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The Profession

Where a Lawyer Makes All the Difference – And Only One Side Has One: Adjarney and the Urgent Need for Court Reform and a Right to Counsel in Eviction Cases

By Esme Caramello, Joel Feldman, and Geraldine Gruvis-Pizarro

Legal Analysis

The Massachusetts Commission Against Discrimination: Steady in the Storm

By Simone R. Liebman

Case Focus

Recent Developments in Regulatory Takings

By Jason ("Jay") Talerman

Legal Analysis

The Importance of Written Information Security Policies in Data Governance

By Christopher E. Hart

Practice Tips

Should it Stay or Should it Go?: Post-MUPC Probate Court Objections in the Wake of Leighton and Cusack

By Timothy F. Robertson, Esq. and Joseph N. Schneiderman, Esq.

Viewpoint

Adorable as Affordable?: The Zoning Challenge of Tiny Houses

By Olympia Bowker

Case Focus

The Cross-Examination of Complainants And the Due Process Rights of Respondents in Student Disciplinary Proceedings After Haidak v. University of Massachusetts-Amherst

By R. Victoria Fuller

Legal Analysis

Understanding When Competitive Bidding Applies to Affordable Housing in Public-Private Partnerships

By Lauren D. Song and Tyler Creighton

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Where a Lawyer Makes All the Difference – And Only One Side Has One: *Adjarthey* and the Urgent Need for Court Reform and a Right to Counsel in Eviction Cases

By Esme Caramello, Joel Feldman, and Geraldine Gruvis-Pizarro

Each week, more than 750 tenants across Massachusetts face eviction in the courts of the Commonwealth. While the vast majority of landlords bringing eviction cases have counsel—almost 80% in the state’s Housing Courts last year—fewer than 9% of people faced with losing their homes have a lawyer to represent them. See **Housing Court Department, Fiscal Year 2019 Statistics** (2019). This disparity in access to counsel would create an unjust power imbalance in any legal setting. In the context of eviction cases, with their tight timelines and complicated procedural rules, the advantage that represented landlords enjoy over their unrepresented tenants is even more troubling.

In the summer of 2019, the Supreme Judicial Court took up this systemic inequality in *Adjarthey v. Central Division of the Housing Court Department*, **481 Mass. 830** (2019). In a striking opinion on behalf of a unanimous Court, Chief Justice Gants reached far beyond the individual claims of the parties to describe an onerous summary process system and the barriers that *pro se* litigants face in trying to navigate it. In its breadth and detail, the opinion illustrates how “the complexity and speed of summary process cases can present formidable challenges to individuals facing eviction, particularly where those individuals are not represented by an attorney.” *Id.* at 831.

The decision makes a compelling case. Summary process is procedurally complex to begin with, *id.* at 834, and this complexity is “exacerbated by the web of applicable statutes and rules.” *Id.* at 837. The Uniform Summary Process Rules are just one part of the procedural maze. *Id.* at 836-37. The Rules of Civil Procedure also apply, but only sometimes, as do an array of statutes and standing orders. As the Court observed, “[d]eciding when to apply which of these rules—and how to resolve inconsistencies among them—is [a] formidable challenge for an unrepresented litigant seeking to comply with fast-moving deadlines, especially when that litigant is also facing the stress of a potential eviction.” *Id.* at 837. Further complicating the task of the *pro se* litigant, the Court noted, is the speed at which a summary process case proceeds. *Id.* Once a case is filed, *it is scheduled to go to trial on the first court date, just ten days later*. Upon receipt of the Summons and Complaint, a tenant must figure out that an “answer” is required, and file and “serve” it, within a week after the case is filed. If she does not properly assert a “jury demand” in that answer, she waives her Constitutional right to trial by a jury of her peers. The tenant also must understand what “discovery requests” are and make sure her landlord *receives* them within that same short week. Overall, the time from service of process to judgment and execution can be as little as 19 days. Two business days later, a constable can remove the tenant from her home. As the *Adjarthey* Court observed, “[t]he swiftness of this process ... leaves little room for error.” *Id.* at 837. As noted above, beyond the inherent complexity and speed of summary process, the vast majority of tenants are attempting to figure out the process on their own. In the words of the Court, “summary process cases are complex, fast-moving, and generally litigated by landlords who are represented by attorneys and tenants who are not.” *Id.* at 834. Because “in most cases, ... the landlord has an attorney who understands how to navigate the eviction process and the tenant does not,” the system is not just out of reach for tenants, but also out of balance. *Id.* at 838. This imbalance presented an injustice the *Adjarthey* Court could not ignore.

In an “Appendix” following the *Adjarthey* decision, the Court attempted to gather, in one place, all the procedural laws governing summary process cases. Doing so took 35 slip opinion pages. While the *Adjarthey* Appendix might be a useful primer on summary process for a lawyer or experienced

advocate, it looks different from the perspective of a low-income mother with limited English proficiency and severe anxiety facing eviction. For her, and for most unrepresented tenants, the Appendix primarily highlights what the rest of the *Adjarthey* decision implies: the eviction system is too hard to understand and navigate without the assistance of a lawyer. And where landlords generally have this assistance and tenants do not, the Appendix is an indictment of a system that aspires but fails to offer equal justice to all. In a study of summary process judgments listed on masscourts.org from 2007-2015 in three out of the then-five divisions of the Housing Court (Boston, Central and Western), the Access to Attorneys Committee of the Access to Justice Commission found that landlords won judgment a shocking 98% of the time. See Shannon Barnes et al., Final Report of the Access to Attorneys Committee of the Massachusetts Access to Justice Commission, 9 (May 2017). With *Adjarthey*, the Supreme Judicial Court has shown us why.

Court Reform as a Necessary Step

Reforming the summary process system is an urgent need. To that end, the Trial Court has recently created a committee that has begun to work on simplifying court forms. Developing plain-language, accessible forms that the typical *pro se* litigant can understand and use is a necessary first step. But forms alone will not level the playing field in a process that is too complicated and too fast to navigate without counsel.

There are many simple changes that would make summary process more accessible for *pro se* litigants. At a recent meeting convened by the Trial Court's summary process reform committee, for example, most tenant lawyers and landlord lawyers agreed that the first court date in an eviction case should not be a trial. Instead, it can be an opportunity for the parties to explore settlement through mediation, and for unrepresented litigants to learn more about the process and seek help from a volunteer lawyer. It also can be a time for tenants to prepare the answers, jury demands, and discovery requests that they may be learning about for the first time when they arrive at court. We are hopeful that the court will soon implement this popular and sensible reform.

A range of other simple reforms are outlined in detail in a December 2017 report that Massachusetts submitted to the Public Welfare Foundation after a yearlong examination of "Justice for All" in the Commonwealth led by a team of judges and practitioners that included Chief Justice Ralph Gants. See [The Massachusetts Justice for All Project, Massachusetts Justice for All Strategic Action Plan](#), 34-56 (Dec. 22, 2017). From rethinking cellphone bans that exclude unsuspecting tenants (and their evidence) from courthouses—a step the Trial Court has recently agreed to take—to promoting flexible scheduling that enables low-wage workers to avoid missing work, the Justice for All report is full of small and big ideas that would make the system fairer. The authors of this article sit on a committee of the Access to Justice Commission tasked with pursuing the report's recommendations, but a much broader effort is needed for real change to happen.

If Landlords Have Lawyers, Tenants Need Lawyers, Too

In an ideal world, our housing dispute resolution system would be simple enough for people to use on their own, and the systemic power imbalances created by dramatic disparities in representation would be eliminated. But in a system designed for lawyers where only one side has one, access to substantive justice is not and cannot be equal. Tenants need lawyers to make the system work fairly.

Existing fee-shifting statutes should entice private attorneys to represent tenants in many eviction cases, and a few lawyers around the state have built financially successful practices representing tenants, but for reasons the Access to Justice Commission is still studying, fee-shifting statutes are underutilized. "Lawyer for a day" programs are meaningful and certainly help. But the problems *Adjarthey* describes cannot be solved by last-minute limited assistance representation, even with experts doing the work. Too

much has transpired by the time the lawyer-for-a-day steps in, when answers and jury trials and discovery have been waived by the unsuspecting tenant and the opportunity to investigate or gather admissible evidence has passed. As a 2012 Boston Bar Association study showed, only vigorous full representation enables tenants to fairly litigate their claims. See Boston Bar Association Task Force on the Civil Right to Counsel, **The Importance of Representation in Eviction Cases and Homelessness Prevention** (Mar. 2012) (summarizing research by Harvard Professor James Greiner and Harvard College Fellow Cassandra Pattanayak showing dramatic differences in outcomes for tenants receiving full representation by experienced litigators as opposed to advice through lawyer-for-a-day program).

New York City, San Francisco, Newark and Cleveland have all recently implemented a right to counsel for tenants in eviction cases. Massachusetts is poised to follow suit with several bills under consideration on Beacon Hill. The active support of the bar for these bills is crucial to bring balance, and legitimacy, to our summary process system. *Adjarney* is our call to action.

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The Massachusetts Commission Against Discrimination: Steady in the Storm

By Simone R. Liebman

Introduction

In October, the Supreme Court of the United States heard argument in three cases that involve an unconventional division between the U.S. Department of Justice (DOJ) and the Equal Employment Opportunity Commission (EEOC), the federal agency authorized to interpret and enforce Title VII of the Civil Rights Act of 1964 (Title VII). These cases concern whether Title VII's prohibition against bias "because of . . . sex" encompasses employment discrimination based on sexual orientation and transgender status.^[1] At the federal circuit court level, the EEOC argued that discriminating against an employee because of sexual orientation and gender identity amounts to sex discrimination under Title VII. When the cases were appealed to the Supreme Court, however, the DOJ took the extraordinary step of filing briefs on behalf of the EEOC, rather than permitting the agency to do so.^[2] Moreover, the DOJ urged the Court to review Title VII restrictively, contrary to the EEOC's established position, and argued that the law does not explicitly prohibit sexual orientation or gender identity discrimination. The split in the federal government was further underscored when former federal officials, including the EEOC's former chairs, commissioners, and general counsels, filed briefs arguing that sexual orientation and gender identity are intrinsically functions of sex and predicated on sex stereotypes.

The DOJ's effort to override the authority and precedent of the EEOC is unique and historically noteworthy. And it provides a sharp contrast with the robust protections ensuring equal opportunities in employment available to Massachusetts employees through chapter 151B of the Massachusetts General Laws as enforced by the Massachusetts Commission Against Discrimination (MCAD). In enacting G.L. c. 151B in 1946, the Legislature granted the MCAD broad remedial powers and significant enforcement authority. The MCAD is a law enforcement agency with police powers designed to vindicate public rights. This legislative mandate has shaped judicial precedent, often putting Massachusetts at the vanguard in providing protection for employees. The statutory scheme includes a case process that is accessible to victims of discrimination regardless of socio-economic class and results in remedies designed to compensate past wrongs and deter future illegal workplace conduct. Due to the independent, prosecutorial nature of the agency, courts have found that victims of discrimination at the MCAD may proceed in situations where private litigants would otherwise have been barred. The current battle in the Supreme Court over who interprets Title VII, and whether the law should be broadly or restrictively construed, demonstrates the importance of the MCAD's ability to act in its own name as a public law enforcement agency to protect civil rights in Massachusetts.

G.L. c. 151B grants the MCAD law enforcement authority.

Chapter 151B has always prohibited religious, race, national origin and ancestry discrimination.^[3] The Legislature acknowledged that discriminatory conduct is no less than a "harmful influence to our democratic institutions" and stated that "no well-informed, right thinking person can be oblivious or indifferent to this evil."^[4] The elimination of discrimination, the Legislature declared, was a "cornerstone" upon which "world peace must be based."^[5] With extraordinary legislative foresight, the statute authorized the MCAD at its inception to act as a civil prosecutor with significant enforcement authority. The legislation granted the MCAD the ability to conduct investigations; subpoena individuals; and issue complaints in its own name, even where no complaint has been filed by an aggrieved person.^[6] To ensure that the MCAD has the opportunity to identify trends and, if appropriate, take action, MCAD's enforcement proceedings "shall, while pending, be exclusive," taking precedence over any other type of recourse available.^[7] The statute imposed criminal sanctions, including imprisonment, where an

employer willfully resists, prevents, impedes, or interferes with the MCAD in the performance of its statutory duties.^[8]

G.L. c. 151B Mandates Liberal Construction.

Of considerable importance, the legislation explicitly requires that G.L. c. 151B “be construed liberally for the accomplishment of the purposes” of the statute.^[9] This directive has resulted in significant protections for Massachusetts employees. In 2013, the Supreme Judicial Court held that G.L. c. 151B prohibits discriminating against an employee based on the employee’s association with an individual who is disabled, despite the absence of an explicit statutory prohibition against associational disability discrimination.^[10] In 2017, the SJC was the first state appellate court to conclude that under specific circumstances, an employer may be required to reasonably accommodate an employee with a debilitating medical condition that is treated through the use of medical marijuana.^[11] This year, the SJC concluded that an employer could be found to have engaged in illegal discrimination even when the discriminatory act in question was a lateral transfer, without any effect on the employee’s base salary, work responsibilities, or title.^[12] Each of these cases relied, in large part, on the long-standing mandate that G.L. c. 151B must be interpreted liberally to achieve its remedial purposes. In contrast, Title VII has no such mandate.

The MCAD’s case processing furthers the remedial goals of the statute.

There is no fee for filing a charge of discrimination with the MCAD and no requirement to obtain legal assistance in filing. If the investigating commissioner concludes that the case has “probable cause” to proceed, and the charging party does not hire private counsel, the matter is assigned to a Commission attorney to prosecute the matter in the public interest. Almost half of the cases found by the MCAD to have probable cause are assigned to a Commission attorney, who generally prosecutes the matter through public hearing at no cost to the complainant.^[13] After probable cause has been found, the Commission schedules a mandatory conciliation conference, again at no cost to the parties, in which an MCAD conciliator “will attempt to achieve a just resolution of the complaint and to obtain assurances that the Respondent will satisfactorily remedy any violations . . . and take such action as will assure the elimination of the discriminatory practices, or the prevention of their occurrence in the future.”^[14] Many cases are resolved at the conciliation conference, and include public interest relief such as training or policy change.

The case is certified to public hearing if the investigating commissioner determines that the public interest so requires, and a complaint is issued in the name of the Commission.^[15] It will then be heard by an MCAD hearing officer or a commissioner with expertise in G.L. c. 151B. If the employer is found to have violated the statute, the MCAD issues remedies designed to deter future illegal conduct, including a cease and desist order, a wide array of injunctive and affirmative relief such as training, reinstatement, policy change, and civil penalties, in addition to attorneys’ fees and compensatory damages to make the complainant whole. See *Stonehill College v. Massachusetts Comm’n Against Discrimination*, 441 Mass. 549, 563 (2004).

The MCAD may proceed where private litigants may not.

The MCAD’s “police powers” allow it to proceed with civil prosecutions in situations where a private litigant seeking redress in court could not. For example, where an employer files for bankruptcy during a civil proceeding, the automatic stay preventing the continuation of any civil proceeding generally applies.^[16] Cases pursued through the administrative process at the MCAD, however, fall within the exception to the automatic stay that allows governmental units to exercise police or regulatory power.^[17] Recognizing the “strongly felt” public policy against discrimination and the enforcement powers granted to the MCAD, the court in *In re Mohawk Greenfield Motel Corp.*, 239 B.R. 1 (Bankr. D. Mass. 1999), held that the MCAD possessed police or regulatory power that qualified for the exception.

The court further acknowledged that while back pay awards have a financial benefit to an employee who proves liability and is awarded victim-specific relief, the imposition of this remedy ensures future compliance and serves a public purpose: ensuring that the employer at issue “as well as others who might contemplate similar odious behavior, would be dissuaded from its future practice.” *Id.* at 9. Crucial to this decision exempting MCAD proceedings from the automatic stay was the recognition that it is fundamental to the MCAD’s authority to act in the public good to identify and remediate discriminatory conduct without excessive delay, and that “the benefit to the public arising from the continuing capability of MCAD to identify and sanction discriminatory behavior overshadows any associated pecuniary benefit to the victim of that discrimination.” *Id.* at 9.

Similarly, it was the public enforcement nature of the MCAD’s process that led the SJC in *Joulé, Inc. v. Simmons*, 459 Mass. 88 (2011), to permit the continued prosecution of an MCAD claim even where a binding pre-employment arbitration agreement required the victim of discrimination to arbitrate the claim rather than file a private right of action. Acknowledging that it is the MCAD and not the complainant that prosecutes the discrimination claim, the SJC concluded that mandatory arbitration clauses, otherwise applicable to private claims of workplace discrimination, do not and cannot bar administrative enforcement proceedings under G. L. c. 151B, § 5. *Id.* at 95-96. Given that over half of American private-sector nonunion employees are subject to mandatory arbitration procedures, the ability to proceed with a claim at the MCAD despite a binding arbitration agreement is of notable significance to employees in the Commonwealth.^[18] In *Whelchel v. Regus Management Group, LLC*, 914 F. Supp. 2d 83 (D. Mass. 2012), the substantial state interest in preserving the MCAD’s oversight role over discrimination claims led the court to refuse to allow an employer to remove an MCAD matter to federal court. These practical advantages to proceeding at the MCAD all flow from the Legislature’s recognition over seventy years ago that the main object of an MCAD proceeding is to “vindicate the public’s interest in reducing discrimination in the workplace by deterring and punishing, instances of discrimination by employers against employees.” *Stonehill College*, 441 Mass. at 563.

Conclusion

When the Legislature enacted G.L. c. 151B in 1946, no one could have foreseen the current divisiveness in the federal government, nor were there any federal civil rights protections or an EEOC in place to enforce them. That was not to come into play until 1964. But the Massachusetts Legislature created safeguards resilient enough to withstand the winds of change.

Rather than merely creating a forum through which private litigants resolve disputes, the Legislature recognized the need for an independent, public agency to promote and protect the fundamental right of Massachusetts citizens to obtain equal opportunities in the workplace.

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[1] *Altitude Express, Inc. v. Zarda*, No. 17-1623 and *Bostock v. Clayton County, Georgia*, No. 17-1618 involve the question of whether sex discrimination under Title VII includes bias based on sexual orientation. *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission*, No. 18-107, addresses the question of whether it is a violation of Title VII to discriminate against an employee

based on the employee's transgender status or under a theory of sex stereotyping under *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

[2] <http://www.abajournal.com/news/article/eecoc-doesnt-sign-us-brief-telling-supreme-court-that-transgender-discrimination-is-legal>; <https://www.reuters.com/article/us-otc-doj/once-again-trump-doj-busts-convention-splits-government-in-high-profile-employment-case-idUSKBN1AC32U>.

[3] See G. L. c. 151B, inserted by St. 1946, c. 368, § 4. Since its enactment, G.L. c. 151B has been expanded to include other protected categories. Currently, G.L. c. 151B prohibits discrimination based on race, color, religious creed, national origin, disability, sex, gender identity, sexual orientation, genetic information, pregnancy (including a pregnancy-related condition), veteran status, age, and active military service. G.L. c. 151B, § 4. The MCAD also has jurisdiction over a host of other types of discriminatory conduct including retaliation, failure to accommodate disabilities, housing discrimination, certain inquiries regarding criminal records, parental leave, public accommodation discrimination, mortgage lending and credit discrimination, and certain types of education discrimination.

[4] REPORT OF THE SPECIAL COMMISSION RELATIVE TO THE MATTER OF DISCRIMINATION AGAINST PERSONS IN EMPLOYMENT BECAUSE OF THEIR RACE, COLOR, RELIGION, OR NATIONALITY, H.R. Rep. No. No. 337, 154th Leg., 1st Sess. at 2 (Mass. 1945).

[5] REPORT OF THE GOVERNOR'S COMMITTEE TO RECOMMEND FAIR EMPLOYMENT PRACTICE LEGISLATION, H.R. REP. No. 400, 154th Leg., 2nd Sess., at 7 (Mass. 1946).

[6] G. L. c. 151B, §§ 1(7) & 5, inserted by St. 1946, c. 368, § 4.

[7] G. L. c. 151B, § 9, inserted by St. 1946, c. 368, § 4.

[8] G. L. c. 151B, § 8, inserted by St. 1946, c. 368, § 4.

[9] G. L. c. 151B, § 9.

[10] *Flagg v. AliMed, Inc.*, 466 Mass. 23 (2013) (“reading the statutory language broadly in light of its remedial purpose, and in order best to effectuate the Legislature’s intent, we think that the concept of associational discrimination also furthers the more general purposes of **c. 151B** as a wide-ranging law, ‘seek[ing] ... removal of artificial, arbitrary, and unnecessary barriers to full participation in the workplace’ that are based on discrimination”).

[11] *Barbuto v. Advantage Sales and Marketing, LLC*, 477 Mass. 456 (2017) (employee use of medical marijuana is not facially unreasonable as a reasonable accommodation).

[12] *Yee v. Massachusetts State Police*, 481 Mass. 290 (2019) (where there are material differences between two positions in the opportunity to earn compensation, or in the terms, conditions, or privileges of employment, the failure to grant a lateral transfer to the preferred position may constitute an adverse employment action under G.L. c. 151B).

[13] 2018 MCAD Annual Report, p. 11 (Commission counsel were assigned 46% of these cases in 2018).

[14] 804 C.M.R. § 1.18(1)(a).

[15] 804 C.M.R. § 1.20(3).

[16] **11 U.S.C. § 362(a)(1)** (the filing of a bankruptcy petition stays the commencement or continuation of all non-bankruptcy judicial proceedings against the debtor).

[17] **11 U.S.C. § 362(b)(4)**.

[18] See A. Colvin, Economic Policy Institute (EPI), “The Growing Use of Mandatory Arbitration” 1-2, 4 (Sept. 27, 2017).

Case Focus

Recent Developments in Regulatory Takings

By Jason (“Jay”) Talerman

Massachusetts is a home rule state, with 351 cities and towns governed by 351 different sets of bylaws and regulations. For a prospective developer of land, that means navigating through 351 sets of zoning codes, subdivision regulations, and wetlands bylaws. Furthermore, in the already highly-developed towns in eastern Massachusetts, land that is undeveloped is often marginal in quality, and therefore may implicate local land use bylaws, ordinances and regulations. In such instances, even the most beneficial of local enactments may operate to restrict the scope of development and, in some circumstances, may even preclude a proposed development altogether.

It is in these circumstances that the specter of a regulatory taking, also known as an inverse condemnation, may become the subject of dispute between a developer and a municipality. Unlike a more traditional affirmative exercise of eminent domain authority, a regulatory taking is a more passive consequence of the application of an otherwise legally-adopted land use regulation.

The legal landscape shaping regulatory takings in Massachusetts was recently affected by two notable decisions: (1) the decision of the Massachusetts Appeals Court in Smyth v. Conservation Commission of Falmouth, 94 Mass.App.Ct. 790 (2019), which held that there is no right to a jury trial on “the question [of liability as to] whether a particular regulatory scheme has effected a regulatory taking,” *id.* at 796, and (2) the decision of the United States Supreme Court in Knick v. Township of Scott, Pennsylvania, 588 U.S. ___, 139 S.Ct. 2162 (2019), which held that exhaustion of state court remedies is not a prerequisite to bringing a § 1983 takings claim in federal court. While these cases, viewed in isolation, address different issues, they may, when viewed together, affect the approach that a landowner may take when contemplating the advancement of a regulatory takings claim.

Background on Regulatory Takings

It is important to note at the outset that a claim for a regulatory taking has not traditionally been treated as a formal claim for a “taking.” While borne from the same Constitutional Fifth Amendment guarantee against a governmental seizure of property, “a claim of regulatory taking involves a preliminary (albeit significant and complex) question whether a taking has occurred at all.” Smyth, 94 Mass.App.Ct. at 795-96. That is, the threshold focus of a regulatory takings case is the question of liability. A conclusion that a regulatory taking has occurred will be justifiable where “governmental regulation [is] ... so onerous that its effect is tantamount to a direct appropriation or ouster.” Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 537 (2005). However, not every governmental regulation that operates to preclude development effectuates a taking; and a claim of regulatory taking will only be sustained where there is either a physical invasion of property or where the regulation in question operates to “completely deprive an owner of ‘all economically beneficial use’ of her property.” *Id.* at 538 (quoting Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1019 (1978) (emphasis in original)). Only once a plaintiff has prevailed in this preliminary element of a regulatory takings claim may he proceed to seek an award of damages for the taking.

Despite the Constitutional predisposition against uncompensated takings, case law reveals that it is quite difficult to prevail in a regulatory taking claim. This is because even though a governmental regulation may sharply reduce the value of a property, a modest residual value may be sufficient to defeat a claim of regulatory taking. In Pallazzo v. Rhode Island, 533 U.S. 606, 631 (2001), an 18-acre parcel appraised at \$3,150,000 was limited, by State regulation, to the development of a single residential lot valued at \$200,000, and the Court nevertheless concluded that such residual value was sufficient to defeat a claim

of inverse condemnation. Closer to home, in Gove v. Zoning Board of Appeals in Chatham, 444 Mass. 754 (2005), the Massachusetts Supreme Judicial Court contemplated the impact of a municipal zoning regulation on a potentially lucrative residential lot along Chatham’s waterfront. The zoning provision rendered the development of a house on the lot impossible and litigation ensued. While various other facts considered by the Court were relevant, the Court ultimately concluded that a residual value of only \$23,000 (the value of the property for assemblage purposes with adjoining properties) was sufficient to dismiss the complaint and find in favor of the town. Id. at 763. See also Smyth, 94 Mass.App.Ct. at 797-98 (economic impact on plaintiff a factor in determining whether regulatory taking occurred).

Massachusetts Appeals Court Decision in Smyth

In a traditional takings action, where a municipality (or other authorized governmental subdivision) takes property under General Laws c. 79, a jury will determine damages. In the calculation and award of damages, it is not uncommon for Massachusetts juries to award in excess of the amount at which the municipality originally valued the property in a taking (known as a pro tanto award). Accordingly, a practitioner may conclude that a jury may possibly be more sympathetic than a judge when evaluating a regulatory takings claim. However, in Smyth, which contemplated the preclusive effect of a local wetland bylaw, the Appeals Court foreclosed the availability of a jury trial when pursuing the initial question of liability under a regulatory takings claim. The Court held that, in Massachusetts, “the right to a jury trial is established by Article 15 of the Massachusetts Declaration of Rights which has been construed as preserving the right to a trial by jury in actions for which [such a right] was recognized at the time the Constitution of the Commonwealth was adopted [in 1780]” Smyth, 94 Mass. App. Ct. at 793 (internal citations omitted). This meant that, in an “ordinary claim of regulatory taking”, “the question whether the plaintiff is entitled to a jury trial . . . depends on whether it is analogous to a common-law claim entitled to a trial by jury in 1780 or whether it is a wholly new cause of action.” Id. at 794. Emphasizing that the facts alleged did not warrant a conclusion that the taking was analogous to an action in common-law tort such as trespass, id. at 794, the Court ultimately concluded that “the question of liability in a regulatory taking claim is a ‘wholly new’ cause of action, to which the right to a jury trial does not attach.” Id. at 796. Thus, while consideration of what may constitute “just compensation” is a question that is appropriately put to a jury, the underlying liability question remains the province of the trial court judge, who is charged with applying the balancing test as detailed in Smyth and the cases cited therein. Id. at 797-98.

U.S. Supreme Court Decision in Knick

The U.S. Supreme Court’s decision in Knick marks a significant departure from the pre-existing process for pursuing a claim for a regulatory taking in federal court. In a 5-4 decision, the Supreme Court reversed a long line of cases that required plaintiffs with a regulatory takings claim to pursue their actions in state court before pursuing a Fifth Amendment claim under 42 U.S.C. § 1983 in federal court. 588 U.S. at ___, 139 S.Ct. 2177-79. Viewing the right to seek damages as accruing at the instant the governmental regulation proscribed a proposed development, the Supreme Court ruled that there was no exhaustion prerequisite to seeking relief in federal court. Id. Accordingly, in the post-Knick landscape, a disgruntled developer may choose, at its discretion, to skip state court altogether and seek compensation for a regulatory taking in one fell swoop in federal court under § 1983.

Practice Implications of Smyth and Knick

While a door for plaintiffs seemingly was shut – in most instances – by virtue of the Smyth decision, it likely swung wide open with the U.S. Supreme Court’s decision in Knick. In Knick, the Supreme Court did not address the question of whether a jury trial attaches to a regulatory taking action, as discussed in Smyth. However, while all actions under 42 U.S.C. § 1983 are not automatically entitled to be heard by a jury, the right to a jury in a regulatory taking claim sounding in § 1983 was firmly established

in Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 721 (1999). Accordingly, when read together with prior precedent, Knick stands for the proposition that a Massachusetts plaintiff may, at its option, skip a bench trial in Massachusetts court and pursue a regulatory claim before a jury in United States District Court. As a consequence, the main thrust of the Smyth decision will not affect a plaintiff that opts for a federal court forum.

Despite the holding of Knick, not all regulatory takings claims are well-suited for a federal court where, as noted by the dissent, complex review of a municipal regulatory scheme must be undertaken. 588 U.S. at ___, 139 S.Ct. at 2187-88. This is especially so where a federal court would have to delve into the intricacies of a detailed local zoning wetland bylaw. However, following the Knick decision, a well-resourced litigant that feels it would benefit from a jury rather than a trial before a state court judge steeped in experience interpreting local regulation, may choose to bring their original action in federal. Conversely, a litigant that may not have the resources to navigate through a federal court jury trial may choose the nuanced review that occurs at the state trial court level. Only time will tell if the results of these two paths are disparate. Until then, there will be significant speculation as to whether verdicts and awards by a federal jury will change the calculus for landowners that are contemplating suit for a regulatory taking.

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The Importance of Written Information Security Policies in Data Governance

By Christopher E. Hart

A critical component of data governance is the written information security program or policy, or “WISP” for short. WISPs are important for three reasons: first, they are often required by specific statutes or regulations. Second, their drafting and maintenance often force organizations to consider more closely the adequacy of their security practices. Third, they can be excellent defenses against liability in the event of a data security incident. Yet organizations often find themselves caught by surprise when they learn that they are either legally required to have a WISP, or ought to have one as a best practice or risk mitigator.

This article discusses what a WISP is, when they are required, what they are good for, why organizations should consider creating and maintaining them, and what the future holds. In the end, you will hopefully consider the WISP to be a critically important component of your or your client’s overall data governance strategy.

What is a WISP?

A WISP is a set of organizational practices relating to certain information, normally personally identifiable information (PII) that the organization maintains (such as a person’s name, email, password, social security number, and credit card information), memorialized in an inward-facing document.¹ While the WISP really refers to the practices or program of information security, the memorialized document is often what people are referring to when they think of WISPs. A WISP is inward-facing in the sense that it is meant to be used internally by an organization, both as a reference and as a memorialization of practices, and not necessarily meant for consumption by consumers or the general public. (In contrast, privacy policies tend to be outward-facing documents, meant to notify potential consumers about an organization’s data use and security practices at or before the point that data is provided.)

To illustrate, one of the most important laws relating to WISPs, the Massachusetts regulations on Standards for the Protection of Personal Information of Residents of the Commonwealth, requires that “[e]very person that owns or licenses personal information” about a Massachusetts resident must “develop, implement, and maintain a comprehensive information security program that is written in one or more accessible parts.” 201 CMR 17.03(1).

What Does a WISP Require?

The purpose of the WISP is to “[i]nsure the security and confidentiality of customer information,” “protect against any anticipated threats or hazards to the security or integrity of such information,” and “[p]rotect against unauthorized access to or use of such information that could result in substantial harm or inconvenience to any customer.” 201 CMR 17.01(1). The WISP is a security requirement, not a privacy requirement: it mandates certain technical and administrative safeguards relating to specific kinds of information. To accomplish these objectives, regulations mandating WISPs focus on a number of common elements:

1. **Risk Assessment.** WISPs generally require that organizations implement practices that are commensurate with the sensitivity and volume of data the organization has, and the resources the organization can bring to bear to protect that data.

2. **Minimum Technical Security.** WISPs will carry requirements that computer systems have adequate encryption, anti-malware software, and other perimeter and internal defenses.
3. **Third-Party Contracts.** Central to a WISP is the concept that organizations that collect information but contract with vendors or other organizations to handle data ensure that those third parties protect the data at least as adequately as the collecting organization, requiring both that vendors be adequately vetted and that assurances regarding security programs by third parties are placed into contracts as specific obligations.
4. **Specific Accountability.** WISPs normally require that a specific individual be held out as having responsibility for implementation of the security program.
5. **Regular Auditing.** WISPs, and the specific requirements within them (such as risk assessments), must normally be reevaluated on at least an annual basis.
6. **Employee Training.** Employees must be trained on the organization's security requirements, and must be knowledgeable of the WISP, in order for the WISP to be a useful instrument.

As these requirements make clear, a WISP is best seen as a bundle of living practices, rather than merely a document that allows an organization to paper its liability.

When is a WISP Required?

As creatures of statute or regulation, WISPs are legally required if an entity falls within the jurisdictional scope of a regulatory regime. So, for example, the Gramm-Leach-Bliley Act, or GLBA, will only apply to those entities that fall under the definition of a "financial institution" as defined by the statute. *See* 15 U.S.C. § 6809(3) ("The term 'financial institution' means any institution the business of which is engaged in financial activities as described in section 1843(k) of title 12"). On the state level, states such as Pennsylvania, New Hampshire, and South Carolina have a WISP requirement for certain insurers as defined by the state's insurance code. *See, e.g.,* 31 Pa. Code § 146c.3 ("A licensee shall implement a comprehensive written information security program that includes administrative, technical, and physical safeguards for the protection of customer information.").

Given the relatively narrow scope of many of these WISP requirements, the Massachusetts regulations stand out as particularly broad. Far from being cabined to entities within a particular industry, the Massachusetts regulations do not limit their application to entities that are domiciled or headquartered in Massachusetts, or even that specifically do business in Massachusetts. Rather, they apply to "all persons [that is, natural person, corporation, other legal entity, etc.] that own or license personal information about a resident of the Commonwealth." 201 CMR 17.01(2). In other words, if a business "owns or licenses" the personal information about a *single resident* of Massachusetts, the regulations (and thus the requirement to develop a WISP) will apply.¹²¹ This is true even if an organization is already regulated by some other regulatory scheme, such as HIPAA. *See Commonwealth v. Milton Pathology Assocs., P.C.*, Civ. A. No. 12-4568 H, 2012 Mass. Super. LEXIS 2902 (Super. Ct. Dec. 20, 2012) (requiring a HIPAA-covered entity to maintain a WISP).

Why Should You Have a WISP?

The **first** reason to have a WISP is because the law might require it, and being out of compliance can prove to be an expensive and embarrassing risk. The Commonwealth of Massachusetts has entered into consent judgments with parties in part (if not exclusively) to bring them into compliance with this requirement. The Attorney General of Massachusetts is an avid enforcer of the WISP requirement. *See, e.g., Commonwealth v. Briar Grp., LLC*, Civ. A. No. 11-1185 B, 2011 Mass. Super. LEXIS 2939 (Mass. Super. Ct. March 28, 2011) (requiring implementation of a WISP against a restaurant group accused of "failing to take reasonable steps to protect the personal information obtained from its patrons" in point of sale credit and debit card transactions); *Commonwealth v. Haney*, Civ. S. No. 16-00183m 2016 Mass. Super. LEXIS 915 (Super. Ct. January 14, 2016) (requiring a solo real estate practitioner to implement a

WISP after allegedly failing to notify clients of a data breach); *Milton Pathology Assocs., P.C.*, 2012 Mass. Super. LEXIS 2902. So is the Federal Trade Commission with regard to the WISP requirement in the GLBA's Safeguards Rule. *See In the Matter of Paypal, Inc.*, 162-3102, ¶ 40a (Fed. Trade Commission, 2017) (bringing a complaint against Venmo for failing to have a WISP through "at least August 2014").

Having a *good* WISP might be as important as simply having one at all. In the wake of the 2017 Equifax breach affecting millions of individuals, the Attorney General of Massachusetts (among countless others) sued Equifax. Among the claims made by the Attorney General was that Equifax had violated the Massachusetts Data Security Regulations by having an insufficient WISP: "Equifax failed to develop, implement, and maintain an *adequate* written information security program . . . and . . . this failure made the data breach possible." *Commonwealth v. Equifax, Inc.*, Opinion No. 139895; 2018 Mass. Super. LEXIS 66 at *2 (Mass. Super Ct. April 3, 2018) (emphasis supplied). Specifically, the Commonwealth alleged that "Equifax knew or should have known" that there was "a serious security vulnerability" in Equifax's systems; that Equifax "failed to patch or upgrade its software to eliminate this vulnerability," and that "Equifax did not even take reasonable steps to determine whether unauthorized parties were infiltrating its computer systems." *Id.* Considering the issue at the motion to dismiss stage, the court concluded that the Commonwealth stated a claim and denied the motion to dismiss. *Id.* at *3. Critically, the Commonwealth used the WISP requirements as a basis for a series of allegations that Equifax did not take reasonable measures to prevent or mitigate the breach—emphasizing that it is not the mere existence of the document, but the adequacy of the practices, that the regulations are intended to control.

In fact, in Massachusetts, the data protection statute authorizing the regulations that require the WISP has itself recently changed, requiring that in the event of a breach triggering notification to the Attorney General and the Office of Consumer Affairs and Business Regulations, the company notify these agencies whether a WISP was in place at the time of the breach. *See* G.L. c. 93H § 3(b). The clear intent of this change to the statute is to (1) create an *in terrorem* motivation to put a WISP in place if one has not yet been developed, and (2) to make it easier for the Commonwealth to prosecute cases in which a breach occurred without adequate safeguards.

The **second** reason to have a WISP is that it can provide a defense to liability. Data breaches are, unfortunately, ubiquitous. So long as the data breach looms large, so too does the follow-on lawsuit. But data breaches are notoriously difficult events for which to hold companies liable. In federal court, simply getting through the hurdle of Article III standing can be impossible. *See, e.g., Clapper v. Amnesty International*, 133 S. Ct. 1138 (2013) (holding that, in order for a plaintiff who alleges future harm to have the necessary Article III standing to sue in federal court, the plaintiff must demonstrate that the harm is "certainly impending"); *Carlsen v. GameStop, Inc.*, 112 F. Supp. 3d 855 (D. Minn. 2015) (applying *Clapper* to hold that there was no actual injury arising from the defendant's alleged use of Facebook to share personally identifiable information in violation of the company's privacy policy). *But see Remijas v. Neiman Marcus Group LLC*, 794 F.3d 688 (7th Cir. 2015) ("*Clapper* does not . . . foreclose any use whatsoever of future injuries to support Article III standing" in the case of a data breach). When the cause of action is a state-based tort claim, such as negligence, the presence of a WISP can also make it difficult for a plaintiff to survive a motion to dismiss. *See Guin v. Brazos Higher Educ. Serv. Corp.*, Civ. No. 05-668 (RHK/JSM), 2006 U.S. Dist. LEXIS 4846 *12 (D. Minn. Feb. 7, 2006) (noting that, while defendant conceded owing plaintiff a duty of care pursuant to the GLBA's requirement of maintaining a WISP, the fact that the defendant indeed maintained a WISP was evidence of reasonable care); *Warren v. Rodriguez-Hernandez*, Civ. A. No. 5:10CV25, 2010 U.S. Dist. LEXIS 96121 at *15 (N.D.W.V. Sept. 15, 2010) (noting that plaintiffs could offer no evidence that their information had not been adequately protected given that, among other things, defendants maintained a WISP).

Conversely, failing to have a WISP can potentially be evidence of negligence. When in search of a working theory of liability for a claim against an organization suffering a data breach, plaintiffs can turn to WISP requirements as evidence of a duty, and thus bring a claim sounding in negligence (whether or

not it succeeds). *See Baum v. Keystone Mercy Health Plan*, 826 F. Supp. 2d 718, 721 (E.D. Pa. 2011) (remanding a removal case to state court when the state statute requiring a “comprehensive” WISP potentially allowed for a negligence per se claim even though HIPAA did not provide a private right of action); *Rebello v. Lender Processing Servs.*, 30 N.E. 3d 999, 1016 (Ohio App. 2015) (holding that the GLBA “manifests a clear public policy against the unauthorized access and disclosure of the nonpublic personal information of consumers” applicable to plaintiff in an unlawful termination suit, as manifested in part through the WISP requirement, and allowing the claim to proceed).

The **third** reason to have a WISP is that it is simply good practice. While having a WISP can help an organization avoid compliance and litigation risk, having a WISP—that is, having actual practices to safeguard PII, memorialized in a document read and understood by those who handle such data—can, before any discussion of liability, help avoid a data breach or minimize the fallout from a data breach if it occurs. In the end, isn’t that the point?

What Does the Future Hold?

The WISP is not only here to stay; it stands a good chance of becoming a universal instrument in a complete data management tool kit, both as a matter of good practice and a matter of law. For example, the EU’s General Data Protection Regulation, or GDPR, does not specifically require a WISP. But the law has a host of requirements suggesting something like a WISP is prudent, if not required. *See, e.g.*, GDPR Art. 5(2) (noting that the controller of personal data “shall be responsible for, and able to demonstrate compliance with” the requirement that personal data be processed lawfully, which includes processing with adequate security); *id.*, Art. 25(2) (“The controller shall implement appropriate technical and organisational measures for ensuring that, by default, only personal data which are necessary for each specific purpose of the processing are processed.”). Given the GDPR’s potentially global territorial scope, something like a WISP is almost certainly going to become a legal norm.

In short, the WISP is a deeply important instrument for organizations in their privacy and security programs. While sometimes overlooked, it is both an increasingly important and ubiquitous regulatory requirement and a critical tool for creating robust security practices in an organization.

[1] For purposes of this article, unless otherwise indicated I will use “PII” to refer to the kind of information the practices outlined in WISPs are intended to safeguard. However, protected information can often be referred to by other terms of art, depending on the regulatory scheme: non-public financial information (the Gramm-Leach-Bliley Act); protected health information (the Health Insurance Portability and Accountability Act); and personal data (the European General Data Protection Regulation), to name three.

[2] A deep dive into the regulations reveals just how broad their scope is. A “person” can be a natural person or any legal entity; “owns or licenses” can mean, simply to “process” or simply “have access to” the personal information of a Massachusetts resident. 201 CMR 17.02.

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Practice Tips

Should it Stay or Should it Go?: Post-MUPC Probate Court Objections in the Wake of Leighton and Cusack

By Timothy F. Robertson, Esq. and Joseph N. Schneiderman, Esq.

Introduction

Since Massachusetts adopted the Model Uniform Probate Code, G.L. c. 190B (MUPC) in 2012, few cases have addressed the topic of objections. This article will offer practical pointers for how to make objections stick in light of two recent (published) appellate decisions.

1. **Objections: History, Contents and Timeliness**

Objections are an essential component of probate litigation. Objections provide notice to interested parties of a controversy within a probate or will action in the Probate and Family Courts. Upon the filing of an objection, the dispute becomes a lawsuit, where discovery may begin.

Objections may contest the merits of an action in probate court or air a more disconcerting lack of communication or trust involving a fiduciary. Affidavits in support of objections can range from the long-winded “let me tell my side of the story” affidavit to the more precise, but speculative affidavit. But neither of those extremes can or should suffice.

Before Massachusetts adopted the MUPC, Probate Court Rule 16 governed objections to wills. See e.g. **O’Rourke v. Hunter, 446 Mass. 814, 816-817 (2006)** (Marshall, C.J.) Rule 16 itself followed the abolition of jury issues in will contests and functioned to screen out frivolous attacks on wills. *Id.* at 817. Rule 16 required an objection to articulate specific facts. An administrator could contest lack of specificity in an objection either by a motion to strike or motion for summary judgment—one did not need to exhaust objections before seeking summary judgment. *O’Rourke*, 446 Mass. at 818-821. But specificity remained the touchstone of an adequate objection. See e.g. **Sher v. Desmond, 70 Mass. App. Ct. 270, 279, n.11 (2007)**.

Today, **G.L. c.190B, §1-401(e)-(f)** governs objections. Objections still require specific facts and must include supporting affidavits. The affidavit should stem from personal knowledge and should contain as much detail as the drafter knows. Compare **Mass. R. Civ. Pro. 56(e)** (governing affidavits in summary judgment.) Allegations of fraud should be stated with particularity. **Compare Mass. R. Civ. Pro. 9(b)**. A best practice is for the drafter (i.e., counsel) to reserve the right to supplement the affidavit as discovery proceeds.

Under the MUPC, it is the timeliness of an objection, however, that is of more critical importance. If an objector lacks sufficient information to develop an appropriate affidavit within the applicable time period (the return date set by the court or otherwise by statute), practitioners should: (1) act quickly to propound discovery on the petitioner (and any other person or entity with relevant information) under **Supp. Prob. Ct. R. 27A** and (2) concomitantly move to extend the deadline for filing the affidavit of objections.

2. **Leighton v. Hallstrom-Case Study of a Successful Objection**

Despite the strict time requirements for filing an objection and the need for a detailed affidavit, a recent Appeals Court decision suggests that substance ultimately prevails over form when considering the adequacy of an objection.

In **Leighton v. Hallstrom, 94 Mass. App. Ct. 439 (2018)**, a magistrate endorsed Leighton’s petition for a formal adjudication of intestacy, determination of heirs, and Leighton’s appointment as personal representative of the decedent’s estate. Prior to the entry of the decree, Hallstrom came forward and announced himself as an interested person and first cousin of the decedent. On a pre-printed Probate and Family Court form (**MPC 505a**), Hallstrom also filed a notice of appearance but did not check the box that his appearance was an objection. In the interim, the magistrate entered a decree on another pre-printed form but left blank the fields for specific individual heirs, instead referring back to the petition.

Hallstrom unsuccessfully tried to persuade Leighton of his lineage to the deceased, including with a genealogical chart. Leighton later petitioned for a complete settlement and Hallstrom objected. The Probate Court judge struck Hallstrom’s objection as tardy and because the magistrate’s initial decree resolved who the heirs were. Hallstrom appealed.

The Appeals Court reversed. The Appeals Court noted that although the MUPC imposed strict time constraints for objections, the true issue was not timeliness but the legal significance of the decree—which did not explicitly list any heirs. Instead, the decree referred back to the petition, which specifically listed Hallstrom as a purported heir. Moreover, the Personal Representative was aware of Hallstrom’s claims. Thus, since the decree did not resolve the issue of who the heirs were, there was no legal basis to preclude Hallstrom’s objection. 94 Mass. App. Ct. at 446, citing and quoting **Day v. Kerkorian, 61 Mass. App. Ct. 804, 809 (2004)** (“Issue preclusion is not available where there is ‘ambiguity concerning the issues, the basis of decision, and what was deliberately left open by the judge.’”).

Leighton illustrates that practitioners should not avoid nor courts discourage limited objections. Indeed, the Probate and Family Court’s pre-printed forms like MPC 505a can lend themselves to ambiguity. So long as the substance of the objection is there, the objection suffices. Indeed, if there is a need to amend the objection, practitioners can and should amend fairly and freely, as they could under former Rule 16. See e.g. **Hobbs v. Carroll, 34 Mass. App. Ct. 951 (1993)**, citing **Mass. R. Civ. Pro. 15**.

3. **Cusack v. Clasby: Are Objections or Contempt Actions Your Recourse for Bad Administration?**

The manner of probating the estate may raise concerns. Is filing an objection to an account the best mechanism to address concerns? Depending on the information known to the interested person and the status of a matter, a petition to remove the personal representative might be the appropriate course. However, if a first and final account has been filed, and the deadline for objections has been set, a potential objector has a limited time period to act.

Cusack v. Clasby, 94 Mass. App. Ct. 756 (2019), illustrates this point. Catherine Cusack died in June 2014, survived by eight children, all equal heirs. Clasby, one of her daughters, and the administrator of her estate, petitioned to probate the estate in October and filed a petition for an order of complete settlement in December 2015. Three of Clasby’s siblings objected, asserting that the final accounting reflected disbursements that had not in fact occurred. A judge in the Probate Court struck the objections, approved the final accounting, and settled the estate. The siblings appealed, asserting that settling the estate was premature.

The Appeals Court affirmed the settlement and rejected this contention. The Appeals Court noted that before Massachusetts adopted the MUPC, settlement was indeed incomplete until all payments were made by the estate. 94 Mass. App. Ct. at 758, citing former G.L. c.206, §22. However, the MUPC expressly repealed and displaced this principle. *Id.* at 759, citing **G.L. c.190B, §3-1001**. Similarly, the MUPC also permitted Clasby, as an administrator, to approve accounting and distribution of the estate. *Id.* at 758.

Thus, the Probate Court judge had authority to jointly approve the accounting and settle the estate. Indeed, the joint order furthered the purpose of the MUPC to spur a “speedy and efficient system for liquidating [an] estate of [a] decedent and making [distributions.]” 94 Mass. App. Ct. at 759, quoting **G.L. c.190B, §1-102(b)(3)**. Finally, the siblings were not without recourse—they could petition for contempt for violations of a court order. *Id.* at 759.

Cusack raises an important practical question about how to redress problems during distribution. On the one hand, procedurally, a contempt action does have benefits. A decree settling an estate certainly constitutes a court order for purposes of contempt. The Probate and Family Court also deals with contempt every day. Contempt actions also proceed under the same docket without a separate filing fee, and a successful litigant may recover their attorney’s fees.

Substantively however, a contempt action after distribution may not provide an ideal solution. Contempt has to be proven by clear and convincing evidence and not every violation of a court order constitutes a contempt. Indeed, ambiguous court orders do not lend themselves to contempts. See e.g. **Hoort v. Hoort, 85 Mass. App. Ct. 363, 365 (2014)**. A contempt action may deleteriously prolong and reopen a seemingly settled estate, and thwart the spirit of speedy settlement under the MUPC—or the purpose of former Rule 16 to screen out frivolous contests.

Conclusion

Leighton and Cusack illustrate how will objection practice has developed since Massachusetts adopted the MUPC. While an affidavit in support of an objection should contain specific facts, merely putting the proponent on notice of a problem may suffice if the proponent is relying on a pre-printed probate court form to preclude an issue.

On the other hand, objections no longer function to redress poor or incomplete administration because administration closes comparatively quickly. Whether or not contempt actions against administrators will actually serve the purposes of objections for bad administration will be interesting to see in light of the severe backlogs in certain probate courts.

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Viewpoint

Adorable as Affordable?: The Zoning Challenge of Tiny Houses

By Olympia Bowker

With Massachusetts' housing affordability crisis showing no signs of abating, it imperative to consider new, creative solutions. A 2018 *Boston Magazine* **analysis** of over 150 Massachusetts cities and towns revealed the lowest median home price in one municipality was \$255,450; the highest was \$1.9M. Contrast these figures with the **roughly \$60,000 retail cost** of a Tiny House, and it is no wonder that these diminutive abodes appear tempting as affordable options. But can they play a meaningful role in ameliorating the affordable housing crisis in Massachusetts? And can the **Community Preservation Act** ("CPA") help spur a Tiny House trend in Massachusetts?

Tiny Houses: What Are They, and Are They Prohibited?

A "Tiny House" is defined by the **2018 International Residential Code** ("IRC") as a dwelling that is 400 square feet or less in floor area excluding lofts used as a living or sleeping space. Generally, Tiny Houses look like miniature versions of traditional houses; they can feature tiny modernist rooflines, colonial shutters, or Victorian gingerbread trimming. They can be built either on trailers or fixed foundations—a key distinction for affordable housing purposes.

While attention is often on the **high-end Tiny House market that focuses on minimalist lifestyles and carbon footprints**, experiments **nationwide** highlight the value of "tiny house villages" to address homelessness. With the wait times for affordable housing in Boston **lasting years**, urgency must beget innovation here as well.

Notwithstanding the growth in Tiny Houses as a social and architectural movement, long-standing provisions of **many municipal zoning bylaws and ordinances ignore, if not effectively prohibit**, Tiny Houses. In Massachusetts, a wheeled Tiny House is legally treated as a recreational vehicle ("RV"), mobile home, or trailer that **must be registered** with the state and used as such (*i.e.*, not parked year-round other than in a designated area), and is often barred by or **heavily regulated under local zoning laws** as undesirable.

If a Tiny House is built on a foundation, it must comply with zoning and building codes applicable to single family residential dwellings, including minimum square footage, lot and building size, and setback requirements. For example, **Holliston Zoning Bylaw §V(D)** has a 600 square foot minimum for floor area, effectively prohibiting Tiny Houses as defined under the IRC. But with the housing shortage at crisis levels, notwithstanding the still-developing zoning and construction standards, high land prices, and political tensions, these small-segment models of housing shouldn't be overlooked.

Tiny Houses as Stock for the Subsidized Housing Inventory under G.L. c. 40B

To incentivize communities to adopt zoning changes to allow Tiny Houses, it is important to note that Tiny Houses constructed for low or moderate-income households may be countable toward a municipality's **Subsidized Housing Inventory ("SHI")** for purposes of the "Comprehensive Permit Law," **G.L. c. 40B**. To qualify as SHI, the unit must be "affordable" to households earning at or below 80% of the Area's Median Income ("AMI")—the rent or mortgage payment and related housing expenses (e.g., utilities) cannot exceed 30% of the household members' annual incomes.

Since enactment in 1969, G.L. c. 40B, §§ 20-23 ("40B") has served as the main statutory scheme to address the affordable housing shortage statewide. 40B includes an 'anti-snob' provision that empowers the Zoning Board of Appeals to override zoning requirements to approve "comprehensive permits" for

denser, larger, and higher developments than would otherwise be allowed under local regulations *if* the municipality has not met its “safe harbor” threshold for SHI: either at least 10% of a municipality’s total housing stock must be “affordable” or more than 1.5% of municipal land must be dedicated to SHI. *See* G.L. c. 40B, § 20; 760 C.M.R. § 56.03(1); DHCD Guidelines (rev. Dec. 2014). If a municipality meets neither SHI threshold, 40B dramatically relaxes local control over approval of comprehensive permits for housing developments that contain 20-25% affordable units.

Even after 50 years of 40B incentive, as of 2017, Massachusetts municipalities had an average of 9.7% SHI, and only **67 of Massachusetts’ 351 municipalities were at or above the 10% SHI threshold**. Tiny Houses that qualify as SHI would be more attractive to municipalities because they would count towards the 10% safe harbor threshold for 40B purposes.

But in order to qualify for SHI, Tiny Houses have to be allowed in the first place.

Crafting Tiny Zoning

Municipalities can start by explicitly including Tiny Houses in their zoning: write Tiny Houses into tables of uses, and define whether they can be used as accessory dwellings, secondary or tertiary structures, or as stand-alone residences. Definitions should address whether they can have wheels, or whether they must be built upon a foundation.

Carefully crafted Tiny House zoning can provide housing stock that fits within the character of towns by allowing continued municipal control over massing, setbacks, aesthetics, and other elements which municipalities would otherwise relinquish under the traditional 40B system.

Further, creation of an overlay district for Tiny House villages could provide for maximum square footage, smaller setbacks, and smaller lot of sizes in certain areas. In such scenarios, preexisting non-conforming lots may become buildable. With creative zoning such as cluster developments, more homes could be built in smaller areas.

In 2016, **Nantucket** enacted a zoning bylaw amendment that explicitly allowed Tiny Houses that comply with the International Building Code. While industry standards did not align at the time to permit prefabricated Tiny Houses under that ordinance, future iterations of bylaw changes and changes in the industry specifications can address those types of mismatches going forward.

Leveraging CPA Funds

The CPA can serve as a catalyst for a Tiny House trend by subsidizing construction or land acquisition for Tiny Houses that count towards SHI thresholds. One way the CPA helps communities create affordable housing is by establishing a “community preservation fund,” which is fed by a local tax of up to 3% on real property.

The CPA defines affordable housing as “community housing” that serves households at or below 100% of AMI. CPA funds can support many types of activities in furtherance of affordable housing, including construction and property acquisition. Municipalities can neutralize land costs by acquiring buildable land, which not only can enhance feasible development possibilities, but also allow more control over design and location of development.

Tiny Houses created with or assisted by CPA funds can be included in a municipality’s SHI through compliance with the Department of Housing and Community Development (DHCD)’s Local Initiative Program, which requires the unit to be created as a result of the municipality’s action or approval. The unit will be sold or rented on a fair and open basis subject to an affirmative fair marketing and resident

selection plan approved by DHCD; be affordable to households below 80% AMI; and have its permanent affordability secured by Department use restrictions. CPA funds used to purchase land for Tiny Houses also incentivize partnerships with developers, such as through subsidies or by allowing the developer to build on municipal land.

Conclusion

Tiny Houses are not the silver bullet, as the resident pool for such housing is admittedly small, but they offer one more means to create much-needed inexpensive housing for single or double occupancy – a segment not prioritized in the current 40B scheme. By considering the interests of citizens, cities and towns, and affordable housing proponents, they can perhaps expand housing options and increase supply – at least a tiny bit.

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Case Focus

The Cross-Examination of Complainants And the Due Process Rights of Respondents in Student Disciplinary Proceedings After *Haidak v. University of Massachusetts-Amherst*

By R. Victoria Fuller

In *Haidak v. University of Massachusetts-Amherst*, the First Circuit Court of Appeals discussed the obligations of public colleges and universities under the Due Process Clause of the Fourteenth Amendment to the United States Constitution when conducting student disciplinary proceedings. Importantly, the Court held that a responding party has no right to cross-examine the complainant or other adverse witnesses, even where the case turns on credibility determinations. The holding represents a significant split from the Sixth Circuit and further leaves public educational institutions without concrete guidance regarding due process requirements where a non-adversarial procedure is utilized in a contested disciplinary proceeding.

The Complaint, and the University's Response

In *Haidak*, a female student reported to the university that a male student, with whom she had been romantically involved, physically assaulted her.

The university's code of conduct required the university to send the responding party a notice of charge ("NOC") and provide 48 hours to request a disciplinary conference. The code of conduct permitted an interim sanction, such as a suspension, without prior notice, but only where the NOC involved a serious violation and a university official had determined that the student was a threat to self, others, or property.

The university issued an NOC to the respondent for physical assault and endangering behavior to persons or property, which included a no-contact order. Regardless, the male and female student promptly resumed consensual contact.

After the complainant's mother alerted the university to the no-contact order violation, the university issued the respondent a second NOC for harassment and failure to comply with the direction of university officials, which included the same no-contact order.

Contact between the students continued. The complainant (and her mother) again reported to the university that the respondent violated the no-contact order. The university took no action for two weeks and then issued a third NOC, this time suspending the respondent without prior notice. The university informed the student that he had a right to a meeting to discuss the suspension with a university official, but took no immediate action to schedule a hearing.

The respondent remained suspended for approximately two months over the summer. Near the end of the summer, the university notified him that the suspension would continue pending a hearing on the assault charge, but the university took no action to schedule one. At the beginning of the fall semester, the respondent withdrew from the university. The university then offered him three potential dates for the hearing, and he chose a date on which he knew he could not attend in-person, only by phone.

The hearing board ("Board") found the respondent responsible for assault and failure to comply with the no-contact order, but not for endangerment or harassment. Pursuant to the code of conduct, the Board sent its report to the Dean of Students. In reliance on the Board's report, and in light of the student's prior disciplinary history, the Dean of Students expelled him.

The University Violated Due Process By Suspending the Respondent Without Prior Notice and a Hearing

Students at public educational institutions are entitled to certain procedural due process rights. The two essential requisites of procedural due process are (1) prior notice; and (2) a hearing. Because suspension deprives a student of all of the benefits of being enrolled, the Court recognized due process generally mandates prior notice and a hearing. Although a university may suspend a student before providing notice and a hearing in limited, exigent circumstances, the university could not establish such circumstances. Indeed, it waited nearly two weeks after learning about the second no-contact order violation to suspend the respondent. Moreover, the “informal interview” that the respondent received after suspension was insufficient to satisfy due process. If the university had conducted a hearing before suspending the student, it would have learned that the continued contact was non-threatening and mutual, and it likely would not have suspended him in the first place. Therefore, the Court held that the university violated the respondent’s right to due process by suspending him for five months without prior notice or a hearing.

The University Did Not Violate Due Process By Denying the Respondent the Opportunity to Cross-Examine the Accuser

The Court held that the respondent’s due process rights were protected, however, at the eventual Board hearing. In particular, the Court noted that (i) the hearing was conducted in accordance with the university’s written procedures, which were provided to the respondent in advance; (ii) the university bore the burden of proof; (iii) the hearing was limited to charges of which the respondent received detailed notice; and (iv) the respondent was invited to be present (although he chose to attend by telephone), hear all evidence against him, respond directly himself, call witnesses, and have an attorney.

Because the hearing turned directly on credibility determinations, the student argued that he had been denied a due process right because he was not allowed to cross-examine the complainant. Instead, he had submitted questions for the Board to pose to her, and a university official eliminated many of the questions. The Court rejected this argument.

The Court noted that the university used a non-adversarial, “inquisitorial” system, under which the university assumed responsibility for investigating the facts and developing the arguments. The Court held that an inquisitorial system did not, in itself, violate the Due Process Clause, as long as the university conducted reasonably adequate questioning. That said, the Court recognized that the university’s procedure could render a proceeding unfair, because: (1) the Board’s manual instructed hearing officers to calm a complaining student with non-leading, non-adversarial, and “easy” questions; and (2) a university official struck some of the respondent’s proposed questions before providing his list to the Board. Nonetheless, having reviewed the hearing, the Court concluded that, while the procedure rendered the *potential* for unfairness, namely a failure to effectively confront an accuser, the hearing was not unfair because the Board adequately questioned the complainant.

The First Circuit’s holding differs from that reached by the Sixth Circuit. In *Doe v. Baum*, 903 F.3d 575, 582-3 (6th Cir. 2018), the Sixth Circuit held that due process mandated that the school permit cross-examination of an accuser (and other adverse witnesses) in all cases turning on credibility determinations. Although recognizing that cross examination, in the “hands of an experienced trial lawyer is an effective tool” to discovering the truth, the First Circuit declined to adopt the Sixth Circuit’s approach, in part because the Court determined that it had “no reason to believe that questioning of a complaining witness by a neutral party is so fundamentally flawed as to create a categorically unacceptable risk of erroneous deprivation.”

Would the outcome have been different, though, if the university official had struck a few more questions? Would the Court have held that the Board violated the respondent’s due process rights by

failing to conduct an adequate examination? Given this inherent potential for procedural unfairness, a public educational institution that implements a non-adversarial system with no opportunity for cross-examination arguably invites judicial scrutiny each and every time it conducts a hearing in a case turning on credibility, putting courts in the business of deciding the adequacy of the examination on a case-by-case basis.

Indeed, *Haidak* may lead public educational institutions to conclude that the only way they may unquestionably comply with due process is to permit cross-examination in such proceedings, and thus abandon the truly inquisitorial system. However, if the educational institution chooses to permit cross-examination in an otherwise non-adversarial system, how should it do so? Through questions submitted to the hearing panel, or by permitting the respondent or a representative to conduct the cross-examination (and thereby risk re-traumatizing a complainant)? The answers to these types of questions will no doubt have to be addressed by future cases.

Conclusion

Where disciplinary proceedings turn on credibility, public educational institutions that have implemented a non-adversarial system will have to decide whether to permit cross-examination, and if so, how it should be conducted. Although the First Circuit recognized that the inquisitorial, non-adversarial approach did not alone deprive a responding student of a constitutional right, it made clear that the improper implementation of such a system *may* violate his or her rights. *Haidak* may inadvertently have invited students unhappy with a credibility determination after a non-adversarial proceeding lacking cross-examination to file suit challenging whether the questioning at the hearing was “reasonably adequate” to satisfy due process. Without a doubt, *Haidak* is not the last we will hear on this important legal issue.

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Understanding When Competitive Bidding Applies to Affordable Housing in Public-Private Partnerships

By Lauren D. Song and Tyler Creighton

Anyone who owns, constructs, or finances a construction project involving public funds, public ownership, and/or public use must carefully consider whether the project may be classified as “public construction.” If so, the project will be strictly regulated under an array of local, state, and federal requirements, including competitive bidding and procurement requirements, prevailing wages, bonding, and affirmative action goals. Mistakenly treating a project with a strong public-private interdependence as exempt from the public construction laws can expose the hybrid project to bid disputes, financial penalties, **unenforceable contracts**, and costly delays in the permitting, acquisition, funding, rehabilitation, and construction of critically needed housing. But compliance with the Massachusetts system of procurement when not required to will also **constrain the construction process, significantly increase project cost and time, and result in other inefficiencies**. This article reviews two bid protests recently decided by the Massachusetts Office of Attorney General (“AG”) to illustrate the challenges inherent in determining when affordable housing projects undertaken through public-private partnerships (“P3”)[i] may be “public construction” for purposes of the competitive bidding requirements under **G.L. c. 149, §§ 44A–44H** (“statute”).

I. Background: Public-Private Partnerships for Affordable Housing

Greater Boston perennially ranks nationally among the **top-five highest average in rents and home prices**. But because of the lack of funding, most low-income people in Massachusetts do not receive rental assistance, and **three in ten low-income people are either homeless or must pay over half of their income in rent**. The need for affordable housing preservation and production is at a **crisis level in Massachusetts and nationally**. [ii]

As the supply of affordable housing in the private market has lagged, **public housing** has been dying a **slow death of divestment** for decades. Established under the **United States Housing Act of 1937**, the public housing program produced nearly 1.4 million units nationwide, but today, only about 1 million units remain with a combined **\$49 billion backlog in unaddressed repairs**. [iii] This backlog will continue to rise even as more federal public housing units are lost permanently with the U.S. Housing and Urban Development’s (“HUD”) effort to “**reposition**” the public housing inventory through public-private partnerships under the **Section 18 demolition and disposition**, **Rental Assistance Demonstration** (“RAD”), and **Moving to Work** programs.

The trend favors increased P3 initiatives with an expectation of greater efficiencies through risk sharing, leveraging financing from both public and private sectors, and accessing broader innovations, knowledge and skills. Already, “**most HUD programs are structurally public-private partnerships (P3s) or have some public-private aspects**.” Yet the legal uncertainty and fact-specific scrutiny necessary to determine when P3 arrangements are subject to the competitive bidding requirements may inadvertently chill critically-needed private investments for affordable housing in Massachusetts.

II. Massachusetts Public Construction Law

A. Massachusetts Competitive Bidding Statute

The Massachusetts public construction bidding law mandates that “[e]very contract for the construction, reconstruction, installation, demolition, maintenance or repair of any building by a public agency

estimated to cost more than \$150,000 ... shall be awarded to the lowest responsible and eligible general bidder on the basis of competitive bids in accordance with the procedure set forth in section 44A to 44H.” G.L. c. 149, § 44A(1)(D).^[iv] The dual remedial purpose of the statute is to eliminate favoritism and corruption through “an honest and open procedure for competition for public contracts,” *Interstate Engineering Corp. v. Fitchburg*, 367 Mass. 751, 757 (1975), and to ensure that taxpayers dollars obtain the lowest price for competent construction by qualified bidders under uniform criteria. *Fordyce v. Town of Hanover*, 457 Mass. 248, 259-60 (2010).

The AG is “charged with investigating allegations of violations of the competitive bidding statute and enforcing its provisions” through “bid protests.” *Brasi Development Corp. v. Attorney General*, 456 Mass. 684, 691 (2010) (“*Brasi*”). Awards of contracts can also be challenged in Superior Court where “the potential class of plaintiffs ... is not necessarily limited to the low bidder on each contract” because standing is interpreted liberally in furtherance of the statute’s remedial purpose.^[v] *Barr Inc. v. Town of Holliston*, 462 Mass. 112, 119 (2012).

The AG may enforce her bid protest decision by filing an action in the Superior Court. See G. L. c. 149, §§ 27C (a), 44H. However, the AG’s bid protest decision is accorded no deference by the courts which construe the statute *de novo*. *Brasi*, 456 Mass. at 694. Accordingly, a bid protest decision cannot settle the legal uncertainty as to whether and under what circumstances the statute applies to P3s.

B. The *Brasi* “Totality of Circumstances” Test

In *Brasi*, the Supreme Judicial Court (“SJC”) held that the competitive bidding statute applied to a “build to lease” arrangement between a private developer, Brasi Development Corporation (“BDC”), and the University of Massachusetts at Lowell (“University”). In so deciding, the SJC adopted a totality of circumstances test to conclude that the so-called “lease back” scenario^[vi] in *Brasi* was in fact “the functional equivalent of a construction contract.” *Id.* at 684. The SJC reasoned that “limiting the inquiry to the [Request for Proposal (‘RFP’)] as has been done in other contexts] ignores relevant circumstances that have a direct bearing on the transaction that the parties contemplated,” and that the totality of circumstances indicated the creation of a project by “an agency for the agency’s use in carrying out its public purpose” which constitutes “construction of a building by a public agency” to which the statute applies. *Id.* at 697-699.

Specifically, the SJC concluded that where BDC was obligated to construct a dormitory and lease it back to the University for up to 30 years subject to the University’s option to purchase and automatic transfer of ownership at the end of the lease, the “character of the agreement was, in essence, a contract for construction by a public agency... rather than a lease.” *Id.* at 684. The SJC admonished that “[o]therwise, the parties could easily employ long-term leases to evade the ‘competitive bidding requirement’ of the procurement statute.” *Id.* at 695. *Brasi* underscores that in evaluating whether public bidding laws apply to a P3, (1) public ownership is not necessary or dispositive and, (2) the “totality of the circumstances” of all agreements focuses on whether there is a “creation of a project by the [public] agency” that is “for the agency’s use in carrying out its public purposes.” *Id.* at 697.

III. Recent Attorney General Decisions on P3 Projects

A. Holyoke Housing Authority Decision: Public Housing Conversion under RAD

On June 20, 2019, the AG issued a detailed decision in *In re Holyoke Housing Authority Rehabilitation of Lyman Terrace* (“*Holyoke Housing*”) methodically applying the *Brasi* factors to the P3 rehabilitation of Lyman Terrace (“Project”) and found that the project constituted a public construction subject to the statute. However, the AG expressly declared that the decision in *Holyoke Housing* was “prospective only and, therefore, does not apply to this specific project, but will serve as guidance to other awarding authorities.” *Holyoke Housing*, p. 2.

This Project involved the conveyance and rehabilitation of 167-units of distressed federal public housing built in 1939 and owned by the Holyoke Housing Authority (“HHA”) to The Community Builders, Inc. (“TCB”), a private developer, as part of HUD’s RAD program under a 75-year ground lease (“Ground Lease”).^[vii] Largely consistent with HHA’s RFP, the Master Development Agreement (“MDA”) required TCB to “initiate, coordinate and administer all planning, design, development, financing, construction and management activities in connection with” the Project,^[viii] subject to certain rights of HHA to approve the general contractor and to review the plans, and subject to procedures for the selection of the contractor to help ensure competitive pricing, payment of prevailing wages, and compliance with other contracting standards.

To implement the Project, TCB formed a separate private limited liability company (“Owner”) to own Phase 1 of the Project pursuant to **G.L. c. 121A**, and HHA obtained HUD’s approval for the disposition of the public housing units under the RAD program. The Owner paid a base rent of \$2,710,000 to HHA, and obtained over \$35 million of financing for Phase 1 (including a \$1 million loan from HHA, eight other loans from different public and private lenders, and almost \$16 million of private equity contribution from the allocation of low-income housing tax credits (“LIHTC”)).^[ix] TCB provided all corporate construction completion guarantees required by financing sources.

In exchange, as required for the RAD conversion, HHA entered into new Housing Assistance Payment (“HAP”) contracts with HUD to ensure the Owner would receive subsidy payments for the continued operation of the rehabilitated units under the Section 8 program. HHA and HUD also retained regulatory and enforcement rights with respect to the Section 8 HAP contracts, and HHA retained a limited right of first refusal and the option to buy back the buildings in 15 years. Other agreements obligated the Owner to “maintain the public purpose of the housing development” by operating and managing the rehabilitated units as affordable for low-income residents. *Holyoke Housing*, at 12.

According to the AG, the RAD Project posed the question under *Brasi*: “whether the public bidding laws apply when a private entity undertakes construction on a housing project that was initially owned by a public housing authority, was initiated by the public housing authority, is funded by public money, serves a governmental purpose, with control over the design and construction process retained by the public housing authority which may revert to the public housing authority if the authority pays fair market value, within a relatively short amount of time.” *Holyoke Housing*, p. 11. Notably, absent from the Project is the “lease back” arrangement that troubled the SJC in *Brasi*.^[x] Rather, *Holyoke Housing* reveals a complex and pervasively regulated set of transactions typical of RAD conversions, which is one of the limited options available to some housing authorities to preserve distressed public housing units as affordable housing.

Nonetheless, the AG decided the Project was subject to the statute, applying the *Brasi* factors and following the SJC’s focus on whether the Project will “assist the public entity in ‘carrying out its public purposes.’” *Id.* at 11-12. The AG also queried why a home-rule waiver from the statute had not been sought for the Project, as had been successfully done in other similar public housing redevelopments undertaken by TCB. *See Holyoke Housing*, p. 4.

B. Chestnut Park Preservation Decision: Privately-Owned, LIHTC Housing

On September 25, 2019, the AG decided *In re MHFA, DHCD, and City of Springfield: Chestnut Park Apartments* (“*Chestnut Park*”) finding that the P3 project there did *not* constitute public construction. *Chestnut Park* involved the occupied-rehabilitation of a privately-owned and privately-developed, 489-unit, LIHTC-financed, mixed-income rental housing development (“LIHTC Project”). In concluding that the LIHTC Project was not a “construction of a building by a public agency” subject to the statute, the AG recognized that there are “two separate legislative systems for creating and

maintaining affordable housing...on both the state and federal levels”: a public housing system owned by *public agencies* that rely on grants and operating subsidies (as in *Holyoke Housing*), and a *private* affordable rental housing system developed, owned, and operated by private for-profit and non-profit entities relying on public and quasi-public loans, subsidies, and tax incentives. *Chestnut Park*, pp. 9-11. The AG then declared that nevertheless, even privately-owned affordable housing like the LIHTC Project is subject to the *Brasi* test. The AG also rejected a narrow interpretation of *Brasi* that the “totality of circumstances” test is “confined to cases involving leases.” *Chestnut Park*, p. 11. Finally, the AG distinguished *Chestnut Park* from the facts in *Brasi* and *Holyoke Housing* to conclude that because the public lenders, MHFA, DHCD, and the City of Springfield (collectively “Public Agencies”), “did not initiate or plan the design or construction of the Project; have never owned and will not own the Project land, buildings or improvements; do not have an absolute right to acquire the premises; and do not control the design or construction of the Project in any way *other than as lenders*, the public bidding laws do not apply” to the LIHTC Project. *Id.*, p. 2 (italics added).

Applying *Brasi* to each indicia of public ownership, project control, use, purpose, and funding, the AG rejected the argument that Chestnut Park Apartments is a government agency-financed and controlled affordable housing facility subject to the statute, and determined that the conditions of financing in the Public Agencies’ regulatory agreements did not constitute “significant control over either the design or the construction of the Project” but were “programmatic” requirements for the operation of the LIHTC Project as affordable housing consistent with the Public Agencies’ public purpose and underwriting requirements.^[xi] *Id.*, pp. 12-15. The AG concluded that “public financing alone ‘does not render a private development ... a public building or public work, or make [an owner] an agent or servant of a public instrumentality,’ and noted that “[i]f that were the case, the private businesses that invest in low-income communities while benefiting from the **New Markets Tax Credit Program** ... would become subject to laws governing public construction and prevailing wage,^[xii] since they [likewise] advance the public purpose of serving low-income communities.” *Chestnut Park*, pp. 16-17 (quoting *Salem Bldg. Supply Co. v. J.B.L. Constr. Co.*, **10 Mass. App. Ct. 360**, 362 (1980)).

IV. More Challenges on the Horizon?

The AG’s recent bid protest decisions applying the *Brasi* totality of circumstances test underscore that in Massachusetts, all public and privately-owned P3 projects are well-advised to continue to consider carefully the applicability of the statute and all other public construction requirements ^[xiii] when one or more of the following “red flags” of potential challenge is present: (1) direct or indirect public ownership in part or all of the project, (2) public or quasi-public financing in the form of equity or debt, or assumption of risks or provision of guarantees, (3) significant public entity control over the construction, rehabilitation, or design of the project, and/or (4) construction to serve a specific public purpose or public use. By addressing the legal requirements for public construction early, P3 projects will be optimally positioned to provide badly needed affordable housing efficiently, with quality construction, within budget, and in a timely manner, and avoid costly public relations hiccups and litigation.

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[i] The U.S. General Accounting Office defines “public-private partnerships” as joint efforts between the public and either the private for-profit or private nonprofit sectors.

[ii] All five Greater Boston counties rank **nationally in the top 10 percent for income inequality**. The median rent of **\$2,450** for a one bedroom apartment in Boston in 2019 is unaffordable for most lower-income and working-class households.

[iii] “Public housing” refers to federal public housing in this article unless otherwise specified. Public housing is funded exclusively by Congressional appropriations. HUD administers the public housing operating and capital funds appropriated by Congress to approximately 3,300 public housing authorities (“PHAs”). However, Massachusetts (along with New York, Connecticut, and Hawaii) also has a state public housing program comprised of more than 240 local PHAs and overseen by the Massachusetts Department of Housing and Community Development (“DCHD”) which also faces a \$2 billion capital funding shortfall.

[iv] In Massachusetts, “public construction” falls generally under two categories of either “vertical construction” of “public buildings” governed by G.L. c. 149, or “horizontal construction” of “public works” governed by **G.L. c. 30, § 39M**. Generally, the vertical projects are subject to more requirements than the horizontal projects. The AG has jurisdiction to investigate bid protests in both vertical and horizontal construction.

[v] See e.g., *Andrews v. City of Springfield*, **75 Mass. App. Ct. 678** (2009) (standing for group of city residents); *Associated Subcontractors of Mass., Inc. v. Univ. of Mass. Bldg. Authority*, **442 Mass. 159** (2004) (standing for subcontractors’ association); *East Side Const. Co. v. Town of Adams*, **329 Mass. 347** (1952) (standing for group of taxpayers).

[vi] Lease backs typically involve creative arrangements where a public entity leases land to a private developer (often for a *de minimus* amount) in exchange for the developer’s promise to build on the land and then enter into a [sub]lease-to-own agreement for the construction with the public entity. See, e.g., *Andrews v. City of Springfield*, **75 Mass. App. Ct. 678**, 679 (2009) (invalidating lease and option to purchase because “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” which Springfield did not follow).

[vii] RAD allows for significant PHA discretion in how the public-private interdependence is structured. At a minimum, RAD conversions of public housing to the more reliable Section 8 platform allow PHAs greater **access to private financing and on better loan terms for renovations**. See, e.g., Fischer, Will. 2014. “**Expanding Rental Assistance Demonstration Would Help Low-Income Families, Seniors, and People with Disabilities**.” Center on Budget and Policy Priorities. See also, Meryl Finkel, Ken Lam, Christopher Blaine, R.J. de la Cruz, Donna DeMarco, Melissa Vandawalker, Michelle Woodford. (Nov. 2010). **Capital Needs in the Public Housing Program**.

[viii] HHA separately undertook the “horizontal” improvement of the public works for Lyman Terrace through grants. HHA used a contractor selected through a competitive bid process but subsequently contracted with a TCB affiliate to complete the site improvement.

[ix] The Low-Income Housing Tax Credit (LIHTC), created by the Tax Reform Act of 1986, is now the **most significant private incentive for affordable rental housing production** in the United States, involving more than 3.13 million housing units placed in service between 1987 and 2017.

[x] Some have argued that the *Brasi* totality of circumstances test applies only in similar “build to lease” or “lease back” scenarios.

[xi] The Public Agency loans impose certain affordability, unit-mix, tenant-selection, and other use restrictions for 52 years, after which the units can be converted into market-rate housing under **G.L. c. 40T, § 3**.

[xii] While the AG is charged with enforcing the state’s prevailing wage statute, the Massachusetts Department of Labor Standards is tasked with issuing state prevailing wage schedules and making applicability determinations, *Felix A. Marino Co. v. Comm’r of Labor and Indus.*, **426 Mass. 458**, 460 (1998), and has adopted *Brasi*’s totality of the circumstances test for determining whether a project is a “public work” subject to the prevailing wage law. See e.g., *Re: Construction of Leasehold Space in*

Private Buildings by Charter Schools for the Purpose of Use as a School, Prevailing Wage Program Opinion Letter (Feb. 22, 2012). Notably, projects that are covered by the state’s prevailing wage statute, G.L. c. 149, § 26–27 are not necessarily subject to the competitive bidding statute and vice versa. This is because, for example, there are amount thresholds in the Competitive Bidding Statute not applicable to the Prevailing Wage Statute, and whereas the bidding laws cover “buildings by a public agency,” the prevailing wage laws apply to “public works.”

[xiii] Other issues that may affect P3 projects in addition to competitive bidding requirements include whether it is federal, state or local, such as relates to: (1) prevailing wages, (2) work force policy mandates relating to DBE, WBE, LBE, etc. (3) procurement restrictions on materials and equipment, (4) bonding requirements, and (5) mechanics lien rights, and (6) even the timing of presentation of claims or commencing an action or the applicability of sovereign immunity or limits on damages.