "Finding") that Al-Tawheed could redeem Locus on or before December 13, 2006, for the sum of $ 20,742.98, with interest and court costs of $ 236.36.

12. Al-Tawheed failed to redeem Locus by December 13, 2006, or at any time thereafter. [12]

> 12 On December 18, 2006, Plaintiff filed its Motion and Notice of Hearing for "Judgment of foreclosure (after finding has expired)." This motion is still pending.

13. Al-Tawheed applied to the Assessors for an abatement in 2007. [13] By letter dated August 24, 2007, the Assessors stated, in part, that it

> is not persuaded that [Locus] as used is or was eligible for exemption. Since you failed to appeal the Board of Assessors denial of your application for exemption and failed to file timely application **[**8]** for abatement when bills were issued [sic]. The Board of Assessors have no legal means to abate the taxes committed for collection. . . .

> 13 This application is not a part of the summary judgment record.

14. Al-Tawheed applied to the Assessors for another abatement on February 27, 2009. [14] By "Notice of Refusal to Abate/Exempt Property Tax" dated May 29, 2009, the Assessors notified Al-Tawheed that its application for an abatement of fiscal year 2009 real property taxes on Locus was denied.

> 14 This application is not a part of the summary judgment record.

* * *

[*121] Plaintiff argues that Al-Tawheed did not redeem Locus (either within the proper time frame or at any time), and as a result Plaintiff owns Locus. Defendant argues that there are material facts at issue, that Plaintiff is guilty of unclean hands, and that Defendant is entitled to an exemption from taxation and, as a result, the Taking was unlawful. I shall address each of these issues in turn.

Right of Redemption

To begin, Plaintiff made a taking of Locus on November 19, 1996, for nonpayment of fiscal year 1995 real estate taxes, and the Taking was recorded with the Registry. Al-Tawheed states that it never saw the notice of the Taking **[**9]** until 2006, but it has never properly challenged the validity of the Taking. [15] Furthermore, Al-Tawheed has owned Locus since 1994, and has never paid any real estate taxes on Locus. The real estate taxes which were the subject of the Taking were for 1995, a year in which Al-Tawheed owned Locus.

> 15 This court notes that the taking was recorded in the Registry and has been a public document for almost thirteen years. Moreover, Defendant referenced a Special Citation letter from Plaintiff to it dated September 13, 2002, and filed an appearance in this case on October 15, 2002.

G. L. c. 60, § 65 (Petition for Foreclosure of Rights of Redemption Under Tax Title) states,

> whoever then holds the title to land acquired by a sale or taking for taxes may bring a petition in the land court for the foreclosure of all rights of redemption of said land . . . after six months from the sale or taking, . . .

G. L. c. 60, § 68 (Answer, Offer to Redeem, Finding of Court for Redemption) states as follows:

> Any person claiming an interest [in property subject to a taking], on or before the return day . . . shall, if he desires to redeem, file an answer setting forth his right in the land, and an offer to redeem **[**10]** upon such terms as may be fixed by the court. . . .

G. L. c. 60, § 69 (Decree Barring Redemption: Vacating Decree; Petition) states that

> if redemption is not made within the time and upon the terms fixed by the court

> under the preceding section, . . . a decree shall be entered which shall forever bar all rights of redemption. . . .

On November 21, 2001, Plaintiff filed a petition in the Land Court to foreclose the right of redemption of persons entitled to redeem Locus. At a hearing before this court on October 17, 2006, both parties appeared, and this court issued the Finding on that day. Pursuant to the Finding, this court found that Al-Tawheed could redeem Locus until December 13, 2006, for the sum of $ 20,742.98, plus interest and court costs. Al-Tawheed neither complied with the terms of the Finding, nor has it made any attempt to redeem since that time. As a result, I find that Al-Tawheed's rights of redemption are forever foreclosed and barred under the Taking.

Exemption/Abatement from Tax

Defendant argues that the issue of exemption is an issue of fact which is in dispute, precluding summary judgment. This court notes that the substantive issues of Al-Tawheed's exemption and abatement **[**11]** from tax are not before it in this action. The sole issue before this court is Al-Tahweed's right of redemption. However, in light of the extensive file on this matter, this court will provide some background to these issues before making a ruling on Plaintiff's Motion for Summary Judgment.

G. L. c. 59, § 2A(b) (Use Classification of Real Property) states that "Real property which is exempt from taxation under section five shall be classified according to [guidelines promulgated by the commissioner of revenue]."

G. L. c. 59, § 5 (Certain Property Exempt from Taxation) states, as follows:

> The following property shall be exempted from taxation . . . houses of religious worship owned by, or held in trust for the use of, any religious organization . . . but such exemption shall not, except as herein provided, extend to any portion of any such house of religious worship appropriated for purposes other than religious worship or instruction. The occasional or incidental use of such property by an organization exempt from taxation under the provisions of *26 USC Sec. 501 (c)(3)* of the Federal Internal Revenue Code shall not be deemed to be an appropriation for purposes other than religious worship **[**12]** or instruction.

G. L. c. 59, § 59 (Abatements; Time for Making Application for Certain Exemptions) states as follows:

> A person upon whom a tax has been assessed . . . if aggrieved by such tax, may . . . apply in writing to the assessors, on a form approved by the commissioner, for an abatement thereof, and if they find him taxed at more than his just proportion or upon an improper classification, . . . they shall make a reasonable abatement; . . .

G. L. c. 59, § 64 (Appeal to County Commissioners; Election by Town to Have Appeal Heard, etc., by Appellate Tax Board; Proceedings) states as follows:

> A person aggrieved by the refusal of assessors to abate a . . . tax on a parcel of real estate, may, . . . within three months after the time when the application for abatement is deemed to be denied as hereinafter provided . . . appeal therefrom by filing a complaint with the clerk of the county commissioners, or of the board authorized to hear and determine such complaints, for the county where the property taxed lies, . . .
>
> Upon the filing of a complaint under this section the clerk of the county commissioners or the board authorized to hear and determine the same shall forthwith transmit a **[**13]** certified copy of such complaint to the assessors and the assessors or the city solicitor or town counsel may within thirty days after receipt of said copy give written notice to said clerk and to the complainant that the town elects to have the same heard and determined by the appellate tax board . . . . Whenever a board of assessors, before which an application in writing for the abatement for a tax is or shall be pending, fails to act upon such application, except with the written consent of the applicant, prior to the expiration of three months from the date of filing of such application it shall then be deemed to be denied and the assessors shall have no further authority to act thereon; . . .

[*122] G. L. c. 58A (Appellate Tax Board), § 7 (Appeals to Board) states as follows:

> Any party taking an appeal to the [Appellate Tax Board], hereinafter called the appellant, from a decision or determina-

> tion of the commissioner or of a board of assessors, hereinafter referred to as the appellee, shall file a petition with the clerk of the appellate tax board and serve upon said appellee a copy thereof in the manner provided in section 9. . . .

Pursuant to *G. L. c. 59, § 59*, the procedure for seeking **[**14]** an abatement of a tax classification for property is to apply to the Assessors. *G. L. c. 59, § 64* provides that the procedure for opposing a tax classification of property by the Assessors is to appeal to the Clerk of the County Commissioners or to the Appellate Tax Board. [16] In 1995, the year after its purchase of Locus, Al-Tawheed applied for an abatement of real estate taxes based on "the statutory exemption authorized by *General Laws, Chapter 59, Section 5*, Clause 3." This application was never acted on and therefore was deemed to be denied. As stated above, *G. L. c. 59, § 64* provides an avenue for the appeal of inaction of the Assessors to the Clerk of the County Commissioners or to the Appellate Tax Board, but Al-Tawheed did not follow this avenue, and this constructive denial was never appealed.

> 16 The statute provides for the Assessors to designate the Appellate Tax Board as the appellate board. Since Al-Tawheed did not appeal the constructive denial by the Assessors, the Assessors never had the opportunity to do so.

In 2006, Al-Tawheed applied to the Assessors for a *G. L. c. 58, § 8* finding on a real estate tax abatement for Locus. The Assessors denied such request by letter **[**15]** dated October 13, 2006. This denial was not appealed to the Clerk of the County Commissioners or to the Appellate Tax Board. [17] In 2007, Al-Tawheed again applied for an abatement of real estate taxes on Locus. The Assessors denied such request by letter dated August 24, 2007. This denial was not appealed to the Clerk of the County Commissioners or to the Appellate Tax Board. In 2009, Al-Tawheed again applied for an abatement of real estate taxes on Locus. By letter dated May 29, 2009, the Assessors denied such request. This denial was not appealed to the Clerk of the County Commissioners or to the Appellate Tax Board. As a result of the foregoing, none of the denials of an abatement for real estate taxes on Locus was properly appealed, and Al-Tawheed has no recourse. Al-Tawheed has never been granted an exemption from taxation on Locus or an abatement of unpaid real estate taxes on Locus by Plaintiff because it never properly applied for such action.

> 17 Defendant now argues that Plaintiff should have requested permission from the Commissioner of Revenue to abate real estate taxes after the statutory abatement period had expired pursuant to *G. L. c. 58, § 8*, but this statutory provision **[**16]** is optional and the Assessors, presumably, saw no basis for such action.

The allegations proffered by Defendant of unfair dealings by the Assessors have not been substantiated in the summary judgment record and such issue is not properly before this court. Unfortunately Defendant has never had the merits of its purported exemption from real estate taxes heard because it has not followed the proper statutory procedures for such action. The fact that Al-Tawheed has obtained tax-exempt classification from the IRS and the Massachusetts Department of Revenue is not dispositive to whether Locus warrants such status under G. L. c. 59. Similarly, that the summary judgment record discloses that Plaintiff has granted tax exempt status for other properties owned by Al-Tawheed is not relevant to the issues relating to Locus here. This court has no choice but to act on the issues before it, which is only the status of the right of redemption.

As a result of the foregoing, I ALLOW Plaintiff' Motion for Summary Judgment, consistent with the above.

Judgment shall enter pending a final review by this court of Plaintiff's Motion for Judgment of Foreclosure.

Sugar Ray Realty Corporation v. Duco Associates

Opinion No.: 110742, Docket Number: BRCV2007-1680-C

SUPERIOR COURT OF MASSACHUSETTS, AT BRISTOL

26 Mass. L. Rep. 531; 2010 Mass. Super. LEXIS 54

February 10, 2010, Decided
February 11, 2010, Filed

JUDGES: [*1] D. Lloyd Macdonald, Justice of the Superior Court.

OPINION BY: D. Lloyd Macdonald

OPINION

MEMORANDUM AND ORDER ON THE PARTIES' CROSS MOTIONS FOR SUMMARY JUDGMENT

The defendant is the successor mortgagee of a residential property in Falmouth. The plaintiff is the successful bidder at a foreclosure auction held in July 2006 by the defendant pursuant to its statutory power of sale.

Shortly after the auction, the owner of the property (the mortgagor, James McDonnell ("McDonnell")) brought an action to void the foreclosure sale, naming as defendants the defendant and the principal of the plaintiff. Among other issues pressed by McDonnell was the sufficiency of the newspaper notice preceding the foreclosure.

Publication of the notice was carried in the *Upper Cape Codder* newspaper, which was published in Yarmouth and printed in Auburn. The *Upper Cape Codder* was a weekly paper and had a paid circulation at the time of 207 in the town of Falmouth. At the same time, there was a newspaper published in Falmouth, the *Falmouth Enterprise*, with a weekly circulation of approximately 18,000. In 2006 Falmouth had approximately 33,000 residents.

Confronted with this challenge and on advice of counsel, the defendant concluded **[*2]** that the foreclosure sale was void for failure of sufficient statutory notice. The defendant offered to return the plaintiff's deposit, but the plaintiff refused to accept it. The defendant then offered to tender title to the plaintiff, albeit without the customary foreclosure affidavit. The plaintiff refused that, as well, and then brought the current action.

The defendant moves for summary judgment on the basis that the notice in the *Upper Cape Codder* was defective as a matter of law. The plaintiff cross moves for partial summary judgment on the issue of liability.

The Court *ALLOWS* the defendant's motion and *DENIES* the plaintiff's cross motion for the reasons that follow.

G.L.c. 244, § 14 provides that when the statutory power of sale is exercised, "no sale under such power shall be effectual to foreclose a mortgage, unless, previous to such sale, notice thereof has been published once in each of three successive weeks in a newspaper, if any, published in the town where the land lies or in a newspaper with general circulation in the town where the land lies. If no newspaper is published in such town, or if there is no newspaper with general circulation in the town where the land lies, **[*3]** notice may be published in a newspaper published in the county where the land lies . . ."

In a recent Land Court case, Judge Long noted, "The purpose behind [*G.L.c. 244, § 14*'s notice] requirement is easily discerned and simply stated. It is to ensure, for the benefit of the mortgagor whose equity interest is about to diminish or disappear and who may face personal liability for the full amount of any deficiency, that a sufficient number of likely bidders learn of the sale so that competition, and thus the highest price, will result." *US Bank Nat. Ass'n v. Ibanez, 17 LCR 202, 2009 WL 795201 (Mass. Land Court) at *3.*

Black's Law Dictionary defines "newspaper" as "a publication for general circulation, usually in sheet form, appearing at regular intervals, usually daily or weekly, and containing matters of general public interest, such as current events." Black's Law Dictionary at 1069 (8th ed. 2004). "Newspaper of general circulation" is defined as "a newspaper that contains news and information of interest to the general public, rather than to a particular segment, and that is available to the public within a certain geographic area." *Id.*

Under the circumstances of this case, where the property being **[*4]** foreclosed on is in the Falmouth community of 33,000 residents, where there is a newspaper published with a weekly circulation of 18,000 and where the purported statutory notice was through a paper neither published nor printed in Falmouth and with a weekly paid subscription in the town of only 207 copies,

the foreclosure sale is void as a matter of law for failure of notice compliant with *G.L.c. 244, § 14*.

In light of the statutory purpose of the publication notice, no reasonable jury could conclude that the *Upper Cape Codder* was a "newspaper with general circulation" within the town of Falmouth in July 2006 for publishing notice of a foreclosure sale of a residential property in the town.

ORDER

The defendant's motion for summary judgment is *ALLOWED.* The plaintiff's cross motion for partial summary judgment on the issue of liability is *DENIED.*

D. Lloyd Macdonald

Justice of the Superior Court

February 10, 2010

TOWN OF BRIMFIELD v. BRIAN CARON, MICHAEL SOSIK, JR. and BATISTA & SONS, INC.

06 MISC. 331899

MASSACHUSETTS LAND COURT

18 LCR 44*; *2010 Mass. LCR LEXIS 14

January 12, 2010, Decided

HEADNOTES

Chapter 61-Municipal Right of First Refusal-Waiver of Right to Purchase by Acceptance of Rollback Taxes

SYLLABUS
[1]**

Justice Keith C. Long ruled that the Town of Brimfield continued to have a right to purchase property placed under Chapter 61 where the property had been sold without any notice having been given or bona fide offer having been made that allocated the purchase price between the Chapter 61 parcel and the rest of the property so encumbered. Justice Long also found that Brimfield's right of first refusal to purchase the land under Chapter 61 was not waived by the property owner's payment of roll-back taxes, where any waiver would have to have been clearly made by the Board of Selectmen, not by the assessors.

COUNSEL: Jonathan David Eichman, Esq., Kopelman and Paige, P.C. for the Plaintiff.

Francis A. Diluna, Esq., Murtha Cullina LLP for B. Caron.

Michael V. Caplette, Esq. for M. Sosik.

Robert A. George, Esq., George & Davis, P.C. for Batista & Sons, Inc.

JUDGES: Keith C. Long, Justice.

OPINION BY: LONG

OPINION

[*44] MEMORANDUM AND ORDER ON THE PARTIES' CROSS-MOTIONS FOR SUMMARY JUDGMENT

Introduction

At issue in this case is a 35.9-acre property in Brimfield that was classified and taxed as forest land under G.L. c. 61. While the property was so classified and without any notice to the town, its then-owner, defendant Batista & Sons, Inc., **[**2]** conveyed the property to defendant Brian Caron, [1] who subsequently cleared trees and removed earth materials from the property. The town contends that the conveyance was therefore a "s[ale] for, or conver[sion] to, residential, industrial or commercial use" under *G.L. c. 61, § 8* that would trigger its right of first refusal to purchase the property on the same terms and conditions as Mr. Caron. The defendants argue that even assuming the conveyance would have triggered the right of first refusal, the Town Meeting failed to approve the purchase of the property and therefore the town's rights are no longer enforceable. In addition, Mr. Caron argues that he paid the roll-back taxes in order to withdraw the property from G.L. c. 61 and therefore the town no longer has an option.

1 Defendant Michael Sosik, Jr. loaned Mr. Caron $ 250,000 towards the purchase of the 35.9-acre property and an adjoining, 1.667-acre lot.

The parties filed cross-motions for summary judgment. For the reasons set forth below, I **ALLOW** the plaintiff's motion for summary judgment in part and **DENY** it in part. Also for the reasons set forth below, I **DENY** the defendant's motion for summary judgment.

[*45] Facts

Summary judgment **[**3]** is appropriately entered when, as here, "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." *Mass. R. Civ. P. 56*; *Cassesso v. Comm'r. of Corr., 390 Mass. 419, 422 (1983)*; *Cmty. Nat'l. Bank v. Dawes, 369 Mass. 550, 553 (1976)*. The following facts are undisputed for the purpose of the parties' motions.

By deed dated March 2, 1992, William X. Pratt acquired a 35.9-acre property in Brimfield, which was later identified as Lot 7 on a 1993 survey. [2] Deed from Ed-

ward J. McDonough to William X. Pratt (March 2, 1992), recorded at the Hampden County Registry of Deeds (hereinafter, the "Registry") in Book 8021, Page 181; Plan of Land in Brimfield, MA, Surveyed for William X. Pratt (Owner) by Sherman and Woods, Land Surveying & Engineering, 118 Park St., Palmer, Mass. (June 29, 1993), recorded in the Registry in Plan Book 286, Page 11. Mr. Pratt subsequently filed an application for the 35.9-acre parcel to be classified as forest land pursuant to *G.L. c. 61, § 2*. On November 7, 1995, the board of assessors approved his application, classifying the parcel as forest land "effective as of January 1, 1995 for the fiscal year beginning **[**4]** July 1, 1996." Classified Forest - Agricultural or Horticultural - Recreational Land Tax Lien (Nov. 7, 1995), recorded in the Registry in Book 9656, Page 212 (Oct. 18, 1996). [3] Hereinafter, the 35.9-acre parcel is identified as the "Forest Parcel." The town then began taxing the Forest Parcel pursuant to such classification. [4]

2 The parcel also is identified as Parcel 9 on the town's Assessors Map 11, Block A.

3 To "clarify[] [the] recorded lien," Joan E. Navarro, Clerk of the Brimfield Board of Assessors, recorded an affidavit that indicated that the "35.9 acre parcel of land known to the assessor's as Map 11, Block A, Lot 9" "is the same parcel shown as Lot 7 on the plan recorded in Book of Plans 286, Page 11." Aff. of Joan E. Navarro (July 3, 2002), recorded in the Hampden County Registry of Deeds in Book 12426, Page 483.

4 The summary judgment record indicates that "the fiscal year beginning July 1, 1996," as stated in the lien, may have begun on August 1, 1996 and correlates to Fiscal Year 1997. *See* Defendant's Appendix, Ex. L (Letter from Robert A. George, Paralegal (Jan. 18, 2006) at Ex. B, Certificate of Penalty Tax & Compound Interest Calculation); Aff. of Joan E. Navarro, Deputy **[**5]** Assessor for the Town of Brimfield at P 9 (Aug. 5, 2008).

On May 30, 2000, defendant Batista & Sons, Inc. ("Batista") purchased both the Forest Parcel and an adjacent parcel of land containing 1.667 acres ("Lot 1"). Deed from William F. Pratt, Marilyn G. Griffin and Kevin J. Pratt to Batista & Sons, Inc. (May 30, 2000), recorded at the Registry at Book 11224, Page 559. [5] On December 8, 2000, Batista's counsel, Robert E. George, sent a letter to the town's assessor's office, which stated that the Forest Parcel "was not 'sold for or converted to residential, industrial, or commercial use.' (Chapter 61, Section 7)." [6] Verified Complaint at Ex. F (Letter from Robert E. George to Joan E. Navarro, Town of Brimfield (Dec. 8, 2000)). Lot 1 was never classified as forest land pursuant to *G.L. c. 61, 2*.

5 That deed indicates that the sellers obtained title from the Estate of William X. Pratt, Hampden County Probate Docket # 97-P1846. Deed from William F. Pratt, Marilyn G. Griffin and Kevin J. Pratt to Batista & Sons, Inc. at 2.

6 Batista also had a forest management plan prepared, which was approved by a Service Forester of the Department of Conservation and Recreation on April 2, 2001 and by the **[**6]** Regional Supervisor on April 6, 2001. However, Batista never filed the certified plan with the town assessor. Defendant Brian R. Caron's Opposition to the Town of Brimfield's Motion for Summary Judgment and Request for Summary Judgment in Favor of Defendant at 3, PP 7-8 (Aug. 28, 2008); Aff. of Richard A. Johnson at 2, P 7 (Oct. 21, 2008). Although the plaintiff has moved to strike this factual assertion due to defendant Caron's failure to include Mr. Johnson's affidavit with his motion, I **DENY** that motion. Mr. Johnson's affidavit was ultimately provided and Mr. Caron claims that the delay was due to counsel for Mr. Johnson having to approve the affidavit and verify DCR records to do so. The delay was not substantial and was not prejudicial to the plaintiff given Mr. Caron's timely summary of the contents of the affidavit in his motion. Further, contrary to the plaintiff's argument, I note that nothing in Mr. Johnson's affidavit conflicts with Ms. Navarro's affidavit. Ms. Navarro indicated that *DCR* forwarded a copy of the management plan to her office. Navarro Aff. at 2, P 7. In any event, as outlined below, whether or not Batista attempted to recertify the property is irrelevant to **[**7]** the issues in this case.

On January 21, 2005, Batista and Caron entered into a purchase and sale agreement for both the Forest Parcel and Lot 1. The purchase and sale agreement indicated that the total purchase price for the two parcels would be $ 275,000. It did not, however, indicate how the total purchase price was to be allocated between the two parcels and, instead, treated the two parcels as one for the purposes of the sale (identifying the two parcels as the "Property"). The two deeds conveying the Forest Parcel and Lot 1 to defendant Brian Caron, however, recite the consideration for each lot as $ 137,500. Quitclaim Deed from Christopher Batista, president and treasurer of Batista & Sons, Inc. to Brian R. Caron, individually (May 9, 2005), recorded at the Registry in Book 15026, Page 145 (conveying the Forest Parcel); Quitclaim Deed from Christopher Batista, president and treasurer of Batista & Sons, Inc. to Brian R. Caron, Trustee of C & F Realty Trust (May 9, 2005), recorded at the Registry in Book 15026, Page 143. Prior to the closing, [7] **[**8]** neither

Batista nor Mr. Caron provided the town with written notice regarding the conveyance of the Forest Parcel or its terms and conditions.

> 7 Although the deeds are dated May 9, 2005 and Mr. Caron indicated that "Mr. Batista signed both deeds at the closing," Mr. Caron indicated that the closing did not occur until either May 17, 2005 or May 18, 2005. Defendant's Appendix at Ex. P (Aff. of Brian Caron at 2, P 11 (indicating that the closing occurred on May 17, 2005)); Supp. Aff. of Brian R. Caron at P 3 (Oct. 9, 2008) (indicating that the closing occurred on May 18, 2005). These discrepancies are not material to this Memorandum.

On May 17, 2005--after the date of the deeds conveying the parcels [8]--Mr. Caron (both individually and as trustee of the C&F Realty Trust) and Daniel Flynn entered into a loan agreement with Michael F. Sosik, Jr. for $ 250,000. [9] Plaintiff's Appendix of Exhibits at Ex. C, Loan Agreement (May 17, 2005) (hereinafter, "Plaintiff's Appendix"). The Loan Agreement indicates that "[t]he Borrowers intend to construct a single-family home on Lot 1 with their own funding. . . . The Borrowers intend to excavate gravel from Lot 7 [the Forest Parcel] during the life of **[**9]** this **[*46]** loan." [10] *Id*. On May 17, 2005, Mr. Caron (individually and as trustee of C & F Realty Trust) also granted mortgages on the Forest Parcel and Lot 1 (respectively) to Mr. Sosik to secure the payment of the $ 250,000. *Id*. at Exs. E-F at P 16 (both titled "Mortgage, Security Agreement, and Assignment of Leases and Rents"). Both mortgages indicate that "[t]he proceeds of loans or loans evidenced by the Note shall be used exclusively for business purposes and no part of the proceeds shall be used for personal, family, household or agricultural purposes." *Id*. Likewise, the Commercial Fixed Rate Note (signed by Mr. Caron, individually and as trustee, and Mr. Flynn) indicates that "[t]he Borrower represents that the proceeds of this Note will be used for commercial and business purposes and not for personal, family, household or agricultural purposes and the Borrower acknowledges that this representation has been relied upon by the Lender." *Id*. at Ex. D (Commercial Fixed Rate Note at 3).

> 8 *See* n. 7, *supra*.
>
> 9 According to Mr. Caron, Mr. Flynn is someone that he has known "for approximately 20 years; approximately one month prior to the closing I spoke to him concerning a potential business **[**10]** arrangement that was later memorialized pursuant to a Development Agreement dated April 20, 2005." Plaintiff's Appendix at Ex. L (Defendant Brian Caron's Response to Plaintiff's Request for Interrogatories at 10, Response No. 15).
>
> 10 Mr. Caron indicated that the first time he saw the Loan Agreement was at closing. Defendant's Appendix at Ex. P (at P 11).

On May 23, 2005, *after* the Forest Parcel was conveyed to Mr. Caron, Attorney Robert E. George (Batista's counsel) sent a letter to the Board of Selectmen indicating the following:

> Please be advised that this office represents Batista & Sons, Inc. relative to the sale of land located at Route 20, Brimfield, Massachusetts. The purpose of this letter is to request execution of the enclosed Release of Right of First Refusal under chapter 61.
>
> The corporation *intends to sell* all of the property it owns at this location. The agreed purchase price is $ 275,000.00.
>
> Kindly acknowledge the Board's willingness to release their rights of first refusal to the property by executing the enclosed and returning the same to me at your earliest convenience.

Defendant Brian Caron's Appendix of Exhibits at Ex. L (Letter from Robert E. George to Board of Selectmen **[**11]** (May 23, 2005), attached as an Exhibit to the Affidavit Pursuant to Chapter 61, § 14, notarized by Robert A. George) (hereinafter, "Defendant's Appendix"). Attorney George did not attach the purchase and sale agreement to this letter and did not outline any of the terms and conditions of Mr. Caron's offer other than the purchase price. Mr. Caron indicated that he was unaware Attorney George had sent this letter. Defendant Brian R. Caron's Opposition to the Town of Brimfield's Motion for Summary Judgment and Request for Summary Judgment in Favor of Defendant at 11, P 65 (hereinafter, "Defendant's Motion").

Also on May 23, 2005, Attorney George, purporting to act on behalf of Mr. Caron, [11] requested "to remove Lot 7 from the provisions of Chapter 61. When the roll back tax is computed please forward to me so that I can get it to Mr. Caron." Plaintiff's Appendix at Ex. I (Facsimile Cover Sheet from Robert E. George (May 23, 2005)). The Board of Assessors calculated these back taxes (total roll-back due of $ 12,921.42) on that same day and they were forwarded to Mr. Caron. *Id*. at Ex. J (Certificate of Penalty Tax for Classified Forest-Agricultural or Horticultural-Recreational Land). Mr. **[**12]** Caron likewise indicated that on or about May 23,

2005, he spoke with Ms. Navarro and Sue Hilka in the assessor's office and confirmed that there were back taxes due. Defendant's Appendix at Ex. P(Aff. of Brian Caron at P 20).

11 Mr. Caron disputes that Attorney George was acting on his behalf. Defendant's Motion at 6, P 33.

On June 16, 2005, Mr. Caron applied for a special permit for "earth removal." Plaintiff's Appendix at Ex. K (Application for Zoning Permit). [12] In his application Mr. Caron indicated that he was seeking to change the land use from "Agriculture Land to Earth Removal." *Id*. At the hearing on the application, Mr. Caron indicated that he wanted to remove 10,000 yards of gravel for a barn and that he would eventually remove 50,000 yards of gravel from the property. Defendant's Appendix at Ex. J (Zoning Board of Appeals' Minutes (Sept. 13, 2005)). The minutes also indicate that Mr. MacFadden (a ZBA member) noted that "the ZBA had received a letter from the Board of Assessors and that it appears there are issues of site control and we may have to table further discussion until December. The parcel of land is in Chapter 61 . . . ." *Id.*

12 Although this application is somewhat **[**13]** ambiguous as to what parcel Mr. Caron was requesting to remove gravel from (he identifies it as Lot 1, but also as Parcel 9 (the Forest Parcel) and all of the attached maps indicate it was for the Forest Parcel), the parties agreed that Mr. Caron applied for an Earth Removal Permit for the Forest Parcel. Defendant's Motion at 6, P 35. Mr. Caron *did* dispute the plaintiff's *characterization* of the application, contending that it was simply to construct a pole barn and claiming that "[i]t was later determined that the Bylaw requiring the Special Permit was not valid." *Id*. Whether or not this is true is not indicated by the record, but is not material to this Memorandum.

On July 27, 2005, town counsel responded to Attorney George's May 23, 3005 letter seeking the release of the town's right of first refusal. In that response, town counsel indicated the following: (1) public records indicated that the property had already been sold prior to notice being delivered to the town; (2) the deed stated that the purchase price for the Forest Parcel was $ 137,500; (3) Attorney George's letter failed to include the purchase and sale agreement (indicating the terms and conditions of the sale); and **[**14]** (4) since the sale, earth materials had been removed from the property. [13] Verified Complaint at Ex. M (Letter from Deborah A. Eliason to Robert E. George (July 27, 2005)). In addition, town counsel asserted that "[t]he actions of Batista & Sons, Inc. have clearly violated G.L. c. 61. The town is entitled to be made whole and to be given the opportunity to purchase the Property. The notification to the Town is not sufficient because it was given after the sale of the Property and the purchase price includes property that is not classified under G.L. c. 61." *Id*. Finally, town counsel noted that the time for the town to exercise its option would only begin once the *bona fide* offer with all of its terms was provided. *Id*. It therefore requested that Attorney George forward a copy of the purchase and sale agreement. *Id*.

13 Although this document and the town's subsequent documents regarding the right of first refusal indicate that Mr. Caron removed earth materials prior to 2006, Mr. Caron disputes the town's timeline and the gravel report he provided indicates that removal began in 2006 after he received a special permit to do so. Since this Memorandum solely addresses the parties' motions **[**15]** for summary judgment and since the removal of earth materials prior to 2006 is in dispute, I shall only consider the removal of materials indicated in the gravel report for purposes of deciding the motions. Evidence of additional removal, if any, can be submitted at the trial (as indicated below).

[*47] On June 28, 2005, Mr. Caron wrote a check to the town in the amount of $ 12,921.42. *Id*. at Ex. R (Treasurer's Check). He also provided a check for $ 75.00 for the release fee. *Id*. The town subsequently cashed those checks. There is a notation on the certificate that the roll-back taxes were "paid in full." [14] Plaintiff's Appendix at J.

14 It is unclear who wrote "paid in full" on this exhibit. The town, however, does not dispute that the entire payment was received. Plaintiff's Response to Defendant Brian R. Caron's Statement of Additional Undisputed Material Facts at 2, P 69 (Oct. 3, 2008).

On August 15, 2005, the town received a copy of the Purchase and Sale Agreement. In response, the Board of Assessors sent a letter to Mr. Caron indicating that the 120-day time period for exercising the town's right of first refusal commenced on the date the agreement was received. Verified Complaint at **[**16]** Ex. O (Letter from Joan E. Navarro, Deputy Assessor to Brian R. Caron (Aug. 26, 2005)). The Board of Assessors also indicated that it would treat the purchase price for the Forest Parcel as $ 137,500, as was stated in the deed. *Id*.

On October 6, 2005, the Board of Selectmen "voted to exercise the option of the Town to purchase said Premises in accordance with *G.L. c. 61, § 8*, contingent

upon a favorable vote appropriating the funds for the acquisition of the premises at the next duly called Special or Annual Town Meeting *and provided that the amount appropriated shall be contingent upon the vote at a Town election to exempt from the provisions of Proposition 2 1/2, so called, the amount required to satisfy the obligations, including principal and interest, under the bond." Id*. at Ex. P (Notice of Exercise of Chapter 61 Option to Purchase Land (Oct. 11, 2005), recorded at the Registry in book 15409, Page 104) (emphasis in original). The notice referred to both Batista and Mr. Caron and indicated that they were "notified that the Town shall purchase the Premises in accordance with the terms of the *bona fide* P&S, with a purchase price of $ 137,500.00 subject to and expressly reserving **[**17]** the Town's right to reduce said purchase price by an amount which compensates the Town for the loss of fair market value due to Caron's activities following the conveyance of the premise without proper notice to the Town under *G.L. c. 61, § 8*." *Id.* The town served copies of the notice on both Batista and Mr. Caron. Verified Complaint at Ex. Q (Affidavit Under G.L. c. 183, § B).

On November 29, 2005, the town held a special town meeting to vote on whether to acquire the Forest Parcel. At that meeting, "Mr. Caron stated that he would not sell [the Forest Parcel] for $ 137,000.00 and he would defend himself with a court action." Defendant's Appendix at Ex.M(Special Town Meeting Actions November 29 2005). The Town Meeting then voted and the motion to purchase the Forest Parcel for $ 137,500 failed (seventy-three in favor and fifty-eight opposed). *Id*.

On April 26, 2006, the Zoning Board of Appeals informed Mr. Caron of the following:

> The Brimfield Zoning Board Of Appeals voted unanimously on April 25th to grant your request for a Special Permit to remove sand and gravel with restrictions from property on US Route 20 known as Lot 7.
>
> The special permit's restrictions will reflect input from abutters, **[**18]** concerned citizens, and relevant town boards. In addition the decision must meet the approval of town counsel and the ZBA. These steps are expected to take between 30 and 60 days. Once the completed decision is filed and released a 20 day appeal period must pass in order for it to become final. Removal of material cannot commence until this process is completed, a permit fee paid, and a performance bond posted. [15]

15 It is unclear whether any of these subsequent steps were completed and thus it is unclear whether the special permit was actually granted. Mr. Caron also argues that a special permit is no longer needed to remove gravel from agricultural land. *See* Defendant's Appendix and Ex. K (Letter from the Office of the Attorney General (Aug. 30, 2006)). Whether or not a special permit was granted or was necessary for Mr. Caron's activities is not material to the issues in this Memorandum. However, this issue *may* impact the town's argument regarding the alleged diminution in the value of the Forest Parcel and therefore may be addressed, if necessary, at trial.

Defendant's Appendix at Ex. I (Letter from Michael MacFadden, Chairman to Brian Caron (April 26, 2006)). Since 2006, Mr. Caron **[**19]** admits to removing 915 cubic yards of fill, gravel, and sand from the property. [16] Plaintiff's Appendix at Ex. L (Defendant Brian Caron's Response to Plaintiffs' Request for Interrogatories at Ex. A (Weekly Gravel Report)). The town moved to stop such removal and, on February 28, 2007, the court (Long, J.) issued a preliminary injunction, prohibiting these activities pending further court order.

16 Although Mr. Caron stated in his response to the plaintiff's statement of material facts that he "admits that he removed 400-500 cubic yards of gravel, sand and fill from the property," Defendant's Motion at 7, P 39, Exhibit A to his Response to Plaintiffs' Request for Interrogatories clearly indicates that 915 cubic yards were removed. Even subtracting the sixty cubic yards extracted by AutoCar and the 135 cubic yards extracted by Hoemig, the report indicates that Mr. Caron actually extracted at least 720 cubic yards. Mr. Caron cannot contradict what the document reflects and, accordingly, I find that it is undisputed that at least 915 cubic yards of material was extracted from the property. *Ng Bros. Const., Inc. v. Cranney, 436 Mass. 638, 647-48 (2002).*

The plaintiff contends that Mr. Caron **[**20]** has actually removed "several thousands of cubic yards of earth materials," citing to photographs attached to the Susan Hilker affidavit as evidence. Aff. of Susan Hilker (Nov. 27, 2006). Such photographs do depict gravel was removed, but do not serve as evidence to substantiate how much was actually removed. In addition, Susan Hilker's and John Hilker's affidavits do not indicate how much material was removed (and do not

indicate that they would be qualified to indicate such information). The plaintiff can submit evidence that more gravel was removed at trial.

Other pertinent facts are included in the Analysis section below.

G.L. c. 6 [17]

17 G.L. c. 61 was amended in 2006, effective March 22, 2007. St. 2006, c. 394. The version in effect in 2006, however, applies to the transactions at issue in this case and all references to G.L. c. 61 in this Memorandum shall refer to that earlier version.

G.L. c. 61 permits an owner of ten or more contiguous acres of forest land used for forest production to apply for and, if certified by the state forester, receive a classification of its property as forest land. [18] *G.L. c. 61, § 2*. The classification limits the property's **[*48]** taxes to: (1) a "products **[**21]** tax equal to eight per cent of the stumpage value of all forest products cut therefrom with authorization of the owner," and (2) a "land tax based upon application of the local rate applicable to commercial property on five per cent of the fair cash valuation placed on said land under the provisions of chapter fifty-nine" (the Assessment of Local Taxes), "but in no event at a valuation of less than ten dollars per acre." *G.L. c. 61, § 3*.

18 The "application shall be accompanied by a forest management plan." *G.L. c. 61, § 2*. "Buildings and structures and the land on which they are erected and which is accessory to their use shall not be entitled to be classified as forest land." *Id.*

Most important to this case, *G.L. c. 61, § 8* provides the following:

> Land taxed under this chapter shall not be sold for, or converted to, residential, industrial or commercial use while so taxed unless the city or town in which such land is located has been notified of the intent to sell for, or so convert to, such other use; provided, however, that the discontinuance of forest certification shall not, in itself, be deemed a conversion. . . . [19] For a period of one hundred and twenty days subsequent to such **[**22]** notification, said city or town shall have, in the case of intended sale, a first refusal option to meet a bona fide offer to purchase said land, or, in the case of an intended conversion not involving sale, an option to purchase said land at full and fair market value to be determined by impartial appraisal. . . . No sale or conversion of such land shall be consummated unless and until either said option period shall have expired or the landowner shall have been notified in writing by the mayor or board of selectmen of the city or town in question that said option will not be exercised. Said option may be exercised only by written notice signed by the mayor or board of selectmen, mailed to the landowner by certified mail at such address as may be specified in his notice of intention and recorded with the registry of deeds, within the option period.

19 Forest land is certified and taxed under G.L. c. 61 for only ten years unless "the owner files with said assessor a new certification by the state forester." *G.L. c. 61, § 2*.

Analysis

The Forest Parcel Was Classified and Taxed Pursuant to G.L. c. 61 at the Time of the Conveyance to Mr. Caron

At the time of the conveyance from Batista to Mr. **[**23]** Caron, the Forest Parcel was being *taxed* as forest land pursuant to G.L. c. 61. *See, e.g.*, Aff. of Susan Hilker (Oct. 3, 2008) (attaching the Fiscal Year 2005 Real Estate Tax Bill (July 1, 2004 to June 30, 2005) that indicates that the property was classified as forest land (code 601 - "All land designated under Chapter 61")); Plaintiff's Appendix at Ex. G (Municipal Lien Certificate (May 17, 2005) indicating that the property was "subject to lien under MGL chapter 61"); Case Management Conference Joint Statement at 5 (filed Jan. 12, 2007) (outlining Batista's position, stating "On May 9, 2005, Batista & Sons, Inc. conveyed 35.9 acre tract in Brimfield *classified under* G.L. c. 61 to Brian Caron."); Aff. of Joan E. Navarro at 2, P 9 (Aug. 5, 2008). As noted above, Mr. Pratt applied for classification pursuant to G.L. c. 61 and the town approved his application. In its approval, the town Board of Assessors noted that such classification was "effective as of January 1, 1995 for the fiscal year beginning July 1, 1996." Classified Forest - Agricultural or Horticultural - Recreational Land Tax Lien (Nov. 7, 1995), recorded in the Registry in Book 9656, Page 212 (Oct. 18, 1996). The ten-year **[**24]** period for classification would therefore end on June 30, 2006, *after* the May 9, 2005 conveyance to Mr. Caron. It is also undisputed that Batista did not affirmatively withdraw the Forest Parcel from classification. Accordingly, the Forest

Parcel was being *taxed* under G.L. c. 61 at the time of the conveyance.

The defendants' arguments to the contrary and suggesting that the Forest Parcel was improperly being classified and taxed pursuant to G.L. c. 61 fail. Mr. Caron argues that Batista was responsible for reclassifying the Forest Parcel when it acquired the property and since it did not, the Chapter 61 classification lapsed. This argument finds no support in the statutory language or in any case law of which I am aware (Mr. Caron cites to none). Rather, *G.L. c. 61, § 2* simply notes that "[l]and shall be removed from classification by the assessor unless, at least every ten years, the owner files with said assessor a new certification by the state forester." [20] It does *not* state that when a property is transferred, the new owner must reclassify the property. Indeed, the very fact that *G.L. c. 61, § 8* addresses the sale of a classified property and does not include such a requirement **[**25]** is telling. The statute appears to require affirmative action from the owner of a classified property (during the ten-year classified period) only if he or she seeks to withdraw the property from classification or intends to sell or convert it to "residential, industrial or commercial use." *See* G.L. c. 61, §§ 6-8.

> 20 I agree with Mr. Caron that Batista did not reclassify the property during its ownership. Although Batista submitted a forest management plan with the State Forester for certification (which was approved), it never filed the plan with the assessor. *See* n. 6, *supra*. *G.L. c. 61, § 2* clearly states that "the *owner* files with said assessor a new certification by the state forester." As noted above, the Board of Assessors only received a copy of the plan from DCR, not from Batista. As such, the Forest Parcel was not recertified as the town argues in its brief. This issue, however, is not material to this Memorandum since the Forest Parcel was sold prior to the expiration of the initial ten-year certification period (and without Batista withdrawing the parcel from G.L. c. 61 classification).

Mr. Caron also argues that the Forest Parcel "was removed from the Chapter 61 provisions **[**26]** and not classified as forest land during the relevant time period." Defendant's Motion at 17. The only support for this statement is Mr. Caron's reference to the Forest Parcel's tax bill for *fiscal year 2006. Id*.; Defendant's Appendix at Ex. U (Fiscal Year 2006 Real Estate Tax Bill ("for fiscal year commencing July 1, 2005 and ending June 30, 2006")). The tax bill for the fiscal year commencing *July 1, 2005* does not support the contention that the Forest Parcel was removed from Chapter 61 at the relevant time period--the date of the purported conveyance to Mr. Caron, which occurred on *May 9, 2005*. It is undisputed that after Mr. Caron purportedly acquired the Forest Parcel, he paid the roll-back taxes. By doing so, were it not for this action, Mr. Caron would have effectively removed the Forest Parcel from the G.L. c. 61 provisions as was indicated on his tax bill for fiscal year 2006. His actions, however, did not effectively remove the Forest Parcel from G.L. c. 61 prior to Batista transferring **[*49]** the property to him and, as discussed below, have no impact on the town's right of first refusal. [21]

> 21 As indicated below, should the town exercise its right, it obviously must refund Mr. **[**27]** Caron's payment of the roll-back tax, with interest.

Finally, Mr. Caron's argument that since the application form identified as "Forest Management Plan" submitted to the Commonwealth states that "[i]n the event of a change of ownership of all or part of the property, the new owner must file an amended Ch. 61/61A plan within 90 days from the transfer of title to insure continuation of Ch. 61/61A classification," Defendant's Appendix at Ex. B, Batista was required to recertify the property, also fails. First, the Forest Management Plan application attached as Exhibit B to Mr. Caron's motion was an application submitted by Batista in 2001. It is unclear whether such "requirement" was in effect at the time Mr. Pratt conveyed the property to Batista. Second, and more importantly, this "requirement" is simply noted on an application. It is nowhere to be found in the statute and the parties have not indicated that it is part of an agency regulation. [22] I simply do not find any support to the argument that a new owner is required to take affirmative actions to maintain the G.L. c. 61 certification and classification. *See, e.g., South Street Nominee Trust v. Bd. of Assessors of Carlisle, 70 Mass. App. Ct. 853, 859 (2007)* **[**28]** ("property already classified as forest land remains so classified unless the property owner fails to file a new certification," *e.g*., after the expiration of the ten-year certification period); *Ward v. Costello*, 2000 WL 1473459, at *5 (Mass. Super. Aug. 16, 2000) ("If, *at the end of ten years*, the owner wishes to continue the classification as forest land, he must obtain a new certification from the state forester." (emphasis added)).

> 22 Even if it were, Batista indicated to the town that when it purchased the Forest Parcel, "[i]t was not 'sold for or converted to residential, industrial, or commercial use.' (Chapter 61, Section 7)." Verified Complaint at Ex. F (letter from Atty. George to Ms. Navarro (Dec. 8, 2000)). This statement and Batista subsequently accepting the tax benefits, at the very least, suggests that Batista intended for the Forest Parcel to remain under the original G.L. c. 61 classification. In addi-

tion, as courts have indicated in several cases, there is a difference under G.L. c. 61 between *certification* ("approval of a forest management plan by the state forester") and *classification* ("the tax status attaching by operation of law to all land qualifying under [chapter **[**29]** 61,] which qualification is duly certified by the State Forester." *See, e.g., South Street Nominee Trust v. Bd. of Assessors of Carlisle, 70 Mass. App. Ct. 853, 859 (2007)*. Therefore, Mr. Caron's argument that Batista was required to recertify the property does not suggest that the Forest Parcel was no longer classified under G.L. c. 61 by the town. *Id*. ("property already classified as forest land remains so classified unless the property owner fails to file a new certification," *e.g*., after the expiration of the ten-year certification period); *Ward v. Costello*, 2000 WL 1473459, at * 5 (Mass. Super. Aug. 16, 2000). In addition, although I need not and do not make any rulings on this issue, I note that the Forest Parcel was indeed recertified by DCR. Batista submitted the Forest Management Plan application and a plan with the state, the plan was approved by the Service Forester and Regional Supervisor in 2001, and the Forest Parcel thus would arguably continue being certified by DCR as forest land under G.L. c. 61 for another ten years.

Based on the foregoing, it is undisputed that at the time Batista attempted to convey the Forest Parcel to Mr. Caron, it was *classified* by the town as **[**30]** forest land pursuant to G.L. c. 61.

The Conveyance of the Forest Parcel Constituted a Conversion Under G.L. c. 61, § 8

At the time of the conveyance, Mr. Caron intended to use the Forest Parcel for "residential, industrial or commercial use" and therefore the conveyance constituted a conversion under *G.L. c. 61, § 8*, triggering the notice requirements of that section. "The critical date is the *date of the sale*, and the critical intent is the *[buyer's] intent* to discontinue the [forest] use of the land on acquiring title." *Sudbury v. Scott, 439 Mass. 288, 299 (2003)* (interpreting G.L. c. 61A, which contains nearly identical provisions as G.L. c. 61) (emphasis added). Although issues of intent are not always appropriately decided in a motion for summary judgment, this issue can be decided in this Memorandum since Mr. Caron's intended use of the property is not a disputed fact in this case. *See, e.g., Brunner v. Stone & Webster Engineering Corp., 413 Mass. 698, 705 (1992)* ("In coming to that conclusion, we recognize that 'where motive, intent, or other state of mind questions are at issue, summary judgment is often inappropriate.' *Flesner v. Technical Communication Corp., 410 Mass. 805, 809 (1991)*. **[**31]** That is not to say, however, that, in such cases, summary judgment is always inappropriate."); *Dolan v. Airpark, Inc., 24 Mass. App. Ct. 714, 717 (1987)* ("It is true that '[t]he granting of summary judgment in a case where a party's state of mind or motive constitutes an essential element of the cause of action is disfavored. . . . The issue of a party's intention or knowledge, raised by the pleadings, often cannot be resolved adequately from a consideration of the limited materials which accompany a summary judgment motion.' However, this is not an absolute rule." (internal citations omitted)).

Here, Mr. Caron does not dispute that he intended to use the property for something other than forest land. For example, as noted above, the following facts are undisputed. The Loan Agreement Mr. Caron entered into to obtain funds to purchase the property indicated that "[t]he borrowers intend to excavate gravel from Lot 7 [the Forest Parcel] during the life of this loan." [23] Plaintiff's Appendix at Ex. C; Defendant's Appendix at Ex. Q. The mortgage also indicated that "[t]he proceeds of loan or loans evidenced by the Note shall be used exclusively for *business purposes* and no part of the proceeds **[**32]** shall be used for personal, family, household or agricultural purposes." Plaintiff's Appendix at Ex. E (emphasis added). The note likewise stated that "[t]he Borrower represents that the proceeds of this Note will be used *solely* for *commercial and business purposes* and not for personal, family, household or agricultural purposes and the Borrower acknowledges that this representation has been relied upon by the Lender." *Id*. at Ex. D (emphasis added). In addition, Mr. Caron admitted that "I intended to run a *business*, Caron Farm Lands and Nursery, out of the property. I received a d/b/a certificate for that purpose--to *sell nursery products* out of the property." Defendant's Appendix at Ex. P (Aff. of Brian Caron at P 17) (emphasis added). He also previously stated that "[p]rior to purchasing the property I intended to operate some sort of farm and farm stand from Lot 7" and that he would sell "harvested timber and gravel excavated **[*50]** during the reclamation of the forest land to agricultural land . . . ." Plaintiff's Appendix at Ex. L (answers to interrogatories).

23 Mr. Caron asserts that he did not read the Loan Agreement, mortgage, or note prior to closing and, instead, relied on Attorney **[**33]** Michael V. Caplette for their validity. Whether or not Mr. Caron read the documents or understood the contents and conditions in them, it is undisputed that Mr. Caron signed all of the documents. He is therefore charged with, at the very least, constructive knowledge of their contents and is bound by them.

Mr. Caron also noted that he is the President of a company called Caron Construction and Environmental, Inc., which uses trucks printed with "Caron Construction & Environmental Sand & Gravel" on their side, and further admits to "excavation and removal of earth materials from the property." *Id*. at Ex. H (requests for admissions at 8-9). He further admitted that, "[a]fter the closing, I hired a forest management company, Tetreault Forest Management, to harvest firewood and to clear approximately three acres on the property." Defendant's Appendix at Ex. P (P 18). Consistent with these statements regarding his intended uses of the Forest Parcel, on June 16, 2005, Mr. Caron applied for a zoning permit and indicated that he planned on changing the use of the Forest Parcel from "agricultural land to *earth removal." Id*. at Ex. H (emphasis added). At a September 2005 Zoning Board of Appeals **[**34]** meeting on that application, the minutes indicate that the board noted that the Forest Parcel was "in Chapter 61," Mr. Caron "said he wanted to remove 10,000 yards of gravel to be able to put in the barn," and "Mr. Caron said he would eventually go for the full 50,000 yards." *Id*. at Ex. J. All of these facts clearly show that Mr. Caron intended to use the Forest Parcel for commercial activities, not as forest land.

Nor does Mr. Caron truly dispute that he intended to use the Forest Parcel in a manner inconsistent with Chapter 61 requirements. Rather, Mr. Caron notes that when he purchased the Forest Parcel, he was unaware that it was classified as forest land [24] and believed that the town no longer had a right of first refusal because it accepted his payment of the roll-back taxes. Specifically, Mr. Caron states that a "Certificate of Title" was prepared, which did not mention the Chapter 61 classification and the first time that he became aware of any issues was when Tetreault Forest Management informed him that there were back taxes due on the property. Defendant's Motion at 10-11. However, it is undisputed that the Chapter 61 lien was recorded at the Hampden County Registry of Deeds. **[**35]** Verified Complaint at Ex. C; Defendant's Motion at 2, Ex. A. Although the "Certificate of Title" that Mr. Caron refers to does not list that lien, it is not actually a certificate of title issued by the land court and, in fact, does not even cover the Forest Parcel. Instead, it is simply a certification made by Attorney Donald C. Cournoyer, Jr., indicating that he examined the records in the registry for the "property described in a Quitclaim Deed from Christopher Batista . . . to Brian R. Caron, Trustee of C & F Realty Trust, dated May 9, 2005 and recorded at the Hampden County Registry of Deeds on May 18, 2005 and recorded at the Hampden County Registry of Deeds on May 18, 2005 at 2:01 P.M. at Book 15026, Page 143." Supplemental Affidavit of Brian R. Caron at Ex. C (Certificate of Title (May 18, 2005)). This deed corresponds to Lot 1, not the Forest Parcel. [25] In any event, even if Mr. Caron did not have *actual* knowledge that the Forest Parcel was classified under Chapter 61, he is charged with *constructive* knowledge since it is undisputed that the lien was recorded at the registry. [26] Since Mr. Caron had knowledge of the Chapter 61 lien, the sale of the property to him did "not **[**36]** extinguish the right [of first refusal]. The holder is entitled to specific performance of the option as to a subsequent owner who purchased with notice of the holder's right of first refusal." *Sudbury*, 439 at 297.

24 Mr. Caron's statements that he was not aware of the Chapter 61 lien are potentially inconsistent with Batista's statements. For example, Christopher Batista (on behalf of Batista and Sons) stated in his Response to Plaintiff's Interrogatories that "I have known Mr. Caron for many years and we had many communications, both formal and informal, before and after May 18, 2006 during which we discussed the Property. The communications consisted of the value of the Property and its status regarding Ch. 61." Plaintiff's Appendix at Ex. B, Answer to Interrogatory No. 11. For purposes of this Memorandum, I accept Mr. Caron's statement that he was not aware that the Forest Parcel was classified under Chapter 61 as true. However, Mr. Caron is charged with knowledge that there was a Chapter 61 lien on the Forest Parcel since that lien was of record.

25 I also note that this "Certificate of Title" was dated *after* the conveyance of Lot 1 (contrary to Mr. Caron's brief stating that the **[**37]** Certificate of Title was presented to him at closing, Defendant's Motion at 10) and therefore could not have assisted Mr. Caron prior to or at closing. Although these discrepancies are misleading, they are not material to this Memorandum and do not influence my findings and rulings.

26 Mr. Caron attempts to avoid this conclusion by noting that he was not represented by an attorney at closing and he relied on the closing attorney's review and explanation of the documents and the state of title. Mr. Caron further states that the closing attorney did not reveal the Chapter 61 lien to him at or before closing. Although I accept these assertions as true for purposes of this Memorandum, Mr. Caron is still charged with the knowledge of the record title. Any alleged failure of attorneys (who may or may not have even represented Mr. Caron) to disclose the Chapter 61 lien is not a defense to the claims *in this case*.

Furthermore, the fact that Mr. Caron paid the roll-back taxes *after* he purchased the Forest Parcel does not change the fact that the Forest Parcel was being taxed under Chapter 61 *at the time of the conveyance*. As noted above, "the critical date is the date of sale . . . ." *Id. at*

299. **[**38]** As discussed below, Mr. Caron's payment of the roll-back taxes does not constitute a waiver of the town's right of first refusal.

Based upon the foregoing undisputed facts, I find and rule that Mr. Caron intended to use the property "for residential, industrial or commercial use" and the conveyance of the Forest Parcel to Mr. Caron was thus a sale or conversion triggering the town's right of first refusal pursuant to *G.L. c. 61, § 8*.

Notice and Right of First Refusal

It is undisputed that Batista and Mr. Caron failed to provide the town with written notice prior to the conveyance of the Forest Parcel. As noted above, it was not until May 23, 2005 that Batista's counsel sent a letter to the Board of Selectmen, stating that "[t]he purpose of this letter is to request execution of the enclosed Release of Right of First Refusal under Chapter 61. The corporation intends to sell all of the property it owns at this location. The agreed purchase price is $ 275,000." Verified Complaint at Ex. L; Defendant's Appendix at Ex. L. This letter failed to comply with the requirements of *G.L. c. 61, § 8* since it was not sent until after the sale occurred, it failed to include the purchase and sale agreement, **[**39]** and an affidavit regarding notice was not recorded. *G.L. c. 61, § 8*; *Smyly v. Royalston, 15 LCR 502, 504-05 (2007)*; *Meachen v. Bd. of Assessors of Sudbury, 6 LCR 235, 237 (1998)* (regarding substantially similar provisions of G.L. c. Land Court Decisions-2010 Volume 18 *CITE AS 18 LCR 51 61A)*. Accordingly, "the 120 day option period [did] not begin to **[*51]** 61A). Accordingly, "the 120 day option period [did] not begin to run . . . ." *Smyly, 15 LCR at 505*.

Although the May 23rd letter failed to comply with the notice requirements of G.L. c. 61, it did place the town on constructive notice that the Forest Parcel was being "sold for, or converted to, residential, industrial or commercial use while so taxed . . . ." *G.L. c. 61, § 6*. Arguably, therefore, the town was required to "investigate and exercise [its] option within a reasonable period of time." *Sudbury, 439 Mass. at 297-98*. Here, the town fulfilled its requirement to investigate by mailing a letter to Batista's counsel, notifying him that the May 23rd letter was defective and requesting a copy of the purchase and sale agreement. Verified Complaint at Ex. M.

A copy of the purchase and sale agreement was forwarded to the town, which was received **[**40]** on August 15, 2005. However, it is undisputed that the purchase and sale agreement covered both Lot 1 and the Forest Parcel and did not contain a purchase price for the Forest Parcel alone. It goes without saying that the purchase price for the Forest Parcel is a material term of an offer for the Forest Parcel. Since the town lacked a material term of the offer, there was no *bona fide* offer for the Forest Parcel and the town's right of first refusal therefore never ripened. As this court has previously noted,

> [b]ecause the *Section 8* option allows the municipality to "meet a bona fide offer to purchase," it is implied by this language that the municipality has been made aware of all the terms of the offer in order to "meet" such an offer. To find otherwise would be to discourage full disclosure in transactions of this nature and frustrate a municipality's attempt to "meet a bona fide offer." Certainly this is not what the legislature intended and it is not what this court wishes to promote.

Smyly, 15 LCR at 504-05.

Indeed, such frustrations were borne out in this case due to the defendants' failure to provide the town with proper notice and a *bona fide* offer for the Forest Parcel. The **[**41]** town, in an effort to ensure that its rights were preserved, attempted to exercise the right of first refusal based upon the purchase price listed in the deed to Mr. Caron for the Forest Parcel ($ 137,500). On October 6, 2005 (well within the 120-day option period beginning with the mailing of the purchase and sale agreement), the Board of Selectmen voted to exercise its option, contingent on the Town Meeting voting to appropriate funds and contingent on those funds being exempt from the provisions of Proposition 2 1/2. Verified Complaint at Ex. P. Notice of the board's exercise of its option was recorded as is required by *G.L. c. 61, § 8*. *Id*. Such actions were all that was necessary for the town to exercise its option according to the requirements of *Section 8*. *Meachen, 6 LCR at 238* (town properly exercised its option even with the Town Meeting contingencies). However, Mr. Caron attended the Town Meeting and announced that he refused to sell the Forest Parcel for $ 137,500. Perhaps (although I do not decide for the purposes of this Memorandum), that announcement played a roll in the Town Meeting voting to not appropriate town funds to purchase the Forest Parcel. In any event, the **[**42]** town's efforts to exercise its option certainly were frustrated by the defendants' failure to provide a purchase price for the Forest Parcel.

Because there was no *bona fide* offer for the Forest Parcel presented to the town (or a purchase and sale agreement that allocated the total purchase price between the two parcels), I find and rule that the town's right of first refusal has not yet ripened and the 120-day option period has not begun to run. Accordingly, the subsequent actions of both the town and Mr. Caron were a nullity,

including the town's purported exercise of its right and the Town Meeting vote.

Although the town argues that the purchase price in the deed for the Forest Parcel is definitive and constitutes the offer the town must meet, Mr. Caron has presented enough to place this fact in dispute. Since the town is seeking summary judgment declaring the purchase price to be $ 137,500, I must view the evidence on that issue in the light most favorable to Mr. Caron. That evidence includes the following: (1) the purchase and sale agreement only contained a single purchase price for the "Property" (both Lot 1 and the Forest Parcel); (2) the Loan Agreement for the purchase indicated **[**43]** that "[t]he lot release consideration [for Lot 1] must be at least $ 60,000"; (3) Mr. Caron stated that he was unaware that the purchase price was being split equally between the two parcels and that the HUD Settlement Statement did not indicate such division; [27] (4) Mr. Caron "considered the purchase price for Lot 7 (36) acres to be $ 225,000.00 and $ 50,000 for Lot 1 (2 acres)"; (5) Batista indicated that "[t]he consideration for both parcels was divided equally between two deeds as a matter of convenience and does not reflect the true comparative value of each parcel;" (6) Batista also indicated that "the purchase price of $ 275,000.00 was intended primarily as consideration for the 35.9 acre parcel. . . . The 35.9 acre parcel was worth far more than the smaller parcel and the total consideration was primarily for the larger parcel." Plaintiff's Appendix at Exs. B, C, & L; Defendant's Appendix at Exs. D&P; Aff. of Christopher Batista, President of Batista & Sons, Inc. (Oct. 9, 2008); Supp. Aff. of Brian R. Caron (Oct. 9, 2008). [28] In addition, the very characteristic of the two parcels itself supports Mr. Caron's assertion--the Forest **[*52]** Parcel contains 35.915 acres, while Lot 1 contains **[**44]** a mere 1.667 acres. Defendant's Appendix at Exs. N-O.

> 27 I agree with the plaintiff that some of Mr. Caron's statements regarding when he saw the deeds are potentially inconsistent. In his supplemental affidavit, Mr. Caron indicated that the deeds were tendered to him at closing, but that he did not review them until the Treasurer returned them to him. Supp. Aff. of Brian R. Caron at 1, PP 3-4. The plaintiff thus moved to strike these statements and the assertion of "undisputed facts" in paragraphs 61 and 62 in Mr. Caron's motion. I note, however, that whether or not Mr. Caron actually saw the listed consideration in the deeds at the time of closing is not material to this Memorandum. Thus, I need not and do not rule on that motion. Rather, the issue is what the purchase price of the Forest Parcel is for purposes of the town's right of first refusal. The consideration listed in the deed is one piece of evidence to suggest what that price should be, but is certainly not the only evidence. Again, the purchase price is thus a disputed material fact and cannot be decided on summary judgment.
>
> 28 The plaintiff moved to strike certain portions of the Batista affidavit. That motion is DENIED. **[**45]** With respect to Batista's statements regarding not completing the process for reclassifying the property, other undisputed facts in the record clarify what Batista means by that statement. In addition, it appears that the town's issue is focused on whether Batista "filed the certified forest management plan with the Town's assessors." Plaintiff's Reply to Defendant Brain [*sic*] R. Caron's Opposition to the Town of Brimfield's Motion to Strike at 2 (Oct. 16, 2008). As noted above, it is undisputed, however, that *Batista* did not file the plan with the assessors. Rather, it was forwarded to the assessors by DCR. With respect to Batista's statements regarding the value and purchase price of the Forest Parcel, I note that the Batista affidavit simply sets forth the intent and beliefs that Batista held when he entered into the contract. I do not take Batista's statements as evidence of the *actual* value and purchase price of the Forest Parcel, but rather as statements reflecting his opinion, which reflect the parties' disagreement on the purchase price of the Forest Parcel. The *actual* purchase price is thus in dispute and shall be determined at trial.

The evidence submitted thus places the **[**46]** purchase price in dispute and summary judgment on this issue is therefore inappropriate. Because the purchase and sale agreement contained all other material terms of the offer and the only term needed for the town's right of first refusal to ripen is the purchase price for the Forest Parcel alone, a trial is now necessary on that issue. In addition, as noted above, it is undisputed that Mr. Caron has altered the landscape of the Forest Parcel. Such actions may have diminished the value of the Forest Parcel to the town since it expected to have an option to purchase forest land that had been protected pursuant to the provisions of G.L. c. 61. The plaintiff acknowledged at the hearing on the motions for summary judgment that whether an adjustment to the purchase price is necessary is an issue that is not appropriate for summary judgment. Accordingly, this issue shall also be addressed at trial. Once final judgment enters that sets the purchase price (subject to adjustments, if any), the town shall thereafter have 120 days to exercise its rights in accordance with G.L. c. 61.

Mr. Caron's Payment of Roll-Back Taxes Did Not Waive the Town's Right of First Refusal

Contrary to Mr. Caron's **[**47]** arguments, Mr. Caron's payment of the roll-back taxes did not waive the town's rights under *G.L. c. 61, § 8* for two key reasons. First and most importantly, as noted above,

> a town's right of first refusal ripens into an option to purchase when the town receives notice of an intended sale under c. 61[] for a non[forest land] use. The statute contemplates that buyers and sellers will act in good faith and will notify the town if a sale for such use is intended. If a sale for non[forest land] use is consummated without such notice to the town, then the town's right of first refusal *endures*. A town's option to purchase may be specifically enforced against one who acquired title to land under c. 61[] for non[forest land] use, and without notice to the town of the intended sale.

Sudbury, 439 Mass. at 297-98 (regarding essentially identical provisions of G.L. c. 61A) (emphasis added). Here, as noted above, notice was not provided to the town prior to the consummation of the sale as is required by *G.L. c. 61, § 8*. The statute specifically states that "[n]o sale or conversion of such land shall be consummated unless and until either said option period shall have expired or the landowner shall **[**48]** have been notified in writing *by the mayor or board of selectmen* of the city or town in question that said option will not be exercised." *G.L. c. 61, § 8* (emphasis added). Had Batista and Mr. Caron complied with the statutory requirements and their requirement to "act in good faith," the option to purchase the Forest Parcel would have irrevocably vested in the town. *Billerica v. Card, 66 Mass. App. Ct. 664, 669 (2006)* (regarding G.L. c. 61A). Mr. Caron's attempt to pay roll-back taxes thus would not have had any impact on that vested right. *Id.* Accordingly, Mr. Caron cannot now benefit from his and Batista's failure to comply with the statutory requirements of G.L. c. 61 and avoid the consequences of *Section 8* simply by having paid the roll-back taxes *after* the sale had already consummated. [29]

> 29 The outcome of this case might have been different if Batista or Mr. Caron paid the roll-back taxes prior to entering into the purchase and sale agreement. *See Ward v. Costello*, 2000 WL 1473459 (Mass. Super. Aug. 16, 2000).

Second, the acceptance of Mr. Caron's payment of the roll-back taxes does not constitute a waiver of the town's right of first refusal. "Waiver may occur by an express and **[**49]** affirmative act, or may be inferred by a party's conduct, where the conduct is consistent with and indicative of an intent to relinquish voluntarily a particular right [such] that no other reasonable explanation of [the] conduct is possible. Here, where waiver is not explicit, it must be premised on clear, decisive and unequivocal conduct...." *Kact, Inc. v. Rubin, 62 Mass. App. Ct. 689, 695 (2004)* (internal citations and quotations omitted). In this case, any action by the assessors cannot possibly constitute a waiver of the town's right of first refusal. *G.L. c. 61, § 8* clearly states that a sale cannot occur unless the "option period shall have expired or the landowner shall have been notified in writing by the *mayor or board of selectmen* of the city or town in question that said option will not be exercised. Such option may be exercised *only* by written notice signed by the *mayor or board of selectmen* . . . ." Accordingly, the right of first refusal and any waiver of that right can only be exercised by the mayor or board of selectmen. Even if the assessors' action of accepting the roll-back tax could be considered an implicit waiver of the right of first refusal (a matter I do not **[**50]** decide), since the mayor or board of selectmen control whether the right is exercised, the acceptance of the roll-back tax cannot bind the town or result in a waiver of its rights. *See Bldg. Inspector of Lancaster v. Sanderson, 372 Mass. 157, 162 (1977)* ("a municipality cannot ordinarily be estopped by the acts of its officers from enforcing its zoning by-law or ordinance"); *Sancta Maria Hospital v. Cambridge, 369 Mass. 586, 595 (1976)* ("one dealing with the officers or agents of a municipal corporation must, at his peril, see to it that those officers or agents are acting within the scope of their authority"). Accordingly, the assessor's acceptance of the roll-back taxes did not constitute a waiver of the town's right of first refusal.

Mr. Caron did however pay the roll-back taxes. Accordingly, should the town exercise its right of first refusal and purchase the Forest Parcel, it must reimburse Mr. Caron for the amount he paid, plus interest.

Conclusion

For the foregoing reasons, the plaintiff's motion for summary judgment is **ALLOWED, in part** and **DENIED, in part**. Also for the foregoing reasons, Mr. Caron's motion for summary judgment is **DENIED**. The conveyance of the Forest Parcel to **[**51]** Mr. Caron constituted a "s[ale] for, or conver[sion] to, residential, industrial **[*53]** or commercial use while so taxed" under *G.L. c. 61, § 8*. Accordingly, Batista and Mr. Caron failed to comply with the notice provisions of that section and the town's right of first refusal endures. Although the purchase and sale agreement outlines substantially all of the material terms of Mr. Caron's offer that the town would have to meet to exercise its option, the exact purchase price of the Forest Parcel is a disputed material fact. Accordingly, the parties shall contact the

court to schedule a pre-trial conference and trial on that issue and whether the purchase price is subject to any adjustments due to Mr. Caron's actions after acquiring the Forest Parcel. Until that trial has concluded and final judgment has entered, this court's preliminary injunction (Feb. 28, 2007) shall continue. As noted in that order, "the defendants are hereby prohibited and enjoined from conducting any activities that alter the 35.59 acre parcel at issue in this case (Lot 7 on the plan recorded in Book of Plans 286, Page 11 in the Hampden County Registry of Deeds; known to the town assessors as Map 11, Block A, Lot 9) **[**52]** until further order of the court. This includes, but is not limited to, a prohibition on any further land clearing, any further excavation of any kind, any further removal of soil or gravel, and any further construction." Preliminary Injunction (Feb. 28, 2007). [30]

30 I specifically note the language of this order and stress that it is still in effect since Mr. Caron admitted that "[s]ubsequent to February 28, 2007, Caron Construction and Environmental, Inc. removed earth materials from the Property," and incorrectly asserted that "such removal [was conducted] pursuant to permission of the Court." Plaintiff's Appendix at Ex.H(Request and Response No. 37).

SO ORDERED.

TOWN OF NATICK v. MICHAEL W. DYER, Trustee of BATMAN REALTY TRUST

06-TL-133926

MASSACHUSETTS LAND COURT

18 LCR 219*; *2010 Mass. LCR LEXIS 42

April 12, 2010, Decided

HEADNOTES

Tax Title Taking-Burden of Persuasion-Instrument of Taking

SYLLABUS

[1]**

After the Town of Natick had introduced into evidence an Instrument of Taking constituting prima facie evidence of the validity of a taking for fiscal 1994 real-estate taxes, the Defendant failed to meet his burden of persuasion to prove payment by adducing as the only non-testimonial evidence selected pages from his 1993 and 1994 tax returns. The Town did, however, err in allocating to the tax-title account certain quarterly payments made in 2000 and 2001, where the taxpayer had made clear that payments should have been applied as designated on each check, and it would have to reallocate the balances due.

COUNSEL: David A. DeLuca, Esq., Murphy, Hesse, Toomey & Lehane, LLP for Plaintiff.

George L. Richards III, Esq., McLaughlin, Richards, Mahaney, Biller & Woodyshek, LLP for Defendant.

JUDGES: Harry M. Grossman, Justice.

OPINION BY: GROSSMAN

OPINION

[*219] DECISION

Introduction

The Town of Natick (plaintiff / Town) seeks to foreclose its tax lien on the premises known and numbered as 5 Presbrey Place in Natick, Massachusetts (Locus / property). The property was taken into Tax Title on May 8, 1998 for non-payment of the fiscal year 1994 real estate taxes and accrued interest in the amount of $ 3,504.21 (1994 Tax Title). The assessed **[**2]** owner of the property is the defendant herein, Michael W. Dyer, Trustee of Batman Realty Trust (defendant). Subsequent to the taking, the Town applied portions of defendant's fiscal year 2000 and 2001 real estate tax payments to the outstanding Tax Title account. As a consequence, the Town asserts that amounts are delinquent not only for fiscal year 1994 but for fiscal years 2000 and 2001 as well. For his part, the defendant denies ever missing a tax payment and seeks a judgment dissolving the lien and dismissing the complaint to foreclose.

For the reasons that follow, this court concludes that defendant remains indebted to the Town of Natick for fiscal year 1994 in the amount of $ 3,504.21, as represented by the corresponding Tax Title as of May 8, 1998, together with such other amounts, including taxes and statutory interest as will be determined by this court in accordance with the procedure set out below.

Further, this court concludes that the Town improperly allocated certain fiscal year 2000 and 2001 tax payments to the Tax Title account. [1] These amounts should have been applied as intended by the taxpayer toward the fiscal year 2000 and 2001 real estate tax obligations. Consequently, **[**3]** the Town must properly reallocate these payments as originally intended by the taxpayer.

1 These payments were applied primarily against the Tax Title interest.

Procedural History

On May 8, 1998, the property was taken for non-payment of real estate taxes by means of an Instrument of Taking recorded at the Middlesex South District Registry of Deeds. [2] On July 21, 2006, the Town of Natick filed a Complaint to foreclose its tax lien on the property at 5 Presbrey Place. On October 23, 2006, Defendant filed an Answer in which he asserted, *inter alia*, that he had paid the fiscal year 1994 tax obligation in full and that he had no knowledge of the tax taking until he was denied a building permit in 2005.

2 The Instrument of Taking was recorded on July 2, 1998 at Book 28797, Page 74.

The case was tried on June 11, 2009. By agreement of the parties, no court reporter was present. The parties introduced various exhibits which were admitted into evidence and incorporated into this decision. Three witnesses testified at trial. The Director of Assessing and Executive Assistant to the Tax Collector testified on behalf of the Town. The defendant testified on his own behalf. Post Trial Briefs were filed **[**4]** on or before July 10, 2009.

Background

On all the testimony, exhibits and other evidence properly introduced at trial or otherwise before me, and the reasonable inferences I draw therefrom, and taking into account the pleadings, memoranda and arguments of the parties, I find as follows:

1. The Locus at 5 Presbrey Place is a parcel of 24,966 square feet in the Town of Natick, Massachusetts. It is identified as Parcel 53F on Natick Assessors Map 60.

2. At all times relevant hereto, the assessed owner of the Locus has been Michael W. Dyer, Trustee of Batman Realty Trust (defendant). The defendant holds title to the Locus pursuant to a deed dated March 5, 1990 and recorded the following day with the Middlesex South District Registry of Deeds at Book 20412, Page 284.

3. Tax abatements were sought by the defendant and granted by the Town for fiscal years 1995, 1996, and 1998.

4. On May 8, 1998, an Instrument of Tax Taking (Instrument) was issued by the Town for non-payment of taxes "for the year 1993-1994." [3]

3 *I.e.*, fiscal year 1994.

5. The Instrument recites that "1993-1994 taxes" remain unpaid in the amount of $ 2,239.22, together with interest to the date of demand in the amount of $ 1,264.99. **[**5]** The total sum for which the "land is taken" is given, therefore, as $ 3,504.21.

6. The Instrument recites further that the demand for payment was made upon the defendant on June 30, 1994 and that such **[*220]** amounts "were not paid within fourteen days after demand therefore."

7. The Instrument of Taking was recorded on July 2, 1998 at Book 2879, Page 74 with the Middlesex South District Registry of Deeds.

8. Defendant has not retained copies of his fiscal year 1994 checks as he "purges" his records every seven years.

9. The defendant further testified that the bank [4] in which the relevant checking account was maintained during fiscal year 1994 has not retained copies of checks that defendant may have written at that time.

4 Mr. Dyer testified that the bank has since undergone a number of mergers.

10. Defendant took deductions for fiscal year 1993 and 1994 real estate taxes on his calendar year 1993 and 1994 federal tax forms.

11. The Town applied defendant's 4th Quarter fiscal year 2000 tax payment, the 3rd Quarter fiscal year 2001 tax payment, and the 4th Quarter fiscal year 2001 tax payment to the outstanding Tax Title account as well as to certain water and sewer liens. As a consequence, the **[**6]** Town's records reflect balances outstanding for fiscal years 2000 and 2001, as well as for fiscal year 1994.

12. At the time these payments were so applied, it was the Town's stated policy not to apply payments received toward amounts owed for a prior year without first securing the taxpayer's approval.

13. The Town produced a handwritten receipt reciting that the defendant's 4th Quarter fiscal year 2000 tax payment was applied to fiscal year 1994 Tax Title interest [5] and principal. [6] The defendant asserts that he mailed in his payment and that he never received such a receipt.

5 In the amount of $ 1300.30.
6 In the amount of $ 265.00.

14. The checks used by the defendant to pay the fiscal year 2000 and 2001 taxes referenced the quarterly payment and either the year or bill due date, *e.g.* "1st Payment 2000," "3RD PAY/8/1/01," handwritten in the memo or "FOR" field.

15. The eight checks used by the defendant to pay his fiscal year 2000 and 2001 quarterly real estate tax bills were drawn on the account of *Design Projects, Inc., 5 Presbrey Pl., Natick, MA. 01760.*

16. Seven of the eight checks used by the defendant to pay his fiscal year 2000 and 2001 quarterly real estate tax bills were dated **[**7]** well beyond the relevant due dates. [7]

7 Thus, the 1st quarter fiscal year 2000 payment due August 2, 1999, was paid by check dated October 25, 1999. The 2nd quarter fiscal year 2000 payment due November 1, 1999, was paid by check dated December 15, 1999. The 3rd quarter fiscal year payment due February 1, 2000, was paid by check dated February 1, 2000. The 4th

quarter fiscal year 2000 payment due May 1, 2000, was paid by check dated July 30, 2000.

The 1st quarter fiscal year 2001 payment due August 1, 2000, was paid by check dated November 1, 2000. The 2nd quarter fiscal year 2001 payment due November 1, 2000, was paid by check dated January 30, 2001. The 3rd quarter fiscal year payment due February 1, 2001, was paid by check dated August 3, 2001. The 4th quarter fiscal year 2001 payment due May 1, 2001, was paid by check dated August 11, 2001.

17. On the checks that were late, defendant unilaterally calculated and remitted interest. Such calculations were accepted by the Town.

18. Defendant alleges that he first learned of the unpaid taxes at the end of 2003.

19. In 2005, defendant was denied a building permit by the Town due to the tax delinquency appearing in the municipal record. Defendant **[**8]** asserts that until this time he had been unaware that the Locus was in Tax Title.

20. On July 21, 2006, the Town filed a Complaint to foreclose its tax lien.

21. The Town's computerized records show defendant with outstanding balances for fiscal years 1994, 2000, and 2001. As of June 8, 2009 those amounts are as follows: for fiscal year 1994, $ 2,298.42 in principal and $ 2,877.78 in interest; for fiscal year 2000, $ 1,251.12 in principal and $ 1,778.26 in interest; and for fiscal year 2001, $ 2,647.48 in principal and $ 3,365.90 in interest. The above amounts total $ 14,218.96, exclusive of additional fees. [8]

8 With attorneys fees and recording fees, the total reaches $ 15,233.96 as of June 28, 2009.

Discussion

As previously observed, the Town of Natick took the subject property into Tax Title pursuant to an Instrument of Taking dated May 8, 1998 and recorded at the Registry on July 2, 1998 at Book 2879, Page 74.

Under the provisions of *G.L. c.60, § 54*, an Instrument of Taking recorded within sixty days of the date of taking "shall be prima facie evidence of all facts essential to the validity of the title so taken . . . ." In the case at bar, the Instrument of Taking referenced the property **[**9]** at 5 Presbrey Place. It recited that demand had been made for non-payment of taxes upon Batman Realty Trust, Michael Dyer, Trustee on June 30, 1994. It further stipulated that the fiscal 1993-1994 taxes remaining unpaid were in the amount of $ 2,239.22 with interest to the date of the taking of $ 1,264.99. Consequently, the total sum for which the property was originally taken, totaled $ 3,504.21.

As the Instrument was recorded within the sixty day period, this court finds that the Instrument of Taking constitutes *prima facie* evidence of all facts essential to the validity of the "title so taken." Among such facts are those set out in the preceding paragraph.

[*221] The case of *Horvitz v. Comm'r. of Revenue, 51 Mass. App. Ct. 386 (2001)* is of assistance in evaluating such *prima facie* evidence. [9]

9 The *Horvitz* court did not explicitly address the situation such as that at bar in which the taxpayer claims to have paid a tax. However, the Court had occasion to discuss *the allocation of the burden of proof* in cases concerning tax matters, as follows:

> [I]n practice the allocation of the burden of proof where a taxpayer seeks relief from imposition of a tax has been far from uniform . . . . What distinguishes **[**10]** one category of case from the other is not apparent.

The court spoke of the principle that the "burden falls where general principles of law would naturally and logically cause it to fall." *Id.* (*quoting The New England Trust Co. v. Comm'r. of Corp. and Taxation, 315 Mass. 639*).

In *Horvitz*, the Commissioner of Revenue's determination as to the taxpayer's domicile was upheld by the Appellate Tax Board (Board). In reversing the Board's decision, the Court acknowledged that "the commissioner was required to produce evidence of a domicile change, upon a *prima facie* showing by the taxpayer that his domicile originally was elsewhere." [10]

> Upon a showing by a taxpayer of an existing domicile, that taxpayer has made out a *prima facie* case that the domicile has continued; *to say that the commissioner then has a burden to produce evidence is to state the obvious*, since the commissioner will automatically lose if he remains silent. The burden upon the commissioner under such circumstances is not only to produce, *but to persuade*. [11]

(Emphasis added)

10 *Id, at 391*.
11 *Id. at 395*.

So too, in the case at hand, where the Instrument of Taking constitutes *prima facie* evidence of the relevant facts recited therein, **[**11]** *i.e.*, those necessary for the validity of the tax taking, I conclude that the taxpayer was obliged to produce *persuasive* evidence demonstrating payment of the fiscal year 1994 tax. It is this court's view that the taxpayer has fallen short in this respect.

The primary non-testimonial evidence produced by the defendant [12] in support of his claim of payment consists of pages purporting to be from his personal 1993 and 1994 calendar year federal tax returns. [13] Included are copies of the front of the first page of defendant's 1993 calendar year 1040 Tax Form together with the front of a *Schedule A-Itemized Deductions* (Schedule A) for that same year. The front of the Schedule A shows a deduction for Real Estate Taxes paid of $ 1,270. Included, as well, is a copy of a front of a *Schedule A-Itemized Deductions* form for calendar year 1994. That copy shows a deduction for real estate taxes paid of $ 5,094. There is attached a copy of the front of a handwritten worksheet page in which the $ 5,094 is broken down as follows:

> $ 4,811.72 -Batman Realty trust/ 5 Presbrey Place
>
> $ 282.47 -Tuckernuck Realty Trust/ Mattapoisett

12 *See* Exhibit 2.
13 *See* however, Findings of Fact, Para. 8, supra.

I have given **[**12]** these documents little or no evidentiary weight owing to their seemingly random, incomplete nature. Inexplicably, the taxpayer has elected to submit not the entire tax document or even an entire page, front and rear, but only, as noted, copies of the fronts of certain pages. [14] Even then, they are unaccompanied by corroborating evidence such as checks to the Town that might have been used for payment of the relevant taxes. It goes without saying that these submissions are not official documents, nor do they purport to be so.

14 *Id*.

As to the payment of the 1994 taxes, this court has taken note of Exhibit 8, a letter dated December 7, 2006 from taxpayer's counsel to the town lawyer concerning various tax obligations, including that for fiscal year 1994. In that letter, counsel purports to place the burden of proof upon the Town in the following manner:

> Unless you can prove otherwise, my client **never** received **any** bills from the Town or notice of any kind regarding the outstanding [1994] taxes (including notice of the filing of the Tax Taking in 1998) and only became aware of it when he was denied a building permit in 2005. Although my client believes he paid the taxes back in 1994 (and claimed **[**13]** them as a deduction on his tax returns), he no longer has cancelled checks from twelve years ago as proof of payment. If the Town had simply billed him for the outstanding taxes and/or notified him of the taking in 1998, he would have had an opportunity to either a) provide proof of payment by way of a cancelled check(s) or b) pay the balance way back then with minimal accrued interest. However, since he never knew they [the fiscal 1994 real estate taxes] were outstanding . . . **and** the outstanding balance was **never** reflected in any future tax bills since, I question whether it is appropriate and/or legally permissible to now charge interest for the last twelve (12) years, as well as legal fees incurred.

While reciting that the taxpayer "believes he paid the taxes back in 1994," much of that paragraph is given over to the Town's alleged failure to (a) notify the taxpayer of the delinquency after it was incurred, and (b) to provide "notice of the tax taking." In fact, emphasis is placed solely on words meant to indicate that the Town was deficient in failing to periodically notify the taxpayer of the asserted delinquency. The last sentence of the paragraph takes issue not with the principal **[**14]** tax obligation, but with the added interest and legal fees.

In any event, the taxpayer has directed the court to no statutory provision, nor is this court aware of any, that would require the Town to transmit periodic notice of delinquency to a taxpayer. As to the alleged failure to receive notice of demand, *G.L. c. 60, § 16*, captioned *Demand; statement of amount*, provides, in relevant part, as follows:

> The collector shall, before selling the land of a resident . . . serve on him a statement of the amount thereof with a demand for payment . . . . Demand shall be made by the collector *by mailing the*

> *same* to the last or usual place of abode, or to the address best known to him, and *failure to receive the same shall not invalidate a tax or any proceedings for the enforcement or collection of same.* [Emphasis added.]

[*222] As to the *§ 16* Demand then, there is no statutory requirement that the taxpayer *receive* that document, only that it be mailed. In any event, there is no convincing evidence on the record that would lead one to conclude that the Demand was not so mailed. Further buttressing this conclusion are the above cited provisions of *§ 54*, which provide a legal mechanism by which this court **[**15]** may satisfy itself that such demand was made.

Moreover, this court is satisfied that notice of the delinquency and proposed taking on May 8, 1998 was duly published in the Natick Bulletin. [15] Further, it is uncontroverted that the Instrument of Taking was properly recorded with the Registry, providing yet another source of constructive notice. [16]

> 15 *See* Exhibit 15. Nothing on the trial record suggests that the Town failed to post notice of the taking in two or more public places as required by *G.L. c. 60, § 53*.
> 16 *See* too, the public posting requirements as set out in *G.L. c. 60, § 53*. There is no evidence to suggest that these statutory requirements were not met.

Therefore, notice to the taxpayer of the delinquency and of the taking itself was sufficient.

Consequently, upon presentation by the Town of *prima facie* evidence under *§ 54*, this court concludes that the defendant has either failed to produce contraverting evidence or, in those instances where such evidence has been provided, I conclude that the defendant has failed to meet his burden of persuasion.

Therefore, this court finds that *as of May 8, 1998*, the defendant was indebted to the Town to the extent of $ 2,239.22 in taxes for **[**16]** the 1993-1994 tax year together with $ 1,264.99 in interest. Such obligation is secured by a Tax Title on the Locus in the amount of $ 3,504.21 as of the date of taking, together with such additional amounts as will be addressed below.

The discussion does not end with the fiscal year 1994 tax obligation. The Town allocated to the Tax Title account certain of the defendant's quarterly tax payments made in fiscal years 2000 and 2001. As a result, the Town asserts that the there are currently amounts outstanding, not just for 1994, but for 2000 and 2001, as well.

In *Comm'r. of Revenue v. Molesworth, 408 Mass. 580 (1990)*, the court held that tax payments may not be applied "contrary to the tax payer's express directions in the absence of statutory authorization." *Id. at 583*. Such statutory authorization has since been enacted. Under *G.L. c.60, § 3E*, "[p]artial payments of bills for taxes . . . shall be applied first to any interest due, then to collection charges . . . ." The statute took effect on July 31, 2003 however, and was not applicable at the time the payments in question were made. Furthermore, the Town concedes that even under *§ 3E*, a property owner "can probably still" direct **[**17]** payment to one particular year's obligation over that outstanding for another year. *Plaintiff's Post-Trial Brief*, p.4 (*citing Molesworth, 408 Mass. 580*).

On all eight of the checks defendant had issued to the Town for taxes in 2000 and 2001, the "FOR" or "Memo" line contained written designations. For example, one such designation read, in part, "1st Payment 2000" while another read, in part, "4th Pay 5/1/00." While slightly different, all of these writings contained the quarterly payment number as well as either the tax year or an individual bill's due date. When, as was typical, defendant made the payments beyond the due date, [17] he calculated on the face of the bill the interest owed using a per diem. Each check issued matched the recalculated amount due.

> 17 *See* Note 5, supra.

Under all the circumstances, I conclude that the taxpayer's intentions were made clear, that the payments should have been applied as designated on each check, and that the Town had not secured the taxpayer's approval prior to allocating the fiscal year 2000 and 2001 real estate tax payments in the manner that it did.

The Town must therefore reallocate the fiscal year 2000 and 2001 payments that were improperly **[**18]** applied to the Tax Title account, and it must recalculate the balances due for fiscal years 1994, 2000, and 2001.

If the payments improperly allocated by the Town were sufficient to satisfy the defendant's tax obligations for 2000 and 2001 at the time those payments were received, the defendant will presumably owe no further principle or interest to the Town for those two tax years.

Conclusion

This court has concluded after trial that the fiscal year 1994 Tax Title obligation together with accrued interest and charges remain outstanding to the Town of Natick. It concludes further that certain fiscal year 2000

and 2001 tax payments were improperly applied by the Town, primarily to Tax Title interest.

Consequently, this court will afford the Town until May 4, 2010 in which to submit a corrected accounting reallocating the payments wrongly applied to the Tax Title account. Thereafter, the defendant will be afforded until June 4, 2010 to file a written objection, if any, to the manner in which the reallocation was accomplished by the Town. To the extent the taxpayer differs with the Town's methodology or its conclusions, it will detail its reasons therefor, proposing an alternative methodology **[**19]** and amount currently due.

Further hearing will be held thereafter, but only to the extent deemed warranted by this court. [18]

18 *See* Land Court Rule 6.

Judgment will enter as per this Decision following resolution of the accounting issue.

SO ORDERED

By the Court.

1

AMERICAN ARBITRATION ASSOCIATION ARBITRATOR'S OPINION & AWARD
Before Michael W. Stutz, Arbitrator

In the Matter of Arbitration between
MASSACHUSETTS COALITION OF POLICE, LOCAL 399, RUTLAND POLICE PATROLMAN'S UNION
-and-
TOWN OF RUTLAND, MASSACHUSETTS
Quinn Bill Benefits
AAA Case No. 1139-1772-09

AWARD of the ARBITRATOR

The undersigned arbitrator, having been designated in accordance with the Parties' arbitration agreement, and having duly heard the proofs, allegations and contentions of the Parties, AWARDS as follows:

1) The Town of Rutland did not violate Article 26 of the collective bargaining agreement by reducing educational incentive payments to officers starting in July 2009.
2) The grievance is denied.

May 23, 2010 Michael W. Stutz

2

BACKGROUND

A hearing in this matter was held on January 22, 2010, in Rutland, Massachusetts, before the undersigned, appointed arbitrator by the parties pursuant to their labor agreement through the offices of the American Arbitration Association. Sandulli Grace, P.C., by Bryan Decker, Esq., represented the Union. Kopelman and Paige, P.C., by David C. Jenkins, Esq., appeared on behalf of the Employer. Both parties submitted written closing arguments.

AGREED ISSUES

The parties submitted the following questions to arbitration:

1. Whether the Town of Rutland violated Article 26 of the collective bargaining agreement by reducing educational incentive payments to officers starting in July 2009?
2. If so, what shall be the remedy?

STATEMENT OF THE CASE

The Town of Rutland, Massachusetts (the "Town," "Employer," or "management") and the Massachusetts Coalition of Police, Rutland Police Patrolmen's Union, Local 399 (the "Union" or "MCOP") are parties to a collective bargaining agreement effective from July 1, 2008 through June 20, 2011 (the "Agreement" or "Contract") that provides at Article 8 for arbitration of unresolved grievances.

This case arose after the Town reduced benefits under the statutory educational incentive known as the "Quinn Bill" which provides wage increases to officers who earn higher educational degrees in law enforcement or law.

Article 26 of the Agreement adopts the Quinn Bill and purports to limit the Town's liability under it:

3

> 26.1 During the term of this Agreement, educational incentive payments, to be made pursuant to the provisions of G.L. c. 41, Section 108L.
> 26.2 The Town and the Union agree that the Town is only liable for its 50% share of Quinn Bill payments.

The Quinn Bill is a State statute that towns may adopt to provide an incentive in the form salary increases for different college and graduate degrees for police officers to get higher education in law and law enforcement. It provides for a 10% salary increase for an associate's degree, 20% for a bachelor's degree and 25% for a masters degree, conditioned upon certification by the board of higher education. The law also requires the Commonwealth to reimburse a town for one half of the cost of the incentive payments.

The State failed to appropriate sufficient funds to pay its 50% of Quinn Bill costs in 1990. In response, several towns commenced legal action to require payment that ended up before the Supreme Judicial Court ("SJC") which overturned the mandatory requirement that the State contribute 50% of Quinn Bill costs because a legislature cannot bind itself or future legislatures to appropriate funds in the future. [*Town of Milton v. Commonwealth,* 416 Mass. 471 (1993)]

The Employer recognized the Truck Drivers Union, Local #170 of the International Brotherhood of Truck Drivers as the representative of the police officers in the Town on March 4, 2002. The Town and Local 170 negotiated a collective bargaining agreement effective from July 1, 2002 to June 30, 2005. During negotiations the Union proposed the following educational incentive payments for officers who obtained advanced degrees:

> 26.1 During the term of this Agreement, educational incentive payments, to be made bi-weekly for the following degrees:
> 25% Masters Degree
> 20% Bachelors Degree
> 10% Associates Degree

4

The Town proposed language limiting the Town's liability to its 50% share of Quinn bill payments. The language that was agreed to read:

> Article 26
> Educational Incentive Pay
> 26.1 During the term of the Agreement, educational incentive payments, to be made pursuant to the provisions of G.L. c.41, sec. 108L.
> 26.2 The Town and the Union agree that the Town is only liable for its 50% share of Quinn Bill payments.

Thereafter, the members of the bargaining unit decertified Local 170 and the Massachusetts Coalition of Police became their exclusive representative for collective bargaining and negotiated a successor Contract. During these negotiations, MCOP proposed reduced educational incentive pay for

part-time members and elimination of the 50% limitation to the Town's liability. The Employer proposed that no change be made to the educational incentive. Robert Marino, Union vice president, testified that, in return for 18% wage increases over three years, the Union agreed to keep the language of article 26 unchanged.

Joseph Becker, member of the Town's board of selectmen since May 2007 and member of the finance committee from 1997 to 2007, testified about the State's reimbursement of educational incentive under the Quinn bill. He explained that the State issues "cherry sheets" with estimated reimbursement amounts, and the exact percentage of reimbursement varies from year to year. The percentage reimbursements from the State over the past decade were as follows:

fy 00 50.8%
fy 01 51.9%
fy 02 50.8%
fy 03 50.9%
fy 04 53.8%
fy 05 46.5%
fy 06 48.5%
fy 07 49.2%

fy 08 51.5%
fy 09 8.7%

Mr. Becker explained that the actual reimbursement is received by the Town in March or April of the following fiscal year.

Mr. Marino testified that he received a 20% pay increase for his bachelor's degree beginning in July 2008. The incentive was cut in July 2009 so that he now receives 12-13%.

On July 20, 2009, the Union filed the grievance complaining that the Town's reduction in Quinn Bill payments violated Article 26.1 of the Agreement. As remedy, the grievance sought reinstatement of full Quinn Bill payments and to make employees whole for their losses.

SUMMARY OF THE PARTIES' POSITIONS

Union:

The Union contends that the Town accepted the Quinn Bill which provides for certain percentages for educational achievement, and the parties incorporated the Quinn Bill into their Agreement. Therefore, by reducing percentages paid to members of the bargaining unit for their educational degrees the Town violated the Agreement.

The Union suggests that the 50% liability limitation in Article 26.2 is an illegal provision that should be either struck from the Contract because it directly conflicts with the law, or it should be read so as not to conflict with the Quinn Bill by considering it merely as an agreement that the Town will seek reimbursement.

The Union also argues that there is a past practice of paying full Quinn benefits even when the State has reimbursed less than 50%.

The Union argues further that the Town reduced its payments even before the Town knew with certainty the amount of reduction in reimbursement from the State.

For these and other reasons the Union asks the arbitrator to sustain the grievance and direct the Town to restore full educational incentive pay and make adversely affected members whole.

Employer:

The Employer asks the arbitrator to enforce Article 26.1 which it argues unambiguously limits the Town's share to 50% of the total obligation.

The Employer argues that the bargaining history demonstrates that the Town agreed to give members of the bargaining unit an 18% wage increase over three years, in part in reliance on its 50% limitation of liability under the Quinn Bill.

The Town points out that the Union proposed during three contract cycles to remove the liability limiting language in Article 26.2 but the Town insisted that it remain. Therefore, a decision in favor of the Union would provide a windfall that they were unable to obtain through collective bargaining.

The Town argues that case law supports the conclusion that the Town could bargain over its liability under the Quinn Bill and that the Town did not waive its right to assert the 50% limitation of liability in the clause.

For these and other reasons, the Employer asks the arbitrator to deny the Union's grievance.

OPINION

Resolution of the Union's grievance requires interpreting the parties' Agreement in the context of the Quinn Bill which is incorporated by reference into the Agreement.

The Quinn Bill provides for specified percentage salary increases for police officers whose municipal employers adopt the legislation and

who earn advanced degrees in law or law enforcement that are approved by the board of higher education. The Quinn Bill provides in mandatory terms that the State shall reimburse participating towns for 50% of the costs of this educational incentive pay.

However, the State unilaterally reduced the amount of reimbursement. Municipalities challenged this reduction in court, but the Supreme Judicial Court held that the legislature could not bind itself to future payments in the absence of appropriations and allowed the State to reduce its Quinn Bill contributions below the 50% provided in the legislation.

The question presented here is whether the Town is obligated to pay eligible members of the bargaining unit the full amount provided by the Quinn Bill or whether the 50% limitation on the Town's liability that was negotiated with the Union is enforceable.

The Contract adopts the Quinn Bill in 26.1 and then in Article 26.2 limits the Town's liability to the 50% set forth in the Quinn Bill. Since both the Contract and the statute provide for a 50:50 split between the State and Town for payment of the educational incentive pay, the two provisions are apparently consistent.

An arbitrator's duty is to enforce the parties' Agreement. There is clear bargaining history in this case that establishes that the Town insisted on limiting its Quinn Bill liability to 50% of the Quinn Bill obligations. When the Union proposed removing this limitation on the Town's liability, the Town rejected the proposal and eventually the Town and Union agreed to an 18% wage increase over three years while retaining the 50% limitation on the Town's liability under Quinn Bill. Plainly, the parties understood and intended that, should the State reduce its reimbursement to the Town beneath its 50% share, the Town's share would not be increased.

The Union argues that the Town's limitation on liability in Article 26.2 is illegal or contrary to the provisions of the Quinn Bill, and should be struck from the Agreement.

The Quinn Bill starts with a mandatory 50% reimbursement by the State which was overturned by the SJC.

> Any city or town which accepts the provisions of this section and provides career incentive salary increases for police officers **shall be reimbursed by the commonwealth for one half of the cost of such payments** upon certification by the board of higher education. [Emphasis supplied]

The statute also uses mandatory language to provide specified percentages pay increase for the incentive:

> Any regular full-time police officer commencing such incentive pay program after September 1st, 1976 **shall be granted** a base salary of ten per cent upon attaining an associate's degree in law enforcement or sixty points earned to a baccalaureate degree in law enforcement, a twenty per cent increase upon attaining a baccalaureate degree in law enforcement, and a twenty-five per cent increase upon attaining a master's degree in law enforcement or for a degree in law. [Emphasis supplied]

The SJC's removal of the Commonwealth's mandate to reimburse 50% of the costs created conflict in the law by removing the State's half responsibility for the costs while retaining the specified percentages for the different degrees in law enforcement.

Having adopted the statute and included it in their Agreement, I appreciate the Union's view that the Town thereby undertook to provide this salary incentive. However, in this case, where the Town bargained with the Union to limit its liability to the 50% which the statute provides it should have, I would have to find this provision to be unlawfully in conflict with the statute in order to sustain the Union's grievance.

I do not conclude that the Town's effort to limit its liability to the 50% provided in the statute conflicts with the law. The Quinn Bill was passed by the legislature with what turned out to be an unenforceable provision purporting to bind the State to make full 50% reimbursement to the municipalities adopting the bill. Therefore, the contractual limitation in the Town's liability to the 50% provided by the statute is consistent with the Quinn Bill.

Since the Quinn Bill split the costs with municipalities adopting the bill and the State, when the legislature decided indirectly by reducing "cherry sheet" reimbursements across the board to reduce its payments of Quinn Bill costs the legislature thereby effectively reduced the amount of the benefit to the financial loss of the eligible police officers in the Town. When the SJC made the State's 50% contribution permissive rather than mandatory, it effectively changed the Quinn Bill so that the three percentages, (10% for associate, 20% for bachelors and 25% for masters degrees), were no longer set in stone, but were to be determined by the legislature. Consequently, especially in light of Article 26.2, the Town's reduction of benefits based on the State's reduction in reimbursement of its half of the costs did not violate the Agreement.

The limitation on the Town's liability in Article 26.2 of the parties' Agreement is enforceable. The Town did not violate the Agreement when it reduced Quinn Bill benefits to officers beginning in July 2009.

May 23, 2010
Michael W. Stutz