

Commonwealth of Massachusetts



Supporting a Commonwealth of Communities

What's New in Municipal Law 2020 – Part Two

Recent Court and

Appellate Tax Board Decisions

Division of Local Services

Bureau of Municipal Finance Law





Part Two - Court and Appellate Tax Board Decisions

Part 2A - Property Tax (9 cases)

Part 2B – Tax Collection and Public Employment (6 cases)

Part 2C – Finance and Land Use Law (6 cases)

 **Part 2D – Other Municipal Decisions (8 cases)**



Drake v. Leicester, 484 Mass. 198 (2/28/20)

**Drake v.
Town of Leicester
484 Mass. 198
February 28, 2020**



Drake v. Leicester, 484 Mass. 198 (2/28/20)

Tort Claims Act - Presentment of a Claim

- **January 19, 2016 - Katherine Drake slipped and fell while picking up grandson at high school during school hours**
- **Ms. Drake fractured her knee and wrist**
- **January 19, 2018 - Drake mailed her presentment letter via certified mail to Town**
- **January 22, 2018 – Town received letter**
- **Town denied liability, Ms. Drake sued for negligence**





Drake v. Leicester, 484 Mass. 198 (2/28/20)

- **Superior Court dismissed claim, siding with Town because Drake missed the two-year statutory presentment deadline**
- **Supreme Judicial Court transferred case from Appeals Court**
- **Issue - what constitutes presentment under G.L. c. 258, s. 4?**
- **Drake argued it is the placement of the letter in the mail**
- **Town argued it is the receipt by the proper executive officer**



Drake v. Leicester, 484 Mass. 198 (2/28/20)

- **Massachusetts Tort Claims Act - public employer liable for loss of property, personal injury or death caused by the negligence or wrongful conduct of public employees acting within scope of their employment. G.L. c. 258, s. 2**
- **Claimant must first present claim in writing to the executive officer of the public employer within 2 years after date cause of action arose. G.L. c. 258, s. 4**
- **Failure to make a proper presentment is fatal to a claim**



Drake v. Leicester, 484 Mass. 198 (2/28/20)

- **Presentment not defined in c. 258**
- **Presentment - “act of presenting or laying before a court or other tribunal a formal statement about a matter to be dealt with legally” (Black’s Law Dictionary)**
- **SJC concluded - to lay or put an item, such as a presentment letter, before another, the receiving person or entity must have the opportunity to observe the item**
- **Drake’s presentment untimely – motion to dismiss claim upheld**





Magliacane v. Gardner, 483 Mass. 842 (1/22/2020)

**Magliacane v.
City of Gardner
483 Mass. 842
January 22, 2020**



Magliacane v. Gardner, 483 Mass. 842 (1/22/2020)

Tort Claims Act

- **Janice Magliacane's hot water heating system failed prematurely three times due to corroded coils**
- **Hundreds of other Gardner residents were having similar problems**



Magliacane v. Gardner, 483 Mass. 842 (1/22/2020)

Background

- **1994 - City consultants reported the corrosive nature of water caused leaching of lead and copper from building plumbing. Recommended Crystal Lake facility should add a non-zinc orthophosphate**
- **1998 - Letter from consultant recommended Snake Pond facility use a soda and poly orthophosphate blend**
- **DEP approved of these anti-corrosive measures but plans not implemented**





Magliacane v. Gardner, 483 Mass. 842 (1/22/2020)

- **2009 - 2010 – City received numerous complaints about failing copper water heater coil features**
- **2011 - City engineer consulted EPA. Water had low alkalinity. City shared this info with Suez, no measures taken**
- **2012 – City received reports of more than 400 coil failures from 250 residents. City & Suez hired Microvision Labs which recommended adding soda ash and orthophosphate. City and Suez took no action**





Magliacane v. Gardner, 483 Mass. 842 (1/22/2020)

- **2013 - City engineer told City Council water tested, but it did not show anything**
- **2015 – City hired Corrosion Testing Labs - leaks in coils caused by pinholes due to soft water and low alkalinity**
- **September 2015 - City issued press release acknowledging soft water and low level of dissolved inorganic carbons contributed to coil failure. Also asserted failure due to the water's natural state**





Magliacane v. Gardner, 483 Mass. 842 (1/22/2020)

- **March 2016 - City Council Public Service Committee meeting, City engineer disclaimed City's responsibility for the coil corrosion - "We are not doing anything wrong"**
- **June 2016 – City and Suez sought approval from DEP to add orthophosphate to water**
- **August 2017 - DEP approved request, City announced adding orthophosphate to "make situation go away"**





Magliacane v. Gardner, 483 Mass. 842 (1/22/2020)

- **October 2017 - Magliacane sent demand letter to City, individually and on behalf of a class of “Gardner residents, property owners, and businesses who have had to replace / purchase heating coils, boilers and hot water heaters since 2000 due to coil corrosion”**
- **December 2017 - Magliacane filed the present suit**
 - **City still had not implemented coil corrosion mitigation plan**





Magliacane v. Gardner, 483 Mass. 842 (1/22/2020)

- **City claimed improper presentment under the Tort Claims Act and lower court dismissed**
 - **G.L. c. 258, s. 4 - “..present claim in writing to executive officer within 2 years..”**
- **SJC overturned dismissal – when fraudulent concealment (defendant takes active steps to conceal cause of action), G.L. c. 260, s. 12 tolls statute of limitations**





Magliacane v. Gardner, 483 Mass. 842 (1/22/2020)

- **City also claimed Tort Claims Act exemptions apply**
 - **G.L. c. 258, s. 10(j) - claims based on public employer's failure to prevent the harmful consequences of a condition not originally caused by the employer**
 - **G.L. c. 258, s. 10(b) - public employers not liable for claim based upon the exercise or failure to exercise a discretionary function acting within the scope of their office**





Magliacane v. Gardner, 483 Mass. 842 (1/22/2020)

- **SJC – 10(j) exemption does not apply where City took responsibility for sale and distribution of water to residents where City knew water to be corrosive**
- **SJC – 10(b) exemption - Whether City made a discretionary policy decision or failed to implement its policy decision is not clear - too fact intensive to permit dismissal based on discretionary function immunity**





Dusti v. Shirley, Rule 1:28 Unpublished, 96 Mass. App. Ct. 1109 (11/12/19)

**Dusti v.
Town of Shirley
96 Mass. App. Ct. 1109
November 12, 2019**





Dusti v. Shirley, 96 Mass. App. Ct. 1109 (11/12/19)

Tort Claims Act

- **September 19, 2012 Dusti and husband secured an offer to purchase their property for \$182,500, conditioned on the property being “buildable”**
- **Building inspector erroneously told the buyer it was not buildable**
- **Buyer withdrew offer**
- **Dusti sued Town for negligent misrepresentation and interference with business relationship**





Dusti v. Shirley, 96 Mass. App. Ct. 1109 (11/12/19)

- **Superior Court granted summary judgment in favor of Town**
 - **Claim for negligent misrepresentation not shown by Dusti and**
 - **Town immune under G.L. c. 258, s. 10(c) from claims of intentional interference with business relations**
- **Dusti appealed**
- **Appeals Court agreed with Superior Court**





Dusti v. Shirley, 96 Mass. App. Ct. 1109 (11/12/19)

- **Negligent Misrepresentation Claim**
 - **Requires reasonable reliance on the misinformation and, here, no evidence Dusti relied on building inspector's statement**
 - **No evidence buyer's reliance was reasonable, or that the buyer suffered harm, and buyer is not a party to this suit**
- **Intentional Interference with Business Relations**
 - **Town immune under G.L. c. 258, s. 10(c)**





Klevan v. Newton, 97 Mass. App. Ct. 87 (2/14/20)

**Klevan v.
City of Newton
97 Mass. App. Ct. 87
February 14, 2020**





Klevan v. Newton, 97 Mass. App. Ct. 87, (2/14/20)

Tort Claims Act

- **Klevan brought suit against City when a water main breached, causing water, silt and sewerage to back up into Klevan's home**
- **Klevan alleged Newton negligently failed to warn of risk of such event**
- **City claimed immunity under sections 10(b) and 10(j) of the Tort Claims Act**
- **Superior Court disagreed that City immune and denied City's motion**





Klevan v. Newton, 97 Mass. App. Ct. 87, (2/14/20)

- **Appeals Court - Klevan’s failure to warn claim is barred by s. 10(j) unless City was “original cause” of condition that led to harm**
- **To qualify as “original cause,” there must be an affirmative act by the City creating the harmful situation**
- **Here - original cause of Ms. Klevan’s harm was flood from the water main break, but no evidence offered that Newton caused break**
- **Appeals Court reversed lower court and allowed City’s motion for summary judgment**





Plymouth v. Power, 97 Mass. App. Ct. 532 (5/29/20)

**Town of Plymouth v.
Power
97 Mass. App. Ct. 532
May 29, 2020**





Plymouth v. Power, 97 Mass. App. Ct. 532 (5/29/20)

Firearm ID Card

- **Robert Power applied for FID card with Plymouth Police Department (Town)**
- **Although Power had extensive criminal history, Town did not take position he was “prohibited person” under G.L. c. 140, s. 129B and did not deny on that ground**
- **If not prohibited person, c. 140, s. 129B(1½) requires petition to District Court requesting Court determine applicant unsuitable to possess FID card (no deadline stated in 129B(1½))**





Plymouth v. Power, 97 Mass. App. Ct. 532 (5/29/20)

- **More than 100 days after Power's application filed, Town petitioned District Court to determine Power unsuitable to possess FID card**
- **District Court Judge ordered Town to grant FID card on ground that c. 140, s. 129B(3) requires approval by licensing authority or denial of prohibited person within 40 days – Town's failure to timely issue decision was constructive approval of FID card**
 - **Also found that Town's determination of FID unsuitability not arbitrary or capricious**





Plymouth v. Power, 97 Mass. App. Ct. 532 (5/29/20)

- **Appeals Court decision**
 - **Town required to file petition for unsuitability in District Court within 40 days, but failure to do so did not result in constructive approval of FID card**
 - **Remanded case to District Court Judge to determine Power's suitability by a preponderance of the evidence**
 - **Standard of review is not whether Town's determination of unsuitability was arbitrary or capricious**





**Williams v.
Boston Public Health
Commission
95 Mass. App. Ct. 1125
August 27, 2019
Further Appellate Review Denied
483 Mass. 1105 (10/18/19)**





Tort Claims Act

- **Commission runs Boston EMS, City's publicly-funded ambulance service**
- **EMS responded to homeless shelter regarding client who expressed suicidal thoughts**
- **EMS practice is to transport suicidal patient to hospital with police escort and in restraints**
- **Here - transport with no police escort and no restraints**



***Williams v. Boston Public Health Commission, Rule 1:28 Unpublished,
Mass. App. Ct. 1125 (8/27/19), FAR denied***



- **When ambulance arrived at hospital and ambulance door opened, patient fled**
- **Patient lay down on street and was struck by motor vehicle, resulting in injuries leading to her death**
- **Patient's estate filed suit under Tort Claims Act for wrongful death against Commission due to negligence of EMTs and failure to supervise / train EMTs**
- **Superior Court dismissed complaint due to immunity under the Tort Claims Act**



***Williams v. Boston Public Health Commission, Rule 1:28 Unpublished,
Mass. App. Ct. 1125 (8/27/19), FAR denied***



- **On review, the Appeals Court**
 - **Agreed with lower court's dismissal of claim based on failure to train/supervise employees because the failure to train/supervise was not the condition that "originally caused" the injury**
 - **Reversed dismissal of claim for wrongful death due to employees' negligence because "the public employees' intervention placed the decedent in a worse position than before their intervention."**





Markham v. Town of Chelmsford, U.S. District Court - MA
Civil Action No. 19-10018-DJC (8/26/19)

Markham v.
Town of Chelmsford
U.S. District Court - MA
Civil Action No. 19-10018-DJC
August 26, 2019





***Markham v. Chelmsford, U.S. District Court, MA,
Civil Action No. 19-10018-DJC (8/26/19)***

Due Process Claim

- **Sewer Fairness Alliance (co-plaintiff) members consisted of 300 households, most of which required to have sewage grinder pumps provided by Town**
- **Markham's pump failed during power outage. Town repaired pump and sent \$1065 bill to Markham**
- **Markham complained and Town held hearing to discuss charge**
- **Bill reduced to \$640**





***Markham v. Chelmsford, U.S. District Court, MA,
Civil Action No. 19-10018-DJC (8/26/19)***

- **Markham and Sewer Fairness Alliance filed suit in Superior Court for violation of due process**
- **Town removed case to Federal District Court and filed motion to dismiss on two grounds**
 - **Challenged standing of Alliance**
 - **Due process complaint failed to state claim upon which relief can be granted**





***Markham v. Chelmsford, U.S. District Court, MA,
Civil Action No. 19-10018-DJC (8/26/19)***

Court denied Town's motion to dismiss

- **Alliance had standing**
- **Due process claim - the notice and hearing required by the Constitution varies with particulars of each case. Here- sufficient due process best decided on fuller record**
 - **Not clear to court from record whether abatement remedies for taxes under G.L. c. 59, s. 59 provided sufficient due process in this case**
- **Parties settled case in February 2020**





Rosenfeld and CommCan v. Mansfield, 28 LCR 184 (4/8/20); Appeal Filed

**Rosenfeld and CommCan v.
Town of Mansfield
28 Land Court Reporter
184 April 8, 2020
(Appeal filed with Appeals Court)**





Rosenfeld and CommCan v. Mansfield, 28 LCR 184 (4/8/20); Appeal Filed

Conversion of Medical Marijuana Dispensary to Recreational Sale of Marijuana

- **CommCan obtained state-issued provisional medical marijuana license and town-issued special permit allowing medical marijuana dispensary**
- **Abutter had appealed special permit to Superior Court; appeal pending**
- **CommCan and Town had entered into Host Community Agreement for the Registered Marijuana Dispensary (RMD)**





Rosenfeld and CommCan v. Mansfield, 28 LCR 184 (4/8/20); Appeal Filed

- **CommCan submitted request to Town to convert to recreational marijuana sales under c. 94G, section 3(a)(1), notwithstanding that recreational sales not permitted in zoning district**
 - **3(a)(1) prohibited use of zoning to stop conversion of RMD to recreational sales if the RMD was (1) provisionally licensed or registered by July 1, 2017 and (2) “engaged in the cultivation, manufacture or sale of marijuana”**





Rosenfeld and CommCan v. Mansfield, 28 LCR 184 (4/8/20); Appeal Filed

- **Town disagreed - section 3(a)(1) did not apply. Special permit had been appealed and CommCan had not constructed its facility - it is not “engaged in the cultivation, manufacture or sale of marijuana” under section 3(a)(1)**
- **Land Court disagreed - Section 3(a)(1) did apply – CommCan’s actions to exercise its license constitute engaging in the sale of medical cannabis; Town cannot use zoning to prohibit conversion of CommCan’s RMD to one for recreational sale of marijuana**

