PIERCE, DAVIS & PERRITANO, LLP
SPRING 2013 NEWSLETTER
DEVELOPMENTS IN MUNICIPAL LAW

Preliminary Injunction Denied to Abutters of Wind Turbine: McKeever v. Board of Health of Town of Scituate, PLCV2012-01424 (Mass. Super. Ct. 2013).

PD&P successfully opposed the efforts of Scituate residents seeking to shut down a private wind turbine built on property leased from the town. On January 15, 2013, Plymouth Superior Court Judge Charles Hely denied a Motion for Preliminary Injunction brought by Scituate residents, Mark and Lauren McKeever. The McKeever home abuts the Scituate wastewater treatment plant where, in 2012, Scituate Wind, LLC, constructed a wind turbine standing 263 feet high, with three blades that measure 132 feet in length. On December 14, 2012, the McKeevers filed suit in Plymouth Superior Court against the Scituate Board of Health, claiming the turbine was causing them and their children a variety of health problems. Among the relief requested, the McKeevers sought to compel the Board of Health to exercise its authority under M.G.L. c. 111, § 123, by determining that the turbine constituted a private nuisance harmful to the public health which, therefore, must be abated. They further demanded that the Board issue an order requiring the turbine operator to cease and desist from all further operations.

In April 2010, the Scituate Planning Board issued a special permit to Scituate Wind authorizing the construction of a wind turbine on town property adjacent to the municipal wastewater treatment plant. Around the time Scituate Wind received its special permit, the McKeevers obtained a settlement payment from Scituate Wind in return for a signed release wherein they agreed not to challenge any permits granted to install the turbine. In exchange for the McKeevers' silence, Scituate Wind paid them $20,000 and agreed to plant six trees on their property to serve as a sound and sight barrier. Despite the language of the release, the McKeevers nonetheless sued the Board of Health complaining of noise and shadow flicker allegedly created by the turbine.

About the Firm

The partners of PD&P bring more than a century of litigation and trial experience to the firm. Our team of experienced and diverse associates is well-trained. We guarantee a quick and thoughtful response to each client's particular needs, as well as creative solutions to litigation.

PIERCE, DAVIS & PERRITANO, LLP
90 Canal Street
Boston, MA 02114
(617) 350-0950
www.piercedavis.com

In support of their Motion for Preliminary Injunction, the McKeevers admitted that the Planning Board had signed off on the special permit, but argued that the Board of Health did not, and that such approval (so they alleged) was also required. The McKeevers also submitted a videotape of shadow flicker inside their home and letters from health care providers as evidence that the health of their family was being negatively affected by the turbine's operations.

Following a hearing, Judge Hely denied the Motion, ruling that the McKeevers failed (on several grounds) to meet the requirements for injunctive relief under Mass. R. Civ. P. 65(c) and Packaging Inds. Group, Inc. v. Cheney, 380 Mass. 609 (1980). First, plaintiffs failed to show a reasonable likelihood of success on the merits in that they did not adequately demonstrate "that the wind turbine is a public health nuisance that must be immediately shut down." That question, reasoned the Judge, remained an "open issue" still pending before the Board of Health. Second, plaintiffs failed to show a substantial risk of irreparable harm should their request for injunctive relief be denied. Plaintiffs provided the Court with only limited evidence to support their claims regarding the adverse health effects of shadow flicker and noise. In light of such limited showing, Judge Hely was clearly reluctant to interfere with the orderly and lawful proceedings of the Board of Health.

Finally, in balancing the plaintiffs' risk of irreparable harm against the potential harm to the town if such injunctive relief was granted, Judge Hely adopted a cautious and practical approach. "There is a substantial public interest in not interfering with lawful pending proceedings of the local governmental body with primary jurisdiction over the matter." After the Court denied their Motion for Preliminary Injunction, the McKeevers voluntarily stipulated to a dismissal of their Complaint.

Not mentioned in the Court's decision, but worth noting, is that, in January 2012, the Massachusetts Department of Environmental Protection and Massachusetts Department of Public Health issued a joint Wind Turbine Health Impact Study concerning the alleged adverse health effects of wind turbines. The Study is the product of a panel of independent experts mandated "to identify any documented or potential health impacts of risks that may be associated with exposure to wind turbines, and, specifically, to facilitate discussion of wind turbines and public health based on scientific findings." The experts' opinion, as stated in the Study, is that while "it is possible" that noise from some wind turbines can cause sleep disruption, "[t]here is insufficient evidence that noise from wind turbines is *directly (i.e., independent from an effect on annoyance or sleep)* causing health problems or disease." (emphasis added).

At present, at least seventeen communities in Eastern Massachusetts have working wind turbines and others have turbines under construction. According to the Massachusetts Clean Energy Center ("MassCEC"), there are currently 24 wind projects throughout the Commonwealth generating over 46 megawatts of clean, efficient energy. Debate about the adverse health effects of wind turbines on those living in close proximity to them will no doubt continue before local boards, at town meetings and in the courts. But Judge Hely, for one, was not prepared to order a wind turbine shut down pending the outcome of that debate.

Case Comments

Massachusetts Appeals Court Reverses Retirement Forfeiture of Child Molester: Retirement Bd. of Maynard v. Tyler, 83 Mass. App. Ct. 109 (2013).

Not all criminal misconduct by a member of a government retirement system will result in a forfeiture of the member's pension. Rather, forfeiture depends on a showing that the member was convicted "of a criminal offense involving violation *of the laws applicable to his office or position . . ..*" M.G.L. c. 32, § 15(4) (emphasis added). Massachusetts courts have consistently interpreted this provision narrowly. State Bd. of Retirement v. Bulger, 446 Mass. 169, 174-75 (2006). In Gaffney v. Contributory Retirement Appeal Bd., 423 Mass. 1 (1996), the Court announced that, in order to invoke the forfeiture provision of Section 15(4), there must be a showing of a nexus or "direct link" between the crime(s) committed and the nature of the member's particular office or position. Id., at 5. "[T]he General Court did not intend pension forfeiture to follow as a sequalae of any and all criminal convictions. Only those violations related to the member's official capacity were targeted." Id.

Recently, the Massachusetts Appeals Court gave the pension forfeiture statute its requisite "narrow" interpretation, but in a split decision. Retirement Bd. of Maynard v. Tyler involved a Maynard firefighter, Anthony Tyler, who resigned and applied for retirement benefits on the same day of his indictment on charges arising out the sexual molestation of a neighbor's (a fellow firefighter's) minor child. Eventually, Tyler pleaded guilty to three counts of indecent assault and battery on a person fourteen years or older, and was sentenced to three years and a day in prison. After a second sexual abuse victim came forward (the relative of another firefighter), Tyler again pleaded guilty and another three year and a day prison sentence was added to the one already being served.

Because the molestations were committed on a son and a relative of fellow firefighters, and because firefighters are duty bound to protect the public, the Maynard Retirement Board concluded that there was a direct link between Tyler's offenses and his position. Accordingly, it suspended Tyler's pension benefits. A Superior Court judge subsequently agreed with the Board and upheld the pension forfeiture pursuant to M.G.L. c. 32, § 15(4).

But the Appeals Court reversed. Writing for the majority, Judge Kantrowitz felt "constrained" to rule that, although Tyler became acquainted with his victims through other firefighters, his offenses were nonetheless "personal in nature" and occurred outside the firehouse while the perpetrator was off duty. Further, there was "no evidence that Tyler used his position, uniform, or equipment for the purposes of his indecent acts, nor were the acts committed on department property." To the Board's criticism that, as a firefighter, Tyler was obligated to protect the public, not harm its individual members, Judge Kantrowitz rejected such an interpretation of the statute as too broad; if adopted, it would "engulf nearly every public official, especially police officers and firefighters, convicted of any crime." Quite simply, the link between one's actions and his official position must be more "direct." The Appeals Court, therefore, reversed the decision below and ordered Tyler's pension restored.

In a compelling dissent, Judge Graham admonished the majority by pointing out that certain forms of employment "carry a position of trust so peculiar to the office and so beyond that imposed by all public service that conduct consistent with this special trust is an obligation of the employment." Perryman v. School Comm. of Boston, 17 Mass. App. Ct. 346, 349 (1983). Firefighters, he insisted, are in such a position. Specifically, firefighters and EMTs are "mandated reporters" required to report incidents of suspected neglect or abuse of a child to the Department of Children and Families. M.G.L. c. 119, § 51A. Here, Tyler was sentenced to prison for sexually abusing children, "the very type of criminal behavior he was required by law to report." As a result, his convictions amply demonstrated "a violation of the public trust as well as a repudiation of his official duties [as a firefighter.]" Under such circumstances, Judge Graham was more than satisfied that Tyler's actions and his office or position were directly linked.

The Maynard case highlights one of the most difficult decisions a retirement board is ever called upon to make – whether to disqualify a member from receiving his or her retirement allowance because of wrongdoing. Yet, even when confronted with criminal misconduct of the most egregious and harmful nature, boards are still constrained in enforcing the forfeiture provisions of M.G.L. c. 32, § 15(4). The Maynard case, however, is not necessarily over. On February 6, 2013, the Retirement Board of Maynard filed an application for further appellate review to the Supreme Judicial Court. On February 19, 2013, counsel for Tyler filed an opposition to that application. As of the date of publication of this Newsletter, the SJC had not yet ruled on the Board's application. If further appellate review is granted, retirement boards may soon receive further guidance from the SJC on the required crime/position nexus.

First Circuit Rejects Class-of-One Equal Protection Claim by Veterans' Charity: Middleborough Veterans' Outreach Center, Inc. v. Provencher, 2013 WL 135719 (1st Cir. 2013).

In a recent unpublished decision, the United States Court of Appeals for the First Circuit illustrated (once again) the difficulty of challenging governmental action under a class-of-one equal protection theory. In September 2010, Paul Provencher, the Veterans' Agent for the Town of Middleborough, wrote letters to local newspapers warning area residents to exercise caution before donating to veterans' charities that used telemarketing or direct solicitation to raise funds. Specifically, Provencher wrote:

> There are a lot of administrative costs associated with telemarketing and direct contact solicitation and more than likely less than 20% of the money raised helps the cause you are being solicited for.

One newspaper published Provencher's letter; another wrote an article based on the letters which quoted the Veterans' Agent as stating that his purpose "was to point out that many nonprofits say they are helping veterans but have high administrative costs."

In April 2011, the Middleborough Veterans' Outreach Center, Inc. ("MVOC"), one of only two charities with high administrative costs specifically identified in Provencher's letters, filed suit against the Veterans' Agent under 42 U.S.C. § 1983, claiming it was unjustly singled out for official

condemnation in violation of the Equal Protection Clause of the Fourteenth Amendment. On cross-motions for summary judgment, Judge Tauro disagreed and ruled in favor of Provencher. MVOC appealed. On January 11, 2013, the First Circuit affirmed the decision below.

In Village of Willowbrook v. Olech, 528 U.S. 562 (2000), the United States Supreme Court expanded the "traditional" equal protection remedy beyond members of protected classes or groups to include those in a class-of-one who have "been intentionally treated differently from others similarly situated and . . . there is no rational basis for the difference in treatment." Id., 528 U.S. at 564. This expansion, however, was not a broad one. When properly focused, a class-of-one plaintiff vindicates the basic principle of "uniform treatment of persons standing in the same relation to the governmental action questioned or challenged." Reynolds v. Sims, 377 U.S. 533, 565 (1964). Yet, the label cannot "transform every ordinary misstep by a local official into a violation of the federal Constitution." 2013 WL 135719, *3, *citing* Cordi-Allen v. Conlon, 494 F.3d 245, 255 (1st Cir. 2007). Moreover, some government actions remain "ill-suited to judicial oversight under the class-of-one formula." 2013 WL 135719, *3, *citing* Engquist v. Oregon Dep't of Agriculture, 553 U.S. 591, 602 (2008) (holding class-of-one theory inapplicable to government employment setting).

To prevail under a class-of-one theory, a plaintiff must first show, with respect to the challenged government action, that he was similarly situated to others who were treated differently. Then, he must demonstrate that there was no rational basis for such difference in treatment. According to the First Circuit, MVOC stumbled (and fell) over the first hurdle. Although MVOC and Provencher agreed on the identities of plaintiff's comparators – those veterans' charities treated differently by the Veterans' Agent (*i.e.,* not singled out in his letters) – they disagreed over the characteristic relevant to such disparate treatment. MVOC claimed it was "similarly situated" to the unidentified comparators because they were all private, local charitable organizations that provided free veterans' services and did not employ professional solicitors. Provencher, on the other hand, claimed that MVOC was unlike the other local veterans' charities because a much greater percentage of its donations was applied to administrative costs and overhead, not to aid area veterans. In other words, the relevant characteristic (according to Provencher) was the aid-to-overhead ratio and, on this criterion, MVOC and its comparators were not "similarly situated." Thus, any difference in their treatment – singling out MVOC, but not the other charities – was not an equal protection violation. The First Circuit agreed.

In affirming summary judgment, the First Circuit added that it was plaintiff's burden to show that it was similarly situated to those treated differently. Thus, if its aid-to-overhead ratio was, in fact, similar to the ratios of its comparators, it was incumbent upon MVOC to come forward with evidence of such similarity. MVOC failed to do so. As if class-of-one cases are not already difficult for equal protection plaintiffs to advance, the relevant characteristic and burden of proof issues addressed in the MVOC case clearly exemplify the disfavor with which the First Circuit views such claims.

Public Employee Indemnification Under Section 9 of Massachusetts Tort Claims Act Held Strictly Discretionary: Williams v. City of Brockton, 2013 WL 254778 (D. Mass. 2013).

In a recent unpublished decision, the United States District Court for the District of Massachusetts, confirmed that public employee indemnification under M.G.L. c. 258, § 9, of the Massachusetts Tort Claims Act ("MTCA"), is not mandatory but, instead, may be decided by a public employer on a case-by-case basis. In Williams v. City of Brockton, Lon Elliot, a former Brockton police officer, sought an order directing the City to indemnify him in the same manner and to the same extent it was indemnifying other police officers named as defendants in the same suit. Elliot contended such relief was warranted under Section 9 of the MTCA which provides that a public employer "may" indemnify a public employee for financial loss and expenses arising from the defense of certain civil actions – namely, intentional torts and civil rights violations – under two conditions. First, the employee must have been acting within the scope of his official duties or employment. Second, any civil rights violation must not have resulted from the employee's grossly negligent, willful or malicious misconduct. M.G.L. c. 258, § 9. In addition, indemnification under Section 9 cannot exceed one million ($1,000,000) dollars.

Elliot's demand arose in the context of a civil rights action brought against him and three other former and present Brockton police officers by Ken Williams, another former officer. In his Complaint, Williams alleged that, among other things, the defendant police officers had falsely arrested a minority citizen. During that arrest, Elliot (Williams' supervisor) allegedly made several racially-offensive remarks and refused to acknowledge evidence that the arrest warrant was invalid. After Williams encouraged the citizen to report his mistreatment to the Department, Elliot allegedly retaliated against him by obstructing plaintiff's unrelated on-duty injury claim. An investigation into Elliot's role in the arrest ultimately led to his termination from the Department for cause.

When Williams filed suit, the City agreed to defend the other officers, but refused to defend or indemnify Elliot on the grounds that his termination was for cause. Elliot acknowledged that Section 9 indemnification is discretionary, but nonetheless insisted that the City must provide a "sound justification" for its refusal to defend him while defending other officers sued under the same set of circumstances. Absent such justification, Elliot claimed, indemnification was required.

Magistrate Dein disagreed. Section 9 grants public employers the authority to indemnify employees under certain conditions, but does not require them to do so. Nor does the statute impose any obligation on public employers to treat employees equally or to provide support for a refusal to indemnify. "Even if the City's decision may arguably appear unfair given its agreement to represent the remaining police officers in this action, the plain language of Section 9 does not support Elliot's reading of the statute, and does not provide grounds for the requested relief." 2013 WL 254778, *5.

If a public employer should adopt Section 13 of the MTCA, employee indemnification may indeed be compulsory under certain conditions. Likewise, a collective bargaining agreement may require indemnification against those claims specifically described in the agreement. But as a source of mandatory public employee indemnification, Section 9 of the MTCA falls far short.

Legal Fees Charged to Developer by Town Prohibited Under Anti-Snob Zoning Act: Zoning Board of Appeals of Sunderland v. Sugarbush Meadow, LLC, 464 Mass. 166 (2013).

Following the Sunderland ZBA's denial of its application under M.G.L. c. 40B, §§ 20-23 (commonly referred to as the "Anti-Snob Zoning Act"), to build five three-story buildings with a total of 150 rental apartments, the developer, Sugarbush Meadow, LLC, successfully appealed to the Housing Appeals Committee (HAC) of the Department of Housing and Community Development. The HAC overturned the ZBA's denial and directed the board to issue the comprehensive permit. In an administrative appeal taken under M.G.L. c. 30A, § 14, the Franklin Superior Court affirmed the HAC decision. The Supreme Judicial Court subsequently granted the ZBA's application for direct appellate review and, in an opinion written by Judge Gants, affirmed the HAC order directing Sunderland to issue the comprehensive permit to Sugarbush.

In its lengthy opinion, the SJC touches on a variety of issues, including the need for low-to-moderate income housing, fire safety, application of the Massachusetts State Building Code, the fiscal impact of large-scale housing projects on local communities, and town counsel fees. On appeal, the ZBA contended that (1) the height of the proposed three-story structures would hinder the Sunderland Fire Department from adequately responding to a fire; (2) the Town maintained an unusually high percentage of affordable housing; (3) the proposed project would be financially burdensome to the community; and (4) the proposed project violated local wetlands protection bylaws. In according great deference to the HAC's experience, competence and specialized knowledge, the Franklin Superior Court and the SJC rejected all arguments advanced by the Town.

Of particular note was the Court's affirmation of the HAC's determination that the Town's comprehensive permit rule, which required submission of an additional $5,000 to $10,000 application fee for "legal services," was prohibited under state regulations codified at 760 CMR §§ 56.00, *et seq.*, as well as under Chapter 40B. Rule 3.02 of the Comprehensive Rules of the Sunderland ZBA required that, in addition to the standard application filing fee, an applicant shall submit $5,000 to $10,000 (depending on the size of the project) "to pay for the services of legal counsel." The Rule further stated: "[t]his cost is a reasonable estimate of the administrative costs for counsel retained to assist the Board with the multitude of legal issues that must be explored."

The HAC recognized that state regulations authorize local boards to assess certain fees during the comprehensive permit review process, such as a "reasonable filing fee to defray the direct costs of processing applications…," and "review fees" to hire consultants to review technical aspects of a proposal. 760 CMR §§ 56.05(2), 56.05(5). However, as the HAC further pointed out, the regulations

explicitly prohibit the assessment of "[l]egal fees for general representation of the Board." 760 CMR § 56.05(5)(a). The Town admitted the Rule 3.02 charge was not a permissible consultant's fee under Section 56.05(5), but nonetheless argued that it was reasonably assessed for "administrative costs for counsel" necessitated by the "novelty and complexity" of the proposal. As such, the charge was permissible (the Town insisted) under Section 56.05(2) "to defray the direct costs of processing applications." The HAC rejected the Town's argument and found the Rule 3.02 assessment constituted a fee charged for "general representation of the Board" as prohibited under 760 CMR § 56.05(5)(a). While recognizing that a board may assess a consultant's fee under Section 56.05(5) where an attorney's specialized legal expertise is needed to review technical aspects of a proposal, the Sunderland charge was nothing more than an inappropriate assessment designed to defray the legal fees for general representation of the ZBA during the local hearings and on appeal to the HAC.

In light of this decision, municipalities should ensure that their rules governing the comprehensive permit application process, as established pursuant to state mandate, are consistent with the purposes of M.G.L. c. 40B, §§ 20-23 – *i.e.,* to provide a streamlined permitting process that overcomes regulatory barriers to the development of low-to-moderate income housing. Any fee deemed inconsistent with state regulations will be considered such a barrier and shall be struck down as a frustration to the Anti-Snob Zoning Act.

Eighth Circuit Upholds Drug Dog Survey of High School Classroom Against Fourth Amendment Challenge: Burlison v. Springfield Public Schools, 708 F.3d 1034 (8th Cir. 2013).

The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." Most Fourth Amendment cases that arise in the context of public schools involve alleged unreasonable *searches* – whether of students, lockers, purses or cell phones. Recently, however, the United States Court of Appeals for the Eighth Circuit was asked to decide whether the backpack of a high school freshman was unlawfully *seized* by local sheriff's deputies and school officials during a brief drug dog survey conducted of his science classroom. Without deciding whether plaintiff's temporary separation from his backpack constituted a "seizure," the Eighth Circuit ruled that, even if it did, such a seizure was not "unreasonable" and, therefore, not unconstitutional.

The Burlison case presents a rather curious "so what?" scenario. At the request of school officials, deputies of the Greene County sheriff's department agreed to conduct a drug dog survey of randomly selected areas within Central High School in Springfield, Missouri. One area selected was plaintiff's science classroom. Before the dogs performed their drug-sniffing activities, deputies instructed the teacher and students to exit the classroom, but leave all personal belongings (backpacks, purses and other items) behind. During the ensuing five-minute survey, no dogs alerted and no student possessions were searched. The plaintiff, meanwhile, was required to wait patiently in the hallway where (so he claimed) he "could no longer see his belongings."

Despite the fact that no drugs, alcohol, weapons or other unlawful items were found by the dogs, and despite the fact that the freshman was not singled out or disciplined for any wrongdoing whatsoever, the plaintiff filed suit against the school, school officials and sheriff under 42 U.S.C. § 1983, for the alleged violation of his civil rights. The drug dog survey, he claimed, was an unreasonable seizure of his property in violation of the Fourth Amendment. The United States District Court for the District of Western Missouri disagreed and granted summary judgment in favor of all defendants; on appeal, the Eighth Circuit affirmed.

The Court of Appeals acknowledged that students retain their Fourth Amendment rights against unreasonable searches and seizures, but such rights "are different in public schools than elsewhere." 2013 WL 776816, *3, *quoting* Vernonia School Dist. 47J v. Acton, 515 U.S. 646, 656 (1995). This is because public schools have a "legitimate need to maintain an environment in which learning can take place." Id., *quoting* New Jersey v. T.L.O., 469 U.S. 325, 340 (1985). This includes providing a drug-free environment in which all students can safely learn. Thus, in a public school setting, probable cause is not required to justify a search or seizure. Rather, a reasonableness inquiry balances the nature of the intrusion on the student's Fourth Amendment rights against the promotion of legitimate governmental interests.

In Burlison, the Eighth Circuit struck that balance firmly in favor of school officials. Without deciding whether plaintiff's separation from his backpack qualified as a "seizure" within the meaning of the Fourth Amendment, the Court reasoned that, even if it did, any intrusion on plaintiff's rights was "minimal." Clearly, plaintiff's freedoms "were not unreasonably curtailed by his brief separation from his possessions because he normally would not have been able to access or move his backpack during class time without permission." Id., *4. On the other hand, the school district, in support of its motion for summary judgment, demonstrated an immediate need for the drug dog procedure by offering "substantial evidence" of a critical drug problem within its schools. In plaintiff's freshman year alone, Central High School recorded 154 drug-related incidents. As the Supreme Court has expressly recognized, drug problems in schools are "serious in terms of size, the kinds of drugs used, and the consequences of that use both for our children and the rest of us." Id., *5, *quoting* Board of Ed. of Ind. School Dist. No. 9 of Pottawatomie County v. Earls, 536 U.S. 822, 839 (2002). The serious health risks that drugs pose to children – including the risks of accidental overdose and death – more than outweighed any intrusion on plaintiff's rights caused by the temporary "seizure" of his backpack during the five-minute survey.

Schools wrestling with the very real and serious problems posed by drugs, alcohol, weapons, sexual assaults and bullying, and which adopt clear and comprehensive policies aimed at protecting a safe learning environment for all students, should find encouragement in Burlison. The lessons of the 1985 Supreme Court decision in T.L.O. still survive. Absent heavy-handed or overly-intrusive activities, public schools should remain protected from civil rights liability as long as the search or seizure is justified at its inception and, as conducted, is reasonably related in scope to the circumstances that justified such interference in the first place.

PD&P Notable Victories

School Held Immune for Student-on-Student Injury Suffered in Gym Class: Fleurant v. Town of Tewksbury, MICV2009-04423 (Mass. Super. Ct. 2012).

PD&P recently obtained summary judgment in favor of the Town of Tewksbury in an action involving a high school student who was injured while playing handball in gym class. In Fleurant v. Town of Tewksbury, the plaintiff sued the Town for negligence, claiming he fractured his ankle while playing handball when a fellow gym class student tackled him. In his Complaint, the plaintiff faulted the gym teacher for 1) forcing the students to play an "inherently dangerous" game; 2) instructing students to tackle one another on the gymnasium floor; and 3) failing to provide students with protective gear. Originally, the Town moved to dismiss the Complaint on the grounds it was immune under Section 10(j) of the Massachusetts Tort Claims Act (MTCA), which bars claims against public employers for the failure to prevent or diminish the harmful consequences of a condition or situation not originally caused by such employer, including the "violent or tortious conduct of a third party." In denying the Town's Rule 12(b)(6) Motion, Superior Court Judge Christine McEvoy specifically relied upon plaintiff's allegations that the teacher *affirmatively* participated in creating the harmful environment by specifically instructing students to tackle one another during the game. She held that such allegations, if true, would divest the Town of immunity under Section 10(j), but nonetheless invited the Town to file a Motion for Summary Judgment at the close of discovery if plaintiff's allegations should prove unfounded.

Judge McEvoy's invitation proved prophetic. At the close of discovery, not only was there no evidence to support the allegations regarding the teacher's instructions, but plaintiff's own sworn deposition testimony directly contradicted the same. Specifically, plaintiff admitted that the game of handball was not (in his estimation) an inherently dangerous one; indeed, it was no more physical than basketball. Further, plaintiff testified that the teacher expressly forbade the students from tackling and engaging in rough play of any kind during gym class. Finally, protective gear would not have prevented plaintiff's ankle injury. In the face of such testimony, Judge McEvoy allowed the Town's Motion for Summary Judgment based, again, on Section 10(j) immunity.

The Fleurant decision offers a welcome dose of protection to educators for student-on-student injuries. Since the Supreme Judicial Court decision in Brum v. Town of Dartmouth, 428 Mass. 684 (1999), Section 10(j) has afforded public schools with substantial immunity from suit for the failure to prevent one student from injuring another. More than a decade later, in Gennari v. Reading Public Schools, 77 Mass. App. Ct. 762 (2010), the Appeals Court ruled that Section 10(j) immunity was nonetheless unavailable to a public school for a claim brought against it by a first-grader who was injured during outdoor recess when he fell and struck his face on a concrete bench after being pushed from behind by another student. The Gennari Court reasoned that a jury might fairly view the principal's "affirmative decision" to conduct recess in the area of the benches was the "original cause" of the student's injury, thereby divesting the school of Section 10(j) protection. The Gennari decision is in tension with Brum and its progeny, under which courts have routinely held student assailants the "original cause" of the condition or situation that results in harm to his fellow students.

Jury Verdict: Aldrich v. Town of Milton, U.S. District Court (D. Mass.) C.A. No. 09-cv-11282

Firm partner John Cloherty successfully obtained a defense verdict in favor of a Milton police officer after a five-day jury trial in federal court held before Judge William Young. The lawsuit arose out of an investigatory traffic stop of a suspect vehicle by an officer of the Milton Police Department following an early morning break-in of an occupied home near the Milton-Boston border. A neighbor reported seeing a man run from behind the house and speed away from the neighborhood in a dark-colored SUV with a loud engine noise. The witness observed the SUV turn north towards the Boston line as it fled. A Milton police officer drove over the Boston line and immediately encountered a matching vehicle driving without headlights on. During a brief investigatory stop, the Milton officer recognized the driver from a prior arrest for breaking and entering in the early morning hours in Milton. The Milton officer detained the suspect for approximately 10 minutes until Boston police officers arrived and arrested the suspect for driving without a license. A later inventory search of the vehicle revealed numerous stolen goods from several housebreaks in Dorchester, Quincy and Waltham. The criminal court, however, suppressed the evidence, ruling that Milton police were not authorized to conduct the stop within the City of Boston. This ruling prompted the suspect to sue the Town and various police officers under 42 U.S.C. § 1983 alleging violation of his civil rights. By the time of trial, plaintiff was representing himself *pro se*, and serving a 20-year sentence as an habitual offender following a conviction for a subsequent burglary. After hearing all the evidence. the jury rapidly concluded that plaintiff's civil rights were not violated and returned a verdict in favor of all police and municipal defendants.

Legislative Updates

Attorney General Rules Municipalities Cannot Ban Medical Marijuana Centers.

On March 13, 2013, the Massachusetts Attorney General's office ruled that communities within the Commonwealth cannot ban the establishment of medical marijuana treatment centers within their borders, but can impose reasonable zoning restrictions on the dispensaries. Specifically, the Attorney General struck down a Wakefield bylaw that would have prohibited such treatment centers, but separately approved a bylaw adopted in Burlington that places a moratorium on such facilities until the town completes a further study of various zoning issues. In November 2012, Massachusetts voters approved a ballot question allowing the use of marijuana for the treatment of certain medical conditions. The new law permits as many as 35 dispensaries to be opened throughout the Commonwealth where a patient can receive up to a 60-day supply of marijuana.

In rejecting Wakefield's proposed outright ban, the Attorney General wrote that ,"[t]he [law's] legislative purpose could not be served if a municipality could prohibit treatment centers within its borders, for if one municipality could do so, presumably all could do so." (Following Wakefield's lead, similar bans were adopted in Reading, Melrose and Peabody.) The Attorney General added, however, that there was nothing to prohibit cities and towns from adopting zoning rules for the treatment centers that could, for example, restrict where a dispensary could be located. Following the Attorney General's ruling, the Wakefield Board of Selectmen voted, on March 25, 2013, to appeal the Attorney General's ruling to Superior Court and to request Town Meeting to adopt a one-year moratorium on local dispensaries.

The law allowing the use of marijuana for patients with serious medical conditions took effect on January 1, 2013. On April 5, 2013, Massachusetts Department of Public Health issued proposed regulations. The public comment period for the proposed regulations recently expired on April 20, 2013.

Pursuant to M.G.L. c. 40, § 32, all town bylaws must be submitted to the Attorney General's office for review and approval before they take effect. If the Attorney General rejects a proposed bylaw because it violates state law, the town may take an appeal to the Superior Court. The Attorney General, however, does not have power to review and reject ordinances passed by cities; city ordinances can only be challenged in the courts.