

Massachusetts Municipal Association



**HANDBOOK FOR
MASSACHUSETTS SELECTMEN**



Fourth Edition

Handbook For Massachusetts Selectmen

Fourth Edition

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Massachusetts Municipal Association

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Dedication

*The 2014 edition of the Handbook for Massachusetts Selectmen is dedicated to
Needham Selectman Jerry Wasserman
1947-2013*

The Massachusetts Selectmen's Association acknowledges the lasting contributions and passion for government of Jerry Wasserman, former MSA President and longtime champion of local government and civic participation. Jerry's service to his community of Needham, and to the entire Commonwealth, exemplifies the highest standards of leadership, and he made his mark with humanity, humor, dignity and professionalism.

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CHAPTER 1

The Massachusetts Selectman – An Introduction

History of the Office of Selectman

Unlike some other offices in colonial America, the office of selectman was not imported from England but evolved here. Early in the history of the Commonwealth, towns had no regularly elected town officials. Town meetings would periodically “select” prominent citizens to perform the business of the town between town meetings. Gradually, town functions became involved enough to require more consistent supervision. Borrowing the concept of councils from their English heritage, the colonists began to elect between three and nine “selectmen,” or “townsmen,” to serve for fixed terms. In 1633, Dorchester (now part of Boston) was the first New England town to organize a local government, choosing twelve men as selectmen. Other Massachusetts towns quickly adopted this unique form of government.

Initially, the powers and duties of selectmen differed from town to town. In general, selectmen were required to carry out and enforce the votes of the town meeting, but they were granted additional authority over specific administrative areas of town government as well. During the late 17th century, the Massachusetts General Court began passing laws that shaped the character of the office. Selectmen were given significant authority over town finances, care of the poor, schools, admission of new residents into the town, roads and other public works, land regulation, local defense, and the appointment of other town officials not elected by the town meeting. Selectmen were almost solely responsible for the content of town meeting warrant articles until 1715, when the General Court passed a law requiring them to accept articles on the petition of ten or more property owners.

In colonial times, when the concerns of towns were simple and their populations were small, most “executive” business of towns was conducted by the board of selectmen. As Massachusetts grew and the activities of towns became increasingly sophisticated, selectmen were assigned greater responsibilities and authority while new elected officers and boards were entrusted with specialized functions, independent of selectmen control. Consequently, no single executive presided with comprehensive control of all “executive branch” agencies of towns.

Historically, as the senior administrative body in each town, the board of selectmen is that community’s principal elected executive board and serves as the town’s titular chief executive, within a limited frame of reference. This status is recognized by the Constitution of the Commonwealth and by statutes enacted over the years.

Massachusetts towns have either “weak” or “strong” selectmen systems of executive branch organization, according to the extent to which their boards of selectmen control town administrative activities. A “weak” selectmen system is characterized by the election of many town administrative officers and boards that are responsible directly to the local voters, and are, therefore, independent of selectmen supervision. In “strong” selectmen towns, the selectmen, the school committee, and possibly a few other executive officers and boards are elected by the voters, while most major administrative officials are appointed by the board of selectmen or by the town’s professional administrator.

[Note: This and other topics touched upon in this chapter are covered in much greater detail in later chapters.]

The Massachusetts General Laws authorize town voters to elect boards of three or five selectmen on an at-large basis, for terms of one or three years. In most towns, selectmen are elected annually for overlapping three-year terms.

A board of selectmen operates as a collective decision-making body. An individual member of the board may act independently only if specifically authorized by the board. One example of this is the chair, who often acts on behalf of the board on routine matters between meetings (such as setting appointments and scheduling). In most towns, the chair of the board of selectmen is chosen by the selectmen themselves, usually for a one-year term. In some towns, the position simply rotates among board members each year. Most boards reorganize, and elect a chair, at the first meeting following the local election.

Government by Committee

Some may think of selectmen as the all-powerful political leaders of the town, at the top of the governmental pyramid, but this is far from the truth. Selectmen have less authority in their towns than the governor does in the Commonwealth or the president does in the federal government, to say nothing of executives in the business world. While selectmen are the principal administrative officers of the town, other boards, including the school committee, the planning board, and the board of health, may wield at least as much authority over certain aspects of town government. Very often, the board of selectmen does not have the only word—or even the last word—on what gets done in town.

Town government in New England is largely government by committee, and the legal authority of selectmen is limited to actions taken by the board at a legally called, posted meeting with a majority of the board present. This structure, so different from what most people have experienced in their professional and social lives, is often a difficult adjustment for new selectmen.

If a board member wants to accomplish specific objectives, the member must find a way to work with the other members of the board and with other boards in town. This may be very difficult for a new board member who ran “against the board,” but an effective selectman must become an expert in the political arts of courtesy and compromise. There may be a need to build bridges to those who have not been supportive in elections while retaining existing support. Moreover, a selectman may have to decide if he or she should follow the wishes of the majority of citizens on issues or do what he or she believes is right.

Legal Authority

The board of selectmen’s formal, legal responsibilities are scattered throughout hundreds of state statutes as well as in a given town’s bylaws, home rule charter and special laws (special acts) enacted by the Legislature for that particular town. Boards of selectmen have general supervision over all matters that are not specifically delegated by law, or by vote of the town, to another officer or board.

While the specific role of selectmen is broad, it varies from town to town. Generally, boards of selectmen have at least several important responsibilities under state law:

- The power to prepare the town meeting warrant
- The power to make appointments to town boards and offices
- The power to employ professional administrative staff and town counsel
- The power to sign warrants for the payment of all town bills
- The authority to grant licenses and permits

(These responsibilities of selectmen are covered in detail in chapters 3, 4, 5 and 11.)

Coordination and Strategic Responsibilities

Apart from legal responsibilities, the board of selectmen can and should be the group in town that sets policy and strategic direction, coordinates the activities of other boards, and hears appeals and resolves problems that have not been settled at lower levels. If there is a professional administrator, the selectmen should work through him or her. In smaller towns, the selectmen should work through department heads. Sometimes, boards of selectmen misunderstand this broad policy role. They may overstep their bounds by getting involved in the daily operations of a department; or fail to set sound written policies or do long-range planning; or be too quick to try to solve problems that should be handled by the administrator, another board or town employees. There is more than enough for selectmen to do without getting bogged down in matters that are better delegated to someone else. The board's time is best spent by concentrating on making the whole of town government work.

Some suggestions for reaching this goal include the following:

- Ask each town official to develop an action agenda for the year that can be shared in a group forum.
- Hold regular meetings of all town officials, so that everyone can keep current on what others are doing.
- Bring together town officials, department heads, and citizen groups for organized discussions when major problems arise.
- Invite the town's state senator and representative to meet with the board and town organizations every few months for give-and-take discussions.

Leadership Responsibilities

An effective selectman has the ability to take the patchwork of laws and bylaws that comprise the board's authority and turn it into an action agenda that can be summed up in a single word: leadership. Leadership is the most important—yet least understood—role of a selectman. It involves both personal leadership and, perhaps more important, leadership by the board as a team.

Leadership may be best understood by describing what good leaders do. Effective leaders take up-front, visible roles. They make decisions based on facts, data and logic, even when these decisions are unpopular. They lead by example, not by words, power or manipulation. They look for the root cause of problems. And they recognize the difference between the right to take action and the wisdom, on occasion, not to.

Most boards are made up of citizens whose philosophies, priorities and personal ambitions differ. The effective board devises ways to work cooperatively—not necessarily unanimously—toward broad common goals. Teamwork can be developed if individual selectmen understand that effectiveness is not achieved by individual action, but by a board of selectmen acting in concert.

The behavior of the board of selectmen sets a tone for the town. A board that is frequently stymied by disagreements loses credibility with the public, other town officials and town employees. If members consistently try to overcome differences and seek to take new initiatives, it is far more likely that their lead will be followed.

Assuming the Office of Selectman

Once elected, the first order of business is to make arrangements to be sworn in. An incoming selectman must make an appointment with the town clerk for the swearing-in ceremony. The next step is to become familiar with town government, meet town employees, and learn the logistics of serving as a selectman.

A new selectman is advised to gather a number of resource materials, specifically:

- The town's charter (if one exists)
- The town bylaws
- The town's zoning bylaw
- The Massachusetts open meeting, public records and conflict-of-interest laws
- A list of key town officials and their phone numbers
- The phone number of each board member
- An organizational chart of town staff and officials
- Any written procedures that the board of selectmen has adopted
- The current year's budget
- The most recent town report

Selectmen should become familiar with the services offered by the Massachusetts Municipal Association (www.mma.org), the Massachusetts Department of Revenue (www.mass.gov/dor), and the Massachusetts Department of Housing and Community Development (www.mass.gov/dhcd).

Each new selectman should plan how he or she will relate to fellow board members, while

recognizing that other board members will be formulating plans of their own. Some new members may want to sit back and listen for a while, especially if there are several veteran board members.

Leaving Office

Selectmen may end their town service voluntarily, such as by moving out of town (selectmen must be residents of the town in which they serve), or they may fail to be re-elected when their term expires. Occasionally, a selectman may be recalled (see Chapter 3). A selectman who chooses to leave office must submit a resignation to the town clerk for it to become official.

Making a Difference

The position of selectman is steeped in nearly 400 years of tradition. Though they earn only a small stipend, if anything, for their work on behalf of their hometowns, selectmen have played significant roles over the years in shaping the future of their communities. They are looked to—by citizens and local government employees alike—for leadership and integrity, particularly in difficult times. Local government has changed dramatically since colonial times, but selectmen continue to be seen as the leaders of an increasingly complex enterprise.

CHAPTER 2

Selectmen and Public Decision Making

Conducting a Proper Meeting

Much of a selectman's work is done at public meetings. This is where decisions are made, policies are discussed and set, and the public's business is conducted. Meetings are the most frequent point of contact between the board and the public. Running a good meeting is, therefore, an important function of a selectman individually and the board of selectmen as a whole.

Running a proper meeting generally involves two distinct but related procedures. The state's open meeting law (addressed more fully below) establishes certain rules for running a meeting. Fundamentally, the law requires boards of selectmen—and all public bodies—to operate in an open and public manner. Some boards of selectmen also use an additional set of standards, called parliamentary procedure, or other local policies. [Locally adopted procedures cannot conflict with the open meeting law.] For example, some boards have a tradition of allowing the senior selectman to speak first on every issue. Others allow the newest selectman to start things off. Still others give preference to the selectman who suggested the agenda item, or they simply rotate the opening statement among board members.

Most boards operate with a combination of tradition and the personal style of the current chair. While there should be a degree of flexibility in the way a board conducts its business, it is a good idea to set out general operating procedures in writing, so that all members of the board understand the rules. Written rules of procedure, for actions such as the calling of meetings and the conduct of public hearings, also help to ensure that the board is complying with its legal requirements.

The objective—both in appearance and reality—should be to be fair, to maintain order, and to move the meeting along.

Role of the Chair

Being chair of the board does not mean forfeiting the right to vote or express an opinion. The chair, however, must be careful not to dominate the meeting. The powers of the chair—to prepare the agenda (see below), to call the items, and to recognize others to speak—give him or her enormous control over the way the meeting is conducted. A good chair will make the effort to ensure that the other selectmen are given an adequate chance to be heard.

The greatest challenge facing a chair is keeping the discussion moving forward. A delicate balance must be established, allowing members to express their views freely, but without getting bogged down in long-winded expressions of opinion. By addressing issues one at a time, in an orderly fashion, and by steering conversation away from irrelevant subjects or personality clashes, the chair can help to build consensus within the board.

The public and the press have a right to be present at any open meeting, but they do not have the right to participate unless the chair recognizes them. Nevertheless, it is important to make every effort to have each issue fully understood, not only by board members but by everyone present.

Courtesy and civility should be the characteristics of all members of the board of selectmen, and it is the responsibility of the chair to preserve decorum and prevent personalities, politics, and personal attacks from interfering with the process. The chair should rule inappropriate comments out of order and issue warnings to the offending parties.

Maintaining Decorum

Most board of selectmen meetings are calm events, but in some cases, depending on the subject being discussed, emotions can cause a meeting to become unruly. Failure to ensure common courtesy and maintain decorum is one of the easiest ways to lose control of a meeting—and, potentially, to commit an error that could lead to the reversal of an action of the board or, even worse, serious legal liability. Boards must resolve to treat all persons and matters fairly. To do less will weaken town government and cause problems.

The following are some examples of challenging situations that a board of selectmen may face:

- An applicant becomes argumentative upon learning that he needs a license or approval from the board, even though the law clearly requires it.
- An attorney representing a client starts an argument with the board or criticizes the board for a policy.
- Members of the public insist on making statements to the board, demand that the board discuss certain matters, or threaten board members.
- Members of the public express their opposition to a matter in a harsh manner.
- Members of the board disagree about the proper way to proceed on a matter.
- The law allows a matter to come before the board that is opposed by board members and a sizable segment of the community.

Some individuals may purposefully try to be disruptive in order to get a reaction from the board or individual members and then use that response to their advantage in some way. When things get out of hand, however, any record of the meeting could form the basis for an appeal or other legal action. These records may enable someone to show that their rights have been violated or that they have grounds to sue. Even if the board may be successfully defended, doing so is costly in terms of time and expense, and the case may well present the board in an unfavorable light to the court and the public. Such controversies are also disruptive to the important work that selectmen do.

Selectmen are well advised to pause and think before responding to any matter before them. They should not fall prey to the occasional wrongful conduct of those before them, whether it is inadvertent or intentional. Board members must be careful not to get involved in a hostile dialogue with anyone before them. If board members feel that a response to hostility is needed, they should make it a neutral one: “We believe that we are conducting a fair and proper meeting. We would ask that all persons please act in a calm manner.”

This does not mean that a board cannot caution a person about interrupting, shouting or speaking when not recognized. A board must exercise control in order to ensure that a meeting is conducted fairly and calmly. Boards must protect those who come before them, but they must do so in a calm and responsible manner. In short, a board of selectmen should maintain firm but fair control.

Removing Disorderly Persons

State law does permit a presiding officer to order a person to leave a public meeting for unruly conduct and, if he or she does not leave, to order a constable or other officer to remove the person from the meeting [G.L. c. 30A, §20(f)]. While it may be tempting to do this at times, it is best

not to, except under the most dire circumstances, and then only in consultation with legal counsel. Ordering someone removed from a meeting is fraught with the danger of a costly lawsuit and rarely worth the risk.

There are several alternative steps a board can take rather than removing someone. The best is to take a recess. Rarely after a recess does the person continue his or her unruly behavior. Or, a police officer can be called in to speak to the person about being disruptive, which usually has the effect of restoring calm. When all else fails, the board should consider adjourning the meeting to another date. While a board may not want to appear to have backed down due to someone's conduct, the wiser path is to avoid a controversy.

The Open Meeting Law

“The purpose of the open meeting law is to ensure transparency in the deliberations on which public policy is based,” states the *Open Meeting Law Guide* published by the attorney general's office, which has responsibility for enforcing the law [M.G.L. c. 30A, §§18-25]. “Because the democratic process depends on the public having knowledge about the considerations underlying governmental action, the open meeting law requires, with some exceptions, that meetings of public bodies be open to the public. It also seeks to balance the public's interest in witnessing the deliberations of public officials with the government's need to manage its operations efficiently.”

The open meeting law must not be taken lightly. Running a good, lawful meeting is not only the least a selectman can do, it is among the *most important* things he or she can do. When tough decisions have to be made by the board, it is certain that at least some residents are going to be unhappy with the outcome. That outcome, however, will be far easier for even the most disappointed citizens to accept if they see that the process that led to it was fair and legal.

As the most visible board in town government, the board of selectmen sets an example for all the other boards, committees and commissions. So selectmen who hold themselves to a high standard of compliance with the open meeting law will, over time, elevate the standards of the whole town.

It is also important to remember that the law has real teeth. Violators face the certainty of embarrassment and the possibility of fines. An incoming selectman would do well to become familiar with the open meeting law before taking a seat for his or her first meeting.

What follows is a brief introduction to the law. No summary, however, can address every situation. The safest thing for a selectman to do is to consult town counsel whenever there is any doubt. [For more information about the open meeting law, visit www.mass.gov/ago/openmeeting.]

Preparation of the Agenda

The agenda of a selectmen's meeting had virtually no legal significance prior to a major overhaul of the open meeting law in 2010. Under the previous version of the law, the meeting posting simply had to say when and where the board would convene. Now, the required notice of a meeting must include "a listing of topics that the chair reasonably anticipates will be discussed at the meeting" [G.L. c. 30A, §20(b)]. Note the imposition of personal responsibility: "that *the chair* reasonably anticipates will be discussed."

Topic descriptions must be specific enough to advise the public of the issues to be discussed. "Construction," for example, is not adequate, but "award of construction contract for new fire station on Elm Street" is. The attorney general's office takes a dim view of catch-all descriptions such as "New Business," preferring that the notice explicitly state that time will be reserved for topics the chair did not reasonably anticipate.

In most towns, the responsibility for preparing the meeting agenda falls to the chair, often with help from professional staff, or to the town manager or other professional staff member. This task includes determining what issues will be up for discussion, what the order of items will be, and what will not appear on the agenda.

Selectmen should set a deadline by which they must receive all requests to have items appear on the agenda. Usually, the agenda is "closed" several days before a regularly scheduled meeting, to allow time for it to be prepared and distributed. Generally, a chair will honor the request of any board member to have an item included on the agenda. If such a request is denied, however, the member can call for a vote of the board to instruct the chair to include the item on the agenda of the next meeting. Some boards have an "added agenda," with important items that came up after the regular agenda was prepared.

Many boards begin the agenda by approving the minutes of the previous meeting. This practice is recommended because it requires that the minutes be prepared promptly and that proper record keeping is maintained. It also reminds all members where they left off in the town's business and what remains to be pursued.

It is good practice to group items on the agenda into the following three categories:

1. Items about which people will be appearing before the board (appointments)
2. Licenses, general correspondence, and other items that require action by the board based on written material or reports of the board members themselves
3. Informational material not requiring any action by the board but perhaps causing some discussion (Such items are often not listed, but included in the meeting packets as information.)

For the items that require action, some boards find that it helps to focus discussion if the chair, staff or presenting party sets out the proposed or recommended action of the board under each item listed in the first two sections of the agenda. It is extra work, but it can help speed up meetings.

There is no legal requirement to state the time when any particular topic will be discussed, or the order of discussion. Given the impossibility of predicting how long selectmen or others may want to talk, it is generally advisable to put in the agenda only the time when the meeting will be called to order and the times of any public hearings.

Some boards arrange the agenda so that items concerning the greatest number of participants and observers will be taken up first. If the chair senses that an item on the agenda will require the board to go into executive session (see below), and if the board regularly has observers at its meetings, it is a courtesy to schedule the executive session either at the beginning or end of the agenda, preferably the latter.

Public Comment

Some boards set aside a public comment period before, during, or at the end of regular meetings, and they set and enforce a time limit for speakers. This practice can involve certain risks, however. Sometimes people come to speak on matters that the board has had no advance notice of, resulting in time being spent on a topic on which more information may be needed. In many cases, the issue will be rescheduled for another meeting, where the same presentation is made yet again. Sometimes people try to engage in showmanship during these “open mic” sessions. Care must be taken to ensure that a speaker does not defame someone who may not have known in advance that they were going to be mentioned.

Public comment sessions can take a lot of time, extending meetings or causing other important matters to not be properly addressed. Some boards that permit a public comment period require people to submit relevant information in advance, and then the discussion is scheduled if the board wishes to discuss the matter. Some boards, at the beginning of a meeting, count the people that want

to comment during the public session and set a certain amount of time per person. If the allotted time is not enough, the person can ask to be included on a future agenda.

Posting Requirements

Except in the case of an emergency, notice must be posted at least forty-eight hours prior to the meeting. Saturdays, Sundays and legal holidays do not count as part of the forty-eight hours. So if a board is to meet on a Monday at 7:30 p.m., the latest it could post notice would be the preceding Thursday at 7:30 p.m. If Monday is a holiday and the board chooses to meet on Tuesday instead, again, the latest the meeting could be posted would be the preceding Thursday. It is the actual posting by the town clerk that counts, not the selectmen's good faith effort to get the notice into the clerk's hands. So it behooves the board to get its completed meeting notice to the town clerk in plenty of time for that official to accomplish the posting at least forty-eight hours prior to the meeting.

The open meeting law requires that notice be "posted in a manner conspicuously visible to the public at all hours in or on the municipal building in which the clerk's office is located" [G.L. c. 30A, §20(c)]. Since most town halls are not open twenty-four hours a day, regulations promulgated by the attorney general's office permit town clerks to satisfy the statutory requirement by supplementing their physical posting with other kinds of notice, including the use of a municipal website, cable television, newspapers, audio recordings available by telephone, or a computer monitor visible from outside the municipal building in which it is located. In short: posting options can be complicated, so selectmen should err on the side of caution and get their notices to the town clerk well before the deadline.

What if a topic comes up within forty-eight hours before the meeting that the chair failed to anticipate? The chair should amend the posted notice as soon as possible, even if it means the topic is posted less than a full forty-eight hours in advance. If feasible, the board may also consider postponing discussion until the next meeting, so there will be no question about the adequacy of notice.

The law provides for emergency meetings in cases of a "sudden, generally unexpected occurrence or set of circumstances demanding immediate action."

Open Session

Every selectmen's meeting must be convened in open session. That means that the public has the right to be present. It also means that any person may make an audio or video recording or

transmission of the meeting, provided he or she has first notified the chair and abides by any reasonable restrictions imposed by the chair to ensure there is no interference with the meeting.

Whenever the open meeting law affords any rights to “the public,” that means anybody and everybody. It does not mean town residents or taxpayers only. Persons attending an open meeting have a right to do so without hindrance or embarrassment. While it is appropriate to demand that anyone who speaks at a meeting identify himself or herself for the record, no identification should be demanded of anyone who chooses merely to observe the meeting.

Unless the board convenes a public hearing—such as on a license application—where a statute entitles the public to be heard, or the board creates a “public participation” portion of its meeting, no member of the public has a right to speak at a selectmen’s meeting. Nothing in the law requires that the door to the meeting room be open during open session; noise in the hallway or the need to keep air-conditioning in the room may dictate that it be closed. It is crucial, however, that members of the public be able to find and enter the meeting room easily.

What Can Selectmen Do Outside a Posted Meeting?

The open meeting law defines a public meeting as “a deliberation by a public body with respect to any matter within the body’s jurisdiction.” “Deliberation” is defined as “an oral or written communication through any medium, including electronic mail, between or among a quorum of a public body on any public business within its jurisdiction” [G.L. c. 30A, §18].

With a three-member board, where any two members constitute a quorum, the open meeting law precludes *any* discussion of selectmen’s business outside of a posted meeting. In the case of a five-member board, any two selectmen may communicate outside a posted meeting without running afoul of the open meeting law, since two members do not constitute a quorum. It is good practice, however, never to communicate substantively outside of a posted meeting, if only to avoid the inadvertent violation that would occur if one selectman told another his or her thoughts on an upcoming matter, and then that second selectman later had private conversations with other selectmen informing them of the first selectman’s views. This kind of “round robin” deliberation is illegal because, even though a quorum never actually got together, the result would be the communication of one member’s views among a quorum outside of a posted meeting.

There is nothing wrong with selectmen receiving a packet, whether paper or electronic, in advance of their meeting providing them with detailed information about the topics to be discussed. Typically, the town administrator or similar official assembles such a packet, including items such as license

applications, reports of subordinate officials and boards, and responses to requests for proposals that the board plans to address. Receiving this kind of background information, which contains no substantive comment by any selectman, is not deliberation.

Selectmen may get together socially, of course, without inviting the public. They can even attend conferences, training programs and media or social events, so long as they do not deliberate. The whole board can show up at another committee's meeting and each selectman attending may participate as a member of the public, all without posting notice of a selectmen's meeting—again, provided that they do not deliberate. (In this scenario, the hosting committee must have posted notice of its own meeting.) “Deliberation” does not include scheduling, so selectmen may call, meet and email each other to their hearts' content on questions of where and when to hold posted meetings. Nor is it deliberation if the board conducts a site inspection, such as viewing the premises of a proposed liquor license, provided that the members refrain from substantive conversation.

Subcommittees

The open meeting law applies with just as much force to subcommittees as it does to the full board of selectmen. Say, for example, that two members of a five-member board of selectmen shun best practices and convene their own conclave at a local coffee shop, where they talk about town business. Their conduct would be risky and unseemly, but so long as they avoid involving a third member, it would not be illegal. But if the full board were to appoint those two members as a subcommittee to investigate and report back on a particular issue, any later meeting between them would have to be convened in open session after forty-eight-hour posted notice if they were to discuss that issue.

Remote Participation

Under some circumstances, members of the board may participate in the meeting remotely (i.e., without being physically present). The selectmen must first decide to allow remote participation by all public bodies in town. At any meeting where one or more members participates remotely, a quorum of the board, including the person chairing the meeting, must be physically present, and the person chairing the meeting must determine and state for the record that it would be “unreasonably difficult” for the member or members who wish to participate remotely to attend the meeting because of illness, emergency, military service or distance. Telephone or Internet connections are most frequently used, but any technology is acceptable if it allows the remote participants and all persons present at the meeting to hear each other clearly. All votes taken at a meeting in which any member participates remotely must be by roll call.

Executive Session

If there's one statute that every selectman should read, it's Chapter 30A, Section 21(a), which identifies the only allowable circumstances under which a public body may go into an "executive session" (i.e., a closed or confidential session). A close reading would dispel many myths, such as that a board may convene in an executive session whenever the subject of personnel comes up, or litigation, or contract negotiations. Most public business can and should be conducted in open session. Executive sessions should be the exception, not the rule. When problems arise, town counsel should be consulted for guidance.

Before going into an executive session, a board must start its meeting in open session. The motion to go into executive session must be reasonably specific about the purpose. The chair must state all subjects concerning the purpose that can be revealed without compromising the purpose of the executive session. A board may cite more than one exemption if applicable. Failure to properly state the reason for the executive session can result in the session being declared invalid, with the result that all matters within the session become public.

The vote to go into an executive session must be conducted by roll call, as are all votes in executive session. Before the executive session, the chair must state whether the open session will reconvene after the executive session. If the chair fails to state that the meeting will return to open session, the board cannot do so. Generally, it is advisable to return to open session.

While in executive session, the board can only discuss matters coming within the reason(s) stated for the executive session.

If a meeting has not been properly posted, the board cannot convene in open session in order to go into executive session.

For some purposes, special conditions must exist to go into executive session. For example, the board may be required to notify the subject of the executive session in advance of the meeting, and to inform the subject he or she has a right to be present, to speak, to have legal representation present, and to be able to make an independent record of the meeting. (Common courtesy and issues of fairness may warrant that the board allow a person's attorney to speak.) Depending on the exemption used, the subject of the meeting may also have the right to require the meeting to be in open session.

Executive Session Purposes

The following are the lawful purposes for executive session:

1. To discuss “the reputation, character, physical condition or mental health, rather than the professional competence, of an individual, or to discuss the discipline or dismissal of, or complaints or charges brought against, a public officer, employee, staff member or individual.” The individual who is the subject of discussion must receive written notice at least forty-eight hours in advance (though notification may be waived upon agreement of the parties), and must be given the opportunity to attend, with counsel if he or she chooses, and to speak on his or her behalf. (His or her lawyer may advise the client, but has no right to address the board.) The individual has the right to cause an independent record to be created of the executive session by audio recording or transcription, at the individual’s expense. If the individual demands it, the meeting must be held in open session. If the subject of the meeting is a critique of a town employee’s performance or a discussion of the qualifications of an applicant, generally the board must discuss such matters in open session.
2. To “conduct strategy sessions in preparation for negotiations with nonunion personnel or to conduct collective bargaining sessions or contract negotiations with nonunion personnel.” Grievance hearings that arise under collective bargaining agreements may be conducted in executive session under this exemption.
3. To “discuss strategy with respect to collective bargaining or litigation if an open meeting may have a detrimental effect on the bargaining or litigating position of the public body.” Before going into executive session, the chair must declare that an open meeting would have such a detrimental effect, and the minutes must reflect that statement. Anyone can sue anyone else for anything, so the mere possibility of litigation is not enough to warrant an executive session. “Potential litigation” is a good basis only where it is clearly and imminently threatened or otherwise demonstrably likely.
4. To “discuss the deployment of security personnel or devices, or strategies with respect thereto.”
5. To “investigate charges of criminal misconduct or to consider the filing of criminal complaints.” Generally this basis is used when a board contemplates filing criminal charges.
6. To “consider the purchase, exchange, lease or value of real property if ... an open meeting may have a detrimental effect on the negotiating position of the public body.” As with collective bargaining or litigation, the chair must declare that an open session may have such a detrimental effect before the board goes into executive session. In order for this basis to be used, the subject matter must relate to real estate.
7. To “comply with, or act under the authority of, any general or special law or federal grant-in-aid requirements.” This purpose is rarely used. The specific statute or grant requirement must

- be referenced in the vote to go into executive session. Selectmen are advised not to attempt this without help from their town counsel.
8. To “consider or interview applicants for employment or appointment by a preliminary screening committee if . . . an open meeting will have a detrimental effect in obtaining qualified applicants; provided, however, that this clause shall not apply to any meeting, including meetings of a preliminary screening committee, to consider and interview applicants who have passed a prior preliminary screening.” Application of this subsection is a perennial problem, but it is really not that difficult. Let’s say a board of selectmen has solicited applications from candidates for the position of town administrator. Board members may reason that since the best candidates are probably already employed in other towns and would be reluctant to jeopardize their existing positions by publicly disclosing their desire to find new employment—at least until they know they have a decent chance of getting the job—some degree of confidentiality would be best in the early stages of screening. The board can delegate the initial screening to a subcommittee of itself (which may or may not contain non-selectmen) or to an entirely separate screening committee appointed by the board. The board may not do the initial screening if it wishes to shield that screening from public view. If the chair of the subcommittee or screening committee declares on the record that an open meeting may have a detrimental effect on obtaining qualified candidates, the subcommittee or screening committee may go into executive session when reviewing applications and interviewing applicants, but after voting to recommend a subset of candidates for consideration to the board of selectmen, no further executive session may be held.
 9. To “meet or confer with a mediator” (as defined in G.L. c. 233, §23C). Before going into executive session, the board should vote to participate in mediation, specifying the parties and issues involved. Any action resulting from the mediation, such as a decision to settle a case, must be approved in open session.
 10. To “discuss trade secrets” or other confidential information arising in the narrow context of energy supply contracts under Chapter 164. This basis for executive session, added in 2010, is rarely used.

An Executive Session Motion Guide in the Appendix (Exhibit 2A) contains suggested forms of motions for the various purposes of executive session.

Records of a Meeting

The open meeting law requires public bodies to create and approve minutes in a timely manner. Minutes must be kept for all open sessions, with a separate set of minutes for all executive sessions. At a minimum, the minutes must state the date, time and place of the meeting, a list of the members present or absent, and the decisions made and actions taken, including a record of all votes.

Most towns have a secretary or administrative assistant who takes notes at and/or records the regular board of selectmen meetings. It is not necessary, when preparing the minutes, to include every question asked or comment made, or to identify every person participating in each discussion. The open meeting law revision of 2010 introduced the common-sense notion that minutes must include a “summary of the discussions on each subject.” The attorney general’s office says that the summary should be detailed enough so that someone who did not attend the meeting could read the minutes and have a clear idea of what occurred, but a transcript is not required.

The minutes must list all documents and exhibits used at the meeting. Such documents and exhibits must be preserved as part of the record of the meeting, but do not have to be kept with the minutes. Records may be subject to disclosure under either the open meeting law or the public records law and must be retained in accordance with the secretary of state’s records retention schedule. For each item, the list would include a document number, description, the correlating agenda item or topic, and any relevant notes.

Minutes of open sessions are, of course, public records. They should be created and approved in a timely manner. They don’t need to be approved by the board, however, before being made available in response to a public records request. Even draft minutes are open to the public. The law generally requires that meeting minutes be made available within ten days upon request.

Executive session minutes must be released as soon as the need for secrecy has ended. The board’s chair or the chair’s designee is to review all executive session minutes at reasonable intervals to determine if the need for secrecy still exists. If the board receives a public records request for executive session minutes and has not yet reviewed them to decide whether they still need to be protected, the board must do so without charge to the requesting person at its next meeting or within thirty days, whichever comes first.

As for approving minutes from a past meeting, there is no need to have anyone read the minutes aloud at the meeting. Presumably all members have had an opportunity to review the minutes. If there are corrections to be made, they can be handled when the minutes are voted on. It is acceptable for a member to merely say that the minutes should be corrected to reflect such and such, and then, when a motion is made to approve the minutes, it would be sufficient to say, “Move to approve the minutes as corrected.”

Evaluations

Another perennial source of friction has been whether materials used by board members to evaluate their appointees have to be produced in response to public records requests. As discussed elsewhere in this handbook, personnel file material, in general, is *not* a public record. What if, however, a board of selectmen conducts a review of the performance of its town administrator or similar official? If the discussion is limited to the administrator's performance, the review cannot be done in executive session. In the past, there has been controversy about whether individual reviews prepared by board members, or compilations of such reviews prepared by the chair or another selectman, must be made public. In the 2010 overhaul of the open meeting law, the Legislature largely put the matter to rest, determining that any evaluations by board members are public records. The attorney general has gone further, holding that both individual evaluations and compilations of evaluations must be treated as public records. The statute further provides that employment applications are not public, but that resumes of job applicants are [G.L. c. 30A, §22(e)]. This does not mean that the resumes of unsuccessful applicants who are weeded out by a screening committee in executive session must be made public, as that would defeat the purpose of the executive session.

Correspondence

A board of selectmen is not required to take up at a meeting every request for action or piece of correspondence it receives. The chair should be trusted to sort the important from the trivial. Many items can be put into a file for board members to peruse at their convenience. Correspondence need not be read at meetings. An alternative practice is to summarize the correspondence. Also, every letter to the board need not be acknowledged.

Some boards do not let any mail go out until the board has an opportunity to review it at the next meeting. This system causes delay and is probably not warranted, except with respect to certain delicate issues. A better approach is to authorize the chair to draft the appropriate correspondence, or to delegate the responsibility for drafting the correspondence to a professional administrator or appropriate staff. Most of the time, those who are responsible for writing letters on the board's behalf should be permitted to do so without prior review. One way to make sure this authority is not abused is to keep file copies of all outgoing correspondence in a folder or notebook that can be reviewed by selectmen at their meetings.

Open Meeting Law Enforcement

Anyone can complain about what he or she perceives as a violation of the open meeting law. A complaint form is available on the attorney general's website (www.mass.gov/ago/openmeeting). Within thirty days of an alleged offense, or as soon as possible after discovering it, the complainant

may file his or her complaint with the chair. The chair's duty is then to send copies to other board members and, within fourteen days, to send a copy to the attorney general's office along with a statement of any remedial action taken (such as releasing minutes or retaking a vote). The statement must also be sent to the complainant, who may press his or her case with the attorney general's office if he or she remains unsatisfied.

The attorney general's office may investigate and issue a decision, which could include ordering board members to take remedial training, nullifying prior votes, ordering the release of minutes, or imposing fines on the board of up to \$1,000. One defense a board may use in any enforcement proceeding is good-faith reliance on the advice of counsel—one more good reason to consult town counsel.

The Public Records Law

The Massachusetts public records law is at once simple and complex. The simple part [G.L. c. 66, §10] says that anyone who makes a request for a public record is entitled to a copy of it within ten calendar days. The complicated part is the definition of "public record" in state law [G.L. c. 4, §7 (26)]. This clause starts off with a broad meaning for the term ("all books, papers, maps, photographs, recorded tapes, financial statements, statistical tabulations, or other documentary materials or data, regardless of physical form or characteristics, made or received by any officer or employee of any agency, executive office, department, board, commission, bureau, division or authority of the Commonwealth, or of any political subdivision thereof, or of any authority established by the general court to serve a public purpose") and proceeds to whittle it down with twenty separate exemptions.

From the standpoint of a selectman, it is important to know what kinds of records are most likely to give rise to a public records request, the process a town must follow in response to such a request, and how individual selectmen can avoid running afoul of the law.

Intersection of Open Meeting Law and Public Records Law

The open meeting law sets forth some of the most important rules about public records likely to arise in the course of a selectman's service. In particular, minutes of meetings (both open session and executive session) are public records. So are the resumes of municipal job applicants, but not their job applications. Evaluations of appointees made by the selectmen are also public records.

Email

Many tend to think of public records as consisting solely of books and papers, but electronic records are equally subject to the law. Every email that a selectman sends or receives in his or her capacity as such potentially constitutes a public record. Selectmen are advised to preserve all their official emails and to consult their town counsel in the event of a public records request for them.

Confidential Information

The greatest single generator of litigation concerning the public records law is probably the privacy exemption codified in Chapter 4, Section 7, clause twenty-sixth (c): “personnel and medical files or information; also any other materials or data relating to a specifically named individual, the disclosure of which may constitute an unwarranted invasion of personal privacy.” Courts have almost uniformly refused to order the disclosure of medical information about named individuals. As for “personnel ... files or information,” the record is mixed. Disciplinary reports about teachers have been held exempt from disclosure, but a police department’s internal affairs investigation about a named officer was deemed to be public record. Public employees generally have a diminished expectation of privacy in connection with their employment, so their public sector salaries and their use of sick time (but not the nature of their illnesses) have been held as public records.

The public records law only addresses what a town must disclose in response to a public records request. It does not limit the records that may be disclosed, though other areas of the law do, including, chiefly, laws regarding privacy. Thus, a record in a town’s possession that may prove embarrassing to named individuals (because, for example, it discloses the health or financial condition of specific, private citizens) probably could not be released without risking a lawsuit from the offended individuals.

Redaction

The public records law is not a license to demand that public employees answer questions. At most, the law entitles a requester to a copy of a record if it already exists. If the record does not exist, or if the only responsive records are exempt from disclosure, the requester gets nothing. Thus, if a citizen sends the town administrator a letter asking how many town employees were terminated in the preceding three years, there is nothing in the public records law that compels the administrator to provide a written answer. If there were, however, a document setting forth the number and not containing any exempt information, it would have to be provided. If, however, the only way to answer the question with existing records would be to disclose termination-related documents

relating to named persons, then at most the requester would be entitled to copies of those papers redacted (i.e., with some words blacked out or otherwise deleted) in such a way as to avoid disclosing exempt information.

Cost

The town is entitled to charge requesters twenty cents per page for photocopies, fifty cents per page for computer printouts, and the actual cost of reproducing items such as photographs, tapes and disks. Requesters also may be required to pay the cost of searching for records and redacting them, billed at the hourly rate of the lowest-paid employee capable of performing the work. If the cost is likely to exceed ten dollars, the town must provide a good faith estimate to the requester and is entitled to demand payment in advance as a condition of fulfilling the request. The supervisor of public records encourages municipalities to waive these fees, but no one can require a town to do so.

Handling Public Records Requests

Any selectman who receives a public records request should immediately forward it to the town administrator or similar town official.

Conducting an Error-Free Hearing

One of the most important tasks of municipal officials is to conduct proper hearings. A hearing is merely a type of meeting. When a board acts collectively—whether it is a meeting or a hearing—it must abide by the open meeting law and any local procedures. A hearing, however, is often more involved, and there is more at risk if it is not conducted fairly and properly. All too often, local officials do not understand the protocols for holding a hearing. Sometimes their only understanding is what they have seen on television—or at local hearings full of errors. A board must ensure that every hearing is conducted fairly and calmly. An improperly conducted hearing is a frequent source of liability as well as an embarrassing situation for local officials. It is important to understand the issues involved in each phase.

Beginning the Hearing

Once a case has been prepared and the proper notices and meeting posting have occurred, the hearing may be held. Unless it is specifically set forth in state or local law, the procedure for starting a hearing appears to be a matter of local custom. Normally, the presiding officer, such as the chair of the board or the individual conducting the hearing, convenes the proceedings simply by stating, for example: “This is a hearing to consider an application [or petition] of [name of applicant] for [purpose].”

Witnesses

A case is presented through witnesses and exhibits. Usually, several of the witnesses would be employees of the municipality, the applicants (if it is a hearing on an application), people in favor or opposed, and/or other such groups of people who usually come voluntarily to the hearing. These people would normally not need to be compelled to come to the hearing. Some witnesses will not come voluntarily, however. Some say they will come, but do not show up. Some witnesses want to come, but for various reasons want to be subpoenaed to attend.

Witnesses who will not come voluntarily (due to job or personal reasons) need to be subpoenaed. State law [G.L. c. 233, §8] provides that witnesses “may be summoned to attend and testify and to produce books and papers at a hearing before a city council, or either branch thereof, or before a joint or special committee of the same or of either branch thereof, or before a board of selectmen ... and other public bodies.”

In addition to the statutory authority, there is generally considered to exist a customary right of bodies or persons holding hearings to have a notary public or justice of the peace issue summonses to compel the attendance of persons at hearings. There is also authority for the notary public or justice of the peace to issue summons under Chapter 233, Section 1, to compel attendance before “other persons authorized to examine witnesses.” Arguably, this could include any officer or board authorized by law to hold a hearing.

If the person so summoned does not appear, then the law provides a mechanism to go to court to seek a court order to compel the attendance of the witness [G.L. c. 233, §10]. The court can order the witness to attend, and a failure to attend then would be in contempt of the court.

Exhibits

In any hearing where there are going to be documents used—basically all hearings—the hearing officer should be prepared to mark the exhibits with either numbers or letters. Small tags that state “Exhibit” on them, with space for the date and number, may be purchased.

It is a good idea to keep a separate “Exhibit List” that indicates the name of the hearing, the date, what party each exhibit is from or if it is a joint exhibit, the number of the exhibit, and, if possible, a brief description of each exhibit. This will help to keep track of the various exhibits and will make it easier to complete the record of the hearing.

In some cases, the parties may agree on certain exhibits in advance and may present them to the board at the beginning of the hearing. They might even pre-mark exhibits that they will try to introduce in the proceedings. In other hearings, the exhibits are introduced as the hearing proceeds.

Relevance

All testimony and exhibits that are relevant to the matter being heard should be allowed and introduced. Board members should have some understanding of what is meant by “relevancy.” The presiding officer may suggest that the board members ask themselves whether it bears in some way on the issues before them. Does it go to the establishing or disproving of any of the issues or allegations? If so, does the exhibit appear to be accurate and authentic? The party hearing the case should be satisfied that the exhibit is what it is claimed to be.

Many times, the parties might stipulate that a document is what it is claimed to be. This of course makes it easier in terms of admitting the document. Any such stipulations should be noted for the record. Sometimes the parties may stipulate as to certain facts. These likewise should be noted for the record.

It is always a good idea to mark as an exhibit, often the first ones, the notice of the hearing, the application if there is one, and any other pertinent correspondence (such as agreements to reschedule the matter). This is not always done (which is not necessarily a problem, depending on the issues and the significance of the proceedings). The more important it is to have a complete record of the matter, the more important it is to have documents, including the notices and applications, introduced. A general reference can be made in the beginning of a hearing that the notices and applications are deemed admitted. If there are other documents in the file that are important, they should also be deemed admitted. Even when this is not done, these items are often incorporated into the record when it is being prepared.

A sample of an Exhibit List could be as follows:

Appeal Hearing

Re:

Exhibit List

Date:

Number

Description

[For hearings with more than one party, exhibits can be numbered by which party introduced them, such as T-1 (Town-Exhibit 1), E-1 (Applicant Exhibit 1), J-1 (Joint Exhibit 1), and so on.]

Oath Taken by a Witness

All witnesses who are to testify should be sworn in by the presiding officer [G.L. c. 233, §8] or by a notary public or justice of the peace. Sometimes this is done by the municipal counsel or clerk to the board. Having witnesses sworn in impresses on them the seriousness of the hearing and encourages truthfulness (due to the risk of a perjury charge). The oath can take several forms, the most common being: “Do you swear that the testimony you are about to give shall be the truth, the whole truth and nothing but the truth, so help you God?”

All witnesses are often sworn in at the same time. If new witnesses come later, they should be sworn in before they testify. If the witnesses are sequestered (not present in the hearing room except when they are testifying) they can be sworn in when they enter the room to testify.

Order of Proceedings

Once the presiding officer has convened the hearing, pre-marked exhibits have been noted, and witnesses have been sworn in, the board is ready to begin hearing the matter. There are, essentially, two types of hearings—adversarial and non-adversarial—each with its own format.

1. Adversarial Hearings

The order of proceedings in adversarial matters (license suspension/revocation hearings, for example) is that the party making the charges puts its case on first, and then the other party puts on its case. During the presentation of cases, either party has a right to object to the questions or exhibits of the other party. These objections need to be ruled on. In addition, the person or body hearing the matter can ask questions of the witnesses.

For example, here’s what a hearing on an application might look like:

- Applicant makes an opening statement, providing an overview of the matter.
- Applicant introduces its first witness and questions same. Applicant may also introduce exhibits through the witness.
- Board or person holding the hearing questions the witness.
- Applicant introduces its next witness, and the same pattern follows.
- Board may allow staff to also question the witnesses.
- Board may allow members of the public to ask questions, through the chair, of each witness, or the board may want to allow members of the public to ask questions after the applicant has presented his or her case.
- Applicant rests his or her case.
- If the public has not yet been allowed to ask questions, then they should be allowed to do

so, through the chair. Members of the public, however, should not be allowed to engage in discussion directly with witnesses.

- The public should be allowed to make general comments on the matter.
- Applicant may respond to comments.
- Board and/or staff may ask further questions.
- Board may continue the hearing to another date in order to obtain more information or for the purpose of discussing and making a decision, or the board may close the hearing and make a decision that night.
- If the board closes the hearing, it should reserve the right to re-open the hearing at the next scheduled hearing date in order to hear more evidence.

It may be that, as the board and staff review the information presented, they realize that additional information is needed. That information should come in at a public hearing at which the public has an opportunity to comment. Problems sometimes arise when a hearing is closed and then the board wants to take in more evidence later. Technically, the board has to give notice that it is going to do so. One way to handle it at this point in the process may be for the board to say something along these lines: “The board is going to close the hearing for the receipt of evidence at this point, subject to the right of the Board to re-open the hearing at its meeting of [date] to take further evidence should it find it necessary to do so. Therefore, if you are interested in this matter, you are advised to be present at the next hearing date of _____.”

During the course of proceedings, a party seeking to introduce an exhibit needs to show it to the other side before the presiding officer considers whether to admit it. Usually the parties know to do this, but sometimes it is necessary to remind them.

Once the other side has seen the exhibit, the presiding officer should ask if there is any objection. If there is, the objector should explain his or her objection. The other side (the party trying to introduce the exhibit) should then be permitted to respond to the objection. The presiding officer can then either “overrule” the objection and allow the exhibit to be admitted or “sustain” the objection and not allow it to be admitted. The exhibit can also be allowed while permitting the objecting party to renew his or her objection later.

There may also be objections during the questioning of a witness. Such objections need to be addressed right away. The questioning should stop and the witness should not answer until the presiding officer permits the answer.

When there is an objection to a question, the presiding officer should allow the objector to explain the basis of the objection. Then the other party (whose question was objected to) should be allowed to respond.

In dealing with objections, as well as other matters, board members are not expected to be as familiar with the law as judges are. Local hearings, as well as many state hearings, are not bound by the strict rules of evidence and judicial procedure. Thus, there is some flexibility. The key is to maintain fairness and use common sense. Even if the board allows a question that a judge would not have allowed, as a general rule it should not be a problem as long as the board conducts a fair and reasonable hearing.

When there is an objection on which the presiding officer is unsure how to rule, he or she may want to allow it in but state that “upon review of the entire matter, the board will give it what weight is appropriate.” It may be that the board does not feel much weight, if any, should be given to the question or exhibit when it reviews the entire matter.

Some objections may be based on legal principles that may disqualify a witness from testifying, such as, for example, spousal immunity. When objections are made based on such issues, the board needs to consult with legal counsel.

2. Non-Adversarial Hearings

Non-adversarial hearings include those where someone is appearing before a board seeking a license or permit. In these hearings, the applicant (or his or her legal counsel) usually makes a presentation to the board as to why he or she should be granted the license or permit. The applicant may present witnesses in support of the application. Often this is done to explain various aspects of the business activity, such as parking and traffic or building design.

After the applicant has presented a witness, or at the conclusion of the applicant’s witnesses, the board may question the applicant or any witnesses. The board may also introduce relevant exhibits.

People associated with the town should be allowed to speak next. It may be a local custom to have certain municipal officials provide information on the application. Next would be the general public. The board can start off by asking those who are in favor of the application to speak first. When that group is done, the board can then ask for those opposed.

The board need not allow the applicant to be questioned by the public. Especially in controversial matters, these questions can be hostile. In any event, all questions should go through the chair.

Decision-Making

It is important to be sure that there is enough evidence before the board makes a decision. Certain matters require findings of good or just cause, or a finding that a public need will be served or that something is not detrimental to the public welfare. Counsel must ensure that enough evidence has been presented in order for the board to make such findings.

Developing a Record

The record of a hearing contains the documents introduced and, to the extent that it exists, the transcript or tape of the matter. It also contains the notices and the decision.

The record is always important, but its importance is even greater if the matter is appealed, because some appeals are based solely on the record developed by the board. Other appeals involve a new hearing before a new fact finder, whether it be a judge or an administrative law magistrate. Even in cases where there will be a new hearing, however, it is important to have a complete record, as the board will want to be able to show that the decision made was based on sound reason and was not arbitrary, capricious or whimsical.

Boards acting in their permitting capacity can create a stronger case for upholding their decisions by being sure that the record contains pertinent information that would enable a judge to see that there was a sound basis for the board's decision. Such information can be introduced by the board itself at the hearing.

If, for example, traffic is a concern relative to a permit application, the record is stronger if someone from the police department testifies as to traffic conditions at the location. A report can also be prepared on this issue and introduced into the record. Under certain procedures, some boards can have the applicant finance a traffic study.

Photographs are also helpful to have in the record so that a fact finder on appeal can get a feeling for the area.

Ex Parte Contact

People either for or against a matter that's pending before a board might call members or stop them on the street to discuss the matter. Usually they mean no harm by doing so, and board members

generally want to be receptive to what their constituents are saying. Board members must be cautious, however, about such communications.

A problem arises if the discussion relates to the particulars of a hearing before the board, in which case it may constitute *ex parte* contact—contact with an adjudicator out of the presence of the parties involved. All parties to a quasi-judicial matter are entitled to know the evidence that the fact finder will be using to decide the matter. They are entitled to be able to respond to the “I heard such and such” or “I don’t think they are telling the truth” statements that may arise in an *ex parte* contact. When such contact is made, it may cause an irregularity in the proceedings and could be the cause of a reversal, or a charge of violating the rights of the parties before the board.

Without being disrespectful to those who want to discuss a matter outside of a hearing, board members should tell them that they too are concerned about the matter and that they appreciate their concern, but since the matter is presently before the board in a hearing they cannot discuss it. If someone wants to comment on a matter, and the proceeding is one that allows public input (e.g., a license or permit hearing), the board member can tell the person that he or she must come to the hearing, where he or she will be allowed to speak.

Local officials must resist the temptation to continue such discussions. In some appeals, board members may be deposed and may be asked if they discussed the facts of the case with anyone. In a typical case, someone has overheard the discussion and then tells someone else who then tells someone else. After a while the conversation is described perhaps much differently than it really happened. By that time, however, the damage is done and the appearance of a problem is there, if not an actual problem.

Personal Investigations

Board members are certainly permitted to know what they observe in their everyday travels. The experiences of daily life do not disqualify them from participating in a local proceeding. A problem arises, however, when a board member decides to do some personal and independent investigating about a matter before a board. Say, for example, a board member decides to go to the scene of a civil service incident and see if something would happen as an officer claimed it did in a hearing before a board. This is fraught with danger. The parties to the proceeding are not there to see what the board member is doing or to be able to address the matter. It is worse if the board member doesn’t tell anyone about the activity, because then no one knows the board member has this additional knowledge relating to a matter before the board. Such circumstances can easily lead to a reversal of a board decision.

If they feel it is necessary, board members can and should request a site visit or a re-enactment of an incident, if possible. This would be done in the presence of all the parties and the person hearing the matter. This is acceptable and, in certain cases, appropriate.

If a board member feels that certain matters should be addressed, he or she can raise the issues at the hearing and have the parties address it. Common sense rules apply. Indicating that there are twenty restaurant licenses in an area and then producing a map to show them is probably acceptable, as long as it is done at the hearing. But a board member conducting his or her own investigation into an incident and speaking to witnesses outside of the hearing is a road to trouble. The concepts of fairness and due process would caution against board members taking actions that would, on their face, appear irregular.

Absent Members: The Mullin Rule

In 1983, in *Mullin v. Planning Board of Brewster*, the Supreme Judicial Court decided that when a board holds adjudicatory hearings, no member who missed even one session of the hearing may vote on the result. “Adjudicatory hearings” may be more often conducted by planning boards, boards of appeals and conservation commissions than boards of selectmen, but there are certainly times when selectmen adjudicate private rights, such as when they decide whether to revoke a liquor license or when they exercise the power granted them by a town bylaw to issue special permits relating to land use.

The Mullin Rule sometimes created a hardship for local boards, especially when a hearing extended over more than a couple of sessions and the board had a small quorum, but a statutory change in 2006 provided, for the first time, that a member who misses no more than one session of an adjudicatory hearing may vote on the matter if the member certifies in writing that he or she has examined the evidence produced at that session, including an audio or video recording or a transcript [G.L. c. 39, §23D].

Chapter 39, Section 23D, must be accepted locally in order to be available for use. If it has not yet been accepted, it is advisable to consult with town counsel to draft an appropriate article and motion for acceptance at town meeting. Any town may specify which types of local adjudicatory hearings the law will apply to and may adopt additional local requirements.

More than one member of a local board can miss a single hearing session and still be able to use this law. Boards must still have a quorum for the hearing session that a member misses; the Mullin Rule does not excuse any quorum requirements. Members who participate remotely in a meeting are not deemed absent for purposes of the Mullin Rule.

Conflicts of Interest and Bias

The state's conflict-of-interest law [G.L. c. 268A] is intended to draw a clear line between the public duties and personal interests of public officials in Massachusetts. Generally, public officials and employees—whether elected, appointed or hired, paid or unpaid, full-time or part-time—are prohibited from using their position for any sort of personal benefit for themselves or their family or outside employer (if any). The conflict-of-interest law may seem cumbersome in some instances, but it is designed to promote good government.

The consequences for noncompliance with the conflict-of-interest law are significant. There are criminal and civil penalties that can be imposed, and actions taken by a community could also be overturned due to conflict issues. The aggravation factor and potential embarrassment of having to address any allegations should be reason enough to adhere to the law.

The State Ethics Commission has oversight and educational responsibilities with regard to the conflict-of-interest law. The commission seeks to “foster integrity in public service in state, county and local government, to promote the public's trust and confidence in that service, and to prevent conflicts between private interests and public duties.”

Volumes of current information about the conflict-of-interest law are available on the Ethics Commission's website (www.mass.gov/ethics), including a wide range of its advisory opinions on topics such as gifts and gratuities, nepotism, divided loyalties, holding a second public position, and former employees. The commission also conducts educational programs, provides clear and timely advice, and “fairly and impartially” interprets and enforces the conflict-of-interest and financial disclosure laws. The Ethics Commission is available to field questions from public officials and employees and to provide free legal advice regarding the applicability of the conflict-of-interest law.

Many aspects of the conflict-of-interest law are complicated, and there are often exemptions to the general rules. Due to the unique nature of their position, there are specific rules and exemptions that apply to selectmen (see Exhibit 2C). Public officials and employees are encouraged to seek legal advice from the Ethics Commission or their agency's legal counsel regarding how the law would apply to them in a particular situation.

A selectman may always discuss a particular set of circumstances with town counsel to see generally what the conflict-of-interest issues may be. In order to be protected from a later charge of violating the law, however, the selectman needs to have obtained an opinion from either the town counsel or the Ethics Commission and to have followed that opinion.

Town officials or employees who seek an opinion from their town counsel, in order to receive the protection of that opinion, must submit it to the Ethics Commission, which then has thirty days to approve it. An opinion issued by the town counsel also has to be filed with the town clerk and is a public record.

Opinions issued directly to an employee by the Ethics Commission are not filed with the town clerk and are not public records. If the employee starts to quote from that opinion, however, the commission can release the entire opinion.

As a practical matter, town counsel will often consult with an attorney at the Ethics Commission in developing an opinion. Town counsel is also readily accessible to selectmen. After a discussion with his or her town counsel, a selectman may decide not to seek the opinion or pursue the matter.

Training and Testing Requirements

All municipal employees, including selectmen, must undergo online training and testing on the conflict-of-interest law. New employees must do so within thirty days. After completion of their initial training, all employees must complete training every two years thereafter. The training can be done individually or in groups.

Upon completion of the program, municipal employees should print out the completion certificate and keep a copy for themselves. Employees are required to provide a copy of the completion certificate to their town or city clerk.

Conflicts in Hearings

Usually, selectmen will know prior to a hearing if there is a potential conflict of interest related to the matter. In such instances, the board must consult with municipal counsel to discuss the issue and see if it disqualifies any member(s) from participating in the matter.

Sometimes, however, a conflict of interest can arise during a hearing, when, for example, certain facts are brought out. In such a situation, the board member for whom there is a conflict should ask that the hearing be recessed. He or she should then consult with municipal counsel. Board members and

legal counsel should not ignore the situation. If they think there might be a conflict, chances are that others will think so as well, and they might raise the issue if it is not addressed properly. If a member participates in a matter in which he or she is disqualified due to a conflict of interest, it could lead to a reversal of the action and may subject the person to a violation of the law.

Some potential conflicts, however, can be addressed by making a disclosure of the situation pursuant to Section 23 of Chapter 268A. In appropriate cases, such a disclosure will protect the person and enable him or her to participate in the hearing. The person must consult with municipal counsel on this.

A common but often overlooked conflict-of-interest situation arises when the matter before a board relates to property abutting the property of a board member. The State Ethics Commission has ruled that it will presume that there is a financial interest in any matter affecting abutting property. The effect of the matter being heard may be positive or negative to one's financial interest in the property—it doesn't matter. Thus, a board member may not participate as a municipal employee or official in the matter unless the member can show that he or she does not have a financial interest in the matter. In other words, the board member would have to overcome the presumption that he or she has a financial interest in the property. Sufficiently demonstrating this is highly unlikely. [See State Ethics Commission Fact Sheet, "Municipal Officials: Don't Vote on Matters Affecting an Abutting Property."]

Board members cannot participate in matters affecting themselves or their family or businesses. Exceptions to this are few and narrow. Board members should not attempt to determine if an exception applies, but rather should consult municipal counsel.

One exception worth noting, however, is the "rule of necessity," which essentially provides that a person who would otherwise be disqualified from participating in a matter due to a conflict of interest may still participate because there is no other way that the matter can be decided. Situations where this rule may be used are few, however, so board members should not consider applying it without specific guidance from municipal counsel. Reasons such as inconvenience, having to reschedule matters, or having to arrange for another legally qualified person to perform a function are not sufficient grounds to invoke this rule.

Online Resources

- State Ethics Commission: www.mass.gov/ethics

- Introduction to the Conflict-of-Interest Law for the Public Sector:
www.mass.gov/ethics/laws-and-regulations-/conflict-of-interest-information/public-employee-trifold.html
- Summary of the Conflict-of-Interest Law for Municipal Employees:
www.mass.gov/ethics/education-and-training-resources/implementation-procedures/municipal-employee-summary.html

Bias

A hearing is generally considered a quasi-judicial function, and as such those conducting hearings are generally expected to observe the impartiality of judicial officers. Bias exists when someone is so predisposed to accept or reject a matter that he or she cannot reasonably be expected to fairly and impartially adjudicate the matter.

People rarely consider themselves biased to a degree that they cannot act impartially, but those reaching this conclusion are usually too close to the situation to make the determination in an unbiased manner. Everyone has some degree of bias, and not all bias is invalidating bias. The problem arises when the bias is to such a degree that it would interfere with the responsibility of conducting a hearing fairly.

Town controversies often end up before the board of selectmen, such as when a controversial business seeks a license or permit, or when there is an allegation of significant misconduct by a public employee. Problems can arise when a board member takes a public stance on the matter, often in response to pleas by local residents or the media.

Before speaking out, board members must consider whether the matter could possibly come before the board in an adjudicatory proceeding. If the answer is yes, then they should be careful in their public pronouncements. Making statements like “There’s no way that store is coming into this community” will only leave the individual and board open to charges of bias and motions that he or she be disqualified from any future hearing. In public, it is better to make statements such as: “The board will hold a very thorough and careful hearing on this matter, to see if it is good for the community. You are welcome to come and testify if you wish.” Another option is: “This is a very serious situation, and the board will hold a hearing to find out what happened and what should be done.”

For any public official, there is a natural tendency to want to assure the public that they are with them on a matter. The local official can better help the public, however, by being careful in their public positions so that they are not subject to a bias charge. Fairness to all who may appear before a

board is the best practice.

Those who are so predisposed that they cannot fairly adjudicate a matter before them should abstain from participating. Since there are so many variables involved, board members are advised to discuss this issue with municipal counsel.

Parliamentary Guide Considerations

With committees, commissions, boards and the like, questions often arise as to what appropriate parliamentary rules should be followed in conducting meetings. Often mentioned are traditional guides such as *Robert's Rules of Order* or some other general guide. *Robert's*, for example, is a good and widely recognized parliamentary guide. Municipal attorneys and those involved in public administration, however, generally consider these traditional and general parliamentary guides more appropriate for fraternal organizations, religious groups, clubs and volunteer associations than for municipal government. Part of the reason *Robert's* is not favored for municipal government is that it can restrict effective participation by the members of a board. Not everyone is well versed in its terms, and it can be rather complicated. Many actions of a board, however well-intended, have been voided because of some technical non-compliance with *Robert's*. Towns are advised not to use *Robert's* as their parliamentary guide.

Robert's is not the only recognized formal parliamentary guide, but most of the others suffer from the same infirmities. What parliamentary guide should be followed? There is no statutory requirement that a meeting be conducted under a specific parliamentary guide. Boards are free to develop their own procedures as long as they comply with all applicable laws, such as the open meeting law. Boards are free to adopt what rules they feel will best facilitate the public's business.

In the absence of a specific guide or framework, the rule of common law would apply. Essentially, common law allows anyone to make a motion, anyone to second a motion, and anyone to speak on a motion. Motions require a majority vote unless the law calls for another quantum of vote.

Bell's Rules

Professor A. Fleming Bell III of the School and Institute of Government at the University of North Carolina at Chapel Hill has written a well-received handbook, *Suggested Rules of Procedure for Small Local Government Boards* (2nd edition, Chapel Hill, N.C. School of Government, 1998). Professor Bell, who is an attorney, also speaks on this subject to various groups.

The first basic rule is to follow the golden rule: Treat people the way you would want to be treated.

Show courtesy, respect and patience.

The second basic rule is to recognize that it is acceptable to disagree as long as one is not disagreeable. Many a good point is lost because people disagree in such a manner that the message is overwhelmed by the way it is presented.

Here, as put forth by Bell, are some general guides for conducting meetings:

1. The board must act as a body.
2. The board should proceed in the most efficient manner possible.
3. The board must act by at least a majority.
4. Every member must have an equal opportunity to participate.
5. The board's rules of procedure must be followed consistently.
6. Decisions should be based on the merits, not on manipulation of the rules.

Suggested Rules of Parliamentary Procedure

The following are some suggested rules of parliamentary procedure, along with the reasoning behind certain rules, meant to address various procedural issues that commonly arise at meetings. Boards are welcome to try these for a while and see if they work; if not, they may change them. These are just options and not requirements.

1. For local government boards, there is nothing wrong with discussing a matter and then presenting a motion when it comes time to take action. This is how things are done most of the time with local boards.
2. Any member, including the chair, can make a motion, second a motion, speak on a motion, and vote on a motion (presuming there is no conflict of interest or other prohibition).
3. Seconds are [or are not] required for a motion.
Reasoning: A board should decide if it wants to have a requirement that there be a second for each motion. Seconds work fine with large bodies, as they indicate that there is at least some interest in the matter, but they may not be needed with small boards. One advantage of such a requirement, however, is that it may prevent a single member from being able to tie up a board in dealing with what may be a personal agenda.
4. Presuming a motion is made (and seconded if required), it is then open for discussion.
5. Members must be recognized by the chair or presiding officer in order to speak.
6. First-time speakers should be recognized before those who have already spoken.
7. A substitute motion can be made, or an amended motion can be made.

Reasoning: To the extent that a board's rules require seconds, the rule would apply to these motions as well. If properly made, the substitute motion would be acted on before the main motion. It's best to try to have no more than one substitute motion pending, although the body may agree otherwise.

8. Any member may make a motion to "call the question."

Reasoning: This is a motion to end debate. With small boards and groups, it may not be needed. If it is made, the rule for seconds applies, and generally it is not debated. Small boards, however, can allow some debate on whether to support a call of the question.

9. The chair shall conduct votes on each motion and declare the results.

10. Motions for reconsideration can be made by any member.

Reasoning: The traditional rule is that only a person who voted on the prevailing side may make the motion to reconsider, but with small boards this should not be required.

11. These rules of procedure for the board may be suspended by action of the board.

Reasoning: A failure to comply with the rules does not affect the validity of any action. This will help in instances where someone is challenging a board's actions because the board did not strictly comply with its own rules. While compliance is important, government should not be hamstrung by what is often a technicality.

Dealing With the Public and the Media

Selectmen are in great demand. Citizens want problems solved, and the public and local media want to discuss the town's position on issues. A selectman is a symbol of town government and is, therefore, the focal point for people with a wide range of complaints and concerns. Even in the face of challenges, however, selectmen need to remember that their behavior reflects on their community as a whole. It's important to keep an objective demeanor and even temper, even as people make increasing demands.

"Public relations" is one of the most misunderstood terms in government. Governmental public relations can be defined as the practices that promote a favorable relationship with the public. For public officials, the major function of public relations is to present their performance to their constituency.

Good public relations occur at many levels. What is said by a selectman—from casual conversations at the grocery store to contact with the news media—influences how people perceive the board of selectmen and town government as a whole. People who are dissatisfied with town government will express themselves at the ballot box, so, in order to remain in office, a selectman must be concerned

with his or her own image and with citizens' perceptions about their town government.

Citizens often form their impressions about town government from their interactions with town employees who answer phones and conduct business face-to-face with the public. While the board of selectmen cannot monitor the behavior of every town employee, selectmen can insist on courtesy from their staff and stress with department heads the importance of good public relations.

Some towns have standardized their procedure for processing inquiries and complaints. When a citizen calls, the person taking the call refers the matter to the appropriate town employee for a reply and logs each call so that department heads, the professional administrator and selectmen can review the types of calls that are being received. Such a system enables selectmen to detect patterns of complaints and to follow up to make sure problems are being taken care of efficiently and effectively.

One of the easiest and best public relations tools is simply being accessible. Selectmen should let the board's secretary, the professional administrator and other town employees know when and where they can be reached. Selectmen who can't take calls at work should make other board members and appropriate town employees aware of the limitation. At a minimum, there should be a number where messages can be left. Some boards find it useful to have selectmen take turns being "on duty" to answer citizens' questions during weekdays and weekends.

Citizen Complaints

Many times, citizen complaints will be about matters that are beyond the board's control, but this does not relieve the board of responsibility to provide information and offer assistance. Sometimes, handling complaints involves nothing more than lending a sympathetic ear. Returning phone calls promptly and listening patiently can often prevent a minor complaint from escalating into something major. Some constituent problems can be solved with a quick call to the right town official or employee. When the town cannot solve a problem, citizens should be informed immediately and directed to the best resource.

Complaints about specific town officials or employees are particularly troublesome. It is important to have a written board policy for dealing with complaints about individuals, in order to ensure that everyone is treated fairly. First, the board should make it a policy not to consider this type of complaint at an open meeting—at least until it has been discussed with the party directly concerned and a preliminary investigation has been conducted. This gives the board a chance to weed out frivolous complaints. If the complaint requires further action, it should not be put before the board of selectmen until the subject or subjects of the complaint have been given prior notice and accorded

an opportunity to present their side of the story. This is the only way to avoid the appearance of a serial drama being played out before the board and in the media.

In general, when a complaint requires action, the person bringing the complaint should be given a reasonable estimate of the time for resolution, and progress reports should also be given.

On rare occasions, a selectman may receive a threatening call or a call from a lawyer who may be planning an action against the town. It is best to keep these conversations brief and immediately consult town counsel for guidance.

Media Relations

The news media—newspapers, websites, radio and television—have become such pervasive forces in modern life that even the smallest town cannot afford to be misinformed about how they work. A natural disaster, sensational murder, or discovery of a lost art treasure in the public library could thrust a town into the spotlight at any time. Selectmen must be prepared to deal with reporters for mundane stories as well as the unexpected.

Reporters have a job to do. They are paid to be inquisitive and skeptical. Their objective is to get the story, get it right, and get it now. It may not be possible to influence what reporters choose to write about, but town officials can help make sure the reporting is balanced and accurate by providing reporters with the information they need. In dealing with the media, honesty is always the best policy. When reporters are given reason to trust, they will usually be fair in their treatment.

Except for decisions made during an executive session allowed under the open meeting law, all decisions of a board must be made at meetings the public is invited to attend and observe. Hopefully, board meetings are covered by seasoned reporters who understand town government. Often, however, boards must deal with inexperienced reporters who have little background in local government. The only way to be sure that a reporter understands what was discussed at a meeting is to seek him or her out after the meeting and explain the issue or problem in more detail.

Even if board meetings are not routinely covered by a reporter, the news media should not be neglected. If a matter of public interest is going to be discussed at a meeting, the local editor should be informed. Press releases, press advisories, and printed statements are all options for notifying the media of an important action.

While it is fine to be friendly with members of the media, a selectman is a public official. Anything said at a meeting, or in a conversation with a reporter, is presumed to be “on the record.” There is no right to go “off the record” during the open portion of any public meeting, nor can anyone expect a

reporter to disregard any comments made at a meeting.

In a private conversation, a selectman may want to brief a reporter on the history of an issue without being quoted. This is perfectly acceptable, provided the reporter agrees to any terms before the conversation begins. To eliminate confusion, it is important to first set out explicit ground rules with the reporter. Terms like “off the record” or “for your background only” may mean different things to different reporters, so it’s important to clarify these terms if they are used. In some cases, it may be a good idea to direct a reporter to contact certain additional sources before using information provided privately “for background.”

When speaking for the record, words must be chosen carefully. While it is acceptable to ask a reporter to read back comments, it is often not possible to take back or reword something that has been said. No source can demand to read a reporter’s story before it’s published. Reporters take their constitutional rights seriously, and they will resent anything that implies censorship.

A cardinal rule in successful media relations is to tell the truth, even if the truth is, “I don’t know.” When possible, avoid answering questions with a terse “no comment,” since it may suggest that there’s something to hide. If town counsel has advised against making public statements about a pending lawsuit, for example, the reporter should be told such. Inquiries like these should be referred to town counsel, who may make a statement that would be informative without disclosing confidential information or strategy. If the board has not reached consensus on how to deal with a problem, the reporter should be told that the issue is being discussed, but no decision has been reached. There is no requirement that a public official answer every question asked by a reporter (or anyone else). Selectmen always have the option of promising reporters that they will be notified when a decision about a certain issue is made.

Reporters often need information before it is appropriate to release it. Selectmen should not give in to pressure to make a comment that may be inappropriate and regretted later. The story, however, will often be written whether officials like it or not, and regardless of whether they’re ready to talk. In certain situations it may be better to release incomplete information than to have it leak out. Such information should be identified as incomplete but the best available at the time.

When a reporter makes a mistake in a story, it is worthwhile to discuss the situation with the reporter, respectfully, and clarify the information so that the error is not repeated in subsequent stories. If a real injustice has been done, a letter should be written to the editor, or a statement should be issued clarifying the information. If a selectman believes that he or she is being mistreated by a

reporter, one approach may be to refuse to deal with that reporter and to discuss the problem with the reporter's editor and/or publisher.

Major News Stories

Occasionally, a town may be the site of an event so unusual or sensational that reporters from all over flock to cover it. Once the national media have converged, they are almost impossible to manage. Reporters will be relentless in seeking out information from any and all sources. Selectmen need to be prepared to cope with a sudden invasion of reporters who want to take up valuable time just when the town is trying to respond to a crisis.

There are a few techniques that can be used to make sure valuable time is not spent answering the same questions from dozens of different reporters. If the event is something the selectmen do not want to discuss in detail (e.g., a department head has been arrested), the best approach is to prepare a carefully worded written statement and circulate it promptly to the media. A spokesperson should be identified to read the statement on radio and television without being tempted to add his or her own comments. Another effective technique is to hold regular media briefings at a central location, such as town hall, where there is room for reporters and television crews to set up their equipment. Reporters are much less likely to stray into inappropriate areas if they know they can get complete, reliable information right where they are.

Sometimes it is best to publicize a story, such as when a major weather event is threatening to hit town. The news media are an invaluable means of reaching citizens quickly to warn them of danger. In these cases, it is wise to designate one or more official spokespersons for the town, so that the information given out is consistent.

Building a Two-Way Relationship

The relationship with the news media should not end with coverage of regular board meetings. Many citizens learn about trash pickups, road construction projects and school closings, for example, by reading their local newspaper or checking a news website. Typically, public works and school departments already have a system in place for providing the media with routine information, such as snow removal schedules and school lunches. But selectmen can be the source of other information that can also be valuable to citizens. The local media can be a huge asset in disseminating important information, particularly if they've been treated responsibly and respectfully on a regular basis.

Suppose a street-paving project has been authorized, and estimates of construction times have been made. The people who live on the street need to know how long the dust is going to blow in their windows, and the people who travel on the street need to know what detours to take and how long they will be inconvenienced. If the engineers have been realistic, and if the word is passed to the media by selectmen, the number of calls each board member receives from dusty homeowners and frustrated drivers can be cut dramatically.

Most small newspapers, especially in the slow summer season, will welcome the opportunity to run stories about local recreation programs, cleanup efforts, and other town-sponsored activities. Selectmen can often encourage this type of favorable coverage with a friendly suggestion to a reporter or a quick call to the local editor. Periodic press releases can be used not only for news, but also to remind the news media of ongoing projects—updates that might form the basis for a story or feature photograph. Selectmen should be judicious in their use of this technique, however. Self-serving press releases are usually recognized for what they are, and end up in the trash.

CHAPTER 3

Organization of Town Government

Definition and Role of Charters

The form of government in a municipality is determined by the provisions of its charter. The classic definition of the word “charter,” when used in connection with municipal governments, comes from the National Civic League (formerly the National Municipal League) and is found in the league’s *Guide for Charter Commissions*, 4th edition (1960):

What is a local charter? It is the basic law that defines the organization, powers, functions and essential procedures of the municipal or county government. It is comparable to the state constitution and to the constitution of the United States. The charter is, therefore, the most important single law of any local government. Through change in the charter, almost any desired change can be achieved in governmental organization, powers, functions, and procedures. All the effects of a new charter may not be felt immediately, but in the long run a charter has important effects, for better or for worse, on everything that the government does. Faulty governmental machinery is responsible for more governmental ills than most people suspect. Other things being equal, the better the charter the better the government.

The Home Rule Amendment [Article 89] to the Constitution of the Commonwealth of Massachusetts explicitly provides that every city or town in the Commonwealth is entitled to a charter and outlines the process for the adoption, revision and amendment of a charter. In 1984, the Massachusetts Legislature adopted a number of amendments to the General Laws intended to clarify the intent and the purpose of the Home Rule Amendment. Among these statutory changes was the insertion of a new clause into Chapter 4, Section 7, defining the term “charter” as follows:

“Charter,” when used in connection with the operation of city and town government shall

include a written instrument adopted, amended or revised pursuant to the provisions of chapter forty-three B which establishes and defines the structure of city and town government for a particular community and which may create local offices, and distribute powers, duties and responsibilities among local offices and which may establish and define certain procedures to be followed by the city or town government. Special laws enacted by the general court applicable only to one city or town shall be deemed to have the force of a charter and may be amended, repealed and revised in accordance with the provisions of chapter forty-three B unless any such special law contains a specific prohibition against such action.

These definitions make clear that a charter should include a description of all of the features of the local government, including its powers; the organization of the community into operating offices and agencies for the exercise of these powers; the offices to be filled by the voters and those to be filled by appointment; the terms of office, powers, duties and responsibilities of the municipality generally, and, specifically, those assigned to the various elected and appointed offices established to conduct the municipal business; the functions to be performed by local officers; and certain procedures to be followed in the conduct of municipal business.

When used in connection with a municipality, the word “charter” may also include the provisions of the General Laws in force relating to that city or town, whether in defining its powers or regulating their mode of exercise. These statutory provisions may not be mentioned in a municipal charter, but they are automatically read into the charter and become a part of it. This is particularly true in Massachusetts, because the powers and duties of nearly all local offices, including boards of selectmen, school committees, boards of assessors, cemetery commissioners, boards of health, library trustees, planning boards, conservation commissions, auditors, accountants, clerks, collectors, treasurers, *et al.*, are set forth at length in state law. Note, however, that Section 20 of Chapter 43B specifically allows a municipal charter to supersede the provisions of state laws relating to municipal charter matters.

A charter is different from a bylaw or an ordinance in the same way that, at the state or national level, a constitutional provision is different from a statute. A charter, like a constitution, is the basic law establishing the form of government and distributing the powers, duties and responsibilities to the various units of the government and setting out how and when those powers will be exercised. The charter is the higher form of law, and other actions taken by the government must be subservient to and consistent with it.

The procedures to be followed in adopting, amending or revising a charter must be different from the procedures that apply when adopting, amending or revising a bylaw or ordinance.

Voter Approval

Prior to the ratification of the Home Rule Amendment by the state's voters in 1966, municipal governments derived their "charters" from certain provisions of the General Laws that provided "options" that might be adopted by municipalities, and by special acts of the Legislature applying to specific communities. When towns petitioned for the establishment of a city form of government, the resulting special acts establishing the city charter always contained a provision for approval by the voters. Likewise, when towns petitioned for authority to move to a representative form of town meeting, the resulting special acts providing for the transition always contained a provision for approval by the voters. Special acts that provided for other changes in local government organization (e.g., creating a city or town manager) routinely contained a provision for approval by the voters. A number of pre-"home rule" state laws providing optional forms of municipal administrative organization required approval by the voters before their provisions would become effective (e.g., authorizing the board of selectmen to act as, or to appoint, other town officers [G.L. c. 41, §21]; establishing a board of public works [G.L. c. 41, §§69C-F]). Chapter 43, beginning in 1915, provided a number of optional charters that could be adopted in cities in whole (Plans A through F) or in part by a ballot vote.

As a general rule, the final step in any process to adopt a city or town charter, or to make major amendments or revisions, has always been seen to require a vote at a regular city or town election.

Section 1 of Article 89 provides as follows:

Right of Local Self-Government. It is the intention of this article to reaffirm the customary and traditional liberties of the people with respect to the conduct of their local government, and to grant and confirm to the people of every city and town the right of self-government in local matters, subject to the provisions of this article and to such standards and requirements as the general court may establish by law in accordance with the provisions of this article.

Clearly, the grant of the right of self-government in local matters is made to "the people," and to be valid, "the people" must participate directly in the process of charter adoption, amendment or revision.

City vs. Town Distinction

The basic distinction between town and city forms of government was spelled out in 1854 by the Massachusetts Supreme Judicial Court in *Warren & others v. Mayor & Aldermen of Charlestown*, 2 Gray 84, 68 Mass. 84 at 101:

The marked and characteristic distinction between a town organization and that of a city is that in the former all the qualified inhabitants meet, deliberate, act and vote in their natural and personal capacities in the exercise of their corporate powers; whereas, under a city government, all this is done by their representatives.

In 1926, an amendment to the state constitution (Article 70) allowed for a form of town government with a representative town meeting (“inhabitants of the town ... elected to meet, deliberate, act and vote in the exercise of the corporate powers of the town”). However, Article 70, and Article 89, which later superseded it, clearly indicates that this option is available only to “towns.”

The issue of what determines a city versus a town was further explored by the Appeals Court in 1978, after Methuen adopted a “home rule” charter providing for a town council to serve as the community’s legislative branch. In *Chadwick v. Scarth*, 6 Mass. App. Ct. 725 at 727-728 (1978), the Appeals Court found that, on the question of whether Methuen is a city or a town, “the retention of the name ‘Town’ by the municipality is immaterial and ... the substance of the charter which has been adopted controls.” The court ruled that “Methuen clearly has a representative form of government,” which qualifies it as a city.

So a town meeting, whether “open” or representative, classifies a community as a town. And whether a community refers to itself as a town does not necessarily mean that it has a town form of government. Greenfield, Franklin and Watertown, for example, are among the communities that adopted “city” forms of government as defined in state law—either mayor-council or council-manager—but continue to use the designation “town.” [The state constitution, it should be noted, precludes any town of fewer than 12,000 inhabitants from adopting a city form of government.]

Selectmen-Town Meeting Form

The selectmen-town meeting form of government, established in colonial times and reaffirmed in various statutes throughout the Commonwealth’s history, remains the form of government in 296 of the state’s municipalities.

The various colonial and early governments of the Commonwealth encouraged the establishment of towns and the formation of several towns out of one original settlement. Almost all officers and boards were elected directly by the town's voters. As the demands on local government continue to increase in both number and complexity, towns have had to adapt to ensure that town government structure and organization is effective and responsive to current needs and preferences.

The following are some changes that have affected the organization of town governments in Massachusetts:

- The authorization of representative town meetings in 1926
- Adoption in 1966 of the Home Rule Amendment, the purpose of which was to “grant and confirm to the people of every city and town the right of self-government in local matters”
- The evolution of the town manager position, beginning at the turn of the twentieth century, modestly boosted following World War II and again after passage of the Home Rule Amendment and the local adoption of charters, and fueled to the greatest degree by the passage of Proposition 2½ in 1980
- Greater popularity of five-member boards of selectmen, notably in towns with populations of 20,000 or more
- A trend in larger towns, often with a town management position, toward greater centralization of functions over time (e.g., consolidated public works departments) [Many home rule charters include consolidation provisions, as do special acts “having the force of a charter” (see G.L. c. 4, §7 [5]).]
- Enactment in 1997 of a statute allowing towns to change certain traditionally elected offices, such as clerk and treasurer, from elected to appointed status by a vote of town meeting, followed by a town ballot vote [Several communities have used this statutory provision (G.L. c. 41, §1B) in circumstances where a long-serving incumbent retired.]

State law recognizes two forms of town government with the following characteristics:

1. Representative Town Meeting-Board of Selectmen

- Population requirement of 6,000 or more
- Town meeting representatives elected from precincts of the town
- Size of town meeting determined locally; most are in the range of 200 to 250 voters

Thirty-six towns have a representative town meeting. In most cases, representatives serve a three-year term, with one-third of the members elected each year. The town of Saugus is on a biennial,

November election schedule, and all representative town meeting members are elected for two-year terms.

The board of selectmen serves as chief executive and must have an odd number of members—typically three or five—serving staggered terms. The board of selectmen may appoint a town manager/administrator position. Currently, all towns with a representative town meeting have a management position.

State law requires that members of the legislative body (i.e., representative town meeting members), the board of selectmen and the school committee be elected. The powers and duties of the manager/administrator are determined locally; there is no state definition.

Since 1971, twelve towns have replaced representative town meeting with mayor-council (6) or council-manager (6) governments, and three towns—Athol, Seekonk and Webster—have returned to open town meeting.

2. Open Town Meeting-Board of Selectmen

- Only form of legislative body available to towns with populations of 6,000 or fewer
- All registered voters may participate in town meeting

The other key features of this form are the same as described above for representative town meeting. Many towns with open town meetings have a manager/administrator position.

In Massachusetts, 261 towns operate with an open town meeting. The largest is Andover (population 33,201). Boards of selectmen have three or five members, with the exception of Wakefield, which has a seven-member board.

State law requires that members of the board of selectmen and the school committee, as well as the moderator, be elected.

Town Government Today

Town charters in Massachusetts present a wide variation both in form and substance and preclude practical classification beyond the form of its legislative body: open or representative town meeting. Some charters deal mainly with the fundamentals of structure and function and omit references to those local offices that are extensively governed by state law. Others specify more or less completely

the municipal organization and the powers, duties and responsibilities of the officers, subordinates and agents.

Home Rule Charters

“Home rule” charters, adopted by local voters pursuant to the Home Rule Amendment and Chapter 43B (the Home Rule Procedures Act), have generally provided, in one document, a complete description of the local government, its structure, and operating procedures. The intent of the charter is:

- To identify all major elected and appointed officers, boards, and commissions, including their size, composition and terms of office
- To describe the role and responsibilities of a management position
- To provide guidance of financial management practices
- To describe the organization of municipal departments and/or provide a procedure for reorganization of municipal functions
- To address standard practices, such as meeting and record requirements for multiple-member bodies
- To authorize the use of recall under certain conditions
- To provide a timeline for actions that may be necessary as the government transitions from its current form to the form as described in the charter

Many of these charters introduced new and novel features to municipal government in Massachusetts—including recall of elected officers and consolidation of municipal offices and functions—which subsequently have been copied by other communities, principally by seeking special acts of the Legislature for their communities.

Sixty Massachusetts towns are currently operating under home rule charters. Towns adopting home rule charters in recent years include Longmeadow (2004), Mashpee (2004) and Ware (2007).

Several towns have also revised home rule charters using the special act process. These include the representative town meeting towns of Auburn, Plymouth and Walpole, and the open town meeting towns of Abington, Ashland, Westwood and Winchendon.

Special Act Charters

“Special act” charters, enacted by the Legislature at the request of a particular town, are often as comprehensive as home rule charters in providing a picture of the town’s structure as well as providing guidance for financial actions, such as the preparation of the operating and capital budgets as well as recall procedures.

Several towns undertook the “special act” process prior to the adoption of the Home Rule Amendment, at a time when a change in form of government could be achieved only by petition to the Legislature and enactment of special legislation. As Section 8 of the Home Rule Amendment reaffirms that the Legislature can take such action upon the request of a particular town, others have pursued this route since 1966.

Forty-seven Massachusetts towns are currently operating under a special act with the force of a charter.

Some towns have determined that the priority need was to create and define a management position, and many of these chose to leave most or all of their government structure intact, including the election of boards, commissions and officers. Seventeen Massachusetts towns are operating with a special act creating a town manager or administrator position.

[For more information, see Exhibit 3A: Towns Operating Under Home Rule Charters, and Exhibit 3B: Special Act Charters and Establishing a Town Manager or Administrator Position.]

Options for Changing Local Government Structure

Selectmen examining the form of government or appointing a town government study committee to consider questions of structure and organization are advised to look for a structure that supports clarity and accountability among and between all town offices, while respecting the premise of voter participation in major decisions.

The majority of towns continue to operate under the state’s statutes relating to local government organization (generally G.L. c. 39-44). These statutes address the organization and procedural requirements of town meeting, local elected and appointed officers and boards, options for consolidated departments, and municipal finance and financial officers.

State law, however, provides several routes for cities and towns to make changes in the organizational structure of local government:

1. Election of a charter commission and subsequent adoption of the commission’s proposed charter
2. A petition for enactment of special municipal legislation
3. Using bylaws and “permissive” legislation to enact structural change

Home Rule Charter Commission

More than 180 charter commissions have been elected since the adoption of the Home Rule Amendment in 1966. The procedures for creation of a charter commission are outlined in Chapter 43B of the General Laws. In summary, any city or town, upon petition of 15 percent of the registered voters, may vote to elect a nine-member charter commission to prepare a charter. A charter commission has a maximum of eighteen months to prepare a proposed charter, but may choose to complete the task in ten months. Following its election, a commission considers the options for changing local government structure and seeks participation from the residents via public meetings, public hearings, publication of a preliminary report, and issuance of a final report. The requirements for public participation are described in Chapter 43B. (See also *The Home Rule Amendment and the Home Rule Procedures Act* from the Department of Housing and Community Development.)

To take effect, a charter proposal must be adopted by a majority of the voters at a municipal election. In towns, some charter commissions follow a ten-month schedule and present a charter proposal to the voters at the annual election one year following the commission's election. If the commission chooses to follow the eighteen-month schedule provided in the law, the charter proposal would be presented to the voters at the municipal election two years following the election of a commission. (This procedure is most applicable to cities with biennial elections.)

The election of a commission, the preparation of a charter, and the submission of a proposal to the voters is a major undertaking. When doing so, most towns make one or more significant changes in their structure, including, but not limited to:

- Creating a general management position (e.g., town administrator or town manager)
- Changing elected boards, commissions and officers to appointed status
- Establishing or consolidating local departments, including enabling provisions to allow organizational changes as circumstances require
- Establishing budget and capital plan procedures

The historic record on home rule charters indicates an average acceptance rate of roughly 50 percent.

The Home Rule Amendment and Chapter 43B anticipate that charters may need amendment and provide a procedure to accomplish such changes. Such amendments, however, cannot relate in any way to the size, composition, mode of election or appointment, or term of office of the legislative body, board of selectmen, or the town manager. These concerns must be addressed either in a home rule charter or via a special act of the Legislature, sometimes referenced as a “charter-level change.”

The municipal charter amendment process requires that a proposed amendment receive a two-thirds vote of town meeting, followed by approval of the majority of voters at a municipal election. The provision also provides specific timelines for actions and a public hearing requirement.

Special Municipal Legislation

The procedures governing special act adoption are:

- Passage, by majority vote, of a warrant article or resolution at town meeting proposing the special legislation
[Some town meetings used to pass an article providing a “general authorization” to enact a specific change, but it is more common now for town meetings to vote on the exact text of a particular proposal. The *Legislative Drafting Manual* on the state website (www.mass.gov) has specific information regarding requirements.]
- Petition to the Legislature to enact the proposed legislation (“home rule petition”)
- Enactment of the petition by the Legislature
- Signing by the governor

In some instances, the petition may require that the act become effective only upon acceptance by a majority of voters at the next regular municipal election (sometimes referred to as ratification). In other instances, the act may contain a certain date when the provisions take effect, or the act may state that its provisions become effective upon passage.

The long-standing tradition of the Legislature has been to require that such acts be approved by the voters prior to taking effect, although there have been exceptions. The premise of state laws regarding town government demonstrates a marked preference for involving the voters in most aspects of local government organization, and this aspect of law continues to be a foundation of most of the optional statutes discussed below.

Towns can also use the special act route to make more discrete changes, such as combining the positions of an appointed collector and treasurer, changing an elected board or commission to an appointed one, creating a consolidated department (if not using the options already provided in state law; see discussion below), and adopting a recall provision.

Bylaws and Permissive Legislation

Towns may accomplish some structural, administrative and organizational changes through the adoption of bylaws, though they are advised to consult with town counsel before proceeding.

In some management areas, notably personnel administration, there have been efforts to adopt

comprehensive bylaws. (Available “enabling” legislation is not always seen as responsive to the management and organizational priorities of municipalities.) A number of towns have used bylaws to create a consolidated department of public works to reflect the local preferences for organizing such functions instead of using the enabling legislation provided by state statute [G.L., c. 41, §§69C-F]. Other towns have used bylaws to encourage coordination among related offices (e.g., all those with financial duties).

State law also provides some organizational options for towns through other “permissive” or enabling legislation, such as the following:

- Chapter 41, Section 1B (enacted in 1997), allows a vote of town meeting followed by a ballot vote at the annual town election to change certain elected positions to appointments of the board of selectmen. The statute applies to the following positions: assessors, boards of health, constables, highway surveyors, road commissioners, sewer commissioners, tax collectors, town clerks, treasurers and tree wardens. Elected officials in these offices at the time of such vote would complete their terms before the appointment provisions took effect. (Note: This section does not apply to boards of selectmen or school committees, which must remain elected.)
- Chapter 41, Section 21, allows selectmen to act as certain offices: board of assessors, board of health, board of public works, commission on public safety, municipal light board, park commissioners, sewer commissioners, water and municipal light commissioners, water and sewer board, and water commission. Section 21 also may be used to grant selectmen the authority to appoint cemetery commissioners, the police chief, the fire chief, assessors, a superintendent of streets, or the board of health.

For sections 1B and 21 of Chapter 41, the question(s) of authorizing the board of selectmen to appoint particular offices or multiple member bodies must be placed on the ballot at an annual election. The question(s) may be placed on the ballot by a vote of the town meeting held at least sixty days before the annual town meeting. For Section 21, the question(s) authorizing selectmen to act as certain boards may also be placed on the ballot upon petition by 10 percent of qualified voters and filed with the selectmen at least sixty days before the annual town meeting.

Other enabling statutes include the following:

- Chapter 41, Section 25, allows for appointment of assessors by the selectmen.
- Chapter 41, Section 1, allows for combining the positions of treasurer and collector.
- Chapter 41, Section 55, allows for appointment of town clerk as town accountant, if he or she holds no other office involving the disbursement or receipt of funds.

- Chapter 40N allows the establishment of a water and sewer commission as “a body corporate and politic.”
- Chapter 43C provides a procedure for creating three consolidated departments: finance, community development, and inspections. Department consolidation is achieved via town meeting vote approving the action and subsequent bylaw adoption. Chapter 43C defines the bylaw provisions for establishing these departments.

Municipal counsel should review any procedural option under consideration. Cities and towns are guided by the Home Rule Amendment, which defines changes in the legislative body, chief executive or town manager as requiring either adoption or revision of a home rule charter or enactment of special legislation.

Town Manager/Administrator

For most towns, the complexity of running town government demands that there be a professional administrator (e.g., administrative assistant, town administrator or town manager) to assist the board of selectmen. While these positions must be authorized by the town charter or town meeting, it is the board of selectmen that does the hiring. Depending on the responsibility vested in the position, the professional administrator can have a significant impact on the ability of selectmen to do their job and on how the town is run.

The powers, duties and responsibilities of a town management position, by whatever title, are determined and defined locally. Most towns operating under home rule charters, special acts with the force of a charter, or a special act establishing a management position define the duties and authority of such positions. The office of “town manager” or “town administrator” is not defined in state law, and there is no state statutory job description for this role, beyond the limited guidance provided in Chapter 41, Section 23A, allowing towns to have a “town administrator” (previously referenced as “executive secretary”).

The long-held view that managers have more authority than administrators has no basis in state law. Some town manager positions have fairly modest authority, and some town administrators have significant authority.

The “strong town manager” reference is also a matter of perspective or individual town experience with the position. Some ways in which the position could be considered “strong” are the extent of appointment authority, authority for the direction of the budget and capital plan process, and assumption of certain duties previously assigned to the board of selectmen (e.g., approval of

payments). As each community has approached this question differently, and the expectations for these positions by town leaders have evolved over time, there are myriad job descriptions for such positions. Examples from which to draw ideas are readily available on town websites that include bylaws and charters.

[For more about the features found in many job descriptions for town managers and town administrators, see Exhibit 3C.]

A town can enter into an employment contract with the manager or administrator, as provided in Chapter 41, Section 108N.

Recall Provisions

In recent years, an increasing number of communities have provided an option for voters to recall, or remove, elected officials prior to the completion of their term of office. Approximately 180 communities in Massachusetts now have recall provisions.

Massachusetts does not have a state recall statute, so the only avenues by which a municipality may allow for a recall are inclusion of a recall provision in a home rule or special act charter, or enactment of a special act of the Legislature authorizing recall in a particular community. Most provisions authorize the recall of any elected official. The towns of Billerica, Chelmsford, Natick and Saugus exempt representative town meeting members, while Acton exempts library trustees.

Most recall provisions provide “windows” or timeframes when a recall cannot be initiated (e.g., within the first six months in office, within the last six months in office, within a year following an unsuccessful recall).

The recall procedure begins when the number of voters specified in the provision file an affidavit with the town clerk containing the name of the officer whose recall is sought, the grounds (reasons) for recall, and requesting the election of a successor to the office. The clerk then provides petition blanks to the voters filing the affidavit to collect voter signatures. Filing of the affidavit can begin with a small number of voters, as seen in many towns with populations under 10,000. Several charters and special acts, however, require a significant number of voters to start the process (e.g., 500 in Rockland).

Signature gathering: Signatures of registered voters are collected on petition forms requesting the

recall. The majority of recall provisions set a percentage of voters to sign the petition. The most common requirement is 20 percent, with a few requiring up to 50 percent.

A period of time is specified for the collection of voters' signatures. The most common time period is twenty days. Other signature requirements may include limiting the number of signatures that can be collected from any one district or precinct, or requiring a minimum number of signatures from each precinct.

Scheduling election: Once a petition is certified by the registrars of voters, the board of selectmen schedules a recall election. Recall elections must follow the relevant procedures and requirements of state election laws. Many recall provisions allow the election to be delayed if another municipal election is scheduled to be held within a similar timeframe (e.g., within 120 days).

Resignation: Many recall provisions require that the board of selectmen or city or town council provide written notice to the officer whose recall is sought. The officer usually has five days to resign from office. In the case of resignation, most provisions require that an election still be held, although only the votes for candidates to succeed the resigned officer are counted. Some recall provisions state that no election need be held if the officer subject to the recall resigns. Any vacancy resulting from a resignation would then be filled as specified in the charter (if applicable) or as state law provides.

Candidates: The recall action may consist of one or two parts on the ballot. In some home rule charter recall provisions, the only question on the ballot is for or against the recall of the officer(s) named. In most recall provisions, however, the ballot contains both the question of recall and the election of a candidate to replace the officer should he or she be recalled. In many instances, the officer whose recall is sought is automatically included on the ballot as a candidate for office without nomination. In a few communities, the officer whose recall is sought is specifically prohibited from being on the ballot.

Voter participation requirement: All recall provisions require at least a majority vote on the question of recall. A few require a two-thirds vote for the recall to take effect. Several recall provisions require a specific level of voter participation in the election for the recall to take effect (e.g., Salisbury and Sutton: 25 percent; Canton and Lynnfield: 30 percent; Pembroke: 40 percent; Oxford: 50 percent). If the officer is recalled, the ballots for candidates are counted. The candidate receiving the highest number of votes is declared elected. In most recall provisions, if the vote on the question of recall is negative, the officer whose recall was sought remains in office, and the votes for the candidates are not counted.

CHAPTER 4

Administrative and Regulatory Responsibilities

The board of selectmen is charged with many administrative and regulatory responsibilities. These functions range from very important to ministerial.

Selectmen and Town Meeting

The most significant responsibility of the board of selectmen related to the town meeting is the preparation of the warrant (see G.L. c. 39, §10), which is like an agenda for the meeting. Every town meeting must be called by a warrant that states the time and place of the meeting and lists all the items of business (“articles”) to be acted on at the meeting. The selectmen govern what appears in the warrant as well as the order of the articles. In short, selectmen organize matters up to the point that the moderator calls the gathering to order.

Selectmen insert articles in the warrant on their own initiative, by request of another town committee, or, in the case of the annual town meeting, by written petition signed by at least ten voters. (To have an article included in the warrant for a special town meeting requires a petition signed by 100 voters, or 10 percent of all town voters, whichever is fewer.) A petition is valid only if it includes signatures and street addresses of the required number of registered voters. The selectmen must have the petition verified by the board of registrars of voters or the board of election commissioners to see that it is in order.

The selectmen are in charge of “opening” and “closing” the warrant. When a town meeting is called, the warrant is considered to be open. To allow for the warrant to be printed, the selectmen may vote to refuse to accept articles after a certain date, and the warrant is closed as of that date. How long the town meeting warrant must be open and how long before the meeting it must be opened are usually set forth in a town’s bylaws. Selectmen may, however, vote to reopen the warrant after it has been closed.

Only those articles of business that have been included in the warrant may be legally acted upon at the town meeting. The selectmen should take care when preparing the warrant to be sure that it is clearly worded, and that it contains a complete description of all subjects to be taken up at the meeting. A well-prepared warrant will do more to ensure that the meeting goes smoothly than anything else (aside from the moderator's skills). Usually the town manager and town counsel are charged with preparing the actual warrant, which must be signed and issued by the selectmen.

The precise format of the warrant will differ from town to town. Some town warrants provide a separate article for the appropriation of money to each town department, while most lump the appropriations for all town expenses under one omnibus budget article. Articles that are similar should be placed together, so that the town meeting does not cover the same ground more than once. This may be difficult, however, in communities where the order of articles is selected by a lottery or bingo drum.

The warrant must be signed and issued by the selectmen at least seven days before an annual town meeting and at least fourteen days before a special town meeting. (It's a good idea to check the town bylaws and confer with town counsel.) The selectmen direct the warrant to the constables, or to whomever is required to give notice of the meeting to the town. The way in which notice is given may be prescribed by the individual town, either through bylaws or through town meeting vote, or it may be done in any manner approved by the attorney general's office.

Ordinarily, it takes a majority of the selectmen in office to call a town meeting. If the selectmen unreasonably refuse, however, a justice of the peace may call a town meeting on the written request of 100 registered voters, or 10 percent of the total voters [G.L. c. 39, §12].

The town meeting can have a great deal of control over department heads. The town meeting can, for example, investigate town problems or administration through its finance committee, other standing committees or special ad hoc committees. On the basis of findings and recommendations by such committees, or on the petition of ten or more local voters, the town meeting may adopt resolutions and bylaws establishing new town policies or initiating new programs [G.L. c. 39, §10]. The town meeting can also, within certain limits, reorganize town agencies and control development in the town. The most important power of town meeting is the power of the purse. By appropriating or withholding funds, the town meeting can force, prevent or influence actions by town officials and departments.

When to Call a Town Meeting

Every town in Massachusetts must hold at least one town meeting each year. The annual town meeting is held in February, March, April, May or June, unless some other month is designated by special law or by a provision in the town's home rule charter. As the annual election is technically part of the town meeting, most towns choose to divide the annual town meeting into two parts, to be held on separate days: one for the election of town officials, and one for the transaction of other business. If the two meetings are held within thirty-five days of each other, they may be called by the same warrant; otherwise, they must be called by separate warrants [G.L. c. 39, §9A]. The date and time of both the annual town meeting and the annual election are usually established by bylaw.

In addition to the annual town meeting, special town meetings may be called at any time. Selectmen must call a special town meeting if they receive a written request, on a form approved by the secretary of state, signed by 200 voters, or 20 percent of all registered voters in the town, whichever is fewer [G.L. c. 39, §9]. It is possible—and sometimes occurs—that selectmen call a town meeting that may actually be held within another town meeting. In other words, a special town meeting may be held within an annual town meeting, and more than one special town meeting may be held or commence on the same date. Separate warrants must be used for each meeting.

There are a number of good reasons for holding special town meetings: to make budgetary transfers; to appropriate money received from federal and state programs; to accept donations, gifts or land, under certain circumstances; or to separate certain articles (e.g., zoning) from the annual town meeting, or for any other legitimate reason. Given the financial challenges facing local government, a fall town meeting is often held to make adjustments to the annual budget when more information may be known and additional funds may be available. Holding too many special town meetings, however, may be a sign of poor management and can test the patience of voters. Some towns, by bylaw, custom or home rule charter provision, have provided that the town meeting have two regularly scheduled sessions, one session in the spring and one in the fall. The intent is to focus attention on financial matters in the spring and allow for more deliberations on non-financial matters in the fall. While this has not always been fully successful, such a model does provide for a regularly scheduled meeting in the fall, which may help to limit the number of special meetings.

State law allows town meetings to be held in more than one location at the same time, as long as the places are connected by a public address system with loudspeakers to allow all town meeting attendees to hear and be heard [G.L. c. 39, §10]. If a town meeting becomes so crowded that people are prevented from participating, the moderator may consult with the selectmen who are present at the meeting and call a recess for not more than fourteen days, until better facilities become available

[G.L. c. 39, §10]. Good planning in advance usually results in additional rooms being available for overflow crowds.

Election Responsibilities

The board of selectmen's primary election responsibilities include calling elections; appointing election personnel from lists of candidates supplied by the major political parties; and designating voting precincts. The conduct of state and national elections is regulated by state law. Local elections are governed by both state law and a town's charter or bylaws.

Towns may hold their annual elections on the same day as the business portion of the annual town meeting or on a separate day. Most towns hold their annual elections a week or more before or after the town meeting.

The majority of Massachusetts towns use official ballots prepared by the town clerk in conformance with state law to elect local officials.

Board of Registrars of Voters

Most towns have a board of registrars of voters, which is responsible for registering voters, making lists of residents, certifying nominating papers and petitions, processing absentee voter applications, and administering election recounts. The board consists of the town clerk and three other people appointed by the selectmen [G.L. c. 51, §15]. Members represent the two major political parties.

A few towns have created a board of election commissioners [G.L. c. 51, §16A] consisting of four members appointed by the selectmen for four-year terms. This board has all the powers and duties of a board of registrars of voters and all those powers and duties of the selectmen and town clerk that relate to caucuses, primaries and elections, except for giving notice of elections and fixing the dates and hours of elections. Two members must represent each of the two major political parties, selected from lists of qualified voters submitted by the town committees of the two major political parties.

Election Officers

The selectmen must annually appoint election officers from lists submitted by the town committee of each political party. Selectmen appoint a number of election officers, depending on the number of precincts and voting places. Election officers must meet a number of qualifications, including being enrolled voters in the town. State law requires that both major political parties be equally represented.

A selectman may not serve as an election officer in a state or presidential primary or state election, but may serve as an election officer for a local election, as long as he or she is not a candidate in that election.

Voting Precincts

Selectmen in towns with more than 6,200 residents are required to divide the town into voting precincts every tenth year [G.L. c. 54, §6]. This is optional in smaller towns, unless the selectmen are directed to establish voting precincts by the town meeting. Each voting precinct must contain a similar number of inhabitants, but no more than 4,000 people. Selectmen have other administrative responsibilities, such as designating the polling places for each precinct.

Voting Procedures

In towns that use official ballots, the selectmen call elections with notices or warrants that specify the offices to be voted for and the time when the polls will be open and closed. Parameters for voting hours are specified by state law [G.L. c. 54, §64]. The type of voting equipment to be used is determined by the board of selectmen and approved by the secretary of state.

Appointing Town Boards, Commissions and Committees

An important responsibility of the board of selectmen is appointing people to serve on town boards and commissions. Depending on a town's organization and the interest of its citizens in civic life, fulfilling this duty can be a major undertaking.

The appointing authority of selectmen may be vast or limited, depending on how the town is organized. Other elected boards and committees, the town meeting moderator, and the professional administrator (if the town has one) all have some appointment responsibility, but selectmen have the power to appoint more local officials than does any other person or group. With so many other obligations, selectmen must necessarily delegate some of this power to department heads. It is important, however, that selectmen retain sufficient control to ensure that the appointment process is always open, fair and properly implemented.

Certain town officers, including the town meeting moderator and members of the school committee, are required by law to be elected. State law designates the selectmen as appointing authorities for several positions, while bylaws and town meeting may authorize the selectmen to appoint others. In addition, towns routinely delegate to selectmen the responsibility for appointing short-term

committees for such purposes as deciding whether to build a new town hall or planning a holiday observance or to study a matter and render a report.

There is also an inherent authority of the selectmen to create and appoint committees who serve under the selectmen. Usually these committees handle a particular function or area and study it, advising the selectmen on their findings. It is important for members of those committees to understand that it is the board of selectmen that makes the ultimate decision. Even if the selectmen do not go along with the recommendation of such a committee, the work of such committees is important in local government.

A town may have more than a dozen committees operating at any one time, and most offer no compensation. Some towns always seem to have a steady supply of committed, qualified people willing to serve on these boards. More often, however, selectmen find that they struggle to find good candidates to fill certain vacancies.

Some selectmen complain that their town government is like musical chairs, with the same people filling different seats. Getting new people to serve on town boards and committees is essential to the vitality of a town, but it doesn't happen by chance. The easiest way to create interest is to educate people about their town government—how it functions, what it does, and how they can become involved.

Several towns publish and circulate a citizens' resource guide that gives a brief description of each office, board, committee and department within the town, along with a list of volunteer opportunities. Another approach is to hold an annual open house at town hall to familiarize residents (especially new ones) with town operations and to solicit their involvement.

The process of appointing people to serve on town boards can be simplified by maintaining a file of qualified applicants. Some towns use an application form that allows citizens to express their interest in serving on particular boards and to briefly describe their background and skills. The form should be published in the annual report or periodically in the local newspaper. Selectmen should keep the responses on file and refer to them as vacancies occur.

Choosing an Appointee

Who is appointed to serve on a town board can be just as significant as who is hired to fill a full-time, paid town position. In some cases, state law or town bylaws set out specific qualifications

for membership on certain boards or commissions. Usually, however, those decisions are up to the selectmen. While there is no one right way to choose an appointee, the following are some suggestions:

- Seek a mix of skills. Don't assume that every member of the board of health must be a physician, or every member of the youth commission must be under 30. The most effective boards often have members from a range of professions and perspectives.
- Seek diversity in age, sex, race, political party, neighborhood, and length of residency.
- Be clear about job requirements. Many boards require a substantial time commitment, including attendance at evening meetings and weekend obligations. Make sure appointees understand what is expected of them.
- Seek a cooperative spirit. Boards function best when their members are willing to compromise. People who hold unshakable opinions or are argumentative can paralyze a board. Such persons can also cause other members to resign and can discourage others from even applying.

Unless otherwise provided by law or bylaw, a person need not live in town to accept an appointment to public office. If the town, however, tells the appointee at the time of appointment that he or she must move into town within a specified time period, then his or her failure to do so means that he or she has voluntarily vacated the office [G.L. c. 41, §109].

The Appointment Process

In many towns, selectmen appoint board members so their terms of office expire at the same time each year, usually at the end of the fiscal year or around the time of town meeting. The board should keep a calendar of appointments so selectmen know when the terms of different board members will expire. (It's also a good idea to publish committee appointments and their termination dates in the annual town report.) When possible, selectmen should meet each candidate for a town board or office before making a decision on the appointment.

Appointments should be made by majority vote of the selectmen (unless otherwise specified by law or bylaw) and should be confirmed in writing with a letter to the appointee. State law requires all appointees to take an oath of office before assuming their duties [G.L. c. 41, §107].

State law also requires those appointed (or elected) to public positions (with a few exceptions) to receive online training regarding the conflict-of-interest law. (This important subject is covered in Chapter 2.)

Most appointed positions authorized by state law are for one-year or three-year terms. In many cases the board may want to renew appointments for another term, but reappointment time provides a good opportunity to review the job being done by the appointee, and by the board in general, and to make any necessary adjustments.

When appointing committees for a specific purpose (e.g., to study municipal insurance), a termination date should always be set beforehand. The lifespan of temporary committees can always be extended, but committees without a firm date of dissolution are often difficult to terminate.

Relations Between Selectmen and Appointed Boards

Once appointed, town boards and commissions must be free to act on their own without interference. If the committee was appointed to advise the selectmen on a certain matter, however, a clear understanding should be set forth as to what, if any, independent authority the committee may have. Such advisory committees can take on a life of their own if their role and extent of independence is not understood. Issues sometimes arise over these boards seeking to place articles on the town meeting warrant, apply for grants, or represent the community before state or federal agencies. A clear understanding in the beginning will avoid awkward problems in the future.

It is important that the board of selectmen maintain close communications with other town boards and departments. At a minimum, selectmen should review the minutes of each meeting of other boards. Some towns circulate copies of board minutes to all town departments and agencies. Many towns make the minutes of all board meetings available to the public at the local library, town hall and/or the municipal website.

One way of improving coordination among town boards and departments is to schedule meetings several times a year with all department heads and board and committee chairs. If well-organized and well-run, these meetings can provide a good forum for discussing larger town issues, such as land use or cost containment, that cannot be solved by one agency. It is important to have an agenda for these meetings to help keep the discussion on track.

Vacancies in Office

Members of town boards sometimes resign in the middle of a term, creating a vacancy. Regardless of the reason for the vacancy, the town clerk must be notified in writing for a resignation to become effective [G.L. c. 41, §109]. If there is a vacancy in a board of two or more members, the remaining

members must give written notice to the selectmen within one month [G.L. c. 41, §11]. The selectmen and the remaining board members must, after one week's notice, fill the vacancy by a majority vote of those voting. The selectmen must fill the vacancy themselves if the remaining board members fail to give notice within the required time.

In the case of a vacancy in the office of accountant, collector or treasurer, or if that person is unable to fulfill the duties of office, the selectmen may make a temporary appointment [G.L. c. 41, §40]. They may also appoint a temporary highway surveyor, road commissioner or tree warden under similar conditions.

If there is a vacancy in the office of town clerk at the time of a town meeting, or if the town clerk is absent or unable to serve, the town meeting must appoint a temporary clerk by ballot. The votes are counted by the selectmen, if present. Otherwise, votes are counted by three people chosen at the meeting. If a town clerk is needed to perform duties other than those at the town meeting, the selectmen must appoint, in writing, a temporary town clerk [G.L. c. 41, §14]. If the selectmen appoint an acting town clerk, the chair of the board must notify the secretary of state's office.

Vacancies on the Board of Selectmen

If there is a vacancy on the board of selectmen, or a failure to elect a selectman, the remaining selectmen may call a special election to fill the vacancy. Selectmen may call a special election for this purpose if they get a request in writing signed by 200 registered voters, or 20 percent of the total number of registered voters in town, whichever is less, and provided that the request is filed not less than 100 days before the next annual election [G.L. c. 41, §10]. If a selectman announces in advance that he or she plans to step down as of a certain date, the town clerk may certify the date when the vacancy will occur. The remaining members of the board may then call a special election, provided that the election is not held before the effective date of the resignation.

Terminating Appointees

The freedom of the board to remove appointees depends on the basis of its authority to appoint them. Depending on a number of factors, there may be limitations on a board selectmen's ability to remove people it appoints. There has been some support, however, for the concept that the power to appoint includes the power to remove, unless otherwise limited by law. In any event, when dealing with these issues it is imperative to consult with town counsel. Even if you have the right to remove someone, it cannot be done for improper purposes. Claims that a removal was discriminatory or in violation of civil rights are very costly and disruptive to local government, even if you prevail in the end.

Licenses and Permits

In most towns, the board of selectmen is the local licensing authority, with the ability to issue licenses and permits for a broad range of activities, such as the sale of alcoholic beverages, lodging houses, automobile dealers, parking lots, the storage and sale of gasoline, restaurants, and many other purposes. Chapter 140 of the General Laws is one of the principal statutes outlining the licensing authority of selectmen. This authority must be exercised strictly in accordance with the provisions set out in the applicable law and in a fair and impartial manner. To do otherwise will likely subject the board and the community to court challenges and potential liability.

There is a distinction between a license and a permit. A license is a grant of permission to engage in some activity or to make use of property in a way that might otherwise be unlawful or that requires regulation or supervision to protect the public health, safety, and general welfare. For this reason, selectmen may issue only those licenses specifically authorized by state law. A board may, however, issue permits for certain activities that fall under the broad police powers of selectmen. For example, permits may be issued for parades or to allow merchants to hold sidewalk sales. A license is ordinarily issued for use over a substantial period of time, whereas a permit is generally for a short duration.

A person does not acquire an automatic right to a license merely by applying for one. An applicant must show that all necessary requirements and qualifications have been met and that a granting of the license is in the public interest. Selectmen must consider the public interest when deciding whether to issue or deny a license. If the board refuses to grant a license, the decision must be for sufficient reasons. The decision to deny a license application or to refuse to renew a license cannot be arbitrary or capricious. Depending on the particular license, there may be specific standards that need to be met to grant the license, or to deny it or decline to renew it. Any adverse ruling must be fair and reasonable and based on evidence presented either against or in favor of the license.

Licenses, as a general rule, are privileges. They are not the property of the license holder. Several Massachusetts courts have ruled, however, that under certain conditions, a license can come close to being a property right and cannot be taken away without due process of law. This is especially true if the license holder can show that the license is essential to his or her livelihood, or that constitutional rights are involved.

Licensing Procedures

Licensing procedures should be clear and uniform, both to ensure that applicants are treated fairly and to make the job of reviewing applications a little easier. Hearings, when required, should be held promptly. Some towns have found it helpful to compile license requirements and procedures in a

single manual—a set of licensing rules and regulations. When possible, licenses should be renewed at the same time each year.

Some licensing statutes clearly require a public hearing in connection with the granting or denial, revocation or suspension of a license. Other laws do not explicitly require such hearings. Even if a hearing is not required by law, it is often a good idea to hold one, especially if there is any hint of controversy over the license application. It is the board's responsibility to hold hearings when required to ensure that the license decision is fair, reasonable, and consistent with the public interest and private rights.

The usual procedure is for selectmen to review applications at their regular meetings, unless a separate hearing is required by law or requested by the applicant. Requirements for some hearings are more stringent than for others, so it is important to check the appropriate section of law before proceeding. In general, however, hearings that follow the basic format outlined in Chapter 2 will be in conformance with state law. As part of the hearing, a license applicant may be required to produce records, documents and other evidence to show that he or she is qualified to hold the requested license and that the activity and location of the proposed use are consistent with the public good.

Violations

Selectmen also have the responsibility, after granting a license, to see that adequate inspections are made by the proper town officials to make certain the license is being properly used. If selectmen learn of a violation, either through an inspection or a complaint, they must provide the license holder with written notice that sets out the specific facts relating to the violations and the time and place of any hearing to consider suspending or revoking the license.

Licenses and Zoning

Although it can be a powerful tool, licensing has its limitations as a way of regulating certain activities in a town. Courts have repeatedly rejected attempts by cities and towns to use their licensing authority to outlaw such things as adult entertainment or video games. Courts have, however, upheld the right of communities to restrict certain activities by means of their zoning bylaws. State law [G. L. c 40A, §9A] gives towns the right to zone adult bookstores as a land use. Making the best use of the town's licensing and zoning authority requires close cooperation between the selectmen and the planning board. At a minimum, selectmen should always check with planning officials and the zoning enforcement officer (usually the building commissioner) prior to issuing a new license to make sure the activity for which the license is being granted is a permitted use.

Regular communication with the planning board can also help selectmen to recognize and head off undesired trends. Some boards use a license input form that is sent to a variety of department heads for their input on any license application.

Licenses and Taxes

If town meeting votes to accept the applicable section of law [G.L. c. 40, §57] and adopts a bylaw relating to it, a town may refuse to issue or renew certain licenses until an applicant settles any unpaid local taxes. Also, if a licensee falls behind in its financial obligations to the town, the board or official issuing the license can deny renewal and can also schedule a hearing to revoke it due to the outstanding sums owed the town. This is a powerful tool for selectmen.

Alcoholic Beverages

Chapter 138 of the General Laws authorizes the local licensing authority to issue licenses for the sale of alcoholic beverages. All liquor licenses (except one-day special licenses) are subject to the final approval by the state's Alcoholic Beverage Control Commission (ABCC). Selectmen may make their own rules regarding the sale of liquor, but all local rules must be in conformance with state law and ABCC regulations. At the end of each licensing year, the board must file a report with the ABCC, showing the number of licenses granted that year, fees charged, any violations of law by any licensees, and any findings or actions taken on those violations [G.L. c. 38, §10A].

The number of licenses that are permitted in a town depends on its population [G.L. c. 138, §17], unless additional licenses are allowed by special legislation or unless the number of licenses is grandfathered. Towns that have a temporary increase in population during part of the year are authorized to issue additional, seasonal licenses. Special, one-day liquor licenses may be issued to the responsible owner or manager of an indoor or outdoor activity or enterprise. Under no circumstances may a liquor license be issued to a person who has been convicted of a state or federal narcotics charge or certain other federal charges.

Both the selectmen and the ABCC have the power to suspend, cancel or revoke licenses. If the selectmen do so, the licensee may appeal to the ABCC. All commission rulings can be appealed in court. Selectmen may refuse to issue or renew a license if an applicant (or licensee) fails to comply with either local or state requirements. The selectmen may modify, suspend or cancel any license issued, but only after a hearing.

Common Municipal Licenses and Permits Issued by Selectmen

Alcoholic beverages: c. 138, §2

Auctioneers: c. 100, §2

Automatic amusement devices: c. 140, §177A

Automobiles

Class I, new car dealer: c. 140, §§58, 59

Class II, used car dealer: c. 140, §§58, 59

Class III, junk dealers: c. 140, §§58, 59

Billiards, pool and bowling alleys: c. 140, §177

Blasting operations: c. 148, §19

Boarding and lodging houses: c. 140, §23

Boats (conveyance of passengers): c. 140, §§191, 192

Boats (rental): c. 140, §194

Cable television: c. 166A, §3

Clubs, associations dispensing food and beverages to members: c. 140, §21E

Coffee and tea house: c. 140, §47

Common victualers: c. 140, §2

Entertainment: c. 136, §4

Dancing schools: c. 140, §185H

Entertainment provided by innholder or common victualer: c. 140, §183A

Storage, manufacture and sale of explosives: c. 148, §13

Ferris wheels: c. 140, §186

Food vehicles, lunch carts: c. 140, §49

Fortune tellers: c. 140, §185I

Hawkers, transient vendors: c. 101, §§5, 17

Junk collectors or dealers: c. 140, §54

Lodging houses: c. 140, §§23, 30

Moving buildings in public way: c. 85, §18

Parking lots: c. 148, §56

Pawnbrokers: c. 140, §70

Picnic groves: c. 140, §188

Pinball machines: c. 140, §177A

Sale of articles for charitable purposes: c. 101, §33

Second hand dealers: c. 140, §54

Shellfish: c. 130, §52

Skating rinks: c. 140, §86

Soft drinks: c. 140, §§21A, 21B

Taxi cabs: c. 140, §22

Theatrical events, public exhibitions: c. 140, §181

Contracting and Procurement

The subject of contracting and its various nuances could be the subject of a separate handbook. The following is only an overview of key areas. It's important to note that the dollar thresholds are adjusted periodically, so a town must be certain it is working with the latest information. The Office of the Inspector General has free handbooks available for various types of contracting and procurement. (See www.mass.gov/ig under Guides, Advisories, Other Publications.) In addition, many communities have procurement officers, or their town manager or other chief administrative official serves as the procurement officer.

Contracting Authority

Towns enter into contracts for a variety of purposes. Contracts are made in the name of the town and under the authority granted to the town by state laws and town bylaws. Under Chapter 40, Section 4, a town "... may make any contract for the exercise of its corporate powers, on such terms and conditions as are authorized by the town meeting ... [and] a town may not contract for any purpose, on any terms, or under any conditions inconsistent with the applicable provision of any general or special law."

This section of law does not expressly authorize any town officer or board to sign contracts. In general, authorization to sign contracts must be set forth in town bylaws, charter or by vote of the town meeting. Additionally, a contract is not valid unless all the necessary legal requirements are met, and there is a prior appropriation.

Generally, a board or official may be authorized to enter into a contract and may negotiate terms and conditions. A contract cannot exceed three years unless a longer term is authorized by town meeting, town bylaws, or a charter. Under Chapter 30B, many communities have voted to authorize, in general, contracts in excess of three years.

A town may also enter into an agreement with one or more other governmental units to jointly perform services or undertake any activity that the town could undertake independently. These are generally referred to as inter-municipal agreements [G.L. c. 40, §4A], and the board of selectmen may authorize such contracts.

There are several different statutory schemes governing public bidding procedures for municipal contracts. The primary laws are the Uniform Procurement Act [G.L. c. 30B], the law relating to public works contracts [G.L. c. 30, §39M], and the law relating to public building construction [G.L. c. 149, §§44A-M].

The Uniform Procurement Act

The Uniform Procurement Act governs the general bidding procedures for the procurement of all town supplies and services costing \$10,000 or more, unless the particular contract is contained in the list of exemptions, such as solid waste, engineering, insurance contracts, legal services, and certain professional service agreements. (This extensive list is found in Section 1 of Chapter 30B.) For procurements under \$10,000, sound business practices are to be followed.

The following chart gives a general overview of the procurement process thresholds. As the law is amended from time to time, it is important to be sure that the most current requirements are being followed. (This chart was updated by the Office of the Inspector General, which administers the Uniform Procurement Act, in May 2014.)

G.L. C. 30B: PROCUREMENT OF SUPPLIES AND SERVICES			
Estimated Contract Amount	Under \$10,000	\$10,000 to \$24,999	\$25,000 and over
Procurement Procedure	Sound business practices (1)	Solicit three written or oral quotes	Sealed bids or proposals. [G.L. c. 30B, §§5 or 6]
Advertising Required	No	No	Advertise once in a newspaper of general circulation at least two weeks before bids or proposals are due, and post a notice on your jurisdiction's bulletin board or website for two weeks before bids or proposals are due. If \$100,000 or more, advertise once in the Goods and Services Bulletin at least two weeks before bids or proposals are due.
Award contract to:	Person offering the best price.	Responsible (2) and responsive (3) person offering the best price.	Under §5, the responsible and responsive bidder offering the best price. Under §6, the most advantageous proposal from a responsible and responsive proposer taking into consideration price and non-price proposals.
Written Contract Required (4)	No	Yes	Yes
Maximum Contract Term (5)		Three years, unless majority vote authorizes longer	

1. G.L. c. 30B, §2, defines sound business practices as “ensuring the receipt of favorable prices by periodically soliciting price lists or quotes.”
2. G.L. c. 30B, §2, defines a responsible bidder or offerer as “a person who has the capability to perform fully the contract requirements, and the integrity and reliability which assures good faith performance.”
3. G.L. c. 30B, §2, defines a responsive bidder or offerer as “a person who has submitted a bid or proposal which conforms in all respects to the invitation for bids or request for proposals.”
4. G.L. c. 30B, §17(a), states, “All contracts in the amount of [\$10,000] or more shall be in writing, and the governmental body shall make no payment for a supply or service rendered prior to the execution of such contract.”
5. G.L. c. 30B, §12(b), states, “Unless authorized by majority vote, a procurement officer shall not award a contract for a term exceeding three years, including any renewal, extension, or option.”

If the chief procurement officer determines that selection of the most advantageous offer requires a comparative judgment of other factors as well as price, the town may issue a request for proposals (RFP). This procedure requires the submission by each offerer of separately sealed price and non-price proposals. The non-price proposals are opened first and evaluated and ranked in accordance with published evaluation criteria. After the evaluation, the price proposals are opened and a contract

may be awarded to the person offering the most advantageous proposal, taking into consideration price and the evaluation criteria.

Chapter 30B also requires a public proposal process for the disposition or acquisition of interest in real property, if the value of the real property interest exceeds \$25,000.

Public Works Contracts

Public works projects include infrastructure projects, such as water, sewer, landfill closures, and road and bridge work. Generally, state laws governing construction, reconstruction, alteration, remodeling, or repair of any public works project (with labor) require sealed bids when a contract is valued at more than \$10,000. When such a contract costs more than \$25,000, it must be awarded in accordance with the public bidding procedures of Chapter 30, Section 39M. This provision requires the preparation of written specifications and an invitation for bid, advertising of the contract in accordance with established procedures, and the award of the contract to the lowest responsible and eligible bidder.

Public Building Projects

If the contract involves the construction, reconstruction, installation, demolition, maintenance or repair of any building by the town, the process to be used depends on the estimated costs. For projects estimated to cost in excess of \$25,000, the contract must be awarded in accordance with the filed sub-bid law [G.L. c. 149, §§44A-44M]. This law requires the preparation of written specifications and an invitation for bid, the separate solicitation of filed sub-bids and general bids, advertisement of the contract in accordance with established procedures, and the award of the contract to the lowest responsible and eligible bidder. A building is defined as any building with four walls and a roof, not including sewer or water pumping stations.

Design Services for Public Buildings

If a contract involves the procurement of design services for a public building project where the estimated cost of construction exceeds \$100,000 and the design contract exceeds \$10,000, the contract must be awarded in compliance with designer selection procedures established by the town in accordance with state law [G.L. c. 7C, §§44-57].

Construction Materials Not Involving Labor

Municipalities may use the bid procedures contained in Section 5 of Chapter 30B for contracts for construction materials if the purchase entails no labor [G.L. c. 30, §39M(d)]. The bid procedures of Chapter 30B, Section 5, differ slightly from those of Chapter 30, Section 39M.

Other Procurement Laws

There are additional competitive bidding laws that govern, for example, police towing contracts [G.L. c. 40, §22D] and the lease of concession stands in town parks [G.L. c. 45, §5A].

Insurance and Liability

Towns have exposure to a variety of risks. To address this, local governments have become careful consumers of insurance and have developed approaches to managing risks.

Some examples of risk include:

- Police protection: police car accidents, arrests, incarcerations, juvenile detention, unlawful impoundment, and civil rights violations
- Fire protection: apparatus accidents, incident command failures, improper training and supervision
- Code enforcement: acting beyond scope of authority, failure to follow procedures
- Public health: negligent care and professional liability
- Roads: potholes, exposed or defective manholes, vehicle and equipment accidents, improper traffic signals, sidewalks, trees and debris
- Water and sewer: broken or leaking lines, water quality, construction accidents, damage to underground utilities, backup of sewer lines, improper maintenance
- Parks and recreation: inadequate maintenance of facilities, accidents during lawn mowing or tree trimming, accidents during supervised sports
- Assets and property: inadequate maintenance of public buildings and vehicles, structural defects
- Employee health: medical, dental, disability and life insurance

The Tort Claims Act

For many years, municipal governments were protected by sovereign immunity, but, based on a court decision, the Legislature in 1978 enacted the Tort Claims Act [G.L. c. 258], which provides for local government liability for negligence. Under the law, towns may be held liable for personal injury, death or property damage caused by the negligent or wrongful conduct of public employees acting within the scope of their employment. In many cases, the law also provides personal immunity to public employees as long as they give reasonable cooperation to the public employer in the defense of any action brought under the law. It is important to note that the law applies both to acts and omissions of employees, and that the employee must have been acting within the scope of his or her office at the time.

The act established ten circumstances under which a town would not be liable for claims arising out of the conduct of its employees. The following are the most commonly cited:

- The employee was exercising due care in the execution of any statute or any regulation of a public employer, or any municipal ordinance or bylaw, whether or not such statute, regulation, ordinance or bylaw is later held to be invalid.
- The employee was exercising or performing, or failing to exercise or perform, a discretionary function or duty, whether or not he or she abused that discretion.
- The tort was intentional, including assault, battery, false imprisonment, false arrest, intentional mental distress, malicious prosecution, malicious abuse of process, libel, slander, misrepresentation, deceit, invasion of privacy, interference with advantageous relations, or interference with contractual relations.
- The claim concerned the assessment or collection of any tax, or the lawful detention of any goods or merchandise by any law enforcement officer.

The law also limits municipal liability in circumstances which were brought about by a third party not under municipal direction and control, and the municipality is not responsible for an act or failure to act to prevent the actions of that third party.

Under the Torts Claim Act, a town employee who was negligent would be immune from liability, but the town would be liable for up to \$100,000 per plaintiff. Those who intend to sue under the Tort Claims Act are required to present a written claim to an executive officer of the town within two years of the date of the cause of action. The lawsuit itself must be filed within three years. Section 8 of the law specifically provides that towns may purchase insurance to cover them for any damages incurred under the act. In addition, towns may indemnify employees for financial loss and expenses up to \$1 million arising out of a claim based on intentional conduct or a violation of civil rights [G.L. c. 258, §9, 13]. The law, however, specifically prohibits indemnification if the employee acted in a grossly negligent, willful or malicious manner.

Other laws that provide an exemption from liability, and other defenses, may also apply. The precise application of any exclusion is, of course, subject to court interpretation.

Defects in Public Ways

A separate area of potential municipal liability arises from the use, maintenance and repair of public ways. State law [G.L. c. 84] requires public ways to be “reasonably safe and convenient” and provides for personal injury or property damage claims arising from defects due to a lack of repair or

insufficient railings. Under the law, those who intend to sue must provide specific written notice to the proper municipal authority within thirty days of the occurrence of the event leading to the suit and must file the suit within three years of the occurrence. The law sets a \$5,000 cap on municipal liability. The defective condition must be the sole cause of the alleged injury. If negligence by the plaintiff or another party contributed to the injury, the claim is invalid. The law is not applicable to any defect, such as a sewer backup or water main rupture, that resulted in damage to private property, since the public way is not involved. If an injury occurs due to ice or snow on the road, the town would not necessarily be liable, as long as the road was otherwise safe and convenient.

Civil Rights Actions

The fact that a town is not liable for a certain claim under the Tort Claims Act does not mean that it cannot be sued under a different law. Municipalities can be targets of federal and state civil rights actions brought under either Section 1983 of the Civil Rights Act of 1871 or Chapter 12, Section 11h, of the Massachusetts General Laws, or both. These actions include allegations of discrimination in employment or the allocation of municipal services, as well as allegations of police brutality.

Risk Management

Since all local governments have exposure to risk, it is important to develop programs that protect the community from loss. Methods of protection include the purchase of insurance (risk is transferred to a third party); minimizing or eliminating the risk (e.g., closing a beach when it is unsafe to swim); and reducing risk by systematically making operations safer. The process used to identify and evaluate possible areas of loss, and to reduce or control losses, is called risk management. Risk management may be applied to property, liability, workers' compensation and employee benefit programs.

An effective risk management program should have the following components:

- Survey town facilities and practices to identify what could expose the town to loss. Are streets adequately lit? Is town land properly fenced? Once a baseline survey is completed, a procedure should be put in place for keeping it up to date.
- Reduce or eliminate exposures. Removing unsafe equipment, for example, or correctly labeling swinging doors can reduce unnecessary injuries.
- When possible, transfer exposure to other parties. If the town owns a parking garage or marina, it could consider requiring the operator to assume the risk for its operation. Indemnity agreements can be used to transfer the risk to the contractor.
- If the exposure cannot be eliminated, estimate possible loss and frequency. Some risks cannot be eliminated, but there should be a rough idea of how much it could cost each year to replace

windows smashed by vandals, for example, or how often the town can expect to be sued by someone who falls on town property.

- Select a practical level of insurance. The town must decide whether to purchase insurance, insure with a deductible, self-insure, or handle claims as an operating cost. A town may be able to pay the relatively small cost of replacing windows, even if they are broken repeatedly, but might not be willing to pay a huge, one-time jury verdict in a personal injury case.
- Monitor the town's insurance portfolio. Whether the town purchases conventional insurance or self-insures, it is important to track coverage and losses. This requires attention to detail and good record-keeping practices. An insurance program must be revised continually so that insurance needs are always covered.
- Plan to re-evaluate the risk management program annually, and make sure the town is collecting the right information.

Safety, training and wellness resources are available to help communities manage their overall risk, including loss prevention and loss mitigation.

Self-Insurance (Self-Funding)

Self-insurance involves establishing a special fund to meet expected losses, rather than paying for losses as they occur. This fund can be invested by the town before money is paid out as claims. Before deciding to self-insure, selectmen should consider the financing and administration of the program. Some towns may decide to self-insure for certain types of risk, such as workers' compensation, or for a range of risks, including property, general liability and employee benefits. It is a good idea to seek professional advice to make sure the program is workable. A combination of insurance options with retentions and deductibles is often the best choice. Even with retentions and deductibles, funds should be budgeted to meet these obligations.

Self-insurance programs may be financed with a reserve fund, which must be adequate to pay all projected losses, costs and attorneys' fees (unless the legal work is handled by the municipal counsel). The fund should not be more than the town would have paid for conventional insurance. State law specifically allows towns to set up reserve funds for workers' compensation and property losses [G.L. c. 40, §§13-14], but not for liability losses.

Reserve funds should be set up so that money can be carried forward from one budget year to the next. This is necessary because many claims arising out of occurrences in one budget year probably will not be settled or paid for a year or more. Self-insurance claims and the costs of processing them should be allocated to the department responsible for originating the claim.

Towns that opt to self-insure may decide either to use their own staff to process claims or to contract with a service company. It is often cost-effective to use a service company, especially if a town is self-insuring for the first time, since these firms offer experience that is difficult to duplicate. In either case, however, a town should have a detailed chart of claim-processing procedures that specifies which staff member is responsible at each step. In addition, the system should gather information that is useful in preventing future losses.

The most important element of claims handling is prompt follow-up of each claim. A claimant who does not feel that reasonable action is being taken is more likely to file a lawsuit. By statute [G.L. c. 258], a claimant must wait six months after providing notice of a claim before he or she can file a lawsuit.

Excess Insurance or Reinsurance (Stop Loss)

A self-insured municipality usually protects itself from unlikely, but potentially costly, claims by taking out a limited form of insurance from a private insurer. This insurance may take the form of excess insurance or another product called “reinsurance.” The intent is to cover losses in excess of a specified amount. If losses in a given year exceed the negotiated amount, either because of an unusual number of claims or an unusually large claim, the reinsurance policy pays the excess.

Group Self-Insurance (Self-Funding)

Laws allow cities and towns to form workers’ compensation and property and casualty self-insurance groups. The Massachusetts Interlocal Insurance Association (MIIA), a nonprofit organization, provides a range of insurance services to member communities of the Massachusetts Municipal Association. The Massachusetts Division of Insurance provides strict oversight regarding statutory, regulatory, financial and operational requirements.

Other Insurance Coverage

In addition to general liability insurance, towns should consider the following types of insurance coverage:

- Umbrella liability provides coverage over underlying liability insurance. If a claim occurs, or a suit is brought for something excluded by the underlying policies but not excluded by the umbrella, coverage would apply in excess of the deductible.
- Pollution liability provides coverage for liability resulting from unintentional incidents such as a chemical spill.
- Ambulance drivers or attendants malpractice pays for damages because of injury to any person

arising out of the rendering or failure to render professional services by one of the town's ambulance drivers or attendants.

- Public officials legal liability coverage applies to financial damages or civil rights violations against officials who are found to have committed wrongful acts in the discharge of town duties.
- School board legal liability coverage applies to financial damages or civil rights violations against school officials who commit wrongful acts in the discharge of school district duties.
- Law enforcement liability coverage applies to damages because of wrongful acts that result in personal injury, bodily injury, property damages or civil rights violations arising out of legitimate law enforcement activities.
- Employee benefits, including medical, dental, disability and life insurance, may be self-funded or fully insured, or a combination of the two.

Managing Municipal Property

Selectmen have a role in acquiring, renting, and disposing of most town property. All town property that has not been placed in the care of any particular town board, officer or department by town meeting vote or bylaw is under the control of the selectmen. In many instances, a home rule charter assigns the care and management of property to the administrative officer [G.L. c. 40, §3]. Most actions concerning town property must be approved by town meeting and, in some cases, the state Legislature (e.g., disposition of park land).

Towns, like other property owners, are required by law to exercise prudence in the management of the property under their control. Harm to abutters and others resulting from the town's negligence could result in lawsuits.

Acquiring Town Property

Towns may acquire property by gift, tax foreclosure, purchase or eminent domain, subject to provisions in their charters or any special acts of the Legislature. Acquisitions by purchase or eminent domain must be authorized by a two-thirds vote of town meeting [G.L. c. 40, §14]. In addition, the town meeting must appropriate money to acquire the land.

Towns may purchase or take land only for a clearly identifiable public purpose, and the town meeting's action may be invalidated if the land was taken for a non-public purpose. Courts have held that towns may acquire property and lease it to others, but only if the property will be used for the public purpose for which it was acquired.

Towns may acquire interests in land lying outside their boundaries, but again only for a public purpose. Typically, this is done for water supply or for public utilities. A town is not required to pay property taxes on land it owns in another municipality, but state law requires that the municipality be paid an amount in lieu of taxes [G.L. c. 59, §5F].

A town cannot become the owner of an interest in land without giving its consent. When a town buys a piece of property, that consent is implied by the purchase price or other consideration. Other deeds of property to the town (or to “the inhabitants of the town”) must be accepted and approved by the selectmen. References to “sewer easement,” “drainage easement,” or “water easement” on a recorded plan, for example, are not valid unless they are accompanied by a document accepted by the selectmen. This safeguard is designed to ensure that the town doesn’t end up with property it doesn’t want.

Eminent Domain

Eminent domain is the right of a government to take private property for public use without the consent of the owner. Ordinarily, buying land for a public purpose is preferable to taking the land by eminent domain. When land is purchased, an acceptable price can be negotiated with the owner prior to seeking an appropriation from the town meeting. When land is taken by eminent domain, the owner has a right to protest the town’s determination of what the property is worth. If an owner wins a land damage suit, the town must pay the judgment, with interest, on any amount above the tendered amount, even if the judgment is in excess of the appropriation.

There may be occasions when taking land by eminent domain is the best alternative, such as when a town is unable to settle on terms with the property owner, or when it is impossible to identify everyone with interests in a property. Town counsel can ensure that legal procedures are strictly followed.

Towns are required by law to compensate the party whose interests are being taken, and the award of damages must be supported by at least one appraisal [G.L. c. 79, §6A]. State law [G.L. c. 79, §44D] allows the town to recover all back property taxes owed to the town on the property during eminent domain proceedings. The collector should give written notice of the claim in the amount of the lien for taxes before any award of damages is paid.

The process of taking property by eminent domain requires the selectmen to execute and, within thirty days, to record an “order of taking” in the appropriate Registry of Deeds. The order must describe the property taken accurately enough for identification and must state the interest taken

(whether fee, easement or right) and the purpose for the taking. Following the recording of the order, a “notice of taking” must be given to the property owner, stating the purpose and extent of the taking, the amount of damages awarded, the time and place where the payment of damages will be made, and the time within which a petition for damages may be filed in the Superior Court [G.L. c. 79, §7C]. The law allows the property owner to accept the amount of the award while reserving the right to take the action to court.

Relocation Assistance

Some takings require that the town help to relocate occupants and businesses dispossessed by its action [G.L. c. 79A], and town counsel should be consulted to ensure compliance. The provisions of this aspect of eminent domain are quite complex and often have serious financial implications for towns. This is another good reason to analyze carefully the full costs of taking land by eminent domain before seeking an appropriation from town meeting or recording an order of taking.

Adverse Possession and Easements by Prescription

There are several legal methods by which a person may acquire ownership or the right to use land just by using it continually over a period of time. Towns, like private parties, may acquire title to, or easements on, land by two of these methods: adverse possession and prescription. This happens rarely, however, because the requirements are difficult to meet. A town cannot prevail in an adverse possession case if it has, in any way, recognized someone else as the true owner of the land (by assessing taxes, for example). Conversely, no one can acquire, by adverse possession, the title to any property held by the town for a public use.

Sale of Town Property

The disposition of municipal property no longer needed for public purposes is governed by Section 16 of Chapter 30B.

Transferring and Leasing Town Property

Once town officials determine that property under their control is no longer needed for a particular public purpose, they notify the board of selectmen. If authorized by a two-thirds vote of town meeting, the selectmen then may execute a deed, or other instrument, transferring the control or management of the property to another town department or for another municipal purpose [G.L. c. 40, §15A].

Selectmen may lease town buildings for not more than thirty years [G.L. c 40, §3]. When the town receives rents for the use by others of town property, wherever located, that property (or whatever portion of it is rented) is subject to local taxation [G.L. c. 59, §28].

Public Disclosure

The Massachusetts open meeting law permits a board to deliberate in executive session in some negotiations involving town property [G.L. c. 30A, §21(a)(6)]. It is proper to meet in executive session when considering the purchase, exchange, lease, or value of real property in cases where an open discussion might compromise the town's negotiating position. Prior to going into executive session, however, selectmen should take great care to comply with the strict requirements of the law. This includes a statement in open session by the chair of the board giving the reason for the executive session and stating that an open session may be detrimental to the town.

Appraisals of land to be taken by eminent domain are exempt from public disclosure for a limited period of time under the public records law [G.L. c. 4, §7(26)(i)]. The law states that appraisals of property that have been, or will be, acquired are confidential until a final agreement is entered into, until any litigation relative to the appraisal has been terminated, or until the time for filing litigation has expired.

All property agreements involving town land must be accompanied by a statement, signed by the parties, indicating the names and addresses of all persons who will have a direct or indirect beneficial interest in the property [G.L. c. 7C, §38].

Town counsel should be involved in any property acquisition to ensure that the proper procedure is followed and that the town is getting good title to the property.

Utilities and Franchise Activities

The Department of Public Utilities (DPU) is responsible for regulating utilities in Massachusetts, while towns have selective control over the placement of poles and transmission lines. Companies wishing to relocate utility poles must apply to the board of selectmen, which will hold a public hearing on the request. Selectmen may permit an increase in the number and height of wires and the alteration of the poles and abutments. Additionally, poles normally erected by one utility are used by other utilities. Under state law [G.L. c. 166, §22], selectmen may authorize the attachment of wire and fixtures on utility poles and equipment of another utility. Selectmen may also grant joint or identical locations to be used in common by companies.

Selectmen do not control the construction of transmission lines, except where those lines cross a street. Electric companies are required by law to apply to selectmen for permission to construct transmission lines on, under, or across a public way. Selectmen must hold a public hearing, and they may grant a location for a line specifying its location, the kind of poles or abutments, the number of wires and the height to which cables or wires may run. Once permission is granted, it cannot be revoked. A utility may appeal a denial or a failure to act to the DPU.

Selectmen may allow the construction of telephone, telegraph, cable television, or electric lines upon, along or under streets for private use. Once constructed, the line and the poles and structures connected with it become the property of the town and are subject to regulation and control by the selectmen [G.L. c. 166, §§23-25].

Municipal Light Departments

Towns are permitted to establish their own gas and electric companies, although no town has done so since 1926. There are forty municipal light departments that supply electricity to local customers. Many of these departments have joined the nonprofit Massachusetts Municipal Wholesale Electric Company.

Most light departments are managed by an elected light board or commission, although some have boards appointed by the board of selectmen. In some cases, the board of selectmen also serves as the light board. Most light departments employ a manager to oversee daily operations.

In 1996, the Federal Energy Regulation Commission ruled that the wholesale power market must be open to competition and that public utilities owning transmissions lines must provide open access. Municipal electric departments are not subject to the same regulation as investor-owned utilities, but they have been encouraged to provide choice of electricity suppliers in their communities.

Deregulation also allows for electricity load aggregation.

Boundaries

Every five years, two or more selectmen (or their designees) are required by law to locate the town boundaries and record with the board of selectmen and the town clerk the boundary markers they were able to find and those they were not [G.L. c. 42, §2]. A copy of the record must be sent, by registered mail, to the town clerk and board of selectmen of all contiguous towns. Selectmen are free to decide the manner of carrying out this mandate, but there should be evidence to support

any determination. Once required by state law, “perambulating the borders” (actually walking the periphery of town) is still a good method of locating town boundaries.

Boundaries maybe “located” by reference to definite locations and geographical features, such as bodies of water (including the ocean), rivers, highways, state lines, and monuments. Evidence can include maps and documents, wide acceptance supported by local assessment and taxation, the performance of governmental functions, and local understanding and practice.

Contiguous towns are required by law to share the cost of erecting permanent stone monuments to mark their common boundaries. If the border is a non-navigable stream, the true boundary lies along its centerline [G.L. c. 42, §8]. In seacoast towns, the boundary line between adjoining towns changes with the natural changes of the shoreline. State law [G.L. c. 42, §1] provides for a method by which this variable boundary is, from time to time, determined.

If there is a dispute between towns over the true location of their common boundaries, the State Land Court has the power to decide where the line falls [G.L. c. 42, §12]. In making that determination, the Land Court will generally consider manmade and natural monuments to be more authoritative than written descriptions, courses and distances.

The Legislature has the sole power to change boundaries between towns.

CHAPTER 5

Financial Management

Sound decision-making by selectmen requires an understanding of the major components of the town's financial management. The town's finances may limit or frame the ability of a board of selectmen to achieve its objectives. To be an active participant in financial policy-making, and to be effective in maintaining a sound financial position for the town, each selectman should have a basic understanding of the following areas:

- Organization of local financial functions and responsibilities
- Budgeting
- Sources of revenue
- Assessment administration
- Proposition 2½
- User fees
- School finance
- Capital budgeting and capital planning
- Debt
- Accounting and financial reporting
- Cash management

Coordinating the activities of the various elected and appointed boards and officers involved in municipal finance is a significant challenge for selectmen in most towns.

Finance Roles and Responsibilities

Board of Selectmen

The board of selectmen serves as the chief executive officer of the town, and so should play a major role in formulating financial policy. The board should participate directly in the town's financial

planning and budget process, provide leadership in the development of the capital improvement plan, and provide oversight and monitoring of the town's financial performance.

Professional staff, typically appointed by the board, oversee the town's day-to-day operations and finances. These appointees may include an executive secretary, town administrator or town manager, a finance director, a town accountant, and in some instances the town treasurer.

The selectmen should:

- Participate in the budget process by developing budget guidelines, reviewing budgets and evaluating proposals for the expenditure of funds
- Participate in broad policy development on issues that will have a major impact on town finances (e.g., a major expenditure such as a new school, authorization of debt, use of the stabilization fund)
- Ensure the development of a capital improvement program
- Monitor financial performance

The selectmen also have certain statutory authority for financial matters, including:

- Signing bonds or notes when the town issues debt
- Signing the warrants for payment of bills
- Classifying property by use, for taxation purposes
- Setting water and sewer rates and other fees, unless this authority is assigned by bylaw to another board or official
- Placing a Proposition 2½ override or debt exclusion vote on the ballot

Certain substantive areas of municipal finance are often the responsibility of other town boards or officials, but selectmen should acquaint themselves with these areas in order to carry out their own responsibilities in making and coordinating financial policy and preserving a strong financial position for the town.

Finance Committee (or Advisory or Warrant Committee)

The finance committee—or, in some towns, the advisory or warrant committee—is a town's official fiscal watchdog. Its primary, statutory responsibility is to advise and make recommendations to town meeting on the budget and other areas of finance. One of the finance committee's most important functions involves making transfers from the town's reserve fund (a contingency fund normally created as part of annual budget appropriations) to other line items in the budget for extraordinary or unforeseen occurrences.

While the finance committee plays a vital role, it is within the executive authority of the selectmen, and/or their appointees, to prepare the town's budget. The selectmen have ultimate responsibility to the residents for this service. The finance committee's responsibility is to review the budget submitted to them and to make recommendations regarding the budget to the town's legislative body: the town meeting.

Town Accountant

The town accountant is responsible for maintaining the town's financial records, including the statement of revenues and expenditures, balance sheet, and any other records required by law or regulation. The town accountant reviews each proposed expenditure to ensure that money has been lawfully appropriated for that expenditure. The town accountant prepares warrants for payment (a list of bills compiled for signature by the board of selectmen or town manager or administrator) and may withhold payment of an item if the expense is illegal, not an approved appropriation, or would cause an appropriation to be exceeded.

The town accountant also prepares a monthly budget report of revenues and expenditures of all town funds, which is a valuable management tool for the board of selectmen and finance committee. The town accountant will generally play a key role in working with the town's independent auditor.

Treasurer

The primary duties of the treasurer are described in state law [G.L. c. 41, §§35-36, and numerous other statutory references] and Department of Revenue guidelines. The treasurer is responsible for the deposit, investment and disbursement of town funds. The treasurer is authorized to issue debt authorized by town meeting, or statute, on behalf of the town, with approval of the selectmen. The treasurer determines the cash needs of the town and determines what is available to invest and when money needs to be borrowed to meet expenses. The treasurer is also responsible for banking relations.

Only the treasurer can sign checks to pay the town's bills. The treasurer, however, cannot release any funds until the warrant is prepared by the accountant and approved by the selectmen or, in some towns, the town manager or administrator. This role of the board of selectmen affects the town's payroll as well as its providers of goods and services. Other boards, committees, department heads and town officials may approve whatever payrolls and bills they wish—and certainly they should be required to do so before the warrants come to the selectmen—but the bills cannot be paid until the selectmen and town accountant sign off on them. Selectmen should rely on department heads to monitor day-to-day spending and make recommendations, but the power to delay or veto expenditures gives the board an important role in overseeing the operation of the town. (Under

home rule charters and special acts of the Legislature, certain towns have authorized town managers to approve warrants for payments.)

In some towns, the position of treasurer may be combined with that of the collector or town clerk. Many town treasurers are elected, though more and more towns are making the position appointed.

Tax Collector or Town Collector

A tax collector only collects taxes and excises, whereas a town collector collects taxes, excises and other amounts owed to the town, such as license fees, permit fees, and fees for services. A tax collector position may be made town collector by town meeting vote.

A tax collector deposits all money received, and must turn over to the treasurer all receipts, at least once per week. Tax collectors also pursue delinquent accounts. In some towns, the position of tax collector, or town collector, may be combined with that of treasurer. Many collectors are elected, but there has been a trend to make the position an appointed one.

Assessors

The board of assessors is responsible for the valuation of real and personal property for the purpose of levying the property tax. The assessors are also responsible for submitting the tax rate recapitulation (“recap”) sheet to the Department of Revenue, although the preparation of this document is generally a team effort involving many of the town’s finance officials. The tax recap sheet is the legal document used to set a community’s tax rate.

The assessors also have the authority to grant abatements and exemptions to taxpayers, subject to the authority provided by state law. Most town assessors are elected, but many towns employ professional appraisers to assist the assessors.

Finance Director

In recent years, more towns have been consolidating town finance functions into a finance department, under the direction of a finance director. Functions and responsibilities of finance departments vary among communities. Many finance departments incorporate the positions and responsibilities of assessor, town accountant, treasurer and collector.

Department Heads

As budgets have evolved from lists of projected expenditures to statements of programs, services and expected outcomes, the role of the department head has become more central to the budget process.

In most communities, department heads develop budget requests that describe the service impacts of proposed spending levels. Town meeting expects department heads to justify their requests by linking departmental spending to program benefits.

Town Meeting

Town meeting is the legislative body and appropriating authority of a town. The appropriating authority approves the annual budget, thereby authorizing specific expenditures. Town meeting must also approve the issuance of debt and the use of free cash. During the course of the fiscal year, special town meetings may be convened to refine the budget or to transfer funds.

Trends in Organization of Finance Functions

In recent years, communities across the Commonwealth have moved from the fragmented structure of independently elected officials to coordinated departments of municipal finance. Many have also chosen to appoint financial officers who traditionally had been elected and to combine the positions of treasurer and collector.

Communities have accomplished these changes in the following ways:

Adoption of Consolidated Department of Municipal Finance Model [G.L. c. 43C, §11]

Chapter 43C, a local-acceptance statute available to municipalities with populations below 150,000, was enacted in 1987 to authorize the creation of several consolidated municipal departments, including the department of municipal finance. Communities may bring the question of adopting a consolidated department to the voters via a petition of 10 percent of the municipality's voters, or by a vote of the board of selectmen to place the questions before the voters.

The department of municipal finance would be instituted via adoption of a bylaw containing the following features:

- The position of director of municipal finance would be established, to be appointed by the chief executive officer (board of selectmen or town manager).
- Director of municipal finance may serve as auditor, accountant, comptroller, treasurer, collector, or treasurer-collector, but may not serve concurrently as auditor or accountant, or comptroller and treasurer, collector or treasurer-collector.
- Director of municipal finance would be appointed for a term of three to five years.
- Bylaw would describe the functions of the consolidated department, which may include the functions and responsibilities of all municipal finance offices (accountant, treasurer, etc.),

purchasing and information services. Municipalities determine the extent of responsibilities of the department in the bylaw or ordinance.

- The director of municipal finance appoints employees of a consolidated department, subject to approval of the appointing authority, unless the charter provides otherwise.
- Such a bylaw can be adopted, revoked or rescinded only at an annual town meeting.

Administrative Organization Provisions of Home Rule Charters

The vast majority of home rule charters include “administrative organization” provisions. Some are detailed, and establish a department structure within the charter, while others extend a general authority to reorganize via bylaw or ordinance to the town meeting or city/town council. Several charters include a specific provision for the creation of a division or department of finance.

Passage of Special Legislation (Home Rule Petition)

Several communities have submitted special act/home rule petitions to the Legislature to create a consolidated finance department or a department of budget and finance. Some of these acts include the functions of treasurer, collector and accountant, while several others also include purchasing, information services, insurance administration, and coordination of the budget preparation process. While several include the assessing function, some retain the board of assessors as an independent board.

Almost all of these acts call for the appointment of a finance director by the board of selectmen, referencing education, training and experience as criteria for selection.

Many special acts have been enacted in recent years changing the positions of treasurer and collector from elected to appointed status; in many instances, the positions are also combined. The vast majority of these acts allow incumbents to complete the terms for which they were elected before the appointment and consolidation of positions is effective. Several such acts also required local voter acceptance before the act’s provisions took effect.

Municipal Budgeting

A budget is a plan, expressed in monetary terms, covering a specific period of time. A governmental budget consists of three elements:

- An estimate of revenue: Towns have various revenue-raising powers, most granted by state statute and others established by local bylaw or by vote of town meeting, the selectmen or the school committee.

- A statement of expenses: Town expenses reflect the cost of programs and services that are provided directly by its departments or in concert with other governmental units (e.g., regional schools). Town budgets may present these expenses in a variety of ways, offering greater or lesser detail about expenses related to departments, programs and expected activities or outcomes.
- A specified time period: In Massachusetts, the fiscal year begins on July 1 and ends on June 30. The fiscal year for the federal government, however, begins on October 1 and ends on the following September 30. (Fiscal years are referenced by the year in which the fiscal year ends.)

Purposes of the Budget

The language of budgets is dollars and cents, but a town's budget should communicate more than the relationship of revenues and expenses for a given fiscal year. The Government Finance Officers Association's Distinguished Budget Presentation Award recognizes government entities whose budgets serve four essential purposes. The guidelines require that the budget document be:

1. A policy document: identifying the town's programs, goals, policies and procedures
2. A financial plan: presenting the town's current financial condition, comparing all revenues and expenditures for the prior year, current year, and coming year, stating economic assumptions, and projecting the town's financial condition at the end of the budget period
3. An operations guide: describing municipal services and operations, such as police and fire protection, education, maintenance of streets, parks, water and sewer systems, and identifying measures of activity, effectiveness and efficiency for individual programs or departments
4. A communications device: articulating a community's challenges and priorities for the coming year and summarizing for taxpayers and other interested individuals and organizations how the town's programs, services and finances will meet the challenges and accomplish the goals

Revenues

A principal element in the development of the budget is to forecast anticipated revenues for the coming year. Town revenues come from property taxes, state aid, local receipts, and other available funds.

Expenditures

Most municipal budgets focus on how a town's limited resources will be allocated to meet service demands (i.e., how the community proposes to spend its money). Preparing or at least reviewing spending plans, analyzing their consequences, and presenting recommendations to town meeting is the essence of the finance committee's charge. Budgets present operating and capital expenditures at

various levels of detail for the different town activities. The budget will contain departmental budget requests, non-departmental budget requests from commissions, boards and committees, and off-budget items. The latter may not require town meeting approval, but nonetheless represent charges, assessments or other financial commitments of the town.

Departmental Budgets

A budget for an operating department might reflect the following expenditure categories:

- Salaries and wages
- Purchased services
- Supplies
- Other expenses
- Capital outlay (though these items may be included in a separate capital budget)
Each category may be further described as “expense objects,” or “line-items,” and the budget document may provide additional supporting information, such as the following:
 - Wage and Salary Requests: Each department may present a schedule of position titles, numbers of full-time equivalent positions budgeted, and salary and wage schedules to support personal services budget requests for the coming fiscal year. If union contracts are not yet settled, an amount for a collective bargaining increase is generally not included. State law requires a specific vote by town meeting to fund a non-school collective bargaining settlement. Because employee compensation often accounts for more than 80 percent of a town’s operating expenses, the budget should provide ample financial information supporting wage and salary requests.
 - Other Operating Expenses: These expense requests for departmental operations should also describe in greater detail the categories of purchased services (e.g., utilities, maintenance, professional services), supplies (office supplies, vehicle supplies), other expenses (travel, training), and capital outlay (desks, chairs, office equipment). Budget guidelines should define which capital outlays are appropriate for operating budgets, and which should be in capital budgets.
[See more on budget formats below.]

Non-Departmental Budgets

Most towns separate budgetary items that are not the responsibility of any one department. These expenses include items such as employee benefits, including Medicare, retirement contributions and health insurance premiums, debt service, liability insurance, and requests such as reserve fund appropriations.

In general, the level of detail supporting these requests should reflect the magnitude of the request and its relationship to elements of the operating budget. As the cost of employee benefits has

grown relative to wages, some towns allocate such costs to the appropriate operating departments or programs. If the budget request fails to relate benefit costs to department or program costs, an analysis is necessary to demonstrate the full cost of the department or program.

Off-Budget Items

There is a need to consider some items as part of the budget even though town meeting does not appropriate funds for such obligations. For example, a balanced budget must include Cherry Sheet assessments, court judgments, overlay reserves (for future property tax abatements), and deficits required to be raised in the next year's tax rate.

Revolving Funds

A revolving fund receives its income from selling goods and services to users or participants in a program and expends funds to cover the costs of such goods or the expenses of providing the particular program or service. The intent is for such activities to break even financially, and the revolving fund is a mechanism that allows for fluctuations in levels of activity.

Revolving funds exist under specific statutory authority and operate without approval or appropriation by town meeting. State law [G.L. c. 44, §53E1/2] allows a wide variety of revolving funds. Revolving funds are commonly used for park and recreation programs, school athletic programs, community adult education and continuing education programs, and school lunch programs. A revolving fund must be authorized annually by town meeting.

Capital Expenditures

Each community should develop a separate five-year capital plan that indicates specific capital requests for the coming fiscal year. This section of the budget presents the purchases proposed to replace or augment the town's fleet of vehicles and equipment, and expenditures to replace, upgrade, or expand the town's infrastructure (roads, streets, sewers and buildings). This section of the budget should identify the funding sources for the capital plan and for the coming year's requests. [Further discussion of capital planning and budgeting appears later in this chapter.]

School Budgets

Education is typically a town's largest service, but state law limits town meeting's latitude in setting the school budget. The town meeting can only vote on a bottom-line budget for the schools and cannot compel the school committee to spend this allocation for specific programs or line items within the school budget. Selectmen should strive to have open communication between the town and the school department to ensure that the town can comply with the school spending

requirements while staying within the revenue constraints of Proposition 2½. [See School Finance section below.]

The Budget Process

An effective budget process begins with a clear understanding of who will be responsible for the following essential budget activities:

1. Issuing budget guidelines
2. Preparing budget requests
3. Assembling requests into a comprehensive budget for review
4. Reviewing, analyzing and recommending a budget to town meeting

Statutory responsibilities, town bylaws, the town's organizational structure and established practice dictate, or at least influence, who is responsible for each of these activities. In general, the executive branch of town government (either the selectmen directly or through the board's professional staff) should be responsible for the first three budget development activities. The finance committee should focus on the fourth.

Towns with professional administrators generally give responsibility for budget development to the individual holding that position. In towns without a coordinating professional manager, the budget-making responsibility should still belong to the executive branch of government: the board of selectmen. The school superintendent and school committee retain responsibility for developing the public school system budget. In some communities, the selectmen are responsible for presenting a comprehensive, balanced budget to town meeting.

Many home rule charters and special act charters contain detailed procedures for the preparation and presentation of the operating budget and the capital improvement plan. Several recently adopted home rule charters include specific provisions for the board of selectmen, school committee, town manager and school superintendent to meet prior to the budget preparation process. These parties should agree on guidelines relating to expected available revenues that will be used during the budget preparation process.

Practical Steps

The practical steps in this budget-making process mirror the development and publication of the following materials:

- The budget calendar, setting forth responsibilities and due dates, providing for adequate review periods, and allowing for advance notice to the public regarding hearings prior to the town meeting

- Preliminary projections of revenue estimates and non-operating expenses that the town must provide for (Cherry Sheet and overlay assessments) [Early presentation of these projections allows all interested parties (e.g., selectmen, the school committee, the general public) an opportunity to review and ask questions. In some towns, the selectmen and finance committee meet at the beginning of the budget process to reach agreement on revenue estimates that form the basis for the financial plan upon which the expenditure budget is based.]
- Budget guidelines, establishing overall parameters for consolidated town and school budgets and a framework for budget development for department heads and other officials [These guidelines can include a statement of the practices to be followed in developing the budget.]
- Budget instructions, describing how to use the standardized forms and procedures for the preparation of the budget requests
- Budget presentation format, indicating the form and content of the budget document [Will it compare prior years' actual expenditures and the current year's budget? What supplemental data will be included? What special challenges or issues will the document address?]
- Comprehensive budget document, incorporating operating and capital budgets from all town bodies, as well as non-departmental and other budget requests
- Schedule for review and public hearings allowing for public comment, questions, and justification of budget requests

Once these materials are completed, the budget is submitted to the finance committee for review. The finance committee then prepares its recommendations for town meeting.

Budget Calendar

The budget process normally occurs from November to May. In a typical town, budget guidelines, worksheets and instructions are distributed to departments in the fall. Over the winter months, these requests are reviewed by the town administrator and selectmen, by the superintendent and the school committee, and by the finance committee. At some point in late winter or spring, these reviews culminate in the development of recommendations to town meeting. In towns with a professional administrator, it is typical to present a consolidated budget recommendation for consideration by the board of selectmen and the finance committee.

Budget Formats

The Commonwealth does not prescribe a mandatory budget format for towns. Therefore, no two town budget documents are alike. The Department of Revenue's Division of Local Services has determined, however, that towns may rely for guidance upon Section 32 of Chapter 44 of the General Laws, which sets forth the budget format for cities.

Line-Item Budgets

A line-item budget presentation for each department will likely focus all attention on expenditures, not the results of expenditures. Monitoring expenses and appropriations at the line-item level will require extensive and time-consuming vigilance to limit spending to each specific appropriation. Since every budget is a set of initial estimates, and because circumstances change during the year, reserve fund transfers and supplemental appropriations may be necessary to respond to mid-course corrections.

Categorical Budgets

A budget that groups department line items into categories, such as personal services and other expenses, offers greater flexibility, but imposes somewhat rigid controls. Such specific town meeting appropriations within each department prevent the department head, town administrator, or selectmen from managing for results. The manager has no discretion to determine the most effective and efficient ways to achieve desired results and deliver services within the total amount of departmental resources.

Single-Appropriation Budgets

A budget format that presents a single appropriation amount for each department, or program, simplifies the process of monitoring and making adjustments during the year. Management can focus on delivering services, rather than on accounting details. In some instances, however, this format may grant more flexibility and authority than the town meeting wishes to convey.

Group or Departmental Appropriation Budgets

A budget presented and voted as appropriations for groups of departments, for broad programs, or even for the entire town government gives broad spending discretion to the selectmen and/or management team. Town meeting must have confidence in the ability and commitment of these administrators to provide the level and quality of services promised by the budget. Group budgets should only be contemplated where the accounting system is capable of providing reports to monitor expenditure detail.

Maximum control is achieved by appropriating funds for “objects of expenditure,” or line items. Spending cannot exceed the amount appropriated for the specific item. Managers gain flexibility when appropriations encompass multiple line items or even multiple departments and programs. Such a system permits over-spending line items and even departmental budgets, as long as total expenditures do not exceed the amount appropriated.

This discussion of the tension between appropriation control and managerial flexibility applies only to non-educational budget elements. In accordance with state law, the appropriation for the local education budget is presented to town meeting as a single amount. Town meeting has no authority to divide elements of the school department's budget, make line-item amendments or direct expenditures to specific purposes within the budget. To pass the regional school budget, town meeting must appropriate the assessment proposed by the regional school district. An appropriation for any amount less than what the regional school proposes constitutes a rejection of the regional school budget.

Legal Requirements

To meet the minimum legal requirements for approving a budget, town meeting must vote appropriations for salaries and wages and for expenses of each town department. In addition, town meeting must vote each year to approve the salaries for elected officials.

In some instances, town bylaws may prescribe specific aggregations of line items for appropriation purposes. More typically, there is no such stipulation, and a town may adopt any degree of itemization within its budget to achieve expenditure control and management flexibility. Regardless of the details of each appropriation, town meeting must approve any transfers of funds between separate appropriations [G.L. c. 44, §33B] for all departments, except the town's school appropriation. If town meeting appropriates a sum for a reserve fund, then the finance committee may transfer funds from this reserve to specific departments within statutory limitations.

Sources of Revenue

Forecasting anticipated revenues for the coming year establishes the framework for preparing a town budget. Towns primarily raise revenue from four sources: property taxes, state aid, local receipts, and other available funds.

Property Taxes

Taxing the value of real estate (land and structures) and personal property (equipment owned by commercial entities) accounts for the largest share of all local revenue. The percentage of revenue from these sources varies widely among municipalities, however.

The amount of property tax revenue a town can raise is governed by a state law known as Proposition 2½ [G.L. c. 59, §21C], which limits the amount of property taxes that may be raised in any year

to 2.5 percent of a community's full assessed valuation and limits the total increase in the property tax levy to 2.5 percent (plus a factor for growth in the tax base resulting from new construction and improvements to existing properties). The law also allows for raising additional taxes through overrides and debt exclusions.

State Aid

Each year, the Department of Revenue issues a two-page document to every city, town and regional school district known as the Cherry Sheet. This document lists the various categories and amounts of state aid to be provided, as well as any offsets and charges from the state, county and special district assessments. Thus, the Cherry Sheet reflects state aid for the coming year, minus deductions for intergovernmental charges. (While these assessments are charges to the town, they are not voted on as an appropriation by town meeting.) The Cherry Sheet is provided on the Division of Local Services website (www.mass.gov/dor/local-officials/municipal-data-and-financial-management/cherry-sheets). The Cherry Sheets are updated regularly as the various state budget proposals are released and passed. (Note: Reimbursements from the Massachusetts School Building Authority are no longer shown on the Cherry Sheet. These numbers are available at www.massschoolbuildings.org.)

Cherry Sheet payments are generally made on a quarterly, semiannual or annual basis, depending on the aid category. Cherry Sheet charges are usually deducted from the quarterly payments.

Cities and towns can't be absolutely certain of the levels of state aid they will receive until the state budget for the fiscal year, which begins on July 1, is enacted by the Legislature and signed by the governor, which generally happens in late June. In order for the budget process to proceed in an orderly fashion, however, reasonable revenue estimates must be made six to eight months earlier. Lacking firm estimates of state aid for the coming year, municipalities may use their current year's Cherry Sheet as a useful starting point for estimating these revenues. In some years, the Legislature provides early information about the likely distribution of education aid (Chapter 70) and other state aid accounts (the largest of which is Unrestricted General Government Aid).

There are a number of state aid accounts that can change significantly from year to year. Some of these (such as the end of a school building assistance payment schedule) should be evident to local officials, while others will be substantially more difficult to anticipate.

Local Receipts

Each town determines the extent to which programs and services will be supported by fees and

charges. Towns may also levy and collect taxes and fees within the provisions of state statutes. Such local receipts collected by the community include, but are not limited to, the following:

- Motor vehicle excise
- Water and sewer charges
- Penalties and interest charges for services
- Departmental revenue
- License and permit fees
- Fines and forfeits
- Investment income
- Hotel/motel tax (where adopted)
- Meals tax (where adopted)

After local taxes, user fees and license and permit fees account for most local receipts. While a user fee cannot be a way of instituting a “hidden tax,” state law allows towns to establish user fees to recover all of the direct and indirect costs of providing services. Local receipts often account for as much as 20 percent of a town’s revenues. For purposes of setting the tax rate, estimated local receipts cannot exceed actual receipts for the prior fiscal year without Department of Revenue approval.

Other Available Funds

This category includes a variety of funds that are available for appropriation to balance the budget. The following briefly describes the major categories of other funds available to most towns.

Free cash, also referred to as an unappropriated fund balance, is a factor in every budget cycle. The Department of Revenue certifies amounts of “free cash” resulting from closing the financial books as of June 30, the end of the fiscal year. Generally, the calculation incorporates the following:

- Surplus revenue (revenue collections in excess of estimated revenues)
- Budget turn-backs (unexpended appropriations)
- Prior year’s free cash (the fund balance from last June 30 that had not been appropriated for the current year’s budget)
- Outstanding property taxes from prior years that were collected

A town’s free cash, or “budgetary fund balance,” is the amount of funds that are unrestricted and available for appropriation. While towns may appropriate free cash to balance the budget for the coming fiscal year, an ample free cash balance provides towns with financial flexibility. Town meeting may appropriate from free cash during a given fiscal year, but depleting free cash, particularly to balance annual budgets, may suggest that a community will face tighter financial times without such

funds to supplement annual revenues. It is best to avoid using free cash as a revenue source for the operating budget, since it is a one-time revenue source. Use of significant amounts of free cash to fund the budget for one year may create a budget deficit the next year, when there is no longer free cash available. It is preferable to use free cash for one-time expenditures, such as equipment or capital projects.

Some communities maintain a more formal “rainy day” fund, called the stabilization fund. Analogous to a bank account, town meeting can appropriate or “make deposits” into this fund for use at some future time. Although a stabilization fund is used mostly as a reserve to fund capital improvements, it can be used for any legitimate municipal purpose. A two-thirds majority at town meeting is necessary to appropriate to or from this fund.

Many financial advisors and rating agencies recommend that a town maintain a free cash and stabilization fund balance equal to at least 5 percent of total revenue. This level can serve as a reserve for use in financial emergencies. It is also used by the bond rating agencies in evaluating a community’s financial condition.

Miscellaneous revenue and other funds include federal and state grants, gifts, funds from the sale of assets, insurance proceeds in excess of \$20,000, transfers from other town accounts (such as a parking meter fund), and other reserve accounts permitted by state law.

Assessment Administration

Assessment administration and the role of the board of assessors is important, since they are responsible for overseeing real and personal property valuations, upon which the property tax is based. Any delay or error in the valuation of property or the issuance of tax bills can result in the need to issue tax anticipation notes.

The Department of Revenue must certify that a town’s property valuations are at full value every three years. To comply with this mandatory certification requirement, towns must revalue their property so that it accurately reflects the market. Property assessment and revaluation do not affect the town’s total tax levy, but it often redistributes the tax burden. To make sure this is done fairly, the assessors must carefully evaluate the local real estate market. If all types of property increased in value equally, this would be an easy task. Property values, however, change at different rates. Property revaluation typically redistributes the tax levy among different types of residential property, different neighborhoods, and different classes of property (such as residential, industrial and commercial).

Property taxes for each fiscal year are due in two installments, on November 1 (subject to deferral if tax bills are sent out late) and May 1, except in towns that have adopted a statute providing for quarterly tax payments. In these towns, preliminary tax payments are due on August 1 and November 1, with payment of the actual tax bill (after credit is given for the preliminary payments) in installments on February 1 and May 1 (if actual tax bills are mailed by December 31). Interest accrues on delinquent taxes at the rate of 14 percent per annum.

Assessors are responsible for carrying out a program of equalization on a continual basis in order to maintain assessments at full and fair cash value. Property may be reassessed during non-certification years to reflect full and fair cash value, provided that the resulting values are consistent within each property class, as well as among all classes of property. Interim year adjustments should be made when statistics demonstrate that assessments are not uniform throughout the community. The results of any equalization program should enable assessors to maintain fair and equitable assessments.

Determination of Market Value

There are three universally accepted approaches to property value: cost, income and market. The cost approach uses replacement or reproduction cost to estimate value. The income approach is the most applicable method to appraise income-producing properties, such as retail stores, warehouses, offices and large apartment complexes. The market approach uses actual market sales. The sales are analyzed and adjusted for differences between the subject and comparable sales data. The market approach is an accurate and dependable tool when there are many sales of like properties, such as for single-family homes.

Classification of Property

Each year, the assessors must classify all real property within the town into one of four real property classes (residential, open space, commercial and industrial), using guidelines established by the Department of Revenue. The selectmen then adopt a residential factor, which determines the percentage of the tax levy to be borne by each class of real property and by personal property (movable goods and materials not affixed to real estate), according to a statutory allocation formula calculated by the Commissioner of Revenue (under G.L. c. 58, §1A). The formula establishes the limits within which a town may shift the tax burden from residential and open space property to commercial, industrial and personal property, to allow multiple tax rates.

Ordinarily, under a single tax rate system, if residential property totaled 81 percent of a community's taxable property, and 4 percent of the community's taxable property were open space, then 81 percent of the community's tax levy would need to be raised by residential property taxes; 4 percent

would be raised by open space taxes; and the remaining 15 percent would be raised by taxes levied on commercial, industrial and personal properties. State law, however, allows a town to increase the levy share of the commercial, industrial and personal property classes by as much as 50 percent in order to reduce the tax burden on residential and open space property, so long as the residential and open space classes raise at least 65 percent of what their share would be if the town had a single tax rate.

State law provides relief for those communities when the maximum shift results in a residential share that is larger than it was in the prior year. Those communities may increase the commercial/ industrial share of the levy by as much as 75 percent, if the residential class would not be reduced to less than 50 percent of its single tax rate share by doing so. This residential share, however, cannot be less than the residential share in any year since the community was first certified at full and fair cash value.

The selectmen may also adopt an open space discount and may grant residential or small commercial exemptions as part of the classification process. Decisions on these exemptions must be preceded by a public hearing [G.L. c. 40, §56].

Selectmen may apply a discount of up to 25 percent to open space. The open space discount reduces taxes on property classified as open space and shifts those taxes onto residential property. The purpose of this discount is to encourage preservation of undeveloped land.

The selectmen may also grant a residential exemption of a dollar amount that cannot exceed 20 percent of the average assessed value of all residential class properties. The exemption reduces, by the adopted percentage, the taxable valuation of each residential parcel that is a taxpayer's principal residence. Granting the exemption raises the residential tax rate and shifts a portion of the residential tax burden from moderately valued homes to apartments, summer homes and higher-valued homes. A residential exemption is one way resort areas (e.g., Cape Cod and the Berkshires) can provide some tax relief for permanent residents.

Another option under classification is the small commercial exemption. This exemption is for commercial parcels occupied by businesses with average annual employment of not more than ten people during the previous calendar year and a value of less than \$1 million. The selectmen may choose an exemption that reduces the taxable valuation of each eligible parcel by a percentage of up to 10 percent. Qualifying small businesses are certified to the assessors annually by the Department of Employment and Training. The exempted taxes are shifted to other commercial and industrial taxpayers through an increase in their tax rates.

Finally, a community may add water and sewer project debt service costs to its levy limit or levy ceiling for the life of the debt, as long as it reduces water and sewer rates by the same amount. The water and sewer debt exclusion is adopted by a majority vote of the town's selectmen and may include all or part of existing and subsequently authorized water and sewer debt, or just the residential share of that debt.

Setting the Property Tax Rate

Towns generally derive most of their revenue from taxes on real estate and personal property, so setting the tax rate is extremely important. Although town meeting adopts a budget before July 1, the start of the fiscal year, the tax rate is not set until October or November. Monitoring the process of setting the tax rate, which may either validate or change revenue estimates (assumptions used to balance the adopted budget), is essential. These revenue estimates, whether confirmed or revised, then become the basis for preliminary revenue forecasts for the following budget year.

The Tax Recapitulation Sheet

The vehicle for setting the tax rate is a tax recapitulation ("recap") sheet that the board of assessors prepares and submits annually to the Department of Revenue as proof that the town has a balanced budget within the limits of Proposition 2½. The Department of Revenue must then approve the annual tax levy growth and the recap sheet, and set the tax rate, before a town can issue tax bills.

The recap sheet reflects the total revenues a town must raise through taxation and other sources used to fund local appropriations, as well as the assessors' overlay and Cherry Sheet assessments. Although the tax recap sheet is the legal responsibility of the assessors, selectmen should participate in the process to ensure that the estimates used and the resulting tax rate are based on previously agreed upon financial policies and goals.

Calculating Taxes To Be Raised

The tax recap sheet guides the calculation of the total tax to be raised by listing the anticipated expenditures and charges and subtracting estimated revenues (other than the property tax). The difference is the amount that the town must raise in real estate and personal property taxes.

A number of steps determine the amount to be raised by taxes. The tax recap sheet first requires entering the amounts for appropriations, anticipated charges and other expenditures and items, including:

- All voted appropriations
- Cherry Sheet “offsets” and charges from the state, counties and other entities as identified on the Cherry Sheet
- Certain deficits (if any), including “snow and ice” expenses not budgeted for
- The overlay (an allowance for property tax abatements and exemptions, determined by the board of assessors and documented by a worksheet showing a five-year history of such abatements)
- Other required items not included in the appropriation process, such as court judgments, tax title/foreclosure costs, etc.

Other than the tax levy, all anticipated revenues are enumerated on the tax recap sheet and supporting schedules, including the following items:

- Cherry sheet receipts (state aid, including “offsets”)
- Local receipts itemized on Schedule A (and A-1, A-2, A-3, if applicable)
- Free cash and other available funds appropriated by town meeting
- Other sources voted specifically to reduce the tax rate

There are many reasons that revenue estimates made prior to the spring town meeting change before setting the final property tax levy. For example, budget estimates for major local revenue sources are generally made in the previous fall, based on the prior year’s actual data and partial results for the current fiscal year. By the fall, data from the year that ended on June 30 is available and might justify modification of the budget year estimate.

Similarly, the estimate of new tax levy growth might have been based on historical data and partial current-year data. By the fall, the board of assessors should have complete information.

Proposition 2½

Proposition 2½, enacted by Massachusetts voters in 1980, fundamentally changed the municipal fiscal landscape and revolutionized the budget process. Prior to the implementation of Proposition 2½, expenditure budgets in most communities were adopted each spring with little, if any, analysis of projected revenues for the next year. Such analyses had been considered unnecessary, because the

budget could always be balanced by raising property taxes when the assessors set the tax rate in the fall. Proposition 2½ dramatically changed this process by limiting the property tax revenues cities and towns could legally assess each year to support their budgets.

Proposition 2½ [G.L. c. 59, §21C] establishes two types of restrictions on the annual property tax levy. First, communities are prohibited from levying more than 2.5 percent of the total full and fair cash value of all taxable real and personal property in the community. This limit is called the levy ceiling. Second, a community's levy is constrained in the amount it may increase from one year to the next—this is called the levy limit. The levy limit is always below or, at most, equal to the levy ceiling. It may not exceed the levy ceiling.

Under Proposition 2½, a community's levy limit increases automatically each year by two factors:

- An increment of 2.5 percent of the prior year's levy limit
- An amount derived from the value of new construction and other growth in the local tax base since the previous year that is not the result of property revaluation

Proposition 2½ does provide communities with flexibility to levy more than their levy limits. With two exceptions, however, all such additional taxes must be approved by a majority of voters at an election. The law establishes two types of tax increases: overrides and exclusions. It also details the referendum procedure a community must follow in order to pass overrides and most exclusions.

A levy limit override is used to obtain additional funds for annual operating budgets. An override increases the community's levy limit for the fiscal year voted and becomes part of the base for calculating levy limits in future years. The result is a permanent increase in the amount of property taxes a community may levy. The override may be for any amount, so long as the new levy limit, including the override, does not exceed the overall levy ceiling of 2.5 percent of the full and fair cash value of the tax base. An override question is placed on the ballot by a majority vote of the selectmen and must follow the language specified in the law.

The second option, an exclusion, may be used to raise additional taxes to fund specified capital projects, such as public building and public works projects as well as land and equipment purchases. A debt exclusion is used to raise additional taxes for the annual debt service costs of a project or projects funded by borrowing. A capital outlay expenditure exclusion is used when the project is funded by an appropriation. Unlike overrides, exclusions are temporary property tax increases; they do not become part of the levy limit, so they do not result in a permanent increase in the amount of property taxes a community can levy. The additional amount is added to the levy limit only

during the life of the debt, in the case of a debt exclusion, or for the year in which a certain project is budgeted, in the case of a capital outlay expenditure exclusion. Unlike overrides, the amount of an exclusion is not limited. Exclusions may increase the tax levy above the levy ceiling. The language to be used for a debt exclusion question is also found in state law. Both types of exclusions require a two-thirds vote of the selectmen to be placed on the ballot.

Two types of exclusions do not require voter approval. The first is a special debt exclusion that allows a community to raise its debt service costs for water or sewer projects outside of the levy limit, or ceiling, if water or sewer rates are reduced by the same amount. The second is a special debt (or capital outlay expenditure) exclusion for communities with programs to assist homeowners to repair or replace faulty septic systems, remove underground fuel storage tanks, or remove dangerous levels of lead paint in order to meet public health and safety code requirements. Under these programs, local boards of health contract for the work, and homeowners repay all project costs by having a portion added to their property tax bills, with interest, for up to twenty years. The amounts appropriated to fund the programs, or the debt service costs on any borrowing, are automatically raised outside the levy limit or ceiling.

Proposition 2½ also allows a community to reduce its levy limit by passing an override. When an override passes, the levy limit for the year decreases by the amount voted. This reduces the base for calculating levy limits in future years, which results in a permanent decrease in the amount of property taxes the community may levy. An override question requires a majority vote of the selectmen to be placed on the ballot. It may also be placed on the ballot by residents, using a local initiative procedure, if one is provided by law. Overrides must be approved by a majority vote of the electorate.

How Proposition 2½ Affects Budgets

Proposition 2½ does not limit appropriations, only property taxes, and no other statute requires that the local appropriating body adopt an annual expenditure within a specified revenue figure. Since neither the levy limit, local receipts, state aid, nor other revenues that support the budget are definitely fixed at the time the budget is adopted, compliance with Proposition 2½ cannot be determined until the tax rate is set several months into the new fiscal year. At that time, the budget must be balanced within the levy limit.

For prudent reasons, communities attempt to adopt expenditure budgets in the spring, within reasonable estimates of property tax and other revenues likely to be available for the year.

Nevertheless, budgets with a higher level of appropriations than supported by estimated revenues could be in place at the beginning of the fiscal year. Appropriations are valid spending authority in such cases until they are rescinded by the local appropriating body. Departments may continue to spend at appropriated levels, even though spending cuts will probably be needed to bring the budget into balance. Alternatively, additional revenue may be sought by placing an override or exclusion before the voters. Approval of the referendum would bring the budget into balance and allow a tax rate to be set. Defeat of such a referendum, however, does not, of its own force, cause the rescission of the budget as a whole, or any particular appropriations made for the purposes described in the question. Difficulties can occur in resolving any differences in the spending decisions made by the appropriating body and taxing decisions made by the voters. This can create uncertainty in the delivery of municipal services and delays in setting the tax rate.

Contingent Appropriations

Towns can use another budgeting option that eliminates the need for town meeting to take further action on the annual budget or special purpose appropriations after a referendum. When voting specific appropriations, town meeting can decide that they will take effect only if additional property tax revenues to support them are approved by the voters (i.e., the appropriations are contingent upon later approval of a Proposition 2½ referendum question). Voter action on the referendum, which must take place within forty-five days, then determines whether those appropriations are effective grants of spending authority for the year.

Statutory Requirements

The use of contingent appropriations is governed by state law [G.L. c. 59, §21C(m)]. Town counsel should be consulted for the proper wording of contingent appropriations and the timing of the election for voter approval of a referendum question to fund a contingent appropriation.

Effect of Contingency

A contingent appropriation vote simply conditions the effectiveness of the appropriation on the approval of a referendum question within a certain time period. It does not place a question on the ballot. The power to place Proposition 2½ questions on the ballot rests solely with the selectmen in towns. They may choose not to place a question on the ballot for any or all contingent appropriations voted by town meeting. They can also decide to place a question on the ballot for an amount less than the contingent appropriation. In that case, approval of the question would make the appropriation effective only to the extent that the appropriation is funded.

Referendum Approach

A separate referendum question is not required for each contingent appropriation. The selectmen may include several appropriations within one question. Alternatively, they can use the so-called “menu” or “pyramid” approaches, if the appropriations are for operating, or other noncapital, purposes. The only limitation is that the purpose of each contingent appropriation that a referendum question is intended to fund must be described in the question in the same manner as the appropriation vote. The question does not have to track the appropriation vote word for word; describing the purpose in substantially the same manner is sufficient.

School Finance

The financing of schools is governed by a complex system of laws, regulations and funding programs that have a major impact on local revenues and the overall municipal budget. Not only is the school budget likely to be the largest item in the local general appropriations budget, but it also one of the most challenging to understand, analyze and explain to town meeting or council members and to local voters. There are a lot of moving parts.

The state and federal governments set rules for services, such as special education and vocational education, that must be provided and funded locally, and the state sets minimum levels for basic local educational spending. In addition to mandated spending, there is also significant discretionary spending on schools determined by local officials and voters that reflects local needs and priorities.

There are many different types of education programs with varying rules. Finance and procedural rules for school departments that are part of town government are different in many ways from the rules governing regional school districts (both academic and vocational). There are educational collaboratives that provide specialized services, and there are private residential and day schools for special education students. There are also rules governing programs that provide parents with educational options for their children, including charter schools, “school choice” and vocational education.

The end result is a complex finance landscape, with consequences for municipal and school budgets that can challenge even the most seasoned municipal official.

Below are brief summaries of some of the more significant education programs that have an impact on municipal finance, as well as some online resources for more information.

Chapter 70 School Aid and Local Contribution Requirements

The landmark education reform act of 1993 established a school funding structure designed to

ensure that all students have access to an adequate education as required by the Massachusetts Constitution. The reform law was enacted in the same year that the Massachusetts Supreme Judicial Court decided, in *McDuffy v. Secretary of the Executive Office of Education*, that it was the responsibility of state government under the Constitution to ensure an adequate education.

The reform act, codified in part as Chapter 70 of the General Laws, established the “foundation budget,” which represents the minimum amount needed to provide an adequate education for all students. A separate “foundation budget” is calculated for each school district and updated annually to reflect inflation and changes in enrollment. Chapter 70 sets a minimum local revenue contribution for each city and town toward the foundation level of spending based on local wealth characteristics, with any remaining amount needed to reach the foundation spending level provided by Chapter 70 school aid. This basic structure is complemented by minimum and maximum local contribution amounts, minimum aid amounts, and other ancillary rules for calculating the required local contribution and aid amounts. Chapter 70 school aid is the largest source of state aid in municipal operating budgets.

On its website, the Department of Elementary and Secondary Education provides a white paper that describes the purposes of Chapter 70 and how the school aid and local contribution calculation works (www.doe.mass.edu/finance/chapter70). Also available are worksheets with detailed calculations for each municipal and regional school district for the current and recent fiscal years, and a variety of other resources that are helpful to understanding how Chapter 70 operates and how the amounts for individual districts are calculated.

Chapter 70 school aid and local contribution amounts for a fiscal year are typically calculated by the Department of Elementary and Secondary Education in early January to be included in the governor’s budget recommendation, which is filed in late January (or early February for a newly elected governor). The amounts reflect the operation of the law and sometimes changes that may be proposed as part of the governor’s budget recommendation. These amounts may be used to help prepare municipal and school budgets, although the House and Senate may make changes as part of the legislative budget process in the spring that change local contribution and aid amounts. In some years, the Legislature provides a measure of certainty to the local budget process by adopting a Local Aid Resolution that commits the House and Senate to minimum school and local contribution amounts.

Chapter 70 school aid amounts are included on preliminary and final Cherry Sheets prepared by the Division of Local Services. The division generally releases preliminary Cherry Sheets beginning with

the governor's budget recommendation and provides updates throughout the budget process until the final state budget is signed by the governor.

School Choice

The school choice program allows children to attend school in districts other than the district serving the city or town in which they reside [G.L. c. 76, §§12B, 12C]. All districts with available "seats" must accept out-of-district students for the school year unless the local school committee adopts a resolution for that year withdrawing from the program.

Under the school choice statute, a tuition amount for each student is deducted from the Chapter 70 school aid allocated to the sending district (where the child resides) and paid to the receiving district (where the child attends school). The tuition amount for a fiscal year is equal to 75 percent of the per student expenditure in the prior year, but not more than \$5,000, except for special education students, for whom a special increment augments that tuition. The amount of the increment is determined by applying annual cost rates to the specific services cited in a pupil's individual education plan (IEP).

Under Department of Elementary and Secondary Education rules, school choice tuition revenue received by a district must be deposited into a school choice revolving account, where the funds are then available for expenditure by the school committee without further appropriation.

Estimated tuition payments to receiving districts and estimates of assessments on sending districts are included on the Cherry Sheets prepared by the Division of Local Services. The amounts may change over the course of the year as enrollments change and are finalized and special education amounts are finalized.

On its website, the Department of Elementary and Secondary Education provides information on school choice enrollment as well as tuition payments and assessments for individual school districts (www.doe.mass.edu/finance/schoolchoice).

Charter Schools

State law authorizes the Board of Elementary and Secondary Education to grant charters to schools that are separate from standard municipal and regional schools [G.L. c. 71, §89]. The board may grant a charter to a board of trustees for a school independent of the local school committee, called a Commonwealth charter school, or it may grant a charter for a school that is part of the local

school district, called a Horace Mann charter school. There are three different types of Horace Mann schools.

Under the charter school statute, a tuition amount for each Commonwealth charter school student is deducted from the Chapter 70 school aid allocated to the sending district (where the child resides) and paid to the charter school that the child attends. Each Commonwealth charter school receives tuition payments from the sending school district based on a state-calculated tuition rate. The tuition includes separate foundation budget (operational) and facilities (capital) amounts. The foundation budget amount is calculated based on the foundation factors used for the distribution of Chapter 70 school aid, with certain exclusions. Each tuition rate is increased based on how much the local district spends above the foundation level of spending. Each tuition rate is further increased by a state-set per pupil capital spending amount. The state treasurer makes monthly payments to Commonwealth charter schools, funded by reducing each sending district's Chapter 70 school aid allocation by a commensurate amount.

All students who reside in the local school district in which a charter school is located must be provided transportation by the district in the same manner that transportation is provided to district students in the same grade or as is required by the student's individualized education program under the special education law.

Horace Mann charter schools are funded through the local school district under the terms of the school's memorandum of understanding. The budget for a Horace Mann charter school, as acted on by the local school committee, may be spent by the charter school board of trustees as it sees fit without any further approval.

Estimates of charter school sending district assessments are included on the Cherry Sheets prepared by the Division of Local Services. The amounts may change over the course of the year, as enrollments are updated and finalized and as other parts of the charter school tuition calculation change. The charter school assessment is not subject to appropriation at the state or local level. It is the largest Cherry Sheet assessment item.

Under charter school law, municipalities and regional school districts are entitled to temporary reimbursement of a portion of the deducted Chapter 70 school aid used to pay tuition to charter schools. This amount, which is subject to state appropriation, is also included as a receipt on the Cherry Sheets. This line item can also change over the course of the year.

The Department of Elementary and Secondary Education's website provides information on the charter school law and regulations (www.doe.mass.edu/lawsregs/603cmr1.html) and on enrollment, tuition payments, tuition assessments and reimbursements for individual school districts (www.doe.mass.edu/charter/finance).

Out-of-District Vocational Education

Under Chapter 74 of the General Laws, a local student may attend a vocational technical school district other than the municipal or regional district that serves the city or town where the student resides. If a city or town does not offer a particular vocational technical education program that a student desires, either in the local high school or in the regional vocational school, the student may attend under a non-resident option any vocational technical high school or other high school in the state that offers the program. The student's municipality of residence must pay to the vocational school a tuition fee set by the Department of Elementary and Secondary Education. If the student's municipality of residence is a member of a local regional vocational school district, the tuition fee shall be paid by the district.

Under Section 8A of Chapter 74, the sending district must provide and pay for the transportation of the student. The district is entitled to state reimbursement to the full extent of the amount expended, subject to state appropriation.

Cherry Sheets do not include an assessment for tuition and transportation costs or a receipt item for any transportation reimbursements that may be appropriated in the state budget. These are separate revenue and expense items for the municipality or regional school district budget.

(For more information, visit www.doe.mass.edu/lawsregs/603cmr4.html.)

Students may also attend another vocational technical high school through the school choice program at a high school that accepts school choice students. Students attending another vocational technical high school under the school choice program can elect any vocational technical program offered by that school.

Agricultural Schools

The state has four vocational technical high schools that offer specialized agricultural programs in addition to other vocational technical education programs [G.L. c. 74A]. They are: Norfolk County Agricultural School, Bristol County Agricultural School, Essex North Shore Agricultural and Technical High School, and Smith Vocational and Agricultural School.

The Department of Elementary and Secondary Education approves the budget for the agricultural school and allocates a tuition assessment on cities and towns that send students to the school. The assessments are deducted from the Chapter 70 school aid allocated to the sending municipality. Cherry Sheets do not include an assessment for tuition and transportation costs or a receipt item for any transportation reimbursements that may be appropriated in the state budget. These are separate revenue and expense items for the municipality or regional school district budget.

(For more information, visit www.doe.mass.edu/lawsregs/603cmr45.html.)

Special Education “Circuit Breaker”

State law provides for state reimbursement of a portion of the educational expenses for high-cost special education students [G.L. c. 71B, §5A], a provision commonly known as the circuit breaker program.

The general rule is that for each student the state’s share is equal to 75 percent of educational expenses that exceed four times the state average per pupil foundation budget. For students without a parent or guardian living in the commonwealth, and for any non-resident student placed in a school by certain state agencies, the state’s share is equal to 100 percent of instructional costs in excess of four times the state average per pupil foundation budget. Reimbursements are subject to state appropriation and are prorated in the event of underfunding. Transportation costs are not reimbursable under the circuit breaker program.

There are special rules for administering “circuit breaker” finances. School districts must exclude the estimated reimbursement expected under this program when preparing a budget recommendation for the upcoming fiscal year.

Cherry Sheets do not include an assessment for tuition and transportation costs or a receipt item for any transportation reimbursements that may be appropriated in the state budget. These are separate revenue and expense items for the municipality or regional school district budget.

Reimbursements paid under this program are deposited in a Special Education Reimbursement Fund and may be spent by the school committee without further appropriation for any special-education-related purpose in the year received or in the following fiscal year. Districts are also permitted to pre-pay tuition crossing fiscal years.

In addition to the regular circuit breaker reimbursements, the “extraordinary relief” program provides assistance to districts experiencing a significant increase in their special education costs. Under this program, districts may file an additional claim form in February for the current year’s estimated expenses. If the expenses have increased by 25 percent or more over the prior fiscal year, then the district will be eligible for an additional extraordinary relief payment to help fund the increase.

Circuit breaker claims are audited by the Department of Elementary and Secondary Education, and adjustments are made to future payments in the event of disallowed costs.

(For more information, visit www.doe.mass.edu/finance/circuitbreaker and www.doe.mass.edu/lawsregs/603cmr10.html?section=07.)

Capital Improvement Planning and Budgeting

Planning for and financing the replacement of a town’s infrastructure is an enormous task that requires active involvement by the selectmen. Evaluating assets and their expected useful lives, projecting replacement costs, examining financing options, determining bonding levels, estimating user fees and tax levies and evaluating the impact on property owners are all important steps in the process.

Capital Projects, Budgets and Improvement Programs

A capital project differs from an operating expense. Capital projects can be defined as major, non-recurring expenditures for one of the following purposes:

- Acquisition of land for a public purpose
- Construction of a new facility, or extension, expansion or major rehabilitation of an existing one (e.g., public buildings, water and sewer lines, roads and playing fields)
- Purchase of vehicles or major equipment items
- Any planning, feasibility, engineering or design study related to a capital project or to a capital improvement program consisting of individual projects

Some towns establish a policy for the dollar value and useful life of a capital project to further distinguish between capital expenditures and operating expenses. There is no formula for setting these criteria. Some larger towns and cities treat as capital budget requests purchases that cost \$25,000 or more and have a useful life of five or more years. Departments include all other expenses in their operating budget requests. Smaller towns may use a lower number for the threshold cost for a capital item. Some communities also focus on the useful life of an asset, using as little as three

years, or as much as seven years, as a criterion.

The capital budget is the amount of funds appropriated by town meeting in a single fiscal year for all capital requests (e.g., capital projects, vehicle and equipment purchases, etc.).

The capital improvement program or plan, often referred to as the CIP, is a plan for future capital expenditures. It identifies each capital project, its anticipated start and completion dates, the amount to be spent each year, and the method of financing the plan. Generally, the CIP covers five years into the future.

Why a Capital Planning Program?

An orderly capital improvement program has many benefits for a town, including:

- Focusing attention on town objectives and financial capacity
- Coordinating the proper scheduling of individual projects in relationship to each other
- Facilitating understanding of the relationships between capital needs and operating budgets
- Enhancing the community's credit rating, controlling its tax rate, and avoiding sudden changes in its debt service requirements
- Helping to maintain a consistent minimum level of spending for capital projects, so that towns don't find it tempting to defer or eliminate capital spending in order to resolve a projected operating budget deficit
- Identifying the most appropriate means of financing capital projects

[The CIP may increase the opportunities for seeking non-tax levy sources of funding, such as federal and state aid, private contributions, user fees, intergovernmental arrangements, etc.]

The existence of a systematic capital planning process is an important consideration for the agencies that rate municipal debt.

Preparing the CIP and Capital Budget

Towns vary widely in their structures, traditions and resources, so responsibilities for preparation of a CIP vary as well. There is no right or wrong approach. Budget experience has shown that some approaches work better than others.

Four approaches to developing a CIP are most common:

1. Moderator-appointed citizen committee: Similar to the finance committee, this committee is created by bylaw, and the moderator appoints its members. State law [G.L. c. 41, §106B] authorizes such committees and specifies that two members of the finance committee must be on the CIP committee.
2. Board of selectmen-appointed committee (permanent or ad hoc): This approach suggests that the overall responsibility for presentation of a capital improvement budget should be with the board of selectmen. The board appoints a CIP committee, which reports to the board of selectmen, often with a recommended capital budget each year and a capital improvement plan. The board may adopt or modify this committee's recommendations in developing the budget it presents to the finance committee and town meeting. A CIP committee appointed by the selectmen might include, at a minimum, one member of the board of selectmen, one member of the finance committee, one member of the planning board, and the superintendent of schools, or his or her designee. Other possible members include the town treasurer, town accountant and the town engineer. This committee determines its own officers, calendar, process and forms to be used. The committee is responsible for the eight steps in developing a CIP described below.
3. Town staff: In some communities, the town manager, town administrator or finance director is assigned responsibility for the preparation of the CIP. He or she is often assisted by other town staff, such as the treasurer, town accountant, planning director or town engineer. Since the town administrator or town manager reports to the board of selectmen, this approach facilitates the expression of the selectmen's priorities in the process.
4. Multiple committees: For example, a moderator-appointed committee of citizens makes a report to town meeting and the finance committee, while the staff makes a report to the board of selectmen. In this case, the citizen-based capital planning committee usually receives the capital budget report sent to the board of selectmen, studies it, and gives its own analysis and recommendations.

Regardless of who has the responsibility for preparing the CIP, the selectmen should ensure that they have significant input in the process. There are several reasons why the CIP should clearly reflect the board's priorities. First, the selectmen have the major responsibility to ensure that the town has the physical infrastructure (land, roads, buildings and equipment) necessary for providing town services. To meet this responsibility, they have to play a major role in the process, either by direct participation or by having staff representation on a capital program committee. Second, while it is important for the finance committee to be involved in the analysis of affordability, the selectmen's responsibility for the financial health of the town requires that they be involved in determining

which projects the town can afford. Finally, political support of the selectmen is often critical to gaining approval for certain projects at town meeting. A process that excludes the selectmen runs the risk of resulting in a CIP that either omits essential projects or recommends projects that are never acted upon because the selectmen do not support them.

The Capital Improvement Planning Process

The following are standard steps for preparing a Capital Improvement Plan.

- Prepare an inventory of existing facilities.
- Determine the status of previously approved projects.
- Develop project requests.
- Develop project evaluation criteria.
- Evaluate project requests.
- Establish project priorities.
- Assess financial capacity.
- Develop a CIP report with a financing plan.

Assess Financial Capacity

Since municipalities work with limited resources, each capital request must compete for funding with other capital needs and with operating expenses. Towns must, therefore, give careful consideration to their capacity to finance the CIP.

Some questions that should be asked to help assess this fiscal capacity include the following:

- What percentage of each year's fiscal resources should be allocated to capital, over operating, purposes?
- Of the amounts allocated to capital spending, how much should be for debt service, and how much should be direct cash spending for capital?
- What are the current and future debt service obligations for debt already issued? For debt already approved, but not yet issued?
- What other non-tax levy revenue sources are available to support capital spending? These include user fees, private contributions, federal and state aid, etc.
- What are the long-term financial projections for revenues and expenditures?
- What is the current policy of the town for using free cash and/or a stabilization fund for capital projects?
- Should the town consider a debt or capital outlay exclusion from Proposition 2½?

These questions should be considered early in the capital planning cycle, and they are properly within the agenda of the finance committee as well as the board of selectmen.

Sources of revenue that might be devoted to capital projects (e.g., any revenue from non-recurring sources) could also be identified by the finance committee and/or board of selectmen. Larger towns with sizable capital needs should consider developing a separate debt policy to guide the CIP committee and town meeting in the prudent use of debt. [Issuing debt for capital projects is addressed in greater detail later.]

Develop a CIP Report With a Financing Plan

The CIP report brings together a municipality's data gathering, evaluation process and financing opportunities. Proposed projects have been evaluated and assigned into priority groups, and the CIP committee can then recommend including the CIP projects that are of highest priority. The committee can also recommend funding in the capital budget for those projects the town appears to have the capacity to finance.

These recommendations should be incorporated into a CIP report. Depending on the structure and mission of the CIP committee, the report should be presented to the board of selectmen, finance committee, the town meeting and/or the town manager.

If the report is presented to the board of selectmen, the board may hold hearings on the CIP, amend the CIP or the capital budget, then forward the capital budget and the CIP to the finance committee or a separate capital expenditures committee. This committee not only reviews and recommends action on the capital budget, but it does so in consideration of the overall capital program.

Some towns have institutionalized their CIP process by enacting a town bylaw that sets forth the capital planning process, including the appointing authority, responsibilities for any committee and a timetable for capital planning activities.

Regardless of how the CIP process is structured or who has responsibility for it, the success of any capital improvement program is dependent on the support it receives from all participants (e.g., department heads, town administrator, selectmen and finance committee). The selectmen will make the job easier in the long run by collaborating with the CIP committee (or staff) throughout the CIP process and making certain that their priorities are reflected in the CIP.

Municipal Debt

Although debt issuance is the responsibility of the treasurer, selectmen should understand the process because of the long-term impact of debt on the town's finances. This understanding will help selectmen evaluate the variety of debt financing options and policies available to them. By working closely with the treasurer during the debt planning and issuance process, the board can develop plans and policies that are consistent with the town's budgetary constraints and financial policies.

Municipalities seek to borrow funds for two general purposes identified by the need and term of the borrowing (i.e., short-term and long-term):

- Short-term basis: Notes are issued for one year, or less, to meet interim cash requirements prior to the receipt of funds from property taxes, state grants, federal grants or the proceeds of a bond sale.
- Long-term basis: Bonds are issued on a permanent basis to fund capital improvements or for other purposes allowed by statute.

The purpose, length to maturity, debt limits and procedures for the issuance of municipal debt, for both short-term and long-term, are tightly regulated by state law [G.L. c. 44]. In general, a town borrows by issuing securities (notes or bonds) in exchange for the funds received. The securities have to be signed by the treasurer, as well as the board of selectmen, and are a legal commitment on the part of the town to pay the purchaser of the securities a specified sum of money, plus interest, on a certain date. The process of issuing debt can be quick and easy or long and time-consuming, depending on the amount being borrowed, the time period over which the debt will be repaid, and the type of issuance (short-term or long-term).

Short-Term Borrowing

Notes are issued for four purposes:

1. Revenue Anticipation Notes (RANs) are issued in anticipation of the collection of local revenue, primarily property taxes.
2. State Aid Anticipation Notes (SAANs) are issued in anticipation of the receipt of a state grant.
3. Federal Aid Anticipation Notes (FAANs) are issued in anticipation of the receipt of a federal grant.
4. Bond Anticipation Notes (BANs) are issued in anticipation of the receipt of proceeds from the sale of bonds by the town.

Long-Term Borrowing

A town authorizes the issuance of debt for a variety of capital, and some noncapital, purposes as provided by statute. Municipalities borrow and repay the debt over a number of years, in order to finance projects they could not afford to pay from their operating budget. In addition, the argument can be made that people who enjoy the use of a major facility in the future should bear some of the cost burden.

Borrowing for long-term capital projects is authorized by a two-thirds vote of town meeting. The project must be described in a warrant article, and the article must state that borrowing is at least an option for the financing of the project. The motion voted upon by town meeting authorizing the borrowing must state the sum of money, authorize said sum to be raised by borrowing, and pass the authorization, either by a declared unanimous vote or by a counted two-thirds vote. It is very important that bond counsel draft, or at least review, the warrant article and motion before action is taken.

The key participants in the debt issuance process are the following:

- Town treasurer: has statutory responsibility for the issuance of bonds, management of borrowed funds and payment of debt service.
- Bond counsel: gives the town legal advice regarding the borrowing and gives a legal opinion to lenders regarding the tax-exempt status of the bonds.
- Financial advisor: advises the town regarding the size, timing, structuring and planning of its debt.
- Underwriters: buy the bonds from the town, usually through competitive bidding, and resell them to investors.
- Credit agencies: rate the town's bonds and notes.
- Selectmen: award the bonds to the underwriter, usually at competitive sale, and sign each bond.

Bond Ratings

A town's bond rating has an effect on the interest rate the town gets when it sells bonds. A good credit rating depends on a variety of factors, some of which can be achieved by good management on the local level.

Most rating agencies use four factors to determine credit ranking:

- Debt factors: How much debt does the town have? What are the terms? What are the trends and future plans? What is the debt retirement rate? What is the town's burden from pension

and retiree health insurance benefits?

- Economic factors: What are the characteristics of the community? Is there much commercial/ industrial diversity? How susceptible is the town to regional and national economic changes? What is its capacity for growth?
- Administrative factors: What is the town's management capacity? What is its political environment? How much capital and long-term planning is being done?
- Financial factors: What is the rate of tax collection? How successfully has the town avoided short-term revenue borrowing? Are there adequate reserves? How diversified is the town's revenue base? What are its operating results?

Debt Planning

In terms of debt planning, there are three areas a town needs to consider. The first, and most critical, is determining how the town will pay for the resulting debt service. The second is gaining town meeting approval, and thus acquiring the authority to borrow. And the third is planning for issuance.

The project approval process requires the community to pass and approve the project on its merits and needs to confirm the ability of the community to afford the resulting debt service. While the treasurer is responsible for executing the debt issuance of the approved project, and should be part of the approval process from conception, the planning of major projects should be a joint project of all appropriate officials from beginning to end. The board of selectmen should be involved in this planning either directly or through its staff.

Ability to Pay Off Debt

Communities must review their ability to add or absorb debt obligations. Demographics, the economy and Proposition 2½ can have a significant impact on the ability to afford new debt. The prioritizing of capital projects will assist in overall debt planning.

In most towns, there will be four options to pay the debt service of a significant project:

1. Absorbing the debt service within the current budget
2. Supporting the debt service from designated revenues, such as water and sewer user fees
3. Excluding the debt service from the limits of Proposition 2½
4. Using a stabilization fund to pay for the project or its debt service

Absorbing in Budget

Absorbing the debt service in the operating budget involves multi-year planning, so the new debt

service is integrated in subsequent town budgets. This usually centers around the current debt service budget, which, under most circumstances, declines each year. With careful planning, new debt service can be added as old debt service is being retired. Planners need to be sure that they are not counting on revenue streams that will end with the debt service, such as school building assistance from the state, debt exclusion revenue, or special revenue from water and sewer fees.

Debt Exclusions

If the town cannot afford to absorb the debt service for a given project in its operating budget, and fee revenue is not available or appropriate, another option is to seek voter approval for a Proposition 2½ debt exclusion. If voters approve the question, the debt service, both long-term and short-term, is excluded from the property tax limits of the town for the years in which the debt service is due. When the debt for the project is retired, the exclusion is eliminated.

Stabilization Fund

An increasing number of towns have established stabilization funds to pay for part or all of the cost of capital items or to pay debt service.

Controlling Debt Position

Every municipality must be diligent in controlling its debt position. The impact of unplanned debt service on town budgets can be severe. The impact of putting substantial debt onto the tax rate can make or break the willingness of a community to pay for future projects. As part of the capital planning process, it is critical to develop a policy or guidelines determining the issuance, timing and tax impact of current and future debt. This guideline should be developed in concert with the treasurer, financial advisor, board of selectmen, finance committee, town administrator and capital planning committee.

Controlling the debt position does not exclude a viable project from approval, but it controls the financial impact of that project on the taxpayer. It forces the community to address and monitor the impact of rulings by state and federal agencies and town meeting as well as the issuance practices of overlapping districts (i.e., regional high school, counties, water/sewer districts, etc.) and bring them into the overall planning process.

Competitive vs. Negotiated Bond and Note Sales

Towns can sell their bonds and notes by either competitive or negotiated sale. Most towns will get the lowest possible interest rate on their bonds and notes by selling competitively. There are certain special circumstances, however, where a negotiated sale can produce the lowest cost for the issuer, such as refunding issues or bond issues for towns with credit problems.

School Building Assistance

In 2004, the state enacted a major reform of the School Building Assistance program. The law created the Massachusetts School Building Authority (MSBA), an independent public entity governed by a seven-member board, with the state treasurer as its chair. The budget for the new School Building Authority is “off budget” and based on revenue from one cent of the state’s sales tax. Most of the priority-setting standards are similar to those under the previous school building program, but significant changes were made to reimbursement rates, application procedures and financing. Every city, town and school district should be familiar with the rules and procedures of the program.

The statute divided projects into three general categories during the transition process:

1. All cities, towns and school districts that were receiving reimbursements continued to receive them as previously scheduled. There were no reductions in amounts, except those caused by the final state audit of a project. (This is the same as the prior law and regulations.)
2. School projects that were on the priority lists in 2004 were grandfathered. They are being funded at the same percentage reimbursement rate as previously listed.
3. Districts that had not submitted their projects to the state prior to the reform law faced a moratorium until July 1, 2007. On July 1, 2006, the MSBA Board published new regulations and standards for new school projects. After July 1, 2007, municipalities applied for state grants for their school projects. The MSBA Board considered all the new applications, ranked them using previously agreed-upon standards, and approved the number of projects within the program’s financial capability. All other projects were rejected and had to reapply the next year.

There is no priority list, and there is no guarantee when or if a particular school project will be approved. Thus, any municipality will be taking a significant risk if it starts a project before a grant is received. The grant will be paid as construction proceeds, and the municipality borrows only its own share of the project. For bonding purposes however, the municipality must authorize the full amount of project costs to be reduced by the percentage of state reimbursement. There is specific language required by the MSBA to be used to authorize the feasibility stage and the construction stage of the project, and the issuer should obtain this language from counsel.

The school building construction program is spelled out in Chapter 70B of the General Laws. This provides the legislative support for the School Building Authority to receive applications, determine eligibility, rank projects, and approve the grants to cities, towns and districts to reimburse them for their school building costs. The purpose of the program is “to promote thoughtful planning and construction of school facility space in order to insure safe and adequate plant facilities for the public schools, and to assist towns in meeting the cost thereof.”

The MSBA has been working to review statutes and regulations, including school building size and cost standards, reimbursement rates, and a range of other issues. The legislation required that reimbursement rates for all new projects after July 1, 2007, be reduced by 10 percent from the previous program. Thus the reimbursements went from the 50 percent to 90 percent range to 40 percent to 80 percent.

Towns should proceed carefully with plans for new school projects and should review the regulations on the MSBA website (www.massschoolbuildings.org).

Water Pollution Abatement Trust

Towns needing to finance sewer, water and some landfill projects may find it advantageous to issue bonds through the Massachusetts Water Pollution Abatement Trust (www.mass.gov/treasury/affiliated-prog/wpat). The trust was created by state law in 1989 to administer the Commonwealth's Water Pollution Abatement Revolving Fund Program. The trust is governed by a three-member board of trustees: the state treasurer, the secretary of the Executive Office for Administration and Finance, and the commissioner of the Department of Environmental Protection.

The revolving fund program incorporates a federal program that capitalizes the trust and a state program that provides subsidies to local communities. The trust issues bonds, the proceeds of which are used to make loans to communities with approved projects. A town that is approved for borrowing from the trust must enter into a loan agreement with the trust that obligates the town to pay the principal and interest on the trust's loans to the town. Towns are also required to deliver their own bonds to the trust, as evidence of the borrower's obligation contained in the loan agreement.

Projects funded under the revolving fund program are eligible for varying levels of financial assistance in the form of loan subsidies. The exact amount of the subsidy depends on certain characteristics of the community. The percentage level of the subsidy is set by the Legislature. As a result of the subsidy, most communities will find it advantageous to issue bonds through the trust rather than sell bonds on their own. A town's financial advisor can provide additional information on the program.

Betterments and Special Assessments

A betterment or special assessment is a compulsory charge levied against specific properties in an effort to defray all or part of the cost of a public improvement that primarily benefits certain properties. Betterments generally refer to the construction of streets, public parks and other public improvements where the taking of land and the payment of damages are required. Special assessments usually apply to the construction and maintenance of sewers, drains, sidewalks and water

extensions. The purpose of betterments and special assessments is to charge those property owners who receive special benefits from a public improvement beyond the general benefits received by the community as a whole. Betterments and special assessments are not considered taxes, so they are not included within the limitations of Proposition 2½.

A typical form of betterment or special assessment financing of capital improvements would have a town issue bonds to pay for the improvement and the town would levy a betterment or assessment against the properties benefiting from the improvement to offset all or part of the annual debt service cost. State law prescribes the procedures and limits on betterments and special assessments. For example, for sidewalks, special assessments are limited to 50 percent of the cost upon abutting properties [G.L. c. 83, §26]. In general, town policies and state statute will determine the percentage of the cost of an improvement that can be levied against property owners and the percentage to be borne by the town. Legal authority for special assessments and betterments for Massachusetts towns can be found in chapters 80, 83, 80A and 40.

Refunding of Existing Debt

During periods when interest rates decline, a town may have an opportunity to save money by refunding some or all of its outstanding debt. The refunding process involves the issuance of refunding bonds and is analogous to refinancing a home mortgage to get lower rates. New debt (refunding bonds) is issued and the proceeds are used to retire the outstanding higher-interest debt (refunded bonds). Savings result from the lower annual debt service on the new bonds.

Certain conditions must be met for a successful advanced refunding, including the following:

- The bonds must be callable.
- Strict federal regulations must be followed regarding the investment of the refunding bond proceeds.
- The present value savings should be large enough to make the issue worthwhile.

A town's financial advisor can perform the analysis to determine the financial feasibility of a refunding.

Federal Tax Reform

The Tax Reform Act of 1986, as amended, has had a significant impact on municipal debt issuance. First, it strengthened the distinction between governmental use bonds (issued for schools, roads, public buildings, etc.) and private activity bonds (issued for projects that benefit private parties).

The second, and most significant, impact of the tax reform is the limitations it places on the ability of an issuer to earn arbitrage on borrowed funds. Prior to tax reform, treasurers took the proceeds of funds borrowed at tax-exempt rates and invested them in higher yielding securities at taxable rates. The new law limits arbitrage by requiring that investment income from bond or note proceeds that is greater than the issuer's borrowing rate be rebated to the federal government. If a community does not comply with this requirement, it risks losing the tax-exempt status on its bonds and notes. There are exemptions from these arbitrage limitations, and towns should work closely with their financial advisors and bond counsel to plan their debt in a way that takes advantages of these exemptions.

The third issue is that the change restricts certain buyers of tax-exempt securities. The major provision disallows a federal tax deduction for financial institutions that purchase the bonds and notes of municipalities who issue more than a set amount of these securities.

A town's financial advisor can assist in formulating a debt issuance plan that avoids the interest rate penalties of these provisions.

User Fees and Enterprise Funds

Property tax revenues derive from a tax rate and property values, with little or no link to the cost of specific government services. In contrast, user fees and charges support the provision of a specific municipal service, with the users paying for the service based on the cost of providing it.

A user fee is simply a charge to the user of a specific government service. The underlying philosophy is that those who use or benefit from a program or service should pay for it. The direct and indirect costs of various services are analyzed, fee mechanisms studied, and fees and rates established to recover the full cost of service delivery.

It is essential to distinguish between the types of user fees. User charges are based on the goods and services used by an individual, group or business (e.g., sewer and water user charges). Other fees, such as licenses and permits, might reflect the costs of the government's review and regulatory processes.

User Charges

User charges introduce a business relationship between the user/customer and the governmental unit imposing the charges. The customer has the option of avoiding both the service and the charge, and the governmental entity provides only the level and quality of service for which users are willing to pay.

Individuals, groups, businesses, and organizations pay these charges for goods or services received. The revenues from these charges are intended to help defray the costs of services, not to regulate the activities. Examples of this type of charge include water and sewer fees, a trash collection fee, fees for using public buildings or recreational facilities, library access fees, and fees for copying or notary services.

User Fees

This second category comprises fees assessed on individuals, groups, businesses and organizations for the opportunity to participate in a government-regulated activity. Examples of these regulation-oriented charges include fees for permits to build or modify structures, liquor license fees, court and legal expenses, and permits to conduct garage sales. These user fees might be considered “mandatory,” since an individual or business may not proceed with a covered activity without regulatory review and the payment of the associated license or permit fee.

The benefits of user fees and charges include the following:

- User fees can promote equity by passing the cost of providing a service directly to the end user, rather than burdening those who neither need nor want the service.
- User fees can improve the allocation of public resources, predicated on a free-market system. When the consumer determines both the value of the service and the level of demand, government is encouraged to provide only the amount of service needed. Public officials can adjust fee schedules, or eliminate services, based on citizen demand. Charging a fee for services, such as water, can also encourage conservation of a scarce resource by discouraging wasteful use.
- User fees establish a revenue source that may vary with the demand for specific services. As demand for a service, and the cost of providing it, increases, so does the revenue stream. As demand declines, revenue does the same. User fees may also provide for the pricing flexibility created by economies of scale. As demand rises for certain services, delivery costs may be reduced, reflecting the lower costs of more efficient operations.
- User fees provide financial flexibility, by creating a revenue source under the limitations of Proposition 2½ that frees up tax revenues for other purposes.
- User fees provide a source of revenue from entities such as hospitals, colleges, and other levels of government, which are exempt from local property taxes.

The most common argument against user fees, generally, is their potential regressivity, implying that user fees place a greater burden on low-income residents than on middle- or upper-income residents. The argument is that those who may most need a service may be least able to pay for it.

In Massachusetts, the regressivity issue is not the major argument of user fee opponents. It is that user fees represent a way of circumventing Proposition 2½—a backdoor tax used to fund municipal services formerly funded by general revenues. Subscribers to this point of view consider such user fees to be an unfair burden on the specific users, who once paid for these services through property taxes or other general revenues. Also, local property taxes are tax deductible for federal income tax purposes, while user fees are not.

Enterprise Funds

An enterprise fund accounts for the income, expense, assets and liabilities of financing specific services to the public, where the governing body intends to recover the costs of providing the services through user charges. Governmental units operate and finance these service activities in a manner similar to a private business or enterprise. Rates and user charges are established, either as part of the budget process or as a separate, formal rate-setting procedure to cover direct and indirect costs, including depreciation of assets, expenses, replacement or improvement of assets, and efforts to retain earnings for future capital investments.

While sound business practices and long-term financial planning might dictate the creation of an enterprise fund, municipalities may also do so to achieve some broader public policy objectives. Some elected and appointed officials believe that those who benefit from a particular government program should pay for the program through user fees. These officials may conclude that an enterprise fund is the best mechanism for systematically accounting for all direct and indirect operational costs and revenues. Thus, an enterprise fund not only yields the financial data needed to periodically determine the required level of revenue, but also responds to public policy goals, management control, accountability and other objectives.

By accepting the provisions of Chapter 44, Section 53F1/2, a town may establish an enterprise fund to segregate the accounting for a group or class of similar municipal services. Without accepting the special legislative provisions, all user fee receipts and related disbursements are commingled in the general fund. If no special legislation is adopted, service expenses in excess of revenue must be raised through the property tax levy or from other general revenues. Revenue surpluses are rolled into the general fund balance and may not be applied to reduce future user fees or be appropriated to maintain assets used to deliver services.

User Fee “Best Practices”

Whether accounted for in the general fund or by an enterprise fund, user fees may be considered, adopted and periodically evaluated through a five-step process:

- Define the services to be provided on a user-fee basis.
- Estimate demand for the services.
- Calculate the full cost (including indirect and overhead costs) of the services, using cost-accounting techniques.
- Determine the total cost of delivering a “unit” of service.
- Establish a fee structure to recover service costs and preserve the asset base.

The town’s accounting system may track all revenues and expenditures in the general fund, but which costs are related to a specific service? The direct costs of a service are generally obvious: wages and salaries, electricity and other utility costs, supplies, materials and some capital outlays. But municipalities must also consider a service’s indirect costs, such as insurance, employee pension costs, operational overhead, municipal space, debt service, etc. These expenses usually appear in other areas of the town’s budget. Depreciation is not even recorded as a general fund expense.

Considerable analysis may be required to identify and quantify indirect costs associated with a specific service. Typically, the town’s budget presents lump sum appropriations and the accounting system records gross expenses for costs, such as workers’ compensation premiums, group health and medical insurance, and principal and interest payments. Identifying and separating these indirect costs is essential to implementing an enterprise fund. Enterprise funds also require the development of a fixed-asset accounting system to ensure that customer service fees cover depreciation expenses and annual capital replacement requirements.

Financial Accounting and Reporting

Accounting

An accounting system documents financial transactions and is the basis for meaningful financial reports. Financial reports summarize town revenues and expenditures and allow selectmen to evaluate financial performance.

Accountants and auditors in the Commonwealth currently use either one of two accounting systems or both systems at the same time.

The statutory system is the older of the two recommended accounting systems. It uses a single fund (i.e., one general ledger) to record all transactions that occur during the course of the year. While the statutory system is allowed, it is no longer recommended.

The Commonwealth's Uniform Municipal Accounting System (UMAS) is a multi-fund accounting system, based on the national Generally Accepted Accounting Practices (GAAP) for governmental units. Because GAAP principles are accepted and used nationally, it is possible to understand the figures and compare them to those from any other municipality. This accounting system recognizes the variety of activities performed by a municipality in several funds.

Town accountants are increasingly sensitive to national governmental accounting models. While UMAS continues as a guide, the state also looks to outside agencies, such as the Governmental Accounting Standards Board (GASB) to establish the principles of accounting and reporting to be followed in Massachusetts. Over the last twenty years, GASB has issued several "statements" requiring outside auditors to include such financial findings as: fixed-asset reporting, management financial summary statements, and other post-employment benefits analysis. Selectmen should be aware of these findings in their audits and understand what they mean for their communities.

Financial Reporting

It is essential that the basic elements of the accounting system—general ledger, general journal, and detailed subsidiary ledgers for revenues and expenditures—be maintained and kept up-to-date, since it is from these that appropriations and revenues are monitored and financial reports are prepared. This is the responsibility of the town accountant or comptroller.

Some important financial reports that selectmen should monitor include a year-end balance sheet, monthly budget reports, and audited financial statements. The balance sheet shows a town's financial position at the end of the fiscal year. It summarizes assets, liabilities and fund equity, and it is used by the Department of Revenue to calculate a town's free cash. Many communities have systems that produce monthly reports that show expenditures by department and purpose in relation to budgeted amounts. This type of report can be used by selectmen or finance committees to monitor spending, in order to ensure that the budget is not exceeded.

Schedule A is a statement of revenues, expenditures, fund balances and other financing sources and uses. This report, prepared at the end of the year for the most recently completed fiscal year, is sent to the Department of Revenue, and its information is entered into the Municipal Data Bank. Information from the Data Bank can be used to compare spending patterns, revenue structures, and financial position across communities. This information can be obtained from the Department of Revenue. Information from Schedule A is used by the Legislature, U.S. Census Bureau, and local government officials interested in analyzing the scope of services provided and using the data to help make policy decisions.

Municipal Audit

An audit is an independent examination of a municipality's financial transactions and accounts to determine whether a town's financial statements are "fairly presented." The audit process involves a review of fiscal procedures and controls, the establishment of audit scopes, the conduct of tests, and independent confirmation and calculation of assets and liabilities.

Independent annual audits in Massachusetts have been commonplace since the mid-1970s. Audits are mandated by the federal government for those communities receiving in excess of a specific amount of federal aid. In addition, the bond market expects audited financial statements to support debt sales, and bond-rating agencies rely on audited financial statements when assigning a bond rating to a community.

The major argument for an audit is the annual outside discipline imposed on the audited financial organization. The presence of an outside professional "looking over the shoulder" is, among other things, an incentive for accounting officials to maintain sound procedures and accurate books of account.

The two products of an audit are financial statements and a management letter. The management letter outlines the auditors' recommendations for improvements in accounting procedures, internal controls and other matters. Management letters can also be noteworthy for what they do not say. A truly "clean" management letter represents a validation that the accounting procedures and processes are in good shape.

Municipal officials should also conduct an exit interview with the independent auditors to hear their assessment of the financial condition of the town. The discussion can give municipal officials the chance to learn of noteworthy trends, financially troubled operations, and the viability of systems and controls in their town. Some towns, as a matter of policy, periodically replace auditors in order to ensure a clear view of its financial procedures.

Cash Management

Cash operations involve the procedures by which money is collected, deposited into a bank, and disbursed to pay salaries and other operating expenses of town government. These activities are the statutory responsibility of the town treasurer.

Cash management is the process used by the treasurer to manage the town's funds to ensure that cash is available when needed and that additional funds are invested immediately at the highest possible yield consistent with safe investment policies and the requirements of state law.

Investments of city and town funds, except for trust funds, are generally restricted by state law [G.L. c. 44, §55]. The law permits investments of available "revenue cash" as well as any available portion of bond and note proceeds in the following:

- Term deposits and certificates of deposit of banks and trust companies
- Obligations issued or unconditionally guaranteed by the federal government, or an agency thereof, with a maturity of not more than one year
- Repurchase agreements with a maturity of not more than ninety days, secured by federal—or federal agency—securities
- Participation units in the Massachusetts Municipal Depository Trust (MMDT)
- Shares of Securities and Exchange Commission-registered money market funds with the highest possible rating from at least one nationally recognized rating organization

The MMDT is an investment pool created by the Commonwealth under the supervision of the state treasurer's office. According to the treasurer's office, the trust's investment policy is designed to maintain an average weighted maturity of ninety days or less and is limited to high-quality, readily marketable fixed-income instruments, including U.S. government obligations and highly rated corporate securities, with maturities of one year or less.

Trust funds, unless otherwise provided by the donor, may be invested in accordance with Chapter 44, Section 54, which permits a broader range of investments than Section 55, including any bonds or notes that are legal investments for savings banks in the Commonwealth. The restrictions imposed by sections 54 and 55 do not apply to city and town retirement systems.

While these statutes are very strict, towns occasionally have problems with their investments. It is important for the town to have an investment policy to set out how it will invest various categories of funds and how these funds will be protected. One method for accomplishing this is for the town treasurer to draft the policy and have the selectmen sign the document. Sample policies can be obtained from many sources, including the Department of Revenue's Division of Local Services and the Massachusetts Collectors and Treasurers Association.

CHAPTER 6

Human Resources, Personnel and Labor Relations

Government depends on people to accomplish its work. Careful attention to human resources law and practice will help selectmen in two important ways: ensuring that people are properly hired, trained, evaluated and compensated, and avoiding the cost and distraction of personnel issues that arise from problems with oversight.

In many ways, the human resource challenges faced by municipalities are similar to those faced by other employers. The two biggest differences are the prevalence of unions in the public sector and the unique challenges of addressing sensitive personnel issues in a public arena.

Union membership has been on the decline for decades in the private sector, and most selectmen come into office without any experience dealing with a unionized environment. It takes time for selectmen to understand the complexities of their role in collective bargaining, but the fact that municipal employees are members of a union does not prevent the board from having a productive and positive working relationship with them.

Another challenge is that these issues are often played out in the media. The open meeting law [G.L. c. 30A, §§18-25], addressed at length in Chapter 2, includes specific provisions that apply to personnel issues, and failure to adhere to the provisions can be damaging to the town.

This chapter provides an overview of the many human resource, personnel and labor relations issues that selectmen are likely to encounter in their official capacity. Issues relating to discrimination, sexual harassment and compliance with other labor laws are highly technical, and day-to-day personnel management should be addressed by professional staff. Selectmen, as the executive branch of local government, should expect the town's professionals to maintain an employment environment that is in full compliance with applicable state and federal laws.

The board of selectmen serves as the final decision maker for the town on many of these challenging issues. When it comes to making decisions, selectmen should always rely upon the advice of competent professionals, such as the town manager or administrator, human resources staff, and legal counsel. These issues are complex, and there are almost always significant ramifications for these decisions, particularly in terms of cost. Taking the time to make informed decisions will lead to fewer controversies and less litigation.

Resources for Selectmen

Town Manager or Administrator

The professional town manager or administrator is the person primarily charged with addressing personnel and labor relations issues. While a substantial portion of the manager or administrator's time will be devoted to the budget and other priorities identified by the board of selectmen, municipal government is a service industry, and much of his or her time will be devoted to issues related to managing the personnel that deliver those services. A town manager or administrator should be highly competent in the area of labor and personnel issues and should keep the board of selectmen informed of any significant issues that arise. When it becomes appropriate for the board to act, members should rely upon the advice of the manager or administrator before making any decisions. Due to the sensitive nature of personnel issues, an individual selectman's comments or intervention can be misconstrued and can further complicate an already challenging situation. Until the time is appropriate for the board to act, members of the board should work through the manager or administrator and avoid direct involvement.

Human Resources Professional

Many communities, particularly larger cities and towns, have employed human resources professionals to support their manager or administrator. The sheer number and complexity of human resource issues warrant the creation of this position. A human resources department will generally oversee payroll, benefits, compliance with labor and employment laws, employee assistance programs, and other employment-related issues. In many smaller communities, it is common for payroll and other benefits to be administered by the individual departments, which can create inconsistencies. Consolidation of these functions into a human resources department can help to avoid many of the problems that can arise in these areas.

Legal Counsel

The liability for making an improper decision on a labor or employment matter can be substantial for a town. There is also potential liability for individuals, including selectmen, who can be sued personally under certain circumstances. It is critical that selectmen consult with qualified counsel on labor and employment matters, and that they follow the advice of counsel.

Labor and employment law is a wide practice area, as is municipal law. There are many practitioners who focus their practice on municipal labor and employment issues, and many towns who consult with these specialists. Labor counsel will advise the selectmen and manager or administrator during contract negotiations, provide guidance on human resource and personnel issues that arise, and will also represent the town in labor and employment-related litigation.

[Note: Most municipalities have insurance coverage for civil rights claims, public officials' liability, and employment practices liability coverage. The town's insurer generally retains the right to select outside counsel for claims that may be covered by insurance, including employment-related claims. Even if counsel is retained by the insurer, however, this attorney represents the town and is responsible to the town as the client.]

In many areas of law, the parties go their separate ways at the end of a dispute, with one side having won and the other side having lost. The nature of labor and employment law is different. At the end of a dispute, the parties must maintain a positive working relationship. The goal is not to win at all costs, but to build and maintain a productive and collaborative relationship. Selectmen should work with their counsel both to protect the town's interests and to help maintain a respectful and positive working relationship with municipal employees.

Categories of Employees

Some professional employees enter into personal services contracts with their appointing authority. Managers and administrators, police chiefs, fire chiefs and other high-level managers are commonly contract employees. These contracts are commonly the subject of contentious and expensive litigation, however, and should always be reviewed by counsel. There is statutory authority for entering into a contract with some officials, and a local charter or bylaw may grant the authority to enter into contracts with other officials. In the absence of statutory or charter authority to do so, towns should tread carefully in entering into these contracts with other officials.

The overwhelming majority of municipal employees in Massachusetts are members of unions organized under Chapter 150E. Generally speaking, teachers, police officers, firefighters, and public

works employees are members of unions. It is also common for clerical and library employees to be union members. An increasing number of supervisory employees are joining or forming unions, creating some special challenges. These employees have management or supervisory responsibilities, and they may have subordinates in the same union, creating divided loyalties.

Many communities establish the wages and benefits of nonunion employees through a personnel bylaw, which may be created under Chapter 41, sections 108A and 108C. It is common for department managers to be covered under such a bylaw, as well as other specialized employees that do not fall within employee categories that are unionized. Administrative employees assigned to the office of the board of selectmen and manager or administrator are considered “confidential” employees under Chapter 150E and should not be union members. The confidential status pertains primarily to their access to information relating to collective bargaining.

In order to provide a wide array of services, towns also rely on a range of seasonal and temporary employees, as well as those that are only called upon on an intermittent basis, such as call firefighters. It is common for the wages and benefits (if any) of these employees to be covered by a personnel bylaw.

Contract Employees: Professional Managers

Personal services contracts are a common source of litigation for municipalities, with potentially costly and contentious disputes. Controversies arising out of these contracts can take months or years to resolve. They become tremendously expensive, even if the town prevails. A dispute arising out of the contract and relationship with a manager or administrator can also inhibit the town’s ability to hire a permanent replacement for the duration of the controversy. For all of those reasons, great care should be given to negotiating the terms of the contract. Professional counsel should be responsible for drafting the document.

Some of the most critical contract provisions are:

- Length or term of the agreement
- Wages (including salary increases)
- Hours
- Performance appraisals
- Basis for separation or termination of the employee

The agreement should have a specific end date, and clauses that result in automatic renewal or rollover of an agreement should be closely scrutinized. These clauses can extend a contract if the

board of selectmen fails to act or notify the employee that the board does not wish to extend the contract.

Wages and other benefits should be clearly stated in the contract and should not be tied to what other employees receive for wage or benefit increases. The contract should also provide the board of selectmen or appointing authority with the ability to evaluate the performance of the employee. These employees are often highly paid, and the contract should provide a means of measuring their effectiveness.

It is also recommended that the contract state specifically whether the professional managers are exempt employees under the federal Fair Labor Standards Act (FLSA), indicating that the employee is required to work as many hours as is required to complete the necessary work. Employees who are exempt would not accumulate compensatory, or “comp,” time on an hour-by-hour basis, nor would they be eligible for overtime.

The terms for separation or termination of the employee are the most critical element of the agreement. If there are no provisions for automatic extensions, contracts and the employee’s service generally end on the last day of the agreement. [In some cases, a hearing by the appointing authority may be required to remove the official, due to a statute or charter provision. See Chapter 48, Section 42, regarding removal of a fire chief.] An appointing or hiring authority may also include terms that allow for termination for malfeasance, including off-duty conduct, and poor performance. These terms should be spelled out in clear and concise terms so that all parties understand what types of conduct and performance are expected.

The negotiation of successor contracts or extensions provides some special challenges for selectmen, particularly when dealing with their town manager or administrator. If the board and the manager or administrator have a successful and productive working relationship, negotiating a contract extension or renewal can be awkward for both parties. Before any negotiation, the board should meet without the manager or administrator present and have a candid discussion of what the members hope to achieve. Salary is often the most difficult issue, since salaries paid to these professionals are considerably higher than what most people earn. It is worth noting that the market determines the value of a manager or administrator position. Failure to provide a competitive salary for a manager or administrator can result in the community losing a successful and valuable professional to a neighboring community. In calculating a salary for professional managers, selectmen should consider the cost of losing a qualified person.

Collective Bargaining

Collective bargaining is the process that governs the relationship with organized employee groups. It is not limited to contract negotiations.

Organized employees have a right to bargain over wages, hours and conditions of work pursuant to Chapter 150E, which covers municipal employees and is similar in most respects to the National Labor Relations Act. Under Chapter 150E, it is illegal for municipal and state employees to strike. The statute identifies two principal parties: the employer and the employee organization or union. For non-school unions, the employer is represented by the board of selectmen. For school unions (e.g., teachers, aides, custodians), the employer is the school committee. Pursuant to Section 1 of Chapter 150E, the manager or administrator or other representative of the board of selectmen is a voting member of the school committee for the specific and limited purpose of collective bargaining.

The union is the sole and exclusive representative for its members, and issues relating to wages, hours and conditions of work must be negotiated with the union, not with individual employees. Employee organizations or unions are commonly part of a statewide or national union.

The parties are required to engage in “good faith” bargaining, which generally imposes an obligation to be reasonable in their respective positions. This obligation was defined in *School Comm. of Newton v. Labor Relations Commission* [388 Mass. 557, 572 (1972)]: “The duty to bargain under G.L. c. 150E is a duty to meet and negotiate and to do so in good faith. Neither party is compelled, however, to agree to a proposal or to make a concession. ‘Good faith’ implies an open and fair mind as well as a sincere effort to reach a common ground. The quality of the negotiations is evaluated by the totality of the conduct.”

Most charges of “bad faith” bargaining are made by the union against the town. If one party has engaged in “bad faith” bargaining, the opposing party may file a charge of prohibited practice with the Department of Labor Relations. Some common allegations include refusing to negotiate or schedule meetings, circumventing the union leadership, and “regressive bargaining,” such as lowering a wage offer without substantial justification for doing so.

As the employer under Chapter 150E, the role of selectmen is analogous to that of management in the private sector. Elected selectmen also serve as representatives of their constituents, which can include employees that are members of town unions. The dual role of executive and elected official

can result in confusion as to where a selectman's loyalty should lie, especially during contentious contract negotiations. It is best to view the role as protecting the town's interests as a whole. Collective bargaining does not have to end with a victory for one side and a defeat for the other. Negotiating responsible wages and benefits is in the interest of both parties. Collective bargaining agreements with overly generous wages and benefits can become unsustainable during lean economic times. The price of unsustainable contracts is ultimately borne by employees when layoffs and other reductions become necessary.

Contract negotiation, or interest bargaining, is a process that can last more than a year, or sometimes for two or more years, especially during lean economic times. While the board of selectmen typically operates as the employer under the law, the board is usually represented at the bargaining table by the town manager or administrator and/or counsel. The union will almost always be represented by a professional negotiator or by an employee who has substantial experience in bargaining, so a selectman who actively participates in negotiations can put the town at a significant disadvantage, particularly if he or she has no collective bargaining experience. In communities that have selectmen at the table, it is common for negotiations to take place at night. Since most selectmen work a full-time job, sitting down to negotiate at the end of a long day can also put the town at a distinct disadvantage. If selectmen are going to participate in contract negotiations, they should understand that it is a complex process, particularly when negotiating wages or other financial increases. It is better to rely on the town manager or administrator to play a primary role.

The most important role of the board of selectmen in contract negotiations is establishing the parameters or goals for the negotiations. Generally, this means starting several months before collective bargaining agreements expire, working with the manager or administrator and financial professionals to establish fiscal parameters, identifying the amount of revenue projected to be available, and calculating the true cost of wage or benefit increases.

The financial package typically involves a cost-of-living adjustment (COLA), applied to all wage categories. The COLA negotiated with town unions constitutes one of the biggest variables in the town's budget, and a single percentage point can mean the difference between maintaining staff and services and being forced to make layoffs.

Selectmen should also strategize with respect to other objectives they wish to accomplish during collective bargaining, such as lowering the cost of benefits (e.g., health insurance, to be addressed below), or clarifying areas that have been the subject of disputes or grievances. Once the board develops a bargaining agenda, those charged with negotiating at the table will have clear objectives and parameters, which can dramatically simplify the bargaining process. The board's collective bargaining strategy meetings, conducted in executive session, are confidential. Disclosing confidential executive session material to others is a violation of the state's conflict-of-interest law [G.L. c. 268A, §23], not to mention that such disclosure can undermine the town's bargaining position.

Selectmen should generally be wary of negotiating increases in paid time off, or negotiating terms that inhibit the ability of the professional manager or department head to operate his or her department. It was a commonly held belief in the past that paid time off, such as sick and vacation leave, was a "no cost" benefit. Frequently, towns negotiated additional time off when there was insufficient revenue for wage increases. Additional time off results in lost productivity and can also result in higher overtime costs (to cover for absent employees).

Selectmen should include department managers as a resource in the strategy process, to consult on proposals that may restrict their ability to assign staff or manage their operation. Subtle changes in contract language can have serious implications.

If the board of selectmen is representing a responsible fiscal position, it is important to have patience and accept the fact that it may take time to conclude negotiations. The best strategy to employ when bargaining gets bogged down is to continue to meet and to attempt to explore creative solutions, such as reworking some of the long-term obligations contained in many contracts. Those obligations may include sick leave buyback or longevity payments. Reducing the cost of long-term obligations in exchange for short-term salary increases can make sense for both the town and its unions.

Impasse

Despite the best efforts of both parties, the collective bargaining process can reach impasse. When this occurs for municipal police and fire unions, the state's Joint Labor-Management Committee (JLMC) may be petitioned by either party to intervene. The initial steps of the intervention include mediation by professional staff mediators, and potentially by volunteer management and union representatives from other communities. If mediation fails to resolve the dispute, the matter can proceed to arbitration, which is typically conducted by a panel that includes a management representative, a union representative, and a neutral arbitrator. After a hearing, the panel will issue

an award, which must be submitted to town meeting or the town council for appropriation. As the employer under Chapter 150E, the board of selectmen is obligated to support the award of the panel, but town meeting can vote to reject the award.

If unions other than police or firefighter unions reach an impasse in negotiations, they can petition the Massachusetts Department of Labor Relations for mediation or fact-finding. The DLR has professional mediators that will attempt to work with the parties to achieve a mutual agreement. There is, however, no arbitration process to resolve unsettled contract disputes.

Impact Bargaining

Selectmen may also be confronted with the issue of what is known as impact bargaining: the obligation to bargain with a union over the impact of changes the employer wishes to make during the term of a collective bargaining agreement. The most common issue that requires impact bargaining is layoffs. When a town is forced to lay off employees, there is an obligation to bargain with the union over the impact the layoffs will have on union members. Generally, impact bargaining involves listening to the concerns of the employees regarding the proposed changes and considering any proposals that may mitigate the impact of the change. If proposals are made, the town should consider them as part of good faith bargaining and offer counterproposals. Impact bargaining is frequently triggered by a demand to bargain by the union, which should be sent to the board of selectmen. A demand to bargain should be referred to counsel, since the town will generally need guidance as to its obligations, depending on the circumstances that resulted in the demand.

The Grievance Process

Union employees have the right to file grievances or complaints with the town. The board of selectmen generally has a formal role in the grievance process, which is governed by the terms of the collective bargaining agreement. Grievances are generally defined as a dispute regarding interpretation of a specific term of the collective bargaining agreement. Some collective bargaining agreements state that a grievance can be any complaint, even if it pertains to non-contract issues. Employee discipline can be subject to the grievance process, as the employee is claiming that there was not “just cause” for the discipline imposed. Most collective bargaining agreements include language that state that the employee cannot be disciplined unless there is “just cause” for that discipline.

Typically, the grievance process calls for the union or the individual employee to file a grievance with the department manager. If the employee is not satisfied with the answer at this first step, he or she may proceed to the next step in the process, usually the manager or administrator. If the employee remains unsatisfied with the decision, he or she may file the grievance with the board of selectmen. If dissatisfied with the outcome of *that* hearing, the union (not the individual employee) can bring the matter to arbitration. The arbitration process, including the means for selection of a qualified neutral arbitrator, should be described in the collective bargaining agreement.

A grievance hearing before the board of selectmen should, as part of the collective bargaining process, be conducted in executive session. Selectmen should receive all relevant documentation in advance of the hearing, including the answers issued at the department and town manager/administrator levels. At the hearing, the union and/or the employee should be allowed to present their case. Board members may then ask the department head to explain the action that triggered the grievance and his or her position. Following any questions by selectmen, it is recommended that the board take the matter under advisement and consider its decision. The board may deliberate while the union and/or employee are present, but it is not obligated to do so. Since a written decision may provide the basis of defense should the matter proceed to arbitration, it is recommended that draft decisions be written by the town manager/administrator or by counsel. After review of the draft answer, the board should vote on the grievance.

Seasonal, Intermittent and Temporary Employees

Cities and towns provide an incredibly wide variety of services, many of which are seasonal in nature. The wages for these employees (and benefits, if any) should be addressed in a personnel bylaw or classification plan, to ensure consistency. Seasonal employees may be eligible for unemployment benefits at the conclusion of their seasonal service unless they are employed for less than sixteen weeks and the Department of Unemployment Assistance certifies their position as seasonal. The town may also employ intermittent employees such as call firefighters or auxiliary police officers, whose wages and benefits should also be included in the personnel bylaw.

Civil Service

In many communities, the board of selectmen is the appointing authority under the state's Civil Service law [G.L. c. 31]. Most often, that role involves the appointment and promotion of police officers. In some communities, the board can be appointing authority for firefighters as well.

The goal of Civil Service is to assure employees that employment decisions, including promotion and discipline, are not improperly motivated by politics and are not “arbitrary or capricious.” Typically, applicants for initial appointment or for promotion become eligible by taking an exam and then being placed on a list based on their score. Placement on the list can also be affected by status as a military veteran, especially if the veteran is disabled. It is increasingly common for Civil Service police and fire departments to employ assessment centers for promotions, since an assessment center is generally viewed as a more comprehensive means of evaluating applicants.

The role of selectman may include interviewing eligible candidates. After a review of all relevant data, including background information, résumés and the candidate’s placement on the list, the selectman should select the best candidate. The appointing authority is not bound to choose the person who is placed highest on the list. If a candidate is bypassed for appointment or promotion by a person lower on the list, however, the town must justify the bypass. That justification would typically include documenting the perceived strengths of the candidate selected and documenting the perceived weaknesses of a candidate that was bypassed.

The board of selectmen, as appointing authority, may also be called upon to review serious discipline, usually suspensions of five days or more, or termination. As is the case for sustaining discipline under a union contract, the town must show that there was just cause for the discipline.

Personnel Matters and the Open Meeting Law

Of the ten purposes for which a public body may meet in executive session under the open meeting law [G.L. c. 30A, §§18-25], the first three are most relevant to personnel or labor relations issues. (See Chapter 2 for a thorough discussion of the open meeting law.)

1. To discuss the reputation, character, physical condition or mental health, rather than professional competence, of an individual, or to discuss the discipline or dismissal of, or complaints or charges brought against, a public officer, employee, staff member or individual. (The rights of an individual set forth in this paragraph are in addition to the rights that he may have from any other source, including, but not limited to, rights under any laws or collective bargaining agreements, and the exercise or non-exercise of the individual rights under this section shall not be construed as a waiver of any rights of the individual.)
2. To conduct strategy sessions in preparation for negotiations with nonunion personnel or to conduct collective bargaining sessions or contract negotiations with nonunion personnel.
3. To discuss strategy with respect to collective bargaining or litigation if an open meeting may have a detrimental effect on the bargaining or litigating position of the public body and the chair so declares.

Issues related to collective bargaining, including grievance hearings, are covered under exceptions 2 and 3, and the chair should note, prior to going into executive session, that the meeting is to hear a grievance with the specified union.

Discussions of professional performance or competence, including performance appraisals, are not permitted to take place in executive session. The law also makes evaluation documents completed by individual members of the board a public record. If the board conducts a performance review or evaluation of an employee, and the results of that review lead the board to consider discipline or discharge, they may then go into executive session under exception 1, after complying with the appropriate notice requirements.

One of the most precarious aspects of executive session is that board members, in the absence of the public, media and local access cable cameras, may let their guard down and discuss persons or issues not declared by the chair to be the subject of the executive session. Such a discussion can have serious consequences, especially if it were found to have violated the rights of an individual not present for the meeting. If a board were found to have violated an individual employee's rights by discussing him or her during an executive session without fulfilling the posting and notice requirements in exception 1, a subsequent action to terminate the employee, even if lawfully done, could be overturned, with back pay, by the attorney general's office. Given the potential risks involved with discussing personnel matters in executive session, it is recommended that no board consider executive session until the matter has been reviewed in detail with counsel.

Health Insurance

Health insurance is a mandatory subject of bargaining under Chapter 150E. Chapter 69 of the Acts of 2011, known as the municipal health insurance reform law, made changes in the process for negotiating health insurance benefits with employees. The most significant changes are that the law allows the board of selectmen, after local adoption of Chapter 32B, sections 21-23, to enter into an expedited negotiation process with unions and retiree representatives to make modifications ("plan design changes") to existing plans, or to join the Group Insurance Commission (GIC), which provides health insurance for state employees. The law created a process by which communities could negotiate these changes with a coalition of union representatives and a retiree representative.

Prior to the enactment of Chapter 69 of the Acts of 2011, towns had to bargain plan design changes (such as changes to copayments and annual deductibles) with each individual union. The process was time-consuming and difficult, and as a result most municipalities were offering plans that were more expensive than those offered to private sector employees in Massachusetts.

Many communities have adopted Chapter 32B, sections 21-23, and have been successful in negotiating changes in their health insurance plans. The law mandates that a portion of the resulting savings be shared with employees and retirees, and many communities elected to use those savings to mitigate the impact of the changes on those employees and retirees most adversely affected by changes such as higher copayments and deductibles. Ultimately, the reform law has provided cities and towns in Massachusetts with a means of more effectively controlling the increasing cost of providing health benefits.

Pensions

Selectmen have no official role in administering the pensions of municipal employees. Under state law [G.L. c. 32], employees of a municipality may have their pensions overseen by a local retirement board or by a county retirement board. These boards manage the assets and liabilities of the pension fund and issue assessments to the town based upon actuarial analysis of the projected cost.

Employees hired after 1996 contribute 9 percent of their regular (non-overtime) wages, with an additional 2 percent for amounts in excess of \$30,000 per year. That amount far exceeds the contribution of their private sector counterparts toward Social Security. The municipality, again in favorable contrast to private employers, only pays about 2 percent of pension costs for retirees. For the purposes of a basic understanding of the pension system, it is important to understand that the current system calls for payment of a fixed benefit to eligible retirees based upon the age and years of service of the employee.

Police officers and firefighters are in Group 4 for the purposes of calculating their benefit, which allows them to retire earlier than other municipal employees, who are in Group 1.

The Legislature has enacted a series of changes in recent years, most of which are intended to eliminate overly rich pensions or loopholes that allow some individuals to collect substantial pensions without having made significant contributions.

There are also provisions for employees who are permanently disabled by accidents while on duty. Those employees can qualify for retirement benefits equal to 72 percent of their wages.

Workers' Compensation and Injured-on-Duty Claims

The state's workers' compensation law [G.L. c. 152] covers most municipal workers and private sector employees as well. Many communities are insured for workers' compensation claims (as is true in the private sector as well).

Full-time police officers and firefighters are not covered by Chapter 152; instead, they are covered for injuries that occur on duty under Chapter 41, Section 111F. One of the differences between traditional workers' compensation and Section 111F benefits is that injured police officers and firefighters receive 100 percent of their pay while out due to injury, as compared to roughly 60 percent for employees on traditional workers' compensation. Another critical distinction is that there is no state agency responsible for administration and adjudication of claims for police and firefighter injuries, as is the case for other employees, who pursue claims through the Industrial Accidents Board.

CHAPTER 7

Public Safety and Emergency Services

A town's public safety and emergency services encompass police, fire and emergency medical services, snow and ice removal, storage of explosives and flammable materials, code enforcement, land excavation, and more. Police, fire and emergency medical services are among the most important, and certainly the most visible, services a community provides. Many citizens measure the effectiveness of their local government by how many patrol cars they see or how quickly the fire department responds to calls. Clearly, however, emergency services involve much more than making arrests and putting out fires.

A board of selectmen's specific relationship with emergency service operations depends on how a town is structured. In some towns, the responsibility for running police and fire departments rests largely with the chiefs. In others, the selectmen or town manager retain authority to approve rules and regulations and appoint personnel. In towns without a manager, selectmen need to understand how the security of the town's citizens is being protected, in order to ensure that emergency service personnel are carefully selected, well-trained and properly equipped, and to monitor procedures and practices used to carry out this critical function.

Police Departments

Unless otherwise specified in the town's charter or a special act of the Legislature, the board of selectmen is the appointing authority for the chief of police and other police officers. Selectmen or other appointing authority may enter into an employment contract with the police chief [G.L. c. 41, §108O].

The board of selectmen's legal relationship with the police department varies depending on the statute under which the department is organized. Under Chapter 41, Section 96, selectmen are granted the power to appoint police officers to serve at their pleasure. As long as the police are

not subject to civil service, or the collective bargaining agreement does not specify otherwise, the selectmen may remove the chief or other officers for cause, after a hearing, at any time during their appointments.

Under the so-called “weak” police chief statute [G.L. c. 41, §97], the selectmen appoint a police chief to run day-to-day operations and may appoint any other officers they deem necessary. Under this acceptance statute, the selectmen may make suitable regulations for the conduct of the police department. The police chief is in immediate control of all town department property. As long as the police are not subject to civil service, or do not have tenure under a state law (e.g., G.L. c. 41, §§129-132), a special act of the Legislature, or collective bargaining agreement, the selectmen may remove the chief or other officers for cause, after a hearing, at any time during their appointments. Where a collective bargaining agreement provides a standard for discipline, Section 133 of Chapter 41 provides that after completing a one-year probationary period, police officers must be reappointed unless the appointing authority has just cause, or whatever standard the collective bargaining agreement specifies for discipline, and then only after a due process hearing.

Under the so-called “strong” police chief statute [G.L. c. 41, §97A], the selectmen appoint a police chief who has the power to make regulations for the department, subject to the selectmen’s approval. While selectmen still have the ultimate authority over the department, a greater degree of management and policy-making responsibility falls to the chief. The chief of police is in control of property used by the department and the police officers. The chief assigns officers to their respective duties.

Another statutory option is a commissioner of public safety [G.L. c. 41, §§21 and 101]. Selectmen have the authority to appoint a commissioner of public safety to act as both police chief and fire chief. The commissioner may appoint a deputy as police chief and one or more deputy fire chiefs, subject to the approval of the selectmen. In practice, some communities have simply appointed a commissioner of public safety without accepting the state law. In most cases, the same person is appointed both as police chief and fire chief. Note that under state law [G.L. c. 48, §§88-89], no permanent firefighter may be required to perform the duties of a police officer during a tour of duty, nor can a firefighter be required to carry firearms in the performance of his duties.

State law authorizes two or more contiguous towns to organize a regional police district to serve and protect residents of the towns, but there are no such districts in operation in Massachusetts at this time.

Appointment, Training and Removal

The authority to appoint, discipline and promote police officers in departments governed by civil service is controlled by various provisions of Chapter 31. In non-civil service departments, the terms of any applicable collective bargaining agreement apply to discipline and occasionally to at least some aspects of promotions. Appointments are a managerial prerogative, meaning the appointing authority may decide whether to fill a vacancy as well as what hiring process and qualifications will apply. Appointments may also be controlled by any applicable provisions of the personnel bylaws. Appointments and promotions under civil service are subject to competitive examinations and certain minimum qualifications. Even non-civil service hiring, however, is subject to a variety of state and federal requirements. For civil service departments, it is important to recognize that the Massachusetts Human Resources Division, which supervises and administers the public safety examination process, is willing to alter the promotion process and allow examination processes other than traditional written examinations.

Non-civil service departments, while not required to follow any statutory hiring or screening procedures, often purchase commercially available written entry and promotional examinations or use written examinations in combination with other processes (such as assessment centers) in making appointments or promotions.

State law prohibits any person who has been convicted of a felony from being appointed as a town police officer [G.L. c. 41, §96A]. Permanent, full-time officers must attend a police basic recruit academy (approximately 800 hours) approved by the Massachusetts Municipal Police Training Committee prior to exercising any police powers [G.L. c. 41, §96B]. Police officers must also receive regular in-service training as determined by the Municipal Police Training Committee (typically between thirty-two and forty hours per year). State law requires police officers to reside within a certain distance of the limits of the town where they work, though towns may adopt bylaws or include in collective bargaining agreements a requirement that all regular police officers hired after August 1, 1978, live within the town limits.

The conditions by which non-civil service police officers and police chiefs may be removed from office vary, depending on the section of law under which they were appointed. In general, however, removal must be for cause, and only after a hearing.

Reserve Force

Towns that are not under civil service and have an organized police department may establish a reserve force by accepting the applicable section of law [G.L. c. 147, §13A]. Reserve officers are

appointed in the same manner as regular members of the police department. They are subject to rules and regulations of the selectmen and may be removed by the selectmen for any “satisfactory” reason.

A town may opt to put reserve officers under civil service [G.L. c. 147, §13C]. In civil service departments, appointments to the intermittent or reserve force are governed by civil service and appointments to the regular force come first from members of the reserve or intermittent ranks [G.L. c. 31, §60].

Mutual Aid

Towns that accept the applicable section of law [G.L. c. 40, §8G] may enter into agreements with neighboring cities or towns, including those across state lines, to provide police mutual aid. Compensation and travel expenses are typically paid by the city or town making the request for mutual aid, unless the mutual aid agreement provides otherwise [G.L. c. 41, §99]. On request, selectmen in towns that border or include federal government reservations may authorize their police force to lend assistance [G.L. c. 147, §1].

Another form of a mutual aid agreement is an inter-municipal agreement, created under Section 4A of Chapter 40 (sometimes called a “4A agreement”). Such agreements, whereby a community provides services or assistance to another, require the approval of the board of selectmen and can be for a variety of functions. Some communities use these agreements for animal control services.

A variation of inter-municipal agreements is a public safety mutual aid agreement under Section 4J of Chapter 40 (sometimes called a “4J agreement”). These provide for emergency assistance in times of a public safety incident, which is defined as “an event, emergency or natural or manmade disaster, that threatens or causes harm to public health, safety or welfare and that exceeds, or reasonably may be expected to exceed, the response or recovery capabilities of a governmental unit including, but not limited to, a technological hazard, planned event, civil unrest, health-related event and an emergency, act of terrorism and training and exercise that tests and simulates the ability to manage, respond to or recover from any such event.”

Mutual aid agreements under Section 8G of Chapter 40 involve just the parties to the written agreement. Under a 4J agreement, the text of the agreement is the statute, and assistance can be requested from or provided by any of the communities that have opted to join. A 4J agreement is, however, limited to public safety assistance. A town that is a party to a 4J agreement can request assistance from any other community that is a member directly, or through the Massachusetts Emergency Management Agency, which acts as a coordinating agency for 4J participants.

Lockups

Towns with 5,000 or more residents are required by law to maintain a “secure and convenient” lockup [G.L. c. 40, §34]. The selectmen are required, each year, to appoint a keeper of the lockup, who is responsible for the care and custody of those detained there. The lockup must be accessible at all reasonable hours to the State Police, sheriffs, constables, and police officers for legal and proper uses [G.L. c. 40, §37]. There are strict requirements for the way lockups must be equipped and operated [G.L. c. 40, §36B]. These requirements protect those who are held in custody as well as the town (from liability resulting from an injury or suicide). Lockups and police stations also must comply with health, safety and sanitation regulations of the Department of Public Health [G.L. c. 111, §21]. The selectmen are responsible for seeing that the regulations are enforced.

Fire Departments

The appointing authority for fire department personnel, as well as the structure of a town’s fire safety operation, varies according to the statute by which it was established.

Under the so-called “weak” fire chief statute [G.L. c. 48, §42A], which is similar to the law governing “weak” police chiefs, the fire department is under the direction of the selectmen. The selectmen appoint a fire chief and other fire personnel and fix their compensation. Selectmen may make suitable regulations governing the fire department and its personnel, and the board may remove the chief and other personnel at their pleasure—if such personnel are not under civil service, do not have an employment contract, or are not covered by a collective bargaining agreement. The fire chief controls town property used by the department as well as the department’s officers and other personnel. The fire chief is the forest warden.

Under the so-called “strong” fire chief statute [G.L. c. 48, §42], the selectmen appoint a fire chief, who in turn appoints a deputy and other fire personnel. Unless otherwise specified in an employment agreement, the fire chief may be removed by the selectmen for cause at any time, after a hearing. Similarly, unless a collective bargaining agreement provides otherwise, the fire chief may remove fire department personnel for cause at any time, after a hearing. Under this section, the chief has “full and absolute authority in the administration of the department,” makes rules and regulations, and reports to the selectmen from time to time. The fire chief also fixes the compensation of permanent and call members of the fire department, subject to the approval of the selectmen. For collective bargaining purposes, the board of selectmen is deemed the employer and negotiates (either directly or through its designee, such as a town manager or labor counsel) the benefits for firefighters. Oftentimes, the fire chief is part of the management negotiating team. The appointment of the fire chief in any town or district with a population of 5,000 or fewer may be for

a period of three years. Commissioners of public safety are provided for in the statutes [G.L. c. 41, §21 and §101]. (See *Organization of Police Departments*.)

In civil service departments, whether under a “weak” or “strong” fire chief, all appointments, promotions, removals and discipline of employees must be done in strict compliance with the civil service laws. These laws are intended to provide for a merit-based employment system and procedural safeguards for employees.

Fire districts may be organized in any town not having an adequate fire department. The district may establish its own fire department, headed by a chief engineer [G.L. c. 48, §§60-66 and special acts of the Legislature].

A few towns may still provide fire protection under one of the following sections of law:

- Fire engineers [G.L. c. 48, §45]: The selectmen establish a fire department composed of engineers. The engineers choose a chief engineer, a clerk and other necessary officers and appoint enginemen.
- Firewards [G.L. c. 48, §§1-2]: Selectmen appoint “firewards,” who are in charge of extinguishing fires.

Forest Fires

The selectmen are required to annually, in June, appoint a forest warden, who is responsible for putting out forest fires [G.L. c. 48, §8]. The forest warden may be the tree warden, a selectman, or the fire chief. Money appropriated by a town for the prevention of forest fires is spent by the forest warden under the supervision of the selectmen.

Mutual Aid

Most towns have agreements with bordering communities to provide mutual aid in the case of a serious fire or other emergency [G.L. c. 48, §59A]. Unless the towns have a written agreement to the contrary, the town giving aid is responsible for operation of its own equipment and for any damage to it. Subject to limits on municipal liability, the town giving aid is also responsible for any injury caused by, or sustained by, its own personnel and for payments to survivors of any firefighters killed or injured on duty.

Emergency Medical Services

Most towns have made some provision to ensure that their residents have access to emergency ambulance and medical services. There's a range of models for providing these services. Towns may contract with a private ambulance service or enter into agreements with other governmental units to provide joint fire, rescue and ambulance services [G.L. c. 40, §4A]. Many towns subsidize volunteer ambulance groups or provide emergency medical services through their police or fire departments. There are various levels of service, including basic life support (BLS) and advanced life support (ALS). Towns often bill for ambulance services and collect from insurers and/or the recipients of the services.

Towns providing emergency medical services (EMS) must comply with state law [G.L. c. 111C] and with regulations promulgated by the Department of Public Health, which also licenses private ambulance companies. Under the law, no ambulance driver or attendant may begin work without having successfully completed a course in emergency medical care approved by the Department of Public Health. The Office of Emergency Medical Services establishes training and certification standards. Standards for vehicles and ambulance services are also established by the Department of Public Health.

No certified emergency medical technician, police officer or firefighter who, in the performance of his or her duty and acting in good faith, renders emergency first aid and/or transportation will be liable for injury or death or for the hospital expenses of those admitted [G.L. c. 111C, §14].

Emergency Communications

Enhanced 9-1-1 has helped communities improve emergency response for police, fire and emergency medical services. Police and fire departments in many larger towns have traditionally provided independent dispatch or communications functions, often with uniformed police and fire personnel. In a growing number of cases, civilians perform the communications/dispatch function. Some towns have consolidated police and fire dispatch. There are a number of joint, or regional, dispatch operations in Massachusetts.

State law requires personnel who dispatch emergency medical personnel to be trained in emergency medical dispatch procedures.

Emergency Management

Towns are authorized by law to establish local organizations for civil defense. Although their original purpose was to defend against enemy attack, today these organizations are most active during natural disasters, providing shelter and emergency power generation, for example, during emergencies. The local civil defense organization is managed by a director, who is appointed by the selectmen or the town manager or administrator. The director may be a selectman or some other official, but often is the fire chief or police chief. He or she is responsible for the administration and operation of the local organization, subject to the direction and control of the appointing authority.

Local organizations are part of a statewide network, under the leadership of the Massachusetts Emergency Management Agency (MEMA). The federal Stafford Disaster Relief and Emergency Assistance Act [42 USC 5121, et seq.] provides for assistance and coordination among federal, state and local governments in times of disaster.

Selectmen may appoint, train and equip volunteer auxiliary firefighters and police officers and may establish and equip other volunteer public protection units, as approved by the state. Unless their actions are determined to be negligent in court, people engaged in emergency management activities, when acting in good faith, are generally immune from liability for anyone's death or injury or for damage to property.

Under a separate law, selectmen, in times of war, public emergency or distress, are charged with expending, either directly or through someone they appoint, money appropriated by the town to maintain, distribute and supply, at reasonable rates, a sufficient supply of food, other common necessities of life and temporary shelter.

Most towns have a designated emergency management director, but selectmen must understand the various issues affecting the administration of their town before, during and after an emergency. In the beginning of such events, the focus is on providing safety and protection to the public. In order to respond effectively to the demands created by such situations, however, local officials must plan ahead by considering the numerous issues that may arise in dealing with a disaster.

The development and scope of emergency response plans can fill a book in itself. This section provides an overview of issues to be considered. An emergency response plan must identify and answer pertinent questions relating to preparing and protecting the community. Many of the issues listed here will be specific to the community and defined by the community's charter, bylaws or

ordinances, departmental organization, job descriptions, and other local documents and procedures. Some state laws apply as well.

APCAM

For governments, issues related to disaster response fall into five areas: authority, personnel, contracts, actions and miscellaneous—or APCAM. There is a fair amount of overlap among these areas. In the absence of some other model a community may develop, APCAM is a useful starting point.

Using the APCAM model, the following are the broad questions that arise:

- Who has the *authority* to do what in times of disaster?
- What are the *personnel* rules in times of disaster?
- What are the special rules in *contracting* during times of disaster?
- What *actions* can the government take during an emergency to provide for public safety and welfare?
- What are the *miscellaneous* legal issues that need to be considered?

1. Authority

- **Responsibility:** The question of who takes charge during a disaster is generally addressed in a community's charter or local government structure.
- **Declaration:** An emergency declaration could come from a federal, state or designated local official. Some rules differ depending on who declares the emergency.
- **Emergency spending and borrowing:** In times of emergency, state law allows towns to raise and appropriate money outside of their debt limits. The expenditure of such funds is under the direction of the board of selectmen or officers appointed by the board [G.L. c. 40, §19]. The prohibition on exceeding appropriations is relaxed in times of disaster if there is a majority vote of the board of selectmen [G.L. c. 44, §31]. Special rules apply for snow and ice removal costs; as long as a community appropriated an amount equal to or greater than the prior year's appropriation, it can incur liabilities in excess of the appropriation [G.L. c. 44, §31D]. During an emergency and its aftermath, it is critical to document all actions taken and all expenditures. Otherwise, the pursuit of recovery loans, grants and reimbursements becomes exceedingly difficult.
- **Open meeting law:** The forty-eight-hour meeting notice requirement may be waived in times of an emergency (defined as "a sudden, generally unexpected occurrence or set of circumstances demanding immediate action"), though it is still a good idea to give as much notice as possible.

- Curfews or bans on liquor sales: Under state law, the chief executive officer of the community has the authority to enact a liquor sales ban and a curfew, but certain procedures must be followed in doing so [G.L. c. 40, §37A; c. 138, §68].

2. Personnel

- Emergency hiring: Towns must know how to hire people in an emergency, particularly in view of civil service or local personnel code requirements. Be careful about hiring anyone who would not have been hired under normal conditions. Under state law [G.L. c. 31, §§31, 32 and 48], an appointing authority can make emergency appointments for civil service positions.
- State militia: Generally, the selectmen can request the militia [G.L. c. 33, §41].
- Mutual aid: Selectmen must know who the town has agreements with, if any, and how they get activated.
- Restrictions on emergency employees performing duties of other employees: Some laws restrict, for example, police from performing the duties of firefighters, but these restrictions may be relaxed during an emergency.
- Calling in retired employees: A number of sections of state law address calling retired employees back into service during an emergency. (See G.L. c. 32, §§83, 83A, 85, 85C, 85E and 91.)
- Volunteers: Under the Torts Claim Act [G.L. c. 258], volunteers are considered employees for liability purposes. There are additional limitations on liability arising from actions of “registered rescue volunteers” [G.L. c. 231, §85AA].
- Liability for injuries, medical expenses or property damage: Basically, the employing governmental unit is responsible for paying the retirement benefits for an employee injured while assisting another community, subject to reimbursement by the other community. Call or volunteer employees can also be covered under certain circumstances. Other rules apply for damage to property [G.L. c. 32, 40, 41, 152 and 258].
- Liability for health care professionals or other volunteers: Certain exemptions from liability exist for some types of employees or volunteers [G.L. c. 71, §55A; c. 112, §§12B, 12C, 12F, 12V, 12V1/2, 23BB, 58A and 60; c. 149, §177B].
- Employee work hours: Days off can be limited in times of emergency for firefighters [G.L. c. 48, §57] and for police [G.L. c. 147, §17]; other workers may be exempted [G.L. c. 149, §§30, 31 and 33A].
- Fair Labor Standards Act and Family Medical Leave Act: Regarding an exception to reasonable time off rules under the Fair Labor Standards Act if there is an emergency situation, see, for example, 29 CFR 553.25(c).

- Municipal employees called up for military duty: Some employees may be called up for reserve duty during a time when their community needs them. There are special rules on how soon they have to return to work following release from military service in order to maintain their rights to their positions. (The U.S. Department of Labor website [www.dol.gov], in the Veteran's Employment and Training Services section, provides a wealth of information on this law, including a *Non-Technical Resource Guide*.)

3. Contracts

- Emergency procurement: Certain bid and procurement requirements can be waived in times of emergency (e.g., for supplies and materials, particularly food, shelter supplies and medical supplies; public works projects; public building projects; and utility contracts). Some laws limit emergency contract work to only the least amount of work needed to abate a given emergency. Some laws require approval from state officials before normal contract rules can be waived. There also may be special requirements for filing certifications with the state when there has been a contract entered into without the normal procurement process.

4. Actions

- Addressing unsafe structures: During an emergency, there will likely be a need for the government to raze or board up buildings or clear property for health and safety reasons. A failure to follow the rules, even in an emergency, can lead to claims later on. Different rules may apply to different officials who may be authorized to take such action. For example, boards of selectmen, boards of health and building departments can take steps to raze buildings that are not safe, but certain procedures must be followed [G.L. c. 111, §§ 122-125; G.L. c. 139, §§1-3B; G.L. c. 143, §§6-12; G.L. c. 148, §5]. It's important to have the forms readily available to deal with dangerous buildings.
- Emergency action addressing roads, wetlands, waterways, private property and utilities: Wetlands laws, for example, require the local agency having jurisdiction to approve any emergency work in a protected area [G.L. c. 131, §40]. Other laws apply to roads and utilities [G.L. c. 81, §21; G.L. c. 82, §§40-40E; G.L. c. 83, §8].
- Hazardous substances: State law allows certain emergency actions to be taken to deal with hazardous substances during an emergency [G.L. c. 21E, §§2, 4; G.L. c. 21K, §§1-9].
- Roadblocks and vehicle searches: Such actions must be exercised in accordance with legal authority and limitations.
- Disposal of debris: Special disposal rules apply to piles of snow, for example, which may have road salt or other chemicals mixed in. Environmental agencies have been known to cite (and fine) local governments for dumping snow into a body of water.

5. Miscellaneous

- **Suspension of certain laws:** In times of emergency, there are provisions for waiving statutes of limitations, “blue laws,” the minimum number of school days, local tax proceedings, creditor/debtor laws, and vehicle repair laws, among others.
- **Insurance coverage:** An emergency declaration may be helpful in getting state or federal aid, but it also may affect the level of insurance coverage a town can expect (e.g., as a result of a natural disaster or military conflict).
- **Contracts:** Many construction project contracts may provide for extensions of time and releases from liability if there is an enemy attack, act of God, or other extraordinary event (typically called a *force majeure*). Many times, these clauses are given little thought, but consideration should be given to a policy of not permitting such clauses. Contractors can obtain insurance to cover these contingencies. There also may be special rules (“works in progress”) for state or federal loans or grants in such cases.

The list of areas of concern can be long, and each community will want to add to its lists as new concerns arise. Each disaster response presents an opportunity to learn and to see what worked and what didn't. After every incident, there should be a review of how things went so that any necessary changes can be made and any areas that were overlooked may be identified.

Traffic Control and Parking

Under several different sections of state law, towns have authority to regulate the use of public and private ways, either by bylaw or by rules and regulations adopted by the selectmen (unless another board has been given responsibility for traffic regulation in a town). In most cases, rules and bylaws must be approved in advance by the state, although there are some exceptions.

The board of selectmen, park commissioners, or the traffic commission or its director, if any, may make special regulations about the speed of motor vehicles and the use of motor vehicles on roads under their control [G.L. c. 90, §18]. The use of vehicles may be prohibited altogether on certain roads. At the written request of the property owners, special regulations for private ways or private parking areas may be issued.

Traffic regulations must be published in a local newspaper and approved in writing by the state before they go into effect. Speed regulations must be approved by the state's registrar of motor vehicles [G.L. c. 90, §18]. There are similar requirements for regulations about the use of roads by pedestrians [G.L. c. 90, §18A].

Separate state laws permit towns to make bylaws, and selectmen to make rules, for the regulation of “carriages and vehicles” on town roads [G.L. c. 40, §22] and to install traffic devices for the protection of schoolchildren [G.L. c. 85, §21A]. Except under certain narrowly defined circumstances, no bylaw or rule purporting to regulate signs, lights, signal systems, traffic devices, parking meters, or markings is effective until it is published and approved by the state [G.L. c. 85, §2].

Towns may, by bylaw, designate areas on town roads to be used as bicycle lanes [G.L. c. 40, §21]. Towns also may provide for the closing of any public way during specified hours to promote recreation or sport [G.L. c. 45, §17A]. The selectmen may set hours and areas on public ways where sledding is permitted [G.L. c. 85, §10A]. The written permission of the selectmen (or road commissioners) is needed to move a building through a public way [G.L. c. 85, §18].

Parking

In towns that accept one of the applicable sections of law [G.L. c. 90, §§20A, 20A1/2], the selectmen (or town manager, if any) appoint a parking clerk who is under their direct control. The parking clerk coordinates the processing of parking notices in the town. In addition, he or she may, subject to the approval of the appointing authority, hire staff and organize divisions or contract for those services by competitive bidding [G.L. c. 90, §20A]. The parking clerk may also perform other municipal jobs, except for police functions. Some towns assign this role to the town clerk.

Various state laws permit towns to regulate where and when people may park. Towns that accept the applicable section of law [G.L. c. 40, §22D] may adopt traffic regulations authorizing the towing of illegally parked vehicles from roads under town control. Towns can also, by bylaw, require that designated parking spaces be provided for disabled veterans or handicapped people in public and private off-street parking areas [G.L. c. 40, §§21, 23]. Towns may limit parking in front of houses and apartment buildings to the people living there, as long as signs are posted [G.L. c. 40, §21].

Towns may appropriate money for the acquisition, installation, maintenance and operation of parking meters on town roads [G.L. c. 40, §22A]. The location of parking meters, however, must be approved by the state [G.L. c. 85, §2]. Towns that have installed parking meters may acquire off-street parking areas and facilities, subject to certain conditions [G.L. c. 40, §22B]. Under the same law, towns may also install parking meters in municipally owned or leased off-street parking lots. Many towns have switched to parking permit machines, which dispense a permit after payment at the site, and the operator places the permit in his car.

Animal Control

One of the least favorite responsibilities of selectmen is handling dog and other animal complaints. Selectmen in many communities have had to sit in a quasi-judicial role and adjudicate complaints of dangerous or vicious dogs. Orders of banishment or the more drastic order of euthanasia are among the more unpleasant duties of selectmen.

The state's animal control laws underwent a major revision in 2012, but there is still strong authority for a town to deal with problem animals. State law [G.L. c. 140, §173] grants towns authority to enact bylaws regulating dogs. This same chapter of state law grants licensing authority for dogs to the town clerk [G.L. c. 140, §§137, 147].

Complaints of nuisance (generally due to excessive barking or other annoyance that interferes with a person's peaceful enjoyment) or dangerous dogs (generally attacks on persons or other animals, or the placement of a reasonable person in imminent threat of physical injury or death) are typically the responsibility of the selectmen, although the law permits a town to designate another party to be the "hearing authority" (selectmen, police chief or person charged with the responsibility of handling dog complaints). At times, a selectman (or other hearing authority) can solve a dog problem simply by acting as a mediator between the dog owner and the neighbor. If the problem is more serious, however, selectmen (or other hearing authority) must, after conducting an investigation, including a public hearing, find that the complaints are not valid, or find that the dog is a nuisance dog or find that the dog is a dangerous dog and issue appropriate orders regarding its restraint or confinement [G.L. c. 140, §157]. A town can no longer ban or exile a dog, but, in the worst cases, it can order the dog to be euthanized. This decision, however, may be appealed within ten days to the district court (magistrate's hearing and then an appeal for a hearing before a judge), and the decision of the court is final (although subject to further court appeal). The town can also seek appropriate court orders for the restraint or confinement of the dog pending an appeal. Anyone who fails to comply with the board's order (or an order of the court) may be fined up to \$500 or imprisoned for sixty days, or both, for the first offense, and fined up to \$1,000 or imprisoned for up to ninety days, or both, for subsequent offenses.

Dogs that are ordered restrained may be captured or detained by a police officer, constable, or animal control officer if found loose and can be euthanized if they pose a threat to public safety or are found to be living in a wild state [G.L. c. 140, §158]. In addition, the selectmen may, after written notice, order the killing of a dog known to have "worried" or killed livestock or fowl, unless the owner agrees to restrain the dog for twelve months and posts a bond as a guarantee [G.L. c. 140, §160].

Annually, the board of selectmen must designate one or more animal control officers, who may be police officers or constables, or contract with a domestic charitable corporation to perform the duties of animal control officers [G.L. c. 140, §151]. These officers must also attend a state approved training program [G.L. c. 140, §151C]. Animal control officers, who may not be licensed animal dealers, are primarily responsible for dealing with animal complaints. Under state law, animals that are ordered destroyed must be killed in a humane manner. In addition, towns may not give or sell any animal that comes into its custody to a research facility or animal dealer [G.L. c. 140, §151].

Annually, the selectmen must issue a warrant directing the animal control officer(s) to catch and confine all dogs that have not been licensed, collared or harnessed and tagged according to state law [G.L. c. 140, §153]. After seven days, any dog that is unclaimed may be destroyed or put up for adoption. Any town officer involved with animal control may, without a warrant, enter any place where there is an exhibition of fighting dogs, birds or other animals, remove the animals, and arrest anyone present [G.L. c. 272, §89].

Public Safety Regulations

There are a range of town bylaws and regulations concerned with public safety. The following are some examples:

False Fire Alarms

The board of selectmen may offer a reward of \$500 for information leading to the arrest and conviction of a person ringing a false fire alarm [G.L. c. 276, §10].

Explosives, Flammable and Hazardous Materials

In most towns, selectmen issue licenses, pursuant to local bylaws, for the storage, handling, manufacture and sale of petroleum products, explosives, gunpowder, dynamite, fireworks and other flammable materials. Bylaws must be approved by the state Board of Fire Prevention, which also regulates these materials [G.L. c. 148, §§9 and 13].

Licenses are granted for the property on which the flammables or explosives are being kept or used, and they may be transferred to new property owners if the property is sold. As the licensing authority, selectmen have fairly broad discretion to grant or withhold these licenses, after a hearing, and to impose conditions on their use. For example, factors other than fire hazards (such as traffic congestion) may be considered when deciding whether to grant a license. Courts have upheld the right of towns to prohibit self-service gas stations.

For a license to be issued, it must have the endorsement of the head of the local fire department. Licenses may be revoked after notice and a hearing by the licensing authority, or by the state fire marshal. They may not be revoked arbitrarily, however. The general oversight of explosives, flammables and hazardous materials is usually handled by the fire department.

Firearms

Residents who want to keep or carry firearms must get approval from the appropriate licensing authority of a town, usually the police chief. A firearm identification card [G.L. c. 140, §129B], which allows the holder to possess rifles or shotguns, is renewable every six years. The law delineates those persons who are disqualified from obtaining a firearm identification card (FID).

A person needs a license, renewable every five years, in order to lawfully carry a rifle and/or shotgun. While the same statutory prohibitions apply as with an FID, the police chief also has considerable discretion in granting or denying a license to carry. In deciding whether to grant a license, the chief must determine whether the applicant is a suitable person to possess a firearm and, if so, whether he or she can demonstrate a proper purpose for carrying one. The decision is virtually never overruled by a court, which can do so only if the chief's decision is found to be arbitrary or capricious or an abuse of discretion. [Note: Firearms regulations, subject to strong political debates, change regularly.]

The police chief or other licensing authority also issues licenses for people to sell, rent or lease firearms, shotguns, rifles and machine guns, to carry on the business of a gunsmith, or to sell ammunition [G.L. c. 140, §§122, 122B]. When issuing or renewing these licenses, the police chief must give notice of his or her action to the state public safety commissioner. Licenses to sell or rent firearms may be declared forfeited or suspended with proof of the licensee's violation of the law or conviction of a felony [G.L. c. 140, §125].

CHAPTER 8

Land Use and Community Development

Planning

Towns face many important decisions regarding land use, planning, conservation and development. Whether residents prefer to maintain a community of homes or to seek economic development to create jobs and increase tax revenue, there are many factors to consider, including the adequacy of water supply and sewage disposal systems, the transportation network, the potential need for new facilities, such as schools and playing fields, and the potential for increasing the level or frequency of municipal services. Resource protection is also an integral element of many planning decisions. Considerations may include the protection of water supplies and other natural resources, the conservation of open space, traffic and noise mitigation, and working with neighboring towns to ensure the protection of shared resources.

Sources of assistance to examine land use questions include many of the town's boards and commissions with land-use related authority (e.g., the planning board), the area's regional planning agency, and state agencies that can provide financial or technical assistance.

A growing number of towns have planning offices (or offices combining the planning and community development functions) and a professional town planner. Other towns must rely on the efforts of the planning board to propose zoning bylaws that will best reflect the town's preferences for growth and conservation. Some small towns share a planner.

Other local boards and offices involved in land-use planning and decision-making (many by state statute or regulation) include the board of health, conservation commission, industrial development commission, zoning board of appeals, water board or water and sewer commission, and building inspector. Local historical commissions, historic district commissions (local government bodies) or historical societies (often private, nonprofit entities) may also want to offer their perspectives on

certain land-use decisions, especially those near historic sites. Towns have the authority, through zoning and local regulations, to control land use and subdivisions and to ensure that sound environmental standards are applied.

Given the number of boards, commissions and officers with aspects of land-use authority, the board of selectmen may want to create some coordinating mechanism so that the town can present a unified and harmonious view of its land-use preferences. Selectmen with appointing authority for these boards, commissions and officers need to question candidates about their philosophies about development, any possible conflicts of interest, and their understanding of their roles. The board of selectmen's success in assuming a leadership role in the planning and land-use area, however, may depend on local politics, as many planning boards remain elected. Several strategies for achieving coordination include: appointing one member of the board of selectmen to serve as a liaison with the planning board (especially important if the selectmen serve as the board of health or water and/or sewer commission); sponsorship by the board of selectmen of occasional "roundtable" discussions among the affected boards (or encouraging the planning board to sponsor such sessions); or having the town planner serve in this coordinator role.

Master Plans

In general, the so-called comprehensive plan, or master plan, is important but optional. The planning board may prepare a master plan, which presents a comprehensive picture of a community's preferences for housing, open space, natural resources, recreation, transportation, public facilities, and commercial/industrial activity. Towns often conduct studies of specific community growth and development issues, such as affordable housing, revitalization of a downtown district, protection of natural resources, or proposed locations for new or expanded public facilities. These may be found within the master plan or as stand-alone studies.

The content of master plans is specified in Chapter 41, Section 81D. The nine required master plan elements are not described in great detail, however, leading some planning consultants to be expansive in their interpretation of what is required. Plans often end up heavy on data collection (some of dubious value) and light on policies and implementation strategies. This should be avoided, as it adds greatly to the expense of planning without offering sufficient guidance to communities.

The master planning statute charges the planning board with "making" a master plan and subsequently adopting the plan. There is no requirement for a public hearing or ratification by the local legislative body, but both are recommended best practices and should be done voluntarily.

Land Use Plans

In addition to master plans, municipalities prepare and publish many kinds of land use plans. Most are not mandatory, but they support good zoning ordinances and bylaws, subdivision regulations, public health rules, land acquisition efforts, building programs, and road and utility construction. Some types of plans may be necessary to qualify for state grant programs and to support eligibility under the Green Communities Act, for example.

Good plans are based on professional consulting, public participation, wide publication and periodic updates. The state makes some limited financial and technical assistance available for community planning. There are also incentives in the Cape Cod Commission Act [1989 Mass. Acts c. 716] for the fifteen Cape towns to prepare local comprehensive plans consistent with regional policy.

The subdivision control law requires planning boards to prepare master plans, but it does not actually require that any laws or regulations be based on them. The Zoning Act permits municipalities to enact a wide array of zoning measures, but it does not actually require that such zoning be based on a plan.

Zoning

Nothing influences the physical development of a town like its zoning. Municipalities use their zoning and general bylaw powers to accomplish important public purposes, addressing issues such as wetlands, wells and water supplies, chemical use and storage, sand and gravel operations, storage tanks, erosion, pollution and noise. Towns have also traditionally relied on their zoning power to control development.

The state's zoning act [G.L. c. 40A] specifies the procedures, format, rights and duties that towns must follow. Among the law's requirements are the development of a zoning map; submission of any proposed zoning bylaw to the board of selectmen, who must transmit it to the planning board within fourteen days; a public hearing on any proposed zoning amendment prior to a town meeting vote; and adoption or amendment of bylaws by a two-thirds vote of the local legislative body (town meeting).

Zoning bylaws typically divide the town into districts to guide land-use patterns that promote harmony and protect the public. Zoning bylaws will define permitted uses of land, prohibited uses of land, and uses of land that either may be allowed "by right" (with just a building permit) or by special permit and/or site plan review. Generally, a land use must be specifically allowed or it is presumed to be prohibited. The town's zoning will also address required dimensions, such as the size

of lots, frontage distances along streets, and heights and locations of buildings on lots in the various districts. A zoning variance provision is provided for in every local bylaw. Zoning bylaws generally provide for special permits, and they may also feature site plan reviews, and, in certain circumstances and for a limited duration, zoning moratoria.

Special Permits

Some specific uses in particular districts (identified in the zoning bylaw) are allowed under special permits issued by a “special-permit-granting authority.” The authority sets certain conditions, safeguards and limits on proposed projects. The special-permit-granting authority may be the planning board, the zoning board of appeals, the selectmen or the zoning administrator [G.L. c. 40A, §13]. In many communities, the building inspector serves as the zoning enforcement officer. Apart from amendments to the town’s charter, towns cannot create a new board for this purpose. The zoning bylaw, however, can specify different boards to serve as the permit-granting authority for different types of permits.

Depending on how a town’s zoning bylaw is drafted, the issuance of special permits may be discretionary or may be required. This point alone underscores the importance of careful drafting of any local laws, especially zoning and land-use laws.

A town’s zoning bylaw may provide that the special-permit-granting authority is the board of selectmen, zoning board of appeals or planning board. In most cases, it is the zoning board of appeals or the planning board.

A permit-granting authority (a zoning board of appeals or zoning administrator) may grant a variance providing relief to a real estate owner if enforcement of a zoning bylaw would create substantial hardship, although hardship alone is not enough. Strict standards are established in state law [G.L. c. 40A, §10], and many variance requests will not meet these requirements.

In order for a permit-granting authority to grant a variance, which is discretionary, the authority must find that *all* of the following criteria are met:

1. Owing to circumstances relating to the soil conditions, shape or topography of such land or structures and especially affecting such land or structures but not affecting generally the zoning district in which it is located;
2. A literal enforcement of the provisions of the bylaw would involve substantial hardship, financial or otherwise, to the petitioner; and

3. Desirable relief may be granted without substantial detriment to the public good and without nullifying or substantially derogating from the intent or purpose of the bylaw.

The meaning of these terms is the subject of numerous court cases.

Developments that may be subject to special permits include multi-family developments, mixed-use developments (including housing and commercial elements), certain developments at higher density, and uses of concern to the community because of public safety or health considerations (e.g., parking lots, gas stations). The bylaw relating to special permit procedures may designate that other town boards (such as the planning board, if it is not the special-permit-granting authority, or the conservation commission or board of health) also participate in the review of the application and then make recommendations to the authority. If the board of selectmen is the special-permit-granting authority, it is a good idea to review the special permit provisions of the town's zoning bylaw to determine if reviews by other boards need be included. If not, the selectmen may wish to establish a policy of seeking advice prior to deciding on an application. The process for special permit issuance includes a public hearing held within sixty-five days after the application is filed.

Voting to grant a special permit is governed as follows:

- Two-thirds majority for a special-permit-granting authority composed of more than five members
- Four votes for an authority composed of five members
- Unanimous vote for an authority composed of three members

Voting to grant a variance or appeal of a decision or action of the building commissioner is governed as follows:

- Four votes for an authority composed of five members
- Unanimous vote for an authority composed of three members

The timelines for holding hearings, making decisions and filing the record differ for special permits and other appeals and variances. The following is a helpful guide:

- For special permits, abide by 65/90/14 rule: Hold hearing within sixty-five days of filing; take final action (filing decision with town clerk) within ninety days of hearing (meaning the last date of the last hearing); and file record with town clerk within fourteen days of vote.
- For other appeals and variances, use 65/100/14 rule: Hold hearing within sixty-five days of filing; make decision within 100 days of filing; file decision and record with town clerk within fourteen days of vote.

Failure to make and file a decision within the required time periods may result in a constructive grant of the relief sought.

Appeals

A special permit decision, or an inability to obtain enforcement action by the local building official, may be appealed to the zoning board of appeals.

Zoning Moratorium

A zoning moratorium places a temporary hold, or rate, on the issuance of building permits, septic system permits, special permits, and/or particular uses (residential development, commercial development). A moratorium is intended to allow the town to adjust its zoning or land-use policies over one or two years to improve the community's growth management. A moratorium must be adopted through the zoning act [G.L. c. 40A] and follow the appropriate notice and hearing requirements. The community must justify the moratorium and use the time to revise local bylaws and regulations and conduct necessary planning. (It may also be an appropriate time to plan needed capital improvements.) Long-term, rate-of-development measures that are not time-limited and associated with special planning or zoning updates have been disallowed by the Massachusetts courts.

Transfer of Development Rights

Transfer of development rights is another tool to direct growth away from certain areas and into others. A town may use this approach to designate land that needs to be protected, such as farms, historic sites, forests or shorelands, and allow owners to transfer building rights permanently to other lands, usually owned by developers, who are then able to develop at greater density.

Site Plan Review

Site plan review zoning involves designating a site plan review board and a process in a zoning bylaw, with jurisdiction to control the design of selected developments not otherwise reviewed as subdivisions. The planning or zoning board is often designated to serve as the reviewing board. Developments subject to site plan review often include projects requiring a special permit, such as industrial parks, large apartment or condominium complexes, shopping centers and sports stadiums. Site plan review may also be appropriate as a stand-alone process for smaller projects allowed by right (e.g., no special permit required).

While site plan review boards in general do not have the authority to deny an application for development, they have authority to shape project design by placing conditions on the development, and they can require developers to submit additional information not covered by other permit

programs. These boards usually consider impacts of traffic, open space, aesthetics, flood control, water supply, effects on abutting properties, and related resource-protection concerns.

If the board of selectmen is designated to serve as the site plan review board, the board will find it helpful to consult with the planning board on all site plans submitted. Consultation with other boards with a particular interest in the site (e.g., conservation commission, historic commission) may also be useful. The board of selectmen may wish to institute a policy of consultation with relevant boards prior to making a final determination on any site plan.

Subdivision Control

A subdivision is the division of a tract of land into two or more lots where the new lots do not have adequate frontage on a qualified way (a road), thereby necessitating the construction of a new way. Subdivision control regulations define the layout, specifications and construction of sewers and streets that are built by the developers but generally turned over to the town (after acceptance by town meeting). In some cases, subdivision roads are not formally accepted and remain as private roads maintained and plowed by the homeowners.

The planning board is primarily responsible for the administration of the subdivision control law [G.L. c. 41, §81K-GG], although the board of health and conservation commission also have regulatory authority if the subdivision has an environmental impact. Planning boards have the authority to adopt regulations governing the design and construction of roads, drainage systems and utilities servicing subdivisions.

The planning board must base its decision on the regulations in place at the time that the developer submits a subdivision plan. Perceptions of the development as unpopular, too large, or incompatible with the area are not adequate justification for the denial of a plan. Only inconsistency with the board's own regulations can serve as the basis for approval or denial. Repeated objection to larger subdivision proposals is generally indicative of poor underlying zoning, which should be examined.

Farmland and Agriculture

Often subject to local zoning, agriculture is encouraged by a state law that authorizes municipalities to establish incentive areas and relax nuisance laws somewhat for farming [G.L. c. 111, §§ 125A]. Farmland also has some protection from eminent domain [G.L. c. 79, §5B]. The zoning act exempts agricultural activities on lots of a certain size and exempts farm stands if they meet certain requisites [G.L. c. 40A, §3].

State law allows for the reduction of real estate taxes on properties used for agricultural and/or horticultural purposes that meet certain minimums for size and gross receipts [G.L. c. 61A]. State law gives municipalities a right of first refusal, which they can assign to others, to purchase farmland that otherwise would be sold or converted to a non-agricultural use.

The Wetlands Protection Act [G.L. c. 131, §40] provides a qualified exemption for normal maintenance or improvement of lands already in agricultural use.

Floodplains

Floodplain protection is a part of local zoning under the Zoning Act. In roughly 80 percent of municipalities, this involves a floodplain zone, a type of “overlay district” where some uses are banned (e.g., building, filling and/or excavating), and others require special permits from a special-permit-granting authority (e.g., zoning board of appeals) if they meet specified criteria. This method of land-use control to protect public health and safety became popular due to related restrictions imposed by the Federal Emergency Management Agency flood insurance program.

Billboards and Signs

Billboards are regulated by the Massachusetts Department of Transportation’s Office of Outdoor Advertising, but they may also be regulated by local zoning or other bylaws. Billboard owners must be issued a state permit annually for each billboard. State regulations prohibit approval of a billboard determined to be in violation of either state or local laws.

Signs other than billboards may be locally regulated. Sign requirements of all types are typically found in a section of the local zoning bylaw or ordinance. If the town is concerned about maintaining a historic character in the commercial area and has a historic district commission, the commission may include sign standards in its regulations for the district.

Community Development

Community development encompasses an array of plans and activities that a town undertakes to improve housing, infrastructure, commercial activity, civic engagement, recreation, and related services. Examples of community development include: a housing rehabilitation program that focuses on bringing properties into code compliance and maintaining an affordable housing stock; revitalizing the commercial district with parking facilities, landscaping, tree planting and sidewalk repairs; road, sidewalk and water and sewer repairs in a specific neighborhood; or the creation or redesign of a park to include a child play area, benches and trees. Any activity leading

to revitalization of the town, or a specific area in town, falls within the definition of community development.

The board of selectmen's involvement in community development often focuses on working with neighborhood groups, civic organizations, nonprofit entities and residents to design a community development strategy, which will address issues such as desired locations of development or redevelopment, priority concerns, available funding sources, timeline for meeting goals, and types of assistance needed. If the board is unable to lead such an effort, it may appoint a committee to study available options, hold public hearings, consult with the area's regional planning agency, and possibly visit other towns that have conducted community development activities and report back to the selectmen with recommendations for a comprehensive strategy.

The board of selectmen will likely serve as a primary source of information about the community development strategy and how the town intends to proceed, so it needs to stay involved as the strategy evolves. Selectmen may need to explain that many of the grant programs available for community development are competitive, so there are no guarantees. The town may also need to appropriate matching funds for certain state and federal grant programs, and selectmen will need to know about these requirements.

In most communities, community development is an ongoing process. All needs cannot be met in a few years, with a few grants. The town also needs to consider the maintenance of facilities or infrastructure after the grant funding is used for construction, as most grant programs do not provide funds for ongoing costs. Identification of priorities, the full cost and service consequences to the town after project completion, and the town's growth intentions all factor into the community development effort.

By working with other town boards as well as community and neighborhood groups, the local or regional chamber of commerce, and faith-based organizations, selectmen will see several different perspectives about the community's needs and priorities. Developing a strategy can be a good opportunity to bring these groups into an effective and productive working relationship with the town, while fostering cooperation among the groups and organizations themselves. Some communities hire consultants specializing in community development to help the town determine its immediate and long-term priorities. Towns can also gain insight from community development corporations (CDCs) in the town or region, as well as their regional planning agency, area colleges and universities, the local or regional housing authority, and state agencies with programs serving municipalities or the business community.

Economic Development

A subcategory of community development is economic development, which may reference any activity with a focus on job creation, job retention, increased commercial activity, or efforts to attract business and industry. Communities may vote to create specific entities to oversee economic development, such as an industrial development finance authority under Chapter 40D, an economic development and industrial corporation under Chapter 121C, a redevelopment authority under Chapter 121B, or a development and industrial commission under Chapter 40, Section 8A.

Successful economic development requires a plan that considers issues of employment, current and planned transportation infrastructure, industry or business mix, resource availability (e.g., water and sewer services), land-use patterns, local and regional competition, the desire for growth, and the town's ability to respond to new growth. Growth may help the tax base, but it's important to consider the service consequences. A large industrial employer, for example, may require increased inspection time from the fire department due to its use and storage of hazardous chemicals. A shopping mall or plaza may add to local traffic, require an increase in police patrols in the parking lot to deter theft, and present difficulties for established downtown merchants. It's important to weigh as many of these costs and benefits as can be identified in the preparation of an economic development strategy.

By staying in touch with the local or regional chamber of commerce, other business organizations, and the regional planning agency, selectmen will be informed of business interests in the area, grant or loan programs for which the community might be eligible, and the pace of economic activity in the region. Downtown merchants, or their association, can offer their perspective on the types of economic activity that would help the downtown thrive. Zoning tools, notably special permits and site plan review, can help the town negotiate conditions for an industrial or commercial development, thus bringing in new activity that is complementary to the town's strategy.

Redevelopment Authorities

State law [G.L. c. 121B, §4] enables any city or town in the Commonwealth to create a redevelopment authority. A redevelopment authority cannot transact business or exercise any powers, however, until the following steps are taken:

- The town must establish the need for a redevelopment authority by passing an article at a regular or special town meeting. The article must identify the need for the redevelopment of substandard, decadent or blighted open areas for industrial, commercial, business, residential, recreational, educational, health services, or other purposes.

- The town must submit to the Department of Housing and Community Development two certified copies of extracts of town meeting showing the adoption of the article and the presence of a quorum.
- Four of the five members of the redevelopment authority are elected at the annual town meeting for staggered terms of one to five years, with subsequent terms being for five-year periods. The fifth member is appointed by the Department of Housing and Community Development for an initial term of three years. The town clerk is responsible for certifying the election or appointment of the members.
- The town then must prepare four certified copies of the minutes of the meeting of the board of selectmen showing the appointment of all members, as well as documents from the organizational meeting of the redevelopment authority board. One copy of the documents is filed with the DHCD, one is filed with the secretary of the Commonwealth, one is retained by the town for bond counsel, and one is retained by the redevelopment authority.
- Following review and approval by the DCHD and the secretary of the Commonwealth, the secretary will issue a certificate of organization to the redevelopment authority.

All members of the redevelopment authority must be residents of the town. A redevelopment authority is not a town department, but rather a quasi-municipal entity. It is autonomous and may not be controlled by the board of selectmen or the town meeting. The board of selectmen must, however, approve the redevelopment authority's acceptance or borrowing of funds from the federal government for a project the authority is authorized to undertake. The redevelopment authority has eminent domain powers and may exercise them without the approval of the board of selectmen or the town meeting. The board of selectmen does not approve the type of project that the redevelopment authority is undertaking.

Housing Authorities

State law [G.L. c. 121B, §3] enables any city or town in the Commonwealth to create a housing authority. Similar to a redevelopment authority, a housing authority may not transact business or exercise any powers before a need is identified and voted at town meeting and the approval of the Commonwealth is obtained.

Under the state law, the town must determine by vote at an annual or a special town meeting that a housing authority is needed “for the purpose of the clearance of substandard, decadent or blighted open areas or the provision of housing for families or elderly persons of low income or engaging in a land assembly and redevelopment project, including the preservation, restoration or relocation of historical buildings.”

The procedure for obtaining approval from the state for a housing authority is the same as for a redevelopment authority. Selection of members is also the same, and, likewise, all members must be residents of the town.

As with a redevelopment authority, the housing authority is independent of control by town meeting or the board of selectmen. Housing authorities, like redevelopment authorities, also have eminent domain power. (See Chapter 121B, Section 11, for housing authority powers generally and paragraph (d) for the power of eminent domain. But note that under paragraph (k), the board of selectmen must approve any agreement with the federal government for the borrowing or acceptance of funds for a particular project.)

Local or regional housing authorities administer housing programs for low- and moderate-income individuals and families. Some authorities administer housing for the elderly and/or the disabled. Housing authorities may also administer either state or federal rental voucher programs, which provide a subsidy for income-qualified individuals and families to live in market-rate housing.

The board of selectmen can look to its housing authority for consultation on the housing needs of the community. The housing authority may also offer insight into the service needs of residents of housing authority properties (e.g., public transportation, health care, adult education, library services).

Community Preservation Act

The Community Preservation Act [G.L. c. 44B] enables communities to establish a special fund that may be spent for certain open space, historic preservation, affordable housing, and outdoor recreation purposes. For towns, adoption of the local-option statute involves a majority vote of town meeting as well as approval by a majority of voters at the next regular municipal or state election. The primary source of revenue is a property tax surcharge of up to 3 percent assessed on each parcel of taxable real estate within the community, amounts not subject to the levy limitations of Propositions 2½. The second source of revenue is matching distributions from the state's Community Preservation Trust Fund. For each fiscal year, the city or town must spend or reserve at least 10 percent of the annual revenues in the local funds for each of the statute's primary purposes: open space, historic preservation and affordable housing. More than 150 cities and towns have adopted the CPA, imposing surcharges ranging from 1 percent to 3 percent. Guidelines are available from the Department of Revenue.

Conservation Restrictions and Open Space

Cities and towns can be party to conservation restrictions, which are voluntary agreements with a government body or qualified charitable organization by which the owner covenants to keep land primarily in its natural condition. The restriction may run in perpetuity or for a period of years. A conservation restriction given to a municipality, or to a charity within the community, must be approved by the selectmen or city council, and then, on application, by the Executive Office of Energy and Environmental Affairs.

The Conservation Restriction Act [G.L. c. 184, §§31-33] governs conservation restrictions, agricultural preservation restrictions, and historic preservation restrictions. These restrictions can be bought and sold, donated or bequeathed. The municipal assessors are required to take account of the restrictions imposed when assessing a property.

Municipalities, as well as many federal and state agencies and regional authorities, may take open space by eminent domain, purchase it, or receive it as a gift. They also may acquire interests such as easements, covenants and other restrictions. The Division of Conservation Services offers grant programs to municipalities for the acquisition of conservation and recreation land, as well as the development and renovation of parks.

Public Lands and Article 97

Article 97 of Amendments to the Massachusetts Constitution, adopted in 1972, requires a two-thirds roll call vote of each chamber of the Legislature in order to dispose of or change the use of certain state, county or local public lands taken or acquired for natural resources proposes, broadly defined. (Amendment Article 97 created an Article 49 of the constitution itself.) In effect, anyone seeking to alter the use of or to grant, sell or lease public land originally taken or acquired for natural resource protection purposes likely would need a bill passed by the Legislature and signed by the governor.

Many municipal transactions amount to dispositions of public natural resource lands (and easements and interests in real estate), and many municipal actions amount to changes in the use of such protected properties. As such, towns may need an Article 97 bill enacted before taking such actions. Several such bills are filed each year—most are not controversial—enabling land swaps with state forests or state parks, limited commercial or private activities in municipal parks and forests, transactions with local businesses and local landowners to lease town properties, legalization of encroachments, or releases of conservation restrictions.

In 1998, the Executive Office of Energy and Environmental Affairs promulgated its Article 97 Land Disposition Policy, the purpose of which is to “ensure no net loss of Article 97 lands under the ownership and control of the Commonwealth and its political subdivisions” (e.g., cities and towns). The Office of Energy and Environmental Affairs is not likely to support an Article 97 land disposition unless the sponsoring agency determines that “exceptional circumstances exist” for the disposal, and certain conditions must be met. The policy provides for an extensive internal review process. The policy specifies that noncompliance leaves the city or town ineligible for grants offered by the Office of Energy and Environmental Affairs or its agencies.

An earlier common law doctrine that is still in effect, known as the prior public use doctrine, requires a majority vote of the Legislature on a bill filed to authorize any changes in the use of public land to inconsistent uses.

In addition to these procedural requisites protecting public lands, many public lands and specific types of resources are governed by individual statutes. Chapter 45 has sections that address city and town parks (§§1-13), playgrounds (§14), public domain (§19), city and town forests (§19), and shore reservations (§§23A-23C). Sections 33-59 of Chapter 92 govern urban parks and recreation lands. Chapter 132 governs forests.

A near perfect protection for public land comes in the form of a “deed in trust,” a real estate instrument drafted and recorded so as to impress a charitable trust requiring that the property be used forever for a specific, stated purpose.

In addition, there is a statutory basis for ten taxpayers to commence an action with leave of court (or the attorney general) to enforce the terms of conveyance or gift to a municipality, county or state agency [G.L. c. 214, §3(10)]. This public charitable trust enforcement statute has been used effectively against cities and towns.

Historic Sites and Structures

Municipalities can create historic districts for managing sites and structures therein. They may do so by special act or, more commonly, by an enabling act under the Historic District Act [G.L. c. 40C]. The resulting historic district commissions, of which there are more than 200 in Massachusetts, are city or town boards with the power to regulate and restrict various changes within the district.

Another approach is a local historical commission, which provides leadership and education to preserve sites and buildings [G.L. c. 40, §8D]. These commissions are distinct from a local historical society, which is a private, non-governmental entity.

Several municipalities have enacted zoning or general “demolition delay” bylaws, requiring permits and imposing delays during which efforts can be undertaken to avoid losses of particular buildings.

Brownfields

The term “brownfield” refers to a contaminated parcel of land that is abandoned due to environmental liabilities. A state law commonly known as the brownfields act [G.L. c. 21E] creates incentives for the remediation and redevelopment of brownfields in order to return them to the tax rolls and create jobs. The incentives include tax credits, loan guarantees, grants for economically distressed areas, and limited liability for redevelopment authorities and community development corporations.

Environmental Concerns

The Home Rule Amendment [Article 89] to the Massachusetts Constitution and the home rule statute [G.L. c. 43B] authorize cities and towns to protect the public health and safety, which has been interpreted to confer broad authority to protect the environment. A community’s environmental concerns and responsibilities can be rather broad. They are often handled by the conservation commission, health department, building department, fire department, planning board, board of appeals, public works department, recreation department, and other local agencies. For example, local boards of health have the power to enforce state laws and regulations concerning groundwater monitoring, septic systems, underground fuel tanks, chemical storage, landfills, incinerators, transfer stations, hazardous waste, and water supply contamination. (See Chapter 10 for more on boards of health.) Selectmen, however, should be familiar with the community’s environmental concerns as well.

Air Quality

Air quality is regulated by the U.S. Environmental Protection Agency (EPA) under the federal Clean Air Act and at the state level by the Department of Environmental Protection under the state’s Clean Air Act [G.L. c. 111, §142A]. Federal and state regulations impose permit requirements and emission limits for certain stationary and moving air pollution sources and certain types of emissions. These rules apply in most of their particulars to cities and towns relative to stationary sources, vehicles and facilities.

Most air quality enforcement is done by the state, but local officials, such as police departments, fire departments, boards of health and building inspectors, have the authority to enforce air pollution control laws and regulations. State law [G.L. c. 111, §31C] grants municipalities the authority to adopt air pollution control rules, including the regulation of emission of smoke, particulate matter, soot, cinders, ashes, toxic and radioactive substances, fumes, vapors, gases, industrial odors, and dusts that constitute a nuisance or danger to public health or that impair public comfort and convenience. The local requirements are administered by the board of health or other authority established for this purpose. Local health regulations must be presented at a public hearing and provided to the Department of Environmental Protection.

Under the authority of state law [G.L. c. 111, §31], most boards of health have implemented certain tobacco and smoking regulations that go beyond the state's workplace smoking ban [G.L. c. 270, §22], also known as the Clean Indoor Air Act. On the issue of second-hand smoke, the board of health receives complaints from the Department of Public Health or from residents. Local health regulations or bylaws usually include a fine structure for instances when an inspection discovers a violation of state law or a local measure.

A ceremonial bonfire to mark the observance of a significant event is allowed in Massachusetts, but boards of selectmen may authorize the town's fire department to issue not more than one permit per year. Bonfire permits can be issued only to a municipal department or to a civic, fraternal or veterans' organization. Many communities allow, but regulate by permit, open burning of residential yard waste during an annual burning season.

Drinking Water

Although many towns still rely, in part, on private wells, most towns in Massachusetts are served by one or more public water supply systems—municipal wells, reservoirs or a combination of the two. There are also some communities serviced by private water utilities, which are subject to oversight by the Department of Public Utilities.

A public water supply is defined as a system that has at least fifteen service connections or regularly serves an average of twenty-five or more people at least sixty days a year. This is the threshold for regulation by the federal Safe Drinking Water Act.

Except for communities receiving water service from the Massachusetts Water Resources Authority, any town may vote to establish and operate its own water supply and distribution system [G.L. c. 40, §39A]. Towns may purchase water from private companies or from other communities.

Towns with a public water supply may create a three-member board of water commissioners, or the selectmen may be authorized to act as the board. Some towns have used the process in state law [G.L. c. 40N] to create a combined water and sewer commission. Towns also use the legislative “special act” process to create municipal water departments and combined water and sewer commissions.

Towns with their own water systems may construct and maintain dams, wells, reservoirs, pumping and filtration plants, buildings, standpipes, tanks, fixtures and other structures as well as purification and treatment plants. The cost of purchasing, developing and enlarging public water supplies can be financed through the issuance of bonds.

A community bills the users of water, based on consumption, for the costs of maintaining and operating the system. Some communities have adopted enterprise funds, as provided for in state law [G.L. c. 44, §53], to ensure that the revenue received for services is sufficient to meet the operating costs and capital expenditures of the water or water-sewer department.

The Department of Environmental Protection has broad authority for monitoring and enforcing water quality standards for public water supplies and for approving sources of water, water systems and treatment facilities. The DEP rules for new sources include requirements for controlling land use near the wells in order to protect the water quality. The DEP regularly tests public water supplies for contaminants. If any water supply fails to meet the standards for drinking water safety and quality, the DEP can require treatment or direct that the public be notified. Water commissioners, or selectmen acting as such, may impose additional controls on a water system, subject to bylaws or any rules and regulations approved by the town [G.L. c. 41, §69B].

The Water Management Act [G.L. c. 21G] regulates water withdrawals in Massachusetts. Each public water supply (municipality or district) must obtain a permit from the DEP authorizing the amount of water available to the municipality. The DEP has grant programs for acquiring land, addressing contamination and constructing filtration plants.

Private wells are under the jurisdiction of local boards of health. For instance, owners of buildings that need a source of water where a municipal water supply is not available must receive a permit from the board of health certifying that there is an adequate supply of potable water at the site. The DEP can provide boards of health with assistance, on request, but the agency has no direct authority over private wells. Some local boards have promulgated well regulations. Further information on

this topic is available from the Massachusetts Association of Health Boards (www.mahb.org) and the Massachusetts Health Officers Association (www.mhoa.com).

The Water Management Act empowers the DEP to deal with water supply shortages and emergencies. Each community must have a water resources management plan that incorporates conservation standards based on guidelines outlined by the Massachusetts Water Resources Commission.

The DEP also has extensive authority to protect groundwater from pollution [G.L. c. 21, §§26-53]. DEP approval is needed for the discharge of most pollutants, including commercial, industrial and agricultural waste, sewage and runoff.

Forests and Trees

The state Forest Cutting Practices Act [G.L. c. 132, §§40-46] is intended to promote the responsible harvesting of trees. Limited exemptions apply for public utility and highway maintenance as well as some other projects requiring city or town permits.

The Public Shade Tree Act [G.L. c. 87] protects publicly owned trees along city, town and county ways. (All trees that border public ways are considered public shade trees, unless someone can show otherwise.) No such tree may be cut, trimmed or removed, even by the owner, without the written permission of the municipal tree warden or his or her deputy after posting and a public hearing. If there is written objection, the work needs approval of the selectmen or mayor.

There is an important exemption in the Shade Tree Act for the selectmen, a mayor, road commissioners, or a highway surveyor to order trees to be trimmed or removed if they deem them to “obstruct, endanger, hinder or incommode” persons traveling on a way. Officers in charge of widening roads may order removal of trees for that purpose.

State law requires every town to have a tree warden [G.L. c. 41, §§1, 106, unless the duties of the warden have been delegated by the town to a board of public works (G.L. c. 41, §69C-F) or to a municipal office of lands and natural resources (G.L. c. 41, §69G)]. The tree warden, or designated agency, has broad authority to plant, trim, and remove public shade trees and shrubs on town streets [G.L. c. 87, §2].

Under state law, towns may appropriate money for the tree warden to plant shade trees along public ways, or up to twenty feet away, to improve, protect, shade or ornament the street [G.L. c. 87, §7].

Trees in public parks are usually under the control of the park commissioners, although the tree warden may be asked to assist in the care of some or all park trees.

The state Scenic Roads Act regulates the cutting or removal of trees, as well as the destruction of stonewalls, along scenic roads so designated by town meeting or city council, by mandating a planning board public hearing.

Massachusetts affords real estate tax relief for land in forest tree use [G.L. c. 61].

About half of the towns in Massachusetts have created town forests. In most cases, the town forest is managed by a town forest committee appointed by the board of selectmen [G.L. c. 45, §21]. Alternatively, a town may designate the conservation commission as the forest committee or direct the conservation commission to appoint a forest committee [G.L. c. 45, §21].

Hazardous Waste and Toxic Materials

The so-called Superfund Statute [G.L. c. 21E] imposes responsibility and liability for releases of hazardous materials and petroleum products and for suspected or confirmed disposal sites. The Department of Environmental Protection's comprehensive regulations, known as the Massachusetts Contingency Plan (MCP), apply to cities and towns just like anyone else. The MCP sets forth what municipal officials need to know about the reporting of releases and sites, response actions and reports, cleanup standards, liabilities and fees, and legal defenses, as well as the presentation and pursuit of claims that cities or towns may have for cost recovery and property damages for which others are liable.

Chapter 21E applies to present and former owners and operators of sites, as well as those who generate, store, transport and dispose of oil and hazardous materials, but cities and towns may enjoy significant defenses in cases of land taken by eminent domain or acquired in good faith innocently, or land that is downstream of sources of contamination. Cities and towns may even have financial claims against the original sources and operators for cleanup reimbursement and property damages.

Comprehensive federal and state laws and regulations govern the location and operation of hazardous waste facilities. In addition, local boards of health have authority under state law [G.L. c. 111, §150B] to assign sites for facilities that store, treat or dispose of hazardous waste.

Like other persons and entities, municipalities are responsible for proper management of hazardous wastes and chemicals [G.L. c. 21C] and toxic use reduction [G.L. c. 21I]. Hazardous materials are

regulated through the so-called “right-to-know” law [G.L. c. 111F], which requires cities and towns to respond to citizens’ requests for information about hazardous substances used by local employers in the course of their routine work. The town’s emergency response personnel also must be aware of potential hazards within town boundaries. The town is also subject to the terms of Chapter 111F as an employer. The selectmen designate a municipal coordinator, who is usually the fire chief, fire commissioner, public health commissioner or public health officer. In small towns, the selectmen may designate one of the board’s members to be the municipal coordinator.

Pesticides

The responsibilities of the Massachusetts Pesticide Board entail advising the commissioner of Agricultural Resources with respect to the implementation and administration of state laws pertaining to pesticides. The board also hears appeals of those aggrieved by the actions or decisions of the department or the board. The state requires registration of pesticides, broadly defined, as well as the registration and proper training of applicators and oversight of the pesticides programs of public utilities [G.L. c. 132B; 333 C.M.R. §§ 2.00, 11.00]. The Pesticide Board has promulgated overall regulations as well as specific rules on pesticide use for right-of-way management. These are important to consult for the maintenance of roads, railroads and utility lines or pipes.

The Massachusetts Pesticide Control Act was amended in 2000 to ban the use of certain pesticides inside grade schools and childcare centers and to require parental notification before the outside application of pesticides. Treated areas must be posted for at least seventy-two hours after the applications. Schools and childcare facilities also must implement integrated pest management plans.

Renewable Energy

The Green Communities Act [2008 Mass. Acts c. 169, §11] overhauled the state’s energy policies in order to promote renewable energy (e.g., solar, wind), conservation and efficiency and decrease reliance on fossil fuels. The law, enacted in 2008, requires municipalities to adopt energy-efficient building codes, provides for long-term contracts for the purchase of renewable energy, and allows metering in two directions (net metering), whereby surplus energy generated by a renewable source can be sold back to the grid.

The Green Communities Act allows municipalities to own renewable energy facilities and grants authority to issue bonds to finance their construction. It also provides for as-of-right siting for renewable or alternative energy facilities (both generating and manufacturing) for qualified green communities in designated areas, and further encourages communities to develop clean energy resources by providing up to \$10 million per year in assistance to municipalities.

The Green Communities Act established the Regional Greenhouse Gas Initiative (RGGI) Auction Trust Fund, and the law requires that 80 percent of auction proceeds go to energy efficiency programs.

The Green Communities Act also:

- Established a Green Communities Program, managed by the Green Communities Division, to provide technical and financial assistance (grants and loans) to municipalities and other local governmental bodies in qualifying Green Communities
- Directed the Department of Energy Resources to design and implement a competitive procedure for the procurement of electric generation from clean-energy generating facilities on behalf of municipalities seeking assistance with the procurement
- Authorizes a public agency to contract for the procurement of energy management services for a term of twenty years or less
- Allows local government bodies to contract for the procurement of energy management services
- Allows a state agency, building authority or local governmental body to contract for energy conservation projects with a total cost of \$100,000 or less
- Allows a state agency, building authority or local governmental body to acquire photovoltaic panels and associated equipment, at a total project cost of less than \$100,000, for on-site use of energy generated by the panels

The siting of energy-producing facilities is also regulated by the Energy Facilities Siting Board, which supervises a mandatory economic and environmental review and evaluation of alternative supply sites, with limited authority to override local obstacles. Special siting approval procedures apply to new or expanded electric generating facilities, transmission lines and natural gas pipelines [G.L. c. 164 §§69G-69S]. To some extent, such proposals can override municipal objections.

Seacoasts

Coastal cities and towns are aware of federal and state regulatory, planning, environmental review and funding programs. Municipal activities and projects need permissions like any others. One proviso is the obligation to secure a consistency determination from the Executive Office of Energy and Environmental Affairs' Coastal Zone Management (CZM) program for projects and activities seeking federal approvals or financial assistance.

CZM works with coastal communities to develop municipal harbor plans, which can free the community from some state constraints. Marine industrial uses are encouraged in state-designated port areas. Municipalities get preferential treatment in connection with ocean wind facilities under

the Ocean Management Plan, which more broadly deals with state oversight, coordination, planning and policy for the state's ocean resources.

Scenic Beauty

Various statutory mechanisms are available to cities and towns with the primary aim of protecting the community's natural beauty.

The Scenic Roads Act [G.L. c. 40, §15C] permits towns to designate any road, other than a state highway, as a scenic road. The designation must be requested by the planning board, conservation commission or historical commission. On a designated scenic road, the town must give its written consent, after a hearing, before any work can be done that involves the cutting or removal of trees or the alteration or removal of stonewalls.

Some communities have adopted local zoning or general bylaws that provide more clarity on standards and procedures for enforcing the Scenic Roads Act and even mandate a permit and give a local board power to disapprove or impose conditions.

The Scenic Mountains Act [G.L. c. 131, §39A] permits cities and towns in Berkshire County only, by local option, to regulate development in mountain areas and to protect watershed and scenic qualities.

The federal Wild and Scenic Rivers Act established a national system to identify outstanding values and to protect the free-flowing condition of rivers. Protection of these rivers, according to the National Park Service, can only occur with commitment from state and local partners. Massachusetts has three nationally designated rivers: the Westfield River, the Sudbury/Assabet/Concord Rivers, and the Taunton River. Riverways Program staff, representing the Commonwealth on the Wild & Scenic committees, participate with municipalities, environmental organizations, the National Park Service and other state and federal agencies on issues relating to National Wild and Scenic studies and designated rivers.

The North River (Hanover, Hanson, Marshfield, Norwell, Pembroke and Scituate) is designated as a State Scenic and Recreational River.

Sewage and Septic Systems

Septic systems, sewage treatment plants, and sewerage (i.e., a system of sewer lines) are of regular concern to municipalities.

Under state law [G.L. c. 21A, §13], the Department of Environmental Protection regulates all disposal of sewage by sewerage systems as well as disposal in unsewered areas (i.e., by septic systems). More than sixty cities and towns in eastern and central Massachusetts are connected directly or indirectly to the Massachusetts Water Resources Authority (MWRA), which is responsible for regional wastewater collection and treatment (and water supply). The MWRA can issue orders to private dischargers and municipalities violating MWRA regulations, which impose quite detailed and comprehensive limitations.

A separate Department of Environmental Protection permit program governs connections and extensions for discharges to sewerage systems [314 C.M.R. 7.00]. Thereby, the Division of Water Pollution Control regulates the construction, connections, repairs, expansions, and extensions of public and private sewage treatment plants and their sewerage and discharge points.

Septic systems fall under a set of regulations known as Title 5 [310 C.M.R. 15.000], a portion of the State Environmental Code dealing with on-site sewage disposal. Title 5 governs the system installed, the permit procedure, the design specifications, the testing prerequisites, and the performance standards (including certain inspections during the life of the system, as with a land transfer). Each septic system requires a permit from the local board of health or its agent, following a physical inspection.

Certain provisions of Title 5 cannot be waived, but any variance requires approval of the board of health and, on review, the Department of Environmental Protection. For example, the DEP must approve the use of most alternative systems, modifications of large flow systems, and several other project types where DEP review is appropriate.

In addition to these state statutes and regulations, municipalities have authority to promulgate their own septic system regulations [G.L. c. 111, §§26G, 31E]. Many municipalities have such local septic systems rules. Some municipalities have used this power to regulate package treatment plants (that is, large septic systems that need groundwater discharge permits from the DEP), mounded septic systems, groundwater and soil conditions, and time-of-testing during the year.

Solid Waste

The Department of Environmental Protection is responsible for establishing rules for the siting, design, operation and maintenance of solid waste management facilities, including landfills, transfer stations, municipal waste combustors (waste-to-energy) and other solid waste handling facilities. Regulations are intended to prevent air, land and water pollution. Such conditions must be abated when and where they occur. The DEP is also responsible for establishing requirements for recycling, composting and conversion (e.g., anaerobic digestion) operations that handle recyclable or organic materials.

State regulations make it difficult to find suitable sites for waste disposal, or even facility expansion. Landfills, for example, cannot be located in or near wetlands, in areas prone to flooding, or in proximity to either public or private water supplies. Only about twenty landfills are still operational in Massachusetts, and it has been nearly twenty years since a new one has been approved, though some have been allowed to expand. Permitting of new waste-to-energy facilities is currently limited to a maximum of an additional 350,000 tons per year.

The DEP produces ten-year, statewide solid waste master plans, policy documents used to guide planning and regulations. The plan for the current decade, called *Pathway to Zero Waste*, addresses waste management, waste reduction and waste diversion, with a strong emphasis on recycling, composting, and reuse in order to reduce the amount of waste that must be transported to landfills or incinerated. The DEP has helped many communities promote household recycling programs. The DEP also works with industry groups to promote markets for recycled products. (For more information, visit www.mass.gov/eea/agencies/massdep/recycle.)

The Mercury Management Act (Chapter 190 of the Acts of 2006) was enacted to remove products containing mercury from the waste stream and to minimize the amount of mercury released into air and water from solid waste disposal facilities. This law is the first in Massachusetts to make product manufacturers responsible for collecting and recycling “end of life” mercury products and components that are sold or distributed in the state.

Under state law, local boards of health are required to approve sites for solid waste disposal facilities [G.L. c. 111, §150A] and hazardous waste facilities [G.L. c. 111, §150B]. A board permit also is needed for the collection and transportation of garbage, or other offensive substances, through town streets [G.L. c. 111, §31A].

Stormwater

Municipalities are subject to the 1972 federal Clean Water Act and, with it, rules requiring permits for their discharges of any pollutants into waters of the United States. The primary focus of the National Pollutant Discharge Elimination System (NPDES) permit program, however, is pollutants in industrial process water and discharges from municipal sewage treatment plants.

Amendments to the Clean Water Act in 1987 implemented a comprehensive national program addressing problematic non-agricultural sources of stormwater discharges. The U.S. Environmental Protection Agency put the NPDES Stormwater Program in place in the 1990s, in two phases. In 1993, NPDES permits were required for stormwater discharges from large and medium municipal separate storm sewer systems (for cities with populations of 100,000 or more). This first phase also covered eleven categories of industrial activity, including construction activities greater than five acres. The second phase, in 1999, extended the permit requirements to small municipal separate storm sewer systems not already covered and construction activities disturbing between one and five acres of land.

Permitting authority for the EPA's NPDES Phase II Stormwater Program has been delegated to the Massachusetts Department of Environmental Protection. Public and private entities are required to develop comprehensive stormwater management programs focused on water quality. This obligation affects many municipalities, industries and large landowners.

Municipalities with municipal separate storm sewer systems (MS4) that have been designated as regulated by NPDES Phase II must comply with all EPA- and DEP-promulgated MS4 standards. City and town plans for their MS4s typically deal with treatment standards, anti-degradation, retrofitting treatment, low-impact development, wetlands construction and restoration, erosion and sedimentation control, pavement types, and natural alternatives. There are more than 250 Phase II communities in Massachusetts.

The DEP has issued regulations governing stormwater discharges. Stormwater is also expected to be controlled in permits required under the state Clean Water Act for both surface discharges and groundwater discharges; under the Wetlands Protection Act and the tidelands and waterways statutes; and in the various certification reviews for activities in Massachusetts seeking federal permits and grants, such as water quality certification and coastal zone consistency determinations.

Underground Storage Tanks

Underground tanks storing chemicals or petroleum products are regulated through the state's underground storage tank program [G.L. c. 21J]. The Department of Environmental Protection has issued underground storage tank regulations governing the design, installation, maintenance, monitoring and removal of tanks. The DEP also administers a limited reimbursement program to assist in meeting the costs associated with the cleanup and removal or replacement of tanks.

Through ordinances and bylaws, cities and towns may adopt tougher underground storage tank standards than state and federal rules. Typically, these local rules authorize a local board or agency, such as the board of health or the fire department, to conduct an inventory of tanks in the municipality and require local registration of underground storage tanks. Several communities have required the replacement of older tanks. Some offer low-interest loans or other subsidies to assist with removal projects.

Wetlands

In Massachusetts, wetlands are broadly defined to include riverfronts, banks, beaches, dunes, flats, wet meadows, and flood-prone areas, in addition to vegetated wetlands, such as swamps, bogs and marshes. The Wetlands Protection Act [G.L. c. 131, §40] and Department of Environmental Protection regulations cover basic procedures for permits needed for most work in and near wetlands, water bodies and flood-prone areas. Nearly 200 communities have enacted their own wetlands bylaws or ordinances.

Under the Wetlands Protection Act and any local wetlands protection bylaw or ordinance, the conservation commission is responsible for wetlands protection by administering and enforcing a permit system. Specifically, permission of some kind is required for any work that affects areas identified in the Wetlands Act. The conservation commission—or the board of selectmen in towns without one—holds a public hearing, considers the application (known as a Notice of Intent with plans) and issues an approval (known as an Order of Conditions) or disapproval. These permits may restrict activities in order to protect groundwater, drinking water supplies and flood storage capacity, prevent storm damage, or protect shellfish, fisheries or wildlife habitat. Decisions of the local conservation commission may be appealed to the Department of Environmental Protection or the courts. [For more information, visit the website of the Massachusetts Association of Conservation Commissions (www.maccweb.org)].

CHAPTER 9

Public Works and Parks

Public Works

Public works functions are organized, managed and administered in many different ways in local government.

Generally, functions that can be considered public works include the following:

- Street maintenance, cleaning and construction
- Sewerage system design, construction, maintenance and management
- Cemetery maintenance
- Shade tree management
- Water system design and construction
- Building maintenance
- Snow plowing
- Street sign installation
- Vehicle maintenance
- Refuse collection and disposal
- Subdivision review
- Maintenance of parks and playgrounds

Organization of Public Works

Historically, and even in many towns today, the various public works functions are managed by elected officials such as highway surveyors, water and sewer commissioners, road commissioners, cemetery commissioners, park commissioners, tree wardens and boards of public works. Some towns with a municipal electric and light commission have incorporated those functions into a department of public works as well. Some boards of selectmen have a great deal of responsibility for the supervision of these functions; others have limited responsibility.

Some towns maintain a work force to undertake various functions, while many contract for certain services from private vendors. It is common to contract for snow removal services, building maintenance and custodial services, street repair and construction, parks and grounds maintenance, vehicle maintenance, engineering services, among other functions.

In many towns, the public works functions are overseen by a director of public works, who is appointed by and reports to the chief administrative officer, such as the town manager, or the board of selectmen.

The following are some statutes that relate to local public works functions:

- A town may elect or appoint highway surveyors [G.L. c. 41, §§1, 62], who have responsibility over the ordinary repair of roads.
- A town may vote to elect one or more road commissioners, who have the same powers and duties regarding roads as highway surveyors [G.L. c. 41, §§63, 64]. Road commissioners also act as tree wardens and, unless there is a separate commission, as sewer commissioners.
- Selectmen may appoint a superintendent of streets, who acts under their direction [G.L. c. 41, §§21, 66, 68]. Two or more towns can join together to share a superintendent of streets [G.L. c. 41, §67].
- A town may vote to elect the cemetery commissioners or have the selectmen appoint them [G.L. c. 114].
- A town may elect a sewer commission or authorize its road commissioners to act as sewer commissioners [G.L. c. 41, §1].
- A town elects a tree warden unless, by vote or bylaw, the position is appointed [G.L. c. 41, §1]. Selectmen may also be authorized to appoint the tree warden [G.L. c. 41, §106].
- If a town votes to have its selectmen act as the water or sewer commissioners, the selectmen may appoint a superintendent of water and sewer, who may be the superintendent of streets [G.L. c. 41, §§21, 69].
- A town may establish an elected board of public works [G.L. c. 41, §§ 69C-F], consolidating all functions into one agency. The board may be made appointive [G.L. c. 41, §21].

For many years, towns have been developing methods of coordinating public works functions and consolidating functions into a department of public works or a department of public services. There has also been a movement in some cities and towns to consider establishing a separate governmental entity, governed by an independently appointed, or elected, commission. In part, this appears to be

designed to ensure that charges recovered from users of services fully cover the cost of operating and delivering services. The highly difficult process of rate setting is thereby shifted to an independent forum.

Roads and Sidewalks

State laws governing maintenance and repair of roads date back to the early days of the Commonwealth, when cows and horse-drawn carriages accounted for most of the traffic on town streets. It is not surprising that many of the state's highway laws now seem outdated and confusing.

Public vs. Private Ways

Town roads are divided into two categories: public ways and private ways. Generally, public ways are those that are open to unrestricted use by the public and for which a town has taken responsibility for maintenance and repair. Private ways are those that are open for a limited use, usually providing access to homes. The distinction might not be obvious to the casual observer, as both types of roads are usually open to traffic, but the difference can be quite significant to a town.

State law requires that public ways and railroad crossings “shall be kept in repair at the expense of the town in which they are situated, so that they may be reasonably safe and convenient for travelers” [G.L. c. 84, §1]. While towns are not required by law to maintain private ways, many have done so over the years. Although it may be tempting to simply stop maintaining private ways, there could be serious political and even legal consequences from such an action, so it is advisable to consult with town counsel. Towns may, by bylaw, establish procedures for making temporary (usually minor) repairs on private ways at the request of abutters [G.L. c. 40, §6N]. The bylaw must address several specific issues, including what percentage of abutters must petition for such repairs, whether betterment charges will be assessed, and the extent of the town's liability due to damages caused by these repairs. Towns that accept the applicable section of state law [G.L. c. 40, §6C] may also vote to appropriate funds for the removal of snow and ice from private roads designated by the selectmen as open to public use.

Typically, roads are “laid” out at the request of a subdivision developer. In accepting a subdivision street as a public way, selectmen should ensure that the developer or the abutting landowners have conveyed ownership or an easement for the street to the town.

Abutting property owners who want the town to take over maintenance and repair of a private way may petition the selectmen (or road commissioners) for the “laying out” of the way and for its

acceptance by town meeting as a public way [G.L. c. 82, §21-23]. State law details the procedure that must be followed.

Many older subdivisions, constructed when subdivision regulations were not necessarily rigorous with respect to road standards, have roads (private ways) that are in poor condition and require major drainage and pavement improvements. A town should consider the conditions under which it will consider acceptance of any roads, as well as how any needed improvements will be made and who will assume the cost.

Not all private ways or subdivision roads are eventually accepted by the town. The acceptance process is technical and should be coordinated with town counsel and the head of the public works department.

Defects in Public Ways

State law [G.L. c. 84] provides for personal injury or property damage claims arising from defects in public ways due to a lack of repair or insufficient railings, but sets a \$5,000 cap on municipal liability. (See Insurance and Liability section in Chapter 4.)

Discontinuing Public Ways

It is sometimes difficult to determine whether a way is public or private. Towns clearly may declare a road to be private by discontinuance, a process that legally frees the town from the responsibility for maintenance of the road. If the road was private to begin with, discontinuance has no effect, except to confirm its status.

One method for discontinuing a public way is by majority vote of town meeting [G.L. c. 82, §21]. This requires a prior hearing and report by the planning board [G.L. c. 41, §81I], but does not require notice to landowners other than the notice contained in the town meeting warrant article, which should, at a minimum, list the road(s) proposed to be discontinued. Under this method, the road ceases to be a public way, and the right to the land usually reverts to the adjoining landowners. Alternatively, the board having charge of a public way may discontinue its maintenance after giving notice to affected property owners, publishing and posting the plan, and holding a public hearing [G.L. c. 82, §32A]. The board must find that the way “has become abandoned and unused for ordinary travel” so that common convenience and necessity no longer require the way to be maintained for travel.

Private owners along a way that has been discontinued have the right to sue a town under the eminent domain law for damages caused by the discontinuance [G.L. c. 82, §24]. The property owner cannot collect from the town merely because the way is no longer public, however. The property owner must suffer damages peculiar to himself or herself, not shared by others.

A road that is discontinued becomes a private drive owned by all persons along it, who have a legal right to use it. Discontinuance does not, by itself, cause a road to become blocked off. The owners may collectively close it off, however, and any one of them can improve it, as long as he or she does not block access to others entitled to use it.

Sidewalks

Selectmen (or road commissioners) have general authority to establish, maintain and rebuild sidewalks [G.L. c. 83, §§25-27]. No sidewalk may be dug up or constructed without their approval.

In ordering construction of a new or permanent sidewalk, the selectmen or road commissioners may provide for special assessments on abutting property not exceeding one-half of the cost of the sidewalk. If the town bylaws so provide, the total amount assessed on any individual property may not exceed 1 percent of its assessed valuation. Assessments must be recorded with the Registry of Deeds.

Trenches

State laws and regulations deal with digging up or creating a trench on public or private property [G.L. c. 82A and 520 CMR 14.00]. In many communities, oversight of trenches is a function of the public works department.

Parks and Recreation

Massachusetts towns have considerable flexibility in the way they manage public parks, playgrounds and other recreational facilities. Depending on how a town is organized, the responsibility for parks and recreation may be in the hands of a single board or split among two or more boards and commissions. In some smaller towns, the selectmen serve as the board of park commissioners. A town may elect a board of park commissioners or authorize its planning board, department of public works, or road commissioners to perform those functions [G.L. c. 45, §2]. The town manager or other chief administrative officer may have oversight over the parks, with local boards setting policy, planning events and so forth.

Unless a town has elected a board of park commissioners or specifically authorized another agency to act as one, the selectmen are in charge of parks. If selectmen serve as the board of park commissioners, they have all the powers and duties granted by law to that body, including laying out and improving public parks and conducting recreation activities [G.L. c. 45, §5].

If responsibility for parks and recreation is vested with other boards in town, the formal role of selectmen in this area is more limited. Selectmen, however, need to have a good working relationship with the board and staff responsible for parks and recreation. When citizens call with complaints about park security or playground noise, selectmen need to know how to get the problem solved. The selectmen's office may also help to coordinate interdepartmental activities (such as when the water department needs to drill a test pit on park land).

Towns may appropriate money for a range of recreation-related purposes, including the construction and maintenance of swimming pools, municipal golf courses, skating rinks, gymnasiums and beaches [G.L. c. 40, §5]. Upon acceptance of local-option legislation, a town may establish a revolving fund or enterprise fund to create self-sustaining recreation programs that are funded through program fees rather than by appropriation [G.L. c. 44, §§53D; 53F¹/₂]. Towns have considerable freedom to choose the recreational programs they will provide and the fees they will charge for the programs.

Many Massachusetts towns have professionally trained parks and recreation officials handling their day-to-day operations. The National Recreation and Parks Association certifies universities and colleges offering degrees in the field. Its state counterpart, the Massachusetts Recreation and Park Association, provides continuing education and training for professionals already in the field. Both organizations are available to help towns hire qualified personnel.

The Department of Transportation assists cities and towns in developing and constructing bikeways, bike lanes, and bicycle parking facilities for commuter and recreational use [G.L. c. 90E]. Other state agencies have different recreational programs.

Board of Park Commissioners

A board of park commissioners has generally the same authority over roads and trees in parks that selectmen, road commissioners and tree wardens have in other parts of town [G.L. c. 45, §§4, 5]. The board may lay out and improve public parks, make rules about how town parks may be used, and appoint engineers, surveyors, clerks and other personnel to help with park maintenance. Subject to appropriation, they also have the power to conduct programs and recreational activities at places other than public parks [G.L. c. 45, §5]. A board of park commissioners also has the power to hire

park police officers. Violations of park and playground rules and regulations may carry a fine of not more than \$200 [G.L. c. 45, §24].

Parks vs. Playgrounds

State law draws a distinction between public parks and playgrounds, which has implications for the way these lands may be managed. Land that was originally acquired for park purposes (including town commons) is generally recognized by law to be held for all members of the public, not just for residents of the town. For this reason, the Legislature has final authority over what is done with it. (See Article 97 of the Massachusetts Constitution.) Playgrounds, or land that was originally acquired for recreational purposes, are under the control of the town board or commission that has been so designated by town meeting, special act or home rule charter. State law gives the agency in charge of public playgrounds and recreation centers extensive authority to acquire, lease and use land and buildings for recreational activities.

Land for parks may be acquired by purchase, gift or eminent domain. Once a park is acquired, however, it takes a special act of the Legislature (as well as town meeting approval) to sell, lease or use it for any other purpose. Only the Legislature has the authority to change the use of any town park or common.

Towns may erect structures for shelter, refreshments and other purposes in parks of at least 100 acres, as long as they do not pose a fire hazard to buildings outside the park. Legislative approval is needed to build any structure larger than 600 square feet [G.L. c. 45, §7]. Boards of park commissioners have the power to allow hunting in parks during hunting season [G.L. c. 131, §59].

Natural Recreation Areas

Natural bodies of water larger than twenty acres, known as “great ponds,” are generally open to the public for recreation, unless they are being used as a drinking water supply. The public must be given reasonable access to great ponds, but towns may make and enforce rules and regulations concerning fishing, hunting and boating [G.L. c. 131, §45]. While motorboats, snowmobiles and other recreational vehicles are regulated by the Department of Fish and Game, towns may, by bylaw or regulation, limit or forbid their use on town land [G.L. c. 90B, §33]. Bylaws governing hunting and fishing are subject to the approval of the Department of Fish and Game. Bylaws governing the use of motorboats are subject to the approval of the Department of Environmental Protection [G.L. c. 131, §45].

CHAPTER 10

Health and Human Services

Public Health

Health officials in towns are involved in numerous public health activities, such as holding flu vaccination clinics; inspecting nursing homes and food-serving businesses; dealing with unsafe or non-compliant structures and other sources of illness or disease; and licensing septic systems, among other tasks.

Organization of Health Services

On the local level, boards of health (and the town's health department) have the primary responsibility for protecting public health. Under state law, the selectmen act as the board of health if the town has no other arrangement [G.L. c. 41, §1]. Selectmen also can be authorized by town meeting to appoint a board of health [G.L. c. 41, §121]. Most towns have a board of health (rather than the selectmen) consisting of three or more elected members. Some towns have a health department with a commissioner of health, as authorized by state law [G.L. c. 111, §26A], which exercise the duties and powers of a board of health. Many town boards of health are elected, though there is a movement toward z boards of health. (This is usually addressed in the charter of the town.) Several groups of towns have elected to form regional health districts [G.L. c. 111, §27A] or have hired professional assistance through regional associations of health boards. Towns may also specify a different method of delegating health duties in their home rule charters [G.L. c. 43B, §20].

Board of health members are not required by state law to have any medical or health training, although in practice many do, and some local ordinances or bylaws require that one member be a doctor or medical professional. Boards of health may appoint a physician and other staff to advise and assist them [G.L. c. 111, §27].

In towns where the selectmen serve as the board of health, the field has become so complex that professional assistance is practically a necessity. Selectmen who serve as the board of health are authorized by law to appoint a health inspector [G.L. c. 41, §102]. In towns of fewer than 3,000 people, this inspector may be the school physician [G.L. c. 41, §102A].

A town charter may provide for another method of appointment of health personnel, such as by the town manager.

Most towns employ a health inspector and a public health nurse (either full-time, part-time or on a contract basis). Qualifications for a health inspector include licensure as a registered sanitarian. Many towns also require that inspectors be certified health officers.

Role of the Board of Health

Boards of health have a wide range of responsibilities and functions specified by state law. Boards of health may operate according to administrative and enforcement regulations of the Department of Public Health or the Department of Environmental Protection. The local board of health usually delegates most of its administrative, inspectional and enforcement activity to a health department comprised of paid employees, leaving policy-setting and oversight to the board.

Under state law [G.L. c. 111, §127A], the board's specific legal duties include enforcement of the State Sanitary Code [105 CMR 400-675], which establishes minimum health standards for residential housing, day camps, swimming pools and food service establishments, among other facilities and activities. The code permits a board of health, or other health authority, to adopt rules and regulations stricter than those contained in the code.

Boards of health are also the local enforcement agents for the State Environmental Code [310 CMR 11.00, 310 CMR 15.000], Title 5 of which establishes minimum standards for sewage disposal. Local boards of health may adopt more stringent regulations as local conditions warrant. There are also other codes for food serving establishments that are under the jurisdiction of the health department.

In addition to many specific statutory jurisdictions and authorities, boards of health have extensive power to adopt and enforce any reasonable health regulation [G.L. c. 111, §31]. Some towns, for example, have instituted smoking or tobacco control regulations that go beyond the state's Clean Indoor Air Act [G.L. c. 270, §22], while others have set standards for noise pollution. Boards of health may issue orders declaring that an emergency exists and requiring that certain actions be

taken. They may order the fluoridation of water supplies, and adopt and enforce local regulations for the control of air pollution and for the operation of animal stables.

Because of the range of their authority, health officials can cooperate with selectmen to shape the standards and character of the community.

Community Health

State law permits boards of health, or selectmen acting as the board of health, to establish and maintain dental, medical and health clinics and to conduct general education campaigns relating to health matters [G.L. c. 111, §50]. Many of these direct health services are aimed at adults and children who are unable to obtain private medical care. Many towns provide flu vaccination clinics, well-baby clinics, hypertension screening, and screening for blood lead poisoning, among other community health services.

The local health authority is required to notify the Department of Public Health within twenty-four hours of the discovery of a case of a communicable disease [G.L. c. 111, §§112, 113]. Every board is required to appoint a person (who may be a board member) to maintain a record of diseases and to give notice in each case to the DPH. The board of health must also notify the school committee of all reported diseases that are dangerous to the public health.

Environmental Health

Boards of health have broad authority to regulate in environmental areas where there is a risk of adverse health consequences. Boards of health have the power to enforce state laws and regulations concerning groundwater monitoring, septic systems, underground fuel tanks and chemical storage, landfills, hazardous waste, and water supply contamination. The board of health may make and enforce regulations concerning house drainage and connection with common sewers [G.L. c. 111, §127].

The board of health is required to approve sites for solid waste disposal facilities [G.L. c. 111, §150A] and hazardous waste facilities [G.L. c. 111, §150B]. Preliminary and definitive subdivision plans must be submitted to the board of health for approval [G.L. c. 41, §81U].

Nuisances

Boards of health and selectmen have comparable authority to take actions in the removal of nuisances. A health nuisance is defined by law as a source of filth or a cause of sickness. State law

[G.L. c. 111, §143] gives the board of health, after a public hearing, the power to approve a business that may result in a nuisance or harm to the inhabitants, cause injury to their land, or cause offensive or dangerous odors. This permission is called a site assignment.

Boards of health are authorized to examine all nuisances that may be injurious to the public health and to destroy, remove or prevent them [G.L. c. 111, §122]. A separate section of law [G.L. c. 139, §3] gives selectmen the same nuisance abatement powers. Selectmen may declare a burned, dilapidated or dangerous building, structure or vacant lot to be a nuisance. After holding a public hearing and giving written notice to the owner of the property or his authorized agent, the selectmen may order the nuisance altered, disposed of or regulated. If the owner fails to comply, the town can sue for the cost of removing the building or for the cost of another solution [G.L. c. 139, §§1, 3A].

Some towns have nuisance bylaws that allow them to clean up a nuisance, bill the property owner for costs, and place a lien on the property if the bill is not paid. [See G.L. c. 111, §127B; G.L. c. 143, §9; and G.L. c. 139, §§3A, 3B.] As an alternative, some towns prefer to seek a court order against the owner requiring the cleanup at the expense of the owner, so that the town does not have to be responsible for any costs involved. This would require court action and thus should be discussed and coordinated with municipal counsel.

Health departments have become an essential part of community code enforcement teams for dealing with unsafe or blighted properties.

Human Services

Human services comprise a variety of publicly funded programs dedicated to improving the quality of life for town residents. The elderly, teens, and the mentally and physically challenged are examples of the specific populations that may be served by local human services programs.

Human services have developed through efforts of both the public sector and private agencies. Although the tradition of local involvement is strong, most notably in health, recreation and elderly programs, many towns address community-centered problems on an as-needed basis. Examples include setting up a youth commission to serve the needs of young people and creating a council on aging to serve only the elderly. This approach addresses specific needs, but may not identify gaps and duplications in services—and makes it difficult to evaluate the quality of programs offered.

Many towns in Massachusetts have recognized the value of an integrated approach to human services that enables community leaders to assess existing programs and plan for the future. Many towns have

created human services departments or have appointed human services coordinators to implement this more comprehensive approach.

Role of Selectmen

The board of selectmen's role in human services planning and coordination will vary, depending on how the town structures its delivery of these services. Selectmen should guide the initiative to ensure that citizen interests are represented on the state and regional levels. They should also regularly discuss the town's human services needs with their state legislators and state human service agencies, such as the Department of Children and Families, the Department of Mental Health, and the Executive Office of Elder Affairs.

Depending on the town charter, the town manager or other chief administrative officer may have oversight over human services, with the local boards setting policy, planning events and so forth.

Components of a Human Services Program

The composition of a human services program varies widely from town to town, depending on community needs and values. Some towns offer elder transportation, while others emphasize day care. Some choose to include veterans' affairs as part of their overall human services function, while others treat it separately. Various state statutes provide blueprints for the creation and support of local human services agencies. [See, e.g., G.L. c. 40, §8B (council on aging); G.L. c. 40, §8E (youth commission); G.L. c. 40, §8J (commission on disabilities); G.L. c. 40, §9 (providing space for veterans' organizations).]

Assessing Needs

Without infinite resources, a town must make choices about which services it can provide, starting with a comprehensive examination of its human services and the establishment of a committee comprising interested citizens, including representatives from agencies already serving the community. A selectman should serve on the committee to make sure its work coordinates with the town's overall planning process.

A town may seek assistance from a local college or university as it inventories needs. A citizens group could be asked to assist in the needs assessment process. Research methods include interviewing current providers, holding public hearings, conducting surveys, and meeting with other cities and towns that have analyzed their human services needs.

Levels of Involvement

The role of a town in human services is most obvious when the town serves as the provider with its own staff and facilities. For example, a town may spend tax dollars to employ a public health nurse, a town recreation director, or a social worker. Towns also participate in the delivery of human services in indirect ways. A town may financially support a private mental health center, offer free space to a day care center in a town building, or secure state or federal funding for a community residence.

Towns often perform the following functions:

- **Funding:** The town provides financial support, or in-kind contributions, to a private organization that provides services to the local community. This might include a youth agency or a community mental health center.
- **Planning:** The town develops policies and sets priorities by conducting needs assessments and working to coordinate human services programs that are already available. Needs assessment activities might include citizen surveys, agency questionnaires, discussions with agency directors, or community meetings.
- **Coordination:** The town uses its influence and staff to encourage joint efforts and programs both inside and outside of government.
- **Advocacy:** The town negotiates with state agencies and community groups on behalf of residents who need certain services.
- **Evaluation:** The town monitors and provides planning help to human services agencies.
- **Publicity:** The town provides information to residents about the availability of services.
- **Other functions:** The town modifies its policies and uses its influence to help meet different needs. For example, a town might authorize a zoning change to permit a group home in a certain neighborhood, or provide tax abatements for disadvantaged groups where authorized by law.

Managing Human Services

In Massachusetts, towns have developed a variety of methods for coordinating human services activities. Although some of these involve a change in the local charter, others can be accomplished by simple administrative action. There is probably no one best approach, since much depends on the character of a town.

The following are some of the approaches towns use to manage human services:

- **Human services department:** A department is created that incorporates all the specialized human service agencies and functions. The degree of central control varies with each town. In some cases, the individual agencies remain largely autonomous. In others, the department exercises considerable control. Budgets may be submitted for individual agencies, or for the department as a whole. Municipalities that use this structure include Arlington, Falmouth and Newton.
- **Existing department:** An existing department, usually health, recreation or community development, assumes authority over human services. This may include some or all of the town's specialized human services agencies.
- **Human services coordinator:** A staff person is assigned the task of overseeing human services, but this person has little or no line authority over existing human service agencies. The staff person may be assigned exclusively to human services or may have other responsibilities as well. In Amherst, the assistant town manager coordinates human services. In Lexington, Brockton and Everett, the coordinator's job is exclusively human services.
- **Collocation:** All the town's human service agencies are brought together into one physical location. Although there may be little or no administrative linkage, the theory is that the proximity will encourage informal contacts, referrals and cooperative planning. Amherst and Concord do this.
- **Contracting:** A nonprofit agency is hired to plan and deliver services. Under this approach, the town relinquishes some control in exchange for freedom from hiring and supervisory responsibilities.
- **Social worker:** The town hires a social worker to keep in contact with vulnerable citizens and to act as both a case manager and an advocate. This method is often found in towns that have not done much by way of needs assessments or planning. The social worker must offer prompt response, information and referral. Weston, Wayland and Framingham use this method.
- **Regional approach:** Contiguous communities create regional agencies, or fund existing agencies, to provide human services planning and program management. In Martha's Vineyard, for example, each of the six towns contributes to an independent community service agency.
- **Citizen commission:** A citizen commission may act alone as adviser to the selectmen, or may function in conjunction with any of the other models. The goal of a commission is to give citizens a voice in policy development and priority setting.

Public Libraries

Public libraries may be established in one of two ways. The first is by bylaw, in which case the library is owned by the town, funded with appropriations, and under the charge of a board of trustees. The trustees are elected at a town meeting, and the number must be divisible by three. One third are elected each year for three-year terms. The trustees are responsible for the care, management and control of the library and all property of the town related thereto. All money raised or appropriated by the town for library purposes is to be expended by the trustees. Likewise, the trustees manage all money donated or bequeathed to the town for library purposes. The trustees may enter into agreement with the board or boards of any neighboring library or libraries to pay for common services or to manage a facility on behalf of the various municipalities that are parties to the agreement, with expenses shared as set out in the agreement.

The second way to establish a public library is for the town to accept a gift or bequest for the purpose of establishing a library. The gift or bequest establishes the manner in which trustees are chosen. For example, a gift could be conditioned on some trustees holding certain offices in the town, such as the minister of a particular church or headmaster of a private school. The gift may require that the trustees be appointed by the board of selectmen or another specified body. When a town appropriates funds to such a library, the trustees serve as department heads when they spend the appropriated funds. Alternatively, the town could appoint an officer or board to manage and expend the appropriated funds, and such officer or board would work with the trustees in furthering the purposes of the library.

Meetings of library trustees are subject to the open meeting law, and its records are subject to the public records law.

CHAPTER 11

Legal Services

Legal issues and entanglements can claim a significant amount of a selectman’s time and attention. This chapter presents an overview of legal representation for a town, which will assist selectmen in their public service.

Despite the importance of the role of the chief legal officer to local government, there is no specific state statutory authorization or direction to appoint one. There is, however, a specific statute defining the position. The term “city solicitor,” according to state law [G.L. c. 4, §7], “shall include the head of the legal department of a city or town.” Thus, in interpreting statutes enacted by the Legislature—unless the law is not otherwise applicable—a reference to a city solicitor would include, and thus be applicable to, the head of the law department of a city or town, whatever the title of the position.

This handbook chapter uses the terms “town counsel” and “chief legal officer” interchangeably. Communities may refer to their legal department as the “law department,” “town counsel’s office,” “legal department” and the like, but there is no real difference between the terms.

Duties and Qualifications

There is no state statute governing the duties of the chief legal officer of a community. The duties and responsibilities are typically set forth by town charter, bylaws or a combination thereof.

Typically, the town charter would include the creation of the position of chief legal officer or head of the legal department. Depending on the charter, the legal department’s organization, duties and responsibilities may be set out in varying degrees of detail.

One should then examine the town’s bylaws to see if they address the duties of the chief legal officer. Usually, there would be a bylaw captioned “Town Counsel” or “Law Department” or “Legal Affairs” that would set forth the composition of the municipality’s law department and include the duties

and responsibilities of the head of the legal department. [See Exhibit 11B for examples of local laws addressing the organization of the legal department.]

The charter and bylaws usually address matters such as the appointment of the chief legal officer, the appointment or hiring of assistants or special counsel, authority to represent the community in all legal matters, and authority regarding the settlement of cases, compensation, law department organization, and the like.

Typical duties and responsibilities for a chief legal officer of a community include some or all of the following, though this list is by no means all-inclusive:

- Provide legal advice for officials, officers, employees and the local government in general
- Defend the community (including its officers, officials and employees) in claims and litigation
- Represent the community (and the aforementioned parties) in litigation they initiate
- Draft contracts, legal documents, local laws, releases, deeds, orders, proclamations, forms, and other documents
- Render advice, both orally and in writing, and draft opinions, advisories, memoranda, decisions, and the like
- Serve as the coordinator for all legal affairs of the community
- Serve as part of the management team of the community
- Prosecute violations of local laws
- Conduct internal investigations and studies
- Conduct seminars for officers, officials and employees
- Represent the community before legislative committees
- Stay informed about the latest issues affecting local government and municipal law

Various state and federal laws also provide specific roles to local counsel and may need to be consulted depending on the particular issue. [See Exhibit 11A: Statutory and Regulatory References to Chief Legal Officer Position.]

Qualifications

There is no statutory set of qualifications for a municipal counsel, but at a minimum he or she needs to be an attorney licensed in Massachusetts. In the absence of a specific requirement under local law, a community is free to establish whatever qualifications it believes to be appropriate. These could include any or all of the following:

- Being a practicing attorney for a certain number of years

- Evidence of commitment and proficiency in municipal law (e.g., by having taken or leading seminars on municipal law topics)
- Membership in certain professional associations
- Having a certain amount of municipal law experience
- Residency

Municipal counsel, by whatever title, is subject to the state's conflict-of-interest law and any local conflict-of-interest law, as well as the Code of Professional Responsibility for attorneys. The Massachusetts Municipal Lawyers Association (www.massmunilaw.org) also has a statement of principles concerning conduct of municipal counsel.

Selectmen's Relationship With Town Counsel

The board of selectmen is advised to develop and maintain a good working relationship with the town counsel. He or she is there to assist the board in the performance of its duties. Selectmen need a strong and effective management team, and the chief administrative officer (e.g., town manager or administrator) and town counsel are key players on that team. Ultimately, the board of selectmen will make the final key decisions on legal matters, but to make those decisions properly, the board needs to work with its legal counsel, and its legal counsel needs to work with the board.

Here are some tips in maintaining a good and effective relationship with the town's legal counsel:

- Consult with counsel in advance of making important decisions.
- Be sure to share with counsel *all* relevant facts and information about a matter.
- Be sure to give town counsel sufficient time to properly respond, in case he or she needs to research a matter to be sure that the answer is based on the most current laws and court decisions.
- Respect the fact that town counsel may at times have to advise that the town cannot legally do something it wants to do. Communities retain legal counsel to assist them in acting within the law. Counsel should advise the community on how to do legally what it wants to do (if it is possible).
- Recognize that others who may offer advice on legal matters may not have the necessary background to understand municipal law and may not have all the facts.

Access

In order to control costs and to have effective local administration, some boards of selectmen adopt local policies on access to counsel. Some have a requirement that department heads and employees go through the town manager, administrator, board of selectmen chair, or the full board in order to consult with town counsel. Other communities allow a more open approach and allow direct contact with town counsel. The policy regarding contact with town counsel often depends on the method of compensation. If counsel is paid on an hourly basis, there may be a concern that costs will get out of hand if everyone may contact counsel directly. Even in instances where counsel is on a salary or retainer, it is not advisable to create or permit a situation where counsel is inundated with requests and thus cannot attend to priorities. A proper working relationship with town counsel should lead to the development of the best approach for the community regarding how contact should be handled.

Town department heads, boards and employees sometimes defer to town counsel on matters for which they are responsible. Town counsel should certainly advise these individuals and help them make the right decision, but should not make decisions that should and could be made by others.

Selection of Town Counsel

The selection of a chief legal counsel for a municipality involves such matters as the following:

- Authority to select
- Qualifications
- Appointment versus election
- Special counsel
- Specific statutes authorizing certain boards to hire counsel

While this section refers to regular or special counsel, the same issues typically would apply to the appointment of an assistant or special municipal counsel.

Working Arrangement

There are many options for the relationship of municipal counsel to the community. These options include in-house versus outside attorney or firm; salary versus hourly versus retainer; or combination of formats or other variations. There is no one plan that works best for everyone. Factors such as the amount of work involved and the town's financial situation are often key considerations in deciding what format is best for a given community.

- **In-house:** The town counsel works as an employee of the town, usually on a salary basis, in a municipal building. Under this scenario, the town needs to provide him or her with the necessary space and tools to do a proper job. This may involve staff support, computers, research programs, office supplies, and an expense budget.

Another question is whether the counsel will be working full-time or part-time for the town. A part-time counsel would normally have other private legal work (as long as it presents no conflict with the town). As a practical matter, a town counsel needs to be available to the town at any time. Thus, even a counsel who works part-time is likely to be called upon outside of those part-time hours.

Some communities have a full-time town counsel and full-time assistant town counsel(s). Alternatively, the town counsel may be full-time and any assistants part-time. Or the town counsel may be part-time and the assistant(s) full-time.

Another variation to the in-house model is to have a counsel who is a regular employee—either full-time or part-time—but does the town’s legal work at his or her private law office. There might be an office supplement involved.

- **Outside attorney or firm:** A community may hire a town counsel who is a sole practitioner or in a small law practice. This person may be appointed as an employee or not. Either way, the person is an official of the town by virtue of his or her appointment as town counsel.

Another variation is appointing a single attorney who is associated with a mid-sized to large firm—or the firm itself. The town should have a primary contact person at the firm, who is usually denoted as the town counsel. That person should oversee and manage the town’s legal matters. In a model of this nature, there may be other attorneys in the firm who will work on the town’s matters. Such firms often have attorneys who have expertise in certain areas, such as labor, contracts, real estate, finance, etc. These attorneys may be working with and under the direction of a community’s town counsel.

When more than one attorney is involved in providing legal services to a town, it is important that the various attorneys know what others are doing regarding the town’s legal matters. The attorney designated as the town counsel is generally the best candidate to perform this coordinating function.

With having a firm, closer attention needs to be paid to the budget, as there will be more than one person working on a town's matters.

- Salary, hourly, stipend or combination: Towns also need to consider the method of compensation for their town counsel. Usually, if the person is full-time or even part-time as an employee (regardless of whether the person does outside private work), he or she receives a salary. A variation may be that the salary covers certain work and the person might be paid on an hourly basis for other work (usually litigation). Some communities pay their town counsel on an hourly basis, though in some cases there may be a minimum number of hours that are provided.

Sometimes a stipend is used to retain the town counsel for certain described work. In such a situation, it must be clear what work is covered by the stipend and what is not. The work not covered—often litigation—is usually compensated on an hourly basis.

- Other legal-related expenses: No matter what model a town adopts, it should expect to either pay for or reimburse its town counsel for out-of-pocket expenses. These items could include fees related to filing, copies of court documents, service of process, stenographers, expert witnesses, consultants, parking (and sometimes mileage), and office supplies.

The bottom line is that the amount spent on legal services is a product of the method of compensation and the amount of work there is.

Authority to Appoint

Any community can create the position of chief legal officer and call it whatever it chooses. Even if there were no specific local law, the chief executive board or officer of a community would, under prevailing views of local municipal authority, have the inherent authority to appoint an attorney. Over the years, however, there have been legal disputes over the issue of who has the authority to hire legal counsel for a municipality. This has resulted in cases where the authority of a municipal department to engage legal counsel is called into question or the obligation of a community to pay an attorney who has provided legal services is at issue.

Under traditional views—for example, Dillon's Rule (since replaced by home rule), where the authority of a community is as specifically set forth in the law or as may be reasonably implied therefrom—the authority of a community to engage an attorney to bring suit must be set forth in its local law, unless otherwise authorized under a specific state statute.

Under state law [G.L. c. 40, §2], a town is authorized to sue and be sued and may appoint agents of the town for those purposes. Typically, the selectmen are appointed by vote or bylaw as the agents of the town for purposes of such suits. This does not mean, however, that the agents so designated are necessarily the only ones who can prosecute suits on behalf of the town. Other laws, discussed here, may authorize other officials to bring such suits.

It is important that the board of selectmen be involved in any decision to bring legal action, unless the law specifically authorizes another party to do so. Litigation is expensive, and there needs to be control on it. That control is usually exercised by the board of selectmen or chief administrative officer of the community. Coordination is necessary in order for a community to properly manage its legal affairs and litigation.

Problems have arisen in some towns over the years when a local board seeks to obtain its own legal counsel without the approval of the selectmen. In a famous case, a board of public works sought to engage its own counsel instead of using town counsel. The Supreme Judicial Court held that the board of public works had no such authority in the absence of a special application to the board of selectmen or a vote of town meeting. “It is conventional learning,” the court ruled, “that a municipal department is not permitted to bring suit for the town without specific authorization from the town or from agents entitled to act for it—unless, indeed, there is governing legislation conferring the power on the department. The rule serves to prevent confusion or conflict in the direction and management of municipal litigation.” [*Board of Public Works of Wellesley v. Board of Selectmen of Wellesley*, 377 Mass. 621 , 624 (1979)] The Supreme Judicial Court also recognized the common practice of a municipality organizing its law department under an appointed counsel as having the “purpose to control expense and improve management.”

The usual issues involved when a local board or department seeks to obtain its own legal counsel concern authority to represent the board and payment for services.

Selection of Regular Municipal Counsel

The typical method for the selection of the regular municipal counsel is by appointment. Depending on the provisions of the local charter or bylaws, such appointment is typically made by the chief executive officer of the community. This could be the board of selectmen or the town manager. Where a single official makes the appointment, there is often a requirement that the appointment be approved or ratified by the board of selectmen. A variation of the specific need for approval by some other local authority is found in communities where there is a requirement that the authority making

the appointment must submit the name to the other body, which must act to reject the appointment or it is presumed to be approved.

At least one Massachusetts community has elected its town counsel, but this is not viewed as a good method for selecting a municipal attorney.

Selection of Special or Outside Counsel

From time to time, a community may find it necessary or beneficial to hire special or outside counsel. This may arise in any number of situations, typically one or more of the following:

- A conflict of interest issue precluding the regular counsel
- A need for local counsel to testify in the proceedings
- A desire to have no possible appearance of conflict in instances where regular counsel is able to participate
- The need in a complex case for an attorney who is particularly skilled in a certain area of law to assist the regular town counsel or to serve as lead counsel (sometimes under the supervision of the town counsel)
- The workload of the town counsel

As with the appointment of regular municipal counsel, one must look to the local laws to see which procedure, if any, has been set out for the appointment of special counsel. Typical provisions address the following:

- Who can make the appointment (e.g., board of selectmen, town manager, town counsel)
- Any limitations on the authority of the special counsel
- To whom the special counsel should report

There has been a growing need to employ special counsel from time to time to respond to particular legal matters, although doing so is not viewed favorably by some members of the public. A regular town counsel serves an important role in recognizing the need for special counsel and recommending it to the town. A community is best served by a municipal counsel who employs the most appropriate strategy in each legal matter and does not overlook the possibility of employing a “specialist” should the need arise. This is an important function of any manager, and the community needs to recognize the town counsel’s advice in that regard.

Special Statutes for Boards/Personnel to Hire Counsel

Specific statutory authority exists for a board or department in certain instances to hire its own legal counsel.

- **School Committees:** School committees have specific statutory authority to hire legal counsel for collective bargaining and for general purposes. State law [G.L. c. 71, §37E] sets a \$25,000 limit on what may be spent on collective bargaining counsel before the school committee must obtain approval from the board of selectmen in a town or the mayor or city manager in a city. There is no such limit, however, for general legal counsel for the school committee [G.L. c. 71, §37F]. Also, the statute refers to the “school committee” hiring counsel. This does not address whether the school superintendent has that authority independent of authorization from the school committee.
- **Board of Assessors:** Boards of assessors are granted statutory authority [G.L. c. 41, §26A] to hire their own legal counsel for appellate tax matters. If the community has a city solicitor or town counsel, however, the assessors are to use that attorney, who will be paid from the counsel’s budget, unless the community specifically appropriates money for the assessors to hire their own counsel. Notwithstanding this limitation, many communities do have a separate attorney handling tax appeals. Depending on local law, a special counsel could be appointed to represent the board of assessors in appellate tax matters.
- **Zoning Board/Special Permit Granting Authority/Planning Board:** A municipal official or board may be provided with legal counsel to appeal certain decisions of the zoning board of appeals, special permit granting authority or planning board [G.L. c. 40A, §17, and c. 41, §81BB]. There is, however, no right to such legal counsel (unless specifically provided for under local law), and thus, presumably, the appointment of such counsel is subject to the authority of the local chief executive board or officer.
- **Retirement Boards:** A retirement board can employ its own legal counsel if it chooses to do so [G.L. c. 32, §20]. Otherwise, the municipal counsel serves as legal counsel to the retirement board.
- **Treasurer/Collector:** If there is no town counsel, and certain actions are brought against the treasurer or collector where the board of selectmen is satisfied that he or she was acting in good faith, without negligence and in the belief that the he or she was acting in the best interests of the town, the board of selectmen shall employ an attorney to represent the treasurer or collector [G.L. c. 41, §43A].
- **Police Officers in Claims Regarding a Police Dog:** Even if there is a regular municipal counsel, a municipality may provide separate legal counsel to represent a police officer in defense of claims arising from damage by a police dog [G.L. c. 41, §100H].

Liability Insurance

A growing issue in municipal legal services is liability coverage for municipal counsel. One could presume that, if the municipal counsel is an official or employee of the community, he or she is covered by liability insurance in the same way as any other official or employee. But some municipal liability insurers take the position—either based on practice or language in the policies—that attorneys for the municipality, regardless of the relationship (regular or special, employee or independent contractor), are not covered by the town’s liability insurance.

The issue is not legal malpractice as much as it is liability if the municipal counsel is sued by someone for something done while acting on behalf of the municipality. It should also be noted that a municipality has certain obligations and options to indemnify employees and officials under state law [G.L. c. 258, §§9, 13]. (Section 13 is a local-acceptance statute.)

Appendix

EXHIBIT 2A

Executive Session Motion Guide

[Adapted from material developed by the Massachusetts Municipal Lawyers Association]

The following are suggested motions for each of the statutory reasons for an executive session. These suggested motions should be modified as appropriate.

Exemption 1

To discuss the reputation, character, physical condition or mental health rather than the professional competence of an individual, or to discuss the discipline or dismissal of, or complaints or charges brought against, a public officer, employee, staff member or individual, provided that the individual involved in such executive session has been notified in writing by the governmental body.

Suggested motion: Move to go into executive session to discuss the reputation, character, physical condition or mental health of an individual, and to reconvene in open session.

Suggested motion: Move to go into executive session to consider the discipline or dismissal of, or to hear complaints or charges brought against, a public officer, employee, staff member, or individual and to reconvene in open session.

Exemption 2

To conduct strategy sessions in preparation for negotiations with nonunion personnel or to conduct collective bargaining sessions or contract negotiations with nonunion personnel.

Suggested motion: Move to go into executive session to conduct strategy sessions in preparation for negotiations with nonunion personnel and to reconvene in open session.

Suggested motion: Move to go into executive session to conduct collective bargaining sessions with nonunion personnel and to reconvene in open session.

Suggested motion: Move to go into executive session to conduct contract negotiations with nonunion personnel and to reconvene in open session.

Note: It may be appropriate and necessary to combine all three into one motion.

Exemption 3

To discuss strategy with respect to collective bargaining or litigation if an open meeting may have a detrimental effect on the bargaining or litigating position of the public body and the chair so declares.

Suggested motion: Move to go into executive session to discuss strategy with respect to collective bargaining and that the chair declare that an open meeting may have a detrimental effect on the bargaining position of the body, and to reconvene in open session.

Note: Chair must separately declare that an open meeting may have a detrimental effect on the bargaining position of the body.

Suggested motion: Move to go into executive session to discuss strategy with respect to litigation, and that the chair declare that an open meeting may have a detrimental effect on the litigating position of the body, and to reconvene in open session.

Note: Chair must separately declare that an open meeting may have a detrimental effect on the litigating position of the body.

Exemption 4

To discuss the deployment of security personnel or devices, or strategies with respect thereto.

Suggested motion: Move to go into executive session to discuss the deployment of security personnel or devices or strategies with respect thereto, and to reconvene in open session.

Exemption 5

To investigate charges of criminal misconduct or to consider the filing of criminal complaints.

Suggested motion: Move to go into executive session to investigate charges of criminal misconduct or to consider the filing of criminal complaints, and to reconvene in open session.

Exemption 6

To consider the purchase, exchange, lease or value of real property, if the chair declares that an open meeting may have a detrimental effect on the negotiating position of the governmental body.

Suggested motion: Move to go into executive session to consider the purchase, exchange, lease or value of real property, and that the chair declare that an open meeting may have a detrimental effect on the negotiating position of the body, and to reconvene in open session.

Exemption 7

To comply with, or act under the authority of, any general or special law or federal grant-in-aid requirements.

Suggested motion: Move to go into executive session to comply with, or act under the authority of, any general or special law or federal grant-in-aid requirements, and to reconvene in open session (specify law; e.g., “to wit the attorney-client privilege”).

Exemption 8

To consider or interview applicants for employment or appointment by a preliminary screening committee if the chair declares that an open meeting would have a detrimental effect in obtaining qualified applicants.

Note: Only the preliminary screening committee can make the motion for this exemption.

Suggested motion: Move to go into executive session to consider [and, if applicable, to interview] applicants for employment or appointment, and that the chair declare that an open meeting would have a detrimental effect in obtaining qualified applicants, and to reconvene in open session.

Note: Chair must separately declare that an open meeting may have a detrimental effect in obtaining qualified applicants.

Exemption 9

To meet or confer with a mediator.

Suggested motion: Move to go into executive session to meet or confer with a mediator and to reconvene in open session.

Note: Before the motion is made, there must be a separate vote in open session to participate in the mediation, with the parties, issues involved and purpose of the mediation disclosed.

Exemption 10

To “discuss trade secrets” or other confidential information arising in the narrow context of energy supply contracts under Chapter 164.

Suggested motion: Move to go into executive session to discuss trade secrets or confidential, competitively sensitive or other proprietary information provided in the course of activities conducted by a governmental body as an energy supplier under a license granted by the Department of Public Utilities pursuant to Section 1F of Chapter 164 [or, if applicable, in the course of activities conducted as a municipal aggregator under Section 134 of said Chapter 164; or, if applicable, in the course of activities conducted by a cooperative consisting of governmental entities organized pursuant to Section 136 of said Chapter 164], and to reconvene in open session.

Note: The governmental body, municipal aggregator or cooperative must have determined that disclosure would adversely affect its ability to conduct business in relation to other entities making, selling or distributing electric power and energy.

A board may also be able to meet in a closed or private session with an attorney for the purpose of obtaining legal advice. This should be discussed with town counsel prior to doing so.

EXHIBIT 2B
Executive Session Minutes Form

TOWN OF _____

BOARD OF SELECTMEN

EXECUTIVE SESSION MINUTES FORM

Date of Meeting: _____

Location of Meeting: _____

Motion made in Open Session to go into Executive Session:

Made by: [Name]

Seconded by: [Name]

For:

[Note: For each exemption below, the chair must also state the subjects to be revealed unless doing so would compromise the purpose of the executive session.]

1. _____ To discuss reputation, character, physical condition or mental health of an individual; or to consider the discipline or dismissal of or to hear complaints or charges brought against a public officer employee, staff member or individual.
2. _____ To conduct strategy sessions in preparation for negotiations with nonunion personnel or to conduct collective bargaining sessions or contract negotiations with nonunion personnel.
3. _____ To discuss strategy with respect to collective bargaining or litigation, AND THE CHAIR DECLARES THAT an open meeting may have a detrimental effect on the bargaining or litigating position of the public body.
4. _____ To discuss deployment of security personnel or devices.
5. _____ To investigate charges of criminal misconduct or to consider the filing of criminal complaints.
6. _____ To consider the purchase, exchange, lease or value of real property, AND THE CHAIR DECLARES THAT an open meeting may have a detrimental effect on the negotiating position of the public body.
7. _____ To comply with or act, or act under the authority of, any general or special law or federal grant-in-aid requirements.

8. _____ To consider and interview applicants for employment by a preliminary screening committee or subcommittee, AND THE CHAIR DECLARES THAT an open meeting may have a detrimental effect in obtaining qualified applicants.
9. _____ To meet or confer with a mediator as defined under G.L. c. 233, §23C. Note: The parties, issues involved and purpose of the mediation needs to be disclosed.
10. _____ To discuss trade secrets or confidential, competitively-sensitive or other proprietary information provided in the course of activities conducted by a governmental body as an energy supplier under a license granted by the Department of Public Utilities pursuant to Section 1F of Chapter 164 [or, if applicable, in the course of activities conducted as a municipal aggregator under Section 134 of said Chapter 164; or, if applicable, in the course of activities conducted by a cooperative consisting of governmental entities organized pursuant to Section 136 of said Chapter 164].
11. _____ To comply with the provisions of a general or special law, here the attorney-client privilege.
12. _____ To consult with legal counsel and obtain legal advice pursuant to the attorney-client privilege.

[Note: For each exemption above, the chair must also state the subjects to be revealed unless doing so would compromise the purpose of the executive session.]

AND:

- _____ to reconvene in Open Session
_____ to not reconvene in Open Session

Roll call vote:

Those In Favor: [Name(s)]

Those Opposed: [Name(s)]

Abstained: [Name(s)]

Not Present: [Name(s)]

- _____ Motion passed
_____ Motion defeated

ALL MOTIONS, INCLUDING TO ADJOURN EXECUTIVE SESSION, MUST BE NOTED AND VOTED BY ROLL CALL:

Motion under subject No. 1 to:

Roll call vote:

Those In Favor: [Name(s)]

Those Opposed: [Name(s)]

Abstained: [Name(s)]

Not Present: [Name(s)]

_____ Motion passed

_____ Motion defeated

Motion under subject No. 2 to:

Made by: [Name]

Seconded by: [Name]

Roll call vote:

Those In Favor: [Name(s)]

Those Opposed: [Name(s)]

Abstained: [Name(s)]

Not Present: [Name(s)]

_____ Motion passed

_____ Motion defeated

Motion under subject No. 3 to [use also for motion to adjourn]:

Made by: [Name]

Seconded by: [Name]

Roll call vote:

Those In Favor: [Name(s)]

Those Opposed: [Name(s)]

Abstained: [Name(s)]

Not Present: [Name(s)]

_____ Motion passed

_____ Motion defeated

EXHIBIT 2C

The Conflict-of-Interest Law, Selectmen Summary

From the State Ethics Commission website (www.mass.gov/ethics), at www.mass.gov/ethics/education-and-training-resources/educational-materials/explanations-of-the-conflict-of-interest-law/selectmen-summary.html. Prepared and issued by the Public Education Division of the State Ethics Commission, last revised September 2005.

As a Selectman, you are a “municipal employee” and are covered by the conflict of interest law, G.L. c. 268A. [If your town population is 10,000 or fewer, you are a “special municipal employee”; if the town population is greater than 10,000, you cannot under any circumstances be a “special municipal employee.” As discussed below, the law places fewer restrictions on “special municipal employees” in some instances.] All municipal officials and employees, whether elected or appointed, full- or part-time, paid or unpaid, must comply with the restrictions of the conflict law. The law also regulates the activities of former employees and business partners of current and former employees. [For additional information, see State Ethics Commission Summary 13: Former Municipal Employees, and Advisory 88-01: Municipal Employees Acting as Agent.] The purpose of the law is to ensure that your private interests and relationships do not conflict with your responsibilities as a public official.

I. RESTRICTIONS ON YOUR ACTIONS

A. Self-Dealing (Section 19)

The law generally prohibits you from taking any official action on matters affecting your own financial interests, or the financial interests of: your immediate family members (i.e., your spouse and the parents, siblings and children of either you or your spouse); partners; your employer(s) other than your town; anyone with whom you are negotiating or have an arrangement concerning prospective employment; or organizations for which you serve as an officer, director, partner, employee or trustee. [Note that this prohibition applies both to for-profit and to charitable organizations.] As a Selectman, you may not act in any way that affects these interests, positively or negatively, nor may you act on any matter that affects these interests within the foreseeable future. If a matter affecting one of these interests comes up for consideration at a Selectmen’s meeting, the wisest course of action is to leave the room during discussion, deliberation and the vote on the matter, and make sure that the minutes of the meeting reflect your recusal.

The prohibition on acting in these matters is very broad. You may not participate as a selectman in any way: you may not vote on these matters; you may not participate in, moderate or chair

discussions; you may not delegate these matters to a subordinate; you may not prepare official documents concerning these matters; and you may not take any other type of official action regarding these matters.

For example, if a budget line item includes the salary of an immediate family member, you may not discuss that line item with your colleagues, even during informal conversations. If a warrant includes payments to a family member or a business organization as described above, you may not sign the warrant. If you are an abutter to a public works project, you may not participate as a Selectman in any hearings or deliberations about that project. If you are on the board of a charitable organization, you may not as a selectman direct the Town Administrator to act on that organization's application for a municipal grant.

Note that there are some special cases, including:

1. Acting on Budgets: You must abstain from any action on budget items which include the salary of an immediate family member (or would otherwise affect the financial interests of one of the entities listed above). Although you are prohibited from acting on those particular line items, you may act and vote on the budget as a whole provided that those line items you abstained from have previously been voted on and approved separately. For more information, see Advisory 05-03: Elected Officials Voting on Budgets and Signing Payroll Warrants that Include Salaries for Family Members.

2. Acting on Matters of General Policy: You may act on municipal ordinances, bylaws and other matters of "general policy" as long as the financial interest of you or your immediate family members is shared by a "substantial segment" of your town's population. The State Ethics Commission has advised that at least 10 percent of a town's total population is a "substantial segment" for the purposes of the conflict law; therefore, you may act on matters affecting your own financial interests, or others' private interests as listed above, if the financial interest is shared by at least 10 percent of your town's residents, as determined by the most recent federal census. For example, as a selectman, you may participate in setting the tax rate because that decision is a matter of general policy and affects more than 10 percent of the town's population.

You also may act on matters of general legislation and certain home rule petitions including drafting, promoting or opposing general legislation (bills that would amend the state's General Laws), or legislation relating to your town government's organization, powers, duties, finances or property. Note that matters involving "special legislation," do not fall within this exception.

3. Acting on Matters Affecting Abutting or Nearby Property: Property owners are presumed by the [State Ethics] Commission to have a financial interest in matters affecting abutting and nearby property. Therefore, you generally may not act in your official capacity on matters involving a business or property which abuts your own property, or which is close enough that the outcome of the matter will affect your own property values. Also, you generally may not act in your official capacity on matters involving a business or property which abuts businesses or property owned by your immediate family members, business partners, private employers, prospective employers, or organizations for which you serve as an officer, director, partner or trustee. For more information, see Advisory 05-02: Voting on Matters Affecting Abutting or Nearby Property.

4. Acting on Matters Affecting Competitors' Financial Interests: Businesses and individuals may have a financial interest in matters affecting their direct competitors when the effect on the competition also affects themselves or their own business. For example, a liquor license holder is presumed to have a financial interest in the liquor license application of a nearby establishment; a job applicant is presumed to have a financial interest in the process of evaluating other candidates for the position. Therefore, you generally may not act on matters affecting your own direct competitors, or direct competitors to an immediate family member, business partner, private employer, prospective employer, or organization for which you serve as an officer, director, partner or trustee. For more information, see Advisory 05-04: Voting on Matters Involving Competitors.

B. Appearances (Section 23)

The law prohibits you from taking any type of official action that could create an appearance of impropriety, or otherwise acting in a manner which could cause an impartial observer to believe that your actions are tainted with bias or favoritism. Before taking any type of action which could appear to be biased, you must first file a full, written disclosure of all the relevant facts with your Town Clerk. We also recommend that you make the disclosure public at the Selectmen's meeting where the issue arises, and see that the minutes reflect your disclosure. Instances in which you should file such a disclosure include: actions affecting the financial interests of a relative who is not an immediate family member, such as a son-in-law, a niece or a grandparent; actions involving a friend, neighbor, business associate, or anyone with whom you have a significant personal or professional relationship. If you are in doubt as to whether there is an "appearance problem," the safest approach is to contact your Town Counsel or the Legal Division of the State Ethics Commission prior to acting.

C. Acting on Behalf of Others and Private Employment (Sections 17 and 18)

The law generally prohibits you from acting as agent or attorney for anyone other than your town in connection with any matter of direct and substantial interest to your town. For instance, you may

not contact a town agency on behalf of a private individual, company, not-for-profit organization, group, association, or other special interest. You may not appear before a town department or town employee on someone else's behalf. You may not allow your name to be used on documents which are submitted to a town board or town employee by someone else. You may not serve as spokesperson or otherwise represent anyone in connection with town business.

Also, you generally may not receive pay or other compensation from anyone other than your town in connection with any matter that involves your town. Even if you recuse yourself to comply with [Sections 19 and 23], as discussed above, you may not represent a private party in the matter from which you are recused.

There are some exemptions to these general prohibitions, including:

1. Legitimate Constituency Work: You generally may act on behalf of a constituent who lives or does business in your town, so long as your actions are “within the proper discharge of official duties.” However, you may not be paid for such representation by the constituent or other private party, and you may not act as the constituent's attorney or agent. For example, you may contact the public works department to inquire about the status of a street repaving project for a constituent; you may not represent a constituent who is suing the town for damage to her property as a result of that paving project nor may you be paid in connection with that lawsuit by the constituent. Note that you may not act on behalf of constituents who are members of your immediate family, business partners, private employers, prospective employers or organizations for which you serve as officer, director, partner or trustee in matters in which they have a financial interest (see “Self-Dealing” above). Even if no financial interest exists, if you act on behalf of constituents who are members of your immediate family, business partners, private employers, prospective employers or organizations for which you serve as officer, director, partner or trustee, you must file a disclosure as discussed in Section B above. Finally, you cannot ask anyone to do something unlawful or put undue pressure on them, as discussed in Section F below. If you have concerns about whether your actions are constituent services, get advice from the Ethics Commission before acting. For more information, see Advisory 05-06: Elected Officials Providing Constituent Services.

2. Acting in Your Personal Capacity: You may always act on your own behalf, and you may always state your own personal points of view. However, you should always make it clear that you are acting on your own behalf, not representing someone else and not acting in any official capacity. You may even represent yourself before a town board (but remember that you may not take any type of official action on a matter that affects you). For example, if you are abstaining as a selectman

from participating in a matter which affects your property, you should leave the table and sit in the audience while the matter is before the board. You may participate in this matter only when other members of the public are invited by the board to participate. When you participate, you should state that you are not acting as a selectman but on your own behalf.

3. Special Municipal Employees: If you serve as a Selectman in a town which has a population of 10,000 or fewer, you are considered a “special municipal employee” for the purposes of the conflict law. Selectmen who are “special municipal employees” may represent others only in the following circumstances: they have never acted on the matter as a municipal official; the matter is not and has not been the subject of their official responsibility; and the matter is not currently pending before the Board of Selectmen.

D. Multiple Contracts and Holding Additional Offices (Section 20)

You are generally prohibited from having a direct or indirect financial interest in a contract with your town or from holding more than one appointed and paid position in town. This section of the law restricts municipal employees from actually having or appearing to have an “inside track” to appointments to paid municipal jobs. The law permits you to hold as many uncompensated appointed positions as you wish, so long as all of the positions you hold are unpaid. It also permits you to hold as many elected positions as you wish even if you are compensated for one or more of these elected positions, so long as all of the positions you hold are elected. For information about other exemptions, see Ethics Primer: Financial Interests in Contracts for Municipal Employees.

There are many exemptions in this section of the law. For instance, you may own less than 1 percent of the stock of a company that does business with your town.

One exemption, known as the “selectman’s exemption,” permits a person already holding an appointed and paid municipal position (e.g., a teacher) to run for and hold the additional municipal position of Selectman. However, for those selectmen who use this exemption, several additional restrictions are imposed. First, you may receive only one municipal salary, but have the ability to choose which salary you will receive. In addition, as a Selectman, you may not vote or act on any matter within the purview of the municipal agency by which you are employed or over which you have official responsibility. Finally, you may not be appointed to any municipal position other than the one you currently hold, including a job promotion, while serving as a Selectman and for six months thereafter.

Also, as discussed above, if you serve as a Selectman in a town which has a population of 10,000 or fewer, you are considered a “special municipal employee” for the purposes of the conflict law. As a special municipal employee, you may have a financial interest in a town contract or a second paid position if you file a disclosure of your financial interest in the contract with the Town Clerk and either (a) the Board of Selectmen has no jurisdiction over the agency with which you have the contract or position or (b) if the Board has jurisdiction over the municipal agency with which you have the contract or position, the other members of the Board of Selectmen vote to exempt you from the provisions of Section 20. [Note that G.L. c. 268A, Section 19, would prohibit you from participating in this vote to grant yourself an exemption.]

For information about the application of these exemptions and other exemptions that may apply, contact your Town Counsel or the Legal Division of the State Ethics Commission.

E. Appointments by the Board of Selectmen (Section 21A)

As a Selectman, you generally cannot be appointed to any position, paid or unpaid, that is both appointed by the Board of Selectmen and is under the supervision of the Board of Selectmen. You must wait 30 days after you finish serving as a Selectman before you are eligible to be appointed to such a position [note that if you rely on the Selectmen’s exemption to Section 20 in order to hold a second municipal position, you must wait six months after you finish serving as a Selectman before you are eligible for appointment to any additional municipal position], or you must receive approval for the appointment at an annual town meeting of the town. You may submit a resume or otherwise indicate an interest in such a position while still being on the Board, but the Board may not take any actions regarding your expression of interest until after the 30-day cooling off period. For more information about this restriction, see Advisory No. 96-01: Municipal Officials Being Appointed to Positions under their own Boards.

Positions on Board subcommittees and positions held ex-officio by virtue of your Selectman’s position are considered to be part of your Selectman’s position, and therefore do not trigger the restrictions of Section 21A. Generally, you may serve on a Board subcommittee, so long as your position on the subcommittee would terminate if you were to resign as a Selectman. Similarly, you may serve ex-officio on another municipal committee that reports to the Board, as long as the committee membership would automatically terminate should you resign as a Selectman. For example, you may serve on the Recreation Commission as the selectmen’s representative on that board, as required by the town’s charter.

F. Unwarranted Privileges (Section 23)

The law prohibits you from using your official position to obtain any type of “unwarranted privilege” of substantial value (\$50 or more) for yourself or anyone else. For instance, you may not use official resources (e.g., office equipment, stationery, municipal cars, the town seal, staff time) for personal or political purposes. You also may not use your official position to get any type of preferential treatment for yourself or anyone else. You may not generally solicit your subordinates, license holders, or anyone under your authority for any personal or political purpose. You may not use your official title to endorse products or activities.

For more information about this restriction, see Advisory No. 84-01: Political Activity and Advisory 05-01: The Standards of Conduct.

G. Confidential Information (Section 23)

The law prohibits you from publicly revealing confidential information, or from using it for private or political purposes. Anything that is not a “public record” under the Massachusetts Public Records Law is considered confidential. Remember that matters discussed while the Board is in Executive Session are confidential until after the Executive Session minutes are released as public records. For additional information on the Public Records law, see www.sec.state.ma.us/pre/preidx.htm.

H. Bribes (Section 2)

You may not ever accept anything that is given to you with an intent to corruptly influence your official actions or to corruptly induce you to take or not take any official action. Anything, of any value, may be considered a bribe if it is given to you in exchange for your agreeing to take some type of official action, or if you agree to not take an official action you would otherwise take.

I. Gifts and Gratuities (Section 3)

You may not accept anything worth \$50 or more if it is given to you because of something you did, or might do, as a municipal official. Whenever you are offered anything from a private party, you must ask whether there is a link between the gift and an official act or act within your official responsibility. The Commission determines whether a link is established by reviewing all the circumstances. Such circumstances may include, for example, the identities or relationship of you and the giver, the giver’s and your expressed intents, the timing of the gift, whether you have acted or will act on matters affecting the giver, and the effect of the gift on your acts. In addition, the Commission will consider whether the gift is repeated, planned or targeted, whether it is a business expense, whether there is personal friendship or reciprocity between the giver and you, the nature,

amount and quality of the gift, and the location of the entertainment and the sophistication of the parties. Because the prohibition applies to acts “performed or to be performed,” a reward of substantial value for a past act may violate the law just as a gift of substantial value in anticipation of a future act might.

Note that multiple gifts from the same person or company with a total value of \$50 or more may be considered illegal gratuities. For more information, see Advisory 04-02: Gifts and Gratuities. Note also that special rules apply to scarce tickets. See Advisory 04-01: Free Tickets and Special Access to Event Tickets.

J. Restrictions After You Leave Government Service (Section 18)

You may never be paid by anyone except your town in connection with a particular matter in which you participated as a public official. For example, if you participate in the Selectmen’s decision to award a town building contract, you may not then be paid by a private company to help it get the contract or, generally, to assist it in performing work under that contract.

In addition, there is a one-year “cooling off” period before you may personally appear before, or telephone or write to, a town agency in connection with a matter that was under your official responsibility within two years prior to your leaving government service, even if you did not participate in it. This includes affixing your professional stamp on documents submitted to your former agency.

For more information on these restrictions, see State Ethics Commission Advisory No. 90-01: Negotiating for Prospective Employment and Summary of the Conflict of Interest Law 13: Former Municipal Employees.

II. SPECIAL RESPONSIBILITIES OF SELECTMEN

In addition to the above restrictions, the conflict law also gives Selectmen certain additional responsibilities.

A. Designating Special Municipal Employees (Section 1)

The Board of Selectmen may vote to designate other municipal positions as “special municipal employee” positions for purposes of the conflict law. Sections 17 and 20 of the conflict law apply less restrictively to “special municipal employees” than they do to other municipal employees.

Only certain part-time or unpaid positions may be designated as “special municipal employee” positions. The designation must apply to an entire category of positions, as opposed to a particular individual’s position. For instance, the Board may vote to designate all part-time police officers as “special municipal employees,” or all members of a particular board, but the Board may not, for example, designate only one part-time police officer to be a “special municipal employee.”

Unless the vote to designate includes a “sunset” provision, “special municipal employee” designations remain valid until revoked by a subsequent vote of the Selectmen. Up-to-date “special municipal employee” designation lists should be kept on file at the Town Clerk’s office and filed with the State Ethics Commission.

B. Making Determinations and Granting Exemptions as an Appointing Authority under Sections 17, 19, 23

Some Boards of Selectmen are the legal appointing authority for certain town employees. Appointing authorities have several primary responsibilities under the conflict law:

1. Section 17: Section 17 generally prohibits town employees from acting as agent for anyone other than the town in connection with matters in which the town has a direct and substantial interest. However, Section 17 allows appointed town employees to act as agents for their immediate family members [“immediate family” includes the employee’s spouse, and the parents, siblings and children of both the employee and his spouse], and for anyone with whom they have a “fiduciary” relationship [examples of fiduciary relationships include acting as guardian, executor or administrator], if they first get permission from their appointing authority. As an appointing authority, you may be asked to vote to give such permission to a town employee.

2. Section 19: Section 19 generally prohibits town employees from participating in their official capacity in any particular matter which affects their own financial interests, or the financial interests of their immediate family members, business partners, private employers, prospective employers or organizations for which they serve as an officer, director, partner or trustee. However, Section 19 allows appointed town employees to participate in such matters if: (a) they first make a written disclosure of all the relevant facts to their appointing authority; and then (b) they receive back from the appointing authority a “written determination” that the financial interest is “not so substantial as to be deemed likely to affect the integrity of the services which the town may expect from the employee.” As an appointing authority, you may be asked to vote to give such a determination to a town employee.

3. Section 20: Section 20 generally prohibits a municipal employee from having a financial interest in a contract with the town. Several exemptions are available which require a vote by the board of selectmen to approve an exemption allowing a municipal employee to hold a contract. For example, in towns with a population of less than 3,500 persons, selectmen may approve an exemption allowing a municipal employee to hold more than one appointed position with the town. Another exemption requires selectmen to approve an exemption that would allow a municipal employee in a town with a population of less than 35,000 to serve in part-time, call or volunteer police, fire, rescue or ambulance departments, provided the head of the department certifies in writing to the town clerk that no other employee is available to perform such services. A number of additional exemptions exist which require approval by the board of selectmen. Individuals seeking exemptions should contact the Ethics Commission or Town Counsel for advice.

4. Section 23: Among other restrictions, Section 23 generally prohibits town employees from acting in a manner which would cause a reasonable person to conclude that anyone could unduly enjoy their favor in the performance of their official duties. However, Section 23 allows town employees to act in such instances if they first make a full, written disclosure of all the relevant facts to their appointing authority. As an appointing authority, you may receive such disclosures, which must be maintained as public records. While you do not have to take any action regarding them, it is recommended that you review them. As the appointing authority, you have the discretion to act in the town's interests and may prohibit an employee from acting in a matter even if the employee discloses the relevant facts.

The determinations and exemptions made by selectmen as discussed above are discretionary. It is the responsibility of the board to weigh the circumstances and determine what is in the town's best interests.

EXHIBIT 2D

State Ethics Commission Advisory Opinions of Particular Interest to Selectmen

- Advisory 86-02: Nepotism
www.mass.gov/ethics/education-and-training-resources/educational-materials/advisories/advisory-86-02-nepotism.html
- Advisory 88-01: Municipal Employees Acting as Agent for Another Party
www.mass.gov/ethics/education-and-training-resources/educational-materials/advisories/advisory-88-01.html
- Advisory 05-01: The Standards of Conduct
www.mass.gov/ethics/education-and-training-resources/educational-materials/advisories/advisory-05-01-standards-of-conduct.html
- Advisory 05-02: Voting on Matters Affecting Abutting or Nearby Property
www.mass.gov/ethics/education-and-training-resources/educational-materials/advisories/advisory-05-02-abutting-property.html
- Advisory 05-03: Elected Officials Voting on Budgets and Signing Payroll Warrants That Include Salaries for Family Members
www.mass.gov/ethics/education-and-training-resources/educational-materials/advisories/advisory-05-03-budgets-and-payroll-warrants.html
- Advisory 05-04: Voting on Matters Involving Competitors
www.mass.gov/ethics/education-and-training-resources/educational-materials/advisories/advisory-05-03-competitors.html
- Advisory 11-1: Public Employee Political Activity
www.mass.gov/ethics/education-and-training-resources/educational-materials/advisories/advisory-11-1.html

EXHIBIT 3A

Towns Operating Under a Home Rule Charter

Representative Town Meeting-Selectmen-Manager

Billerica ¹	Falmouth	Stoughton
Chelmsford	Natick	Swampscott
Dartmouth	Reading	Winchester
Dedham		

Open Town Meeting-Selectmen-Manager*

Acton	Hudson	North Reading	Sturbridge ¹
Acushnet	Longmeadow	Northborough	Sutton
Athol ³	Lynnfield	Northbridge	Townsend
Bedford	Mansfield	Norton	Truro
Bellingham	Marshfield	Norwell	Uxbridge
Blackstone	Mashpee	Orleans	Wakefield
Chatham	Maynard	Oxford	Ware
Dracut	Medfield	Provincetown ¹	Wareham
Eastham	Middleton	Rockland ²	Webster ³
Easton	Millbury	Salisbury	Wellfleet
Grafton	Millis ²	Scituate	Westborough
Harwich	Nahant ²	Seekonk ³	
Hopkinton	North Andover	Stow	

Towns With City Form of Government**

Mayor-Council: Agawam, Easthampton, Greenfield⁴, Methuen, West Springfield, Weymouth
 Council-Manager: Barnstable, Bridgewater, Franklin, Palmer, Randolph, Southbridge, Watertown, Winthrop

Towns Replacing/Revising Home Rule Charter by Special Act

Cities: Agawam (1988), Methuen (1992), replaced manager with mayor

Representative town meeting: Auburn (2009), Plymouth (2004), Walpole (1999)

Open town meeting: Abington (2004), Bourne (2012), Ashland (2008), Lunenburg (2009), Westwood (2012), Winchendon (2010)

Norwell revised some portions of its charter by special act in 2012.

Notes

- * “Manager” is used here as a generic title, connoting a professional administrative position of similar responsibility (e.g., town administrator, executive secretary, town executive, town coordinator, etc.).
- ** Many of these communities still use the designation “town.”
- 1. Had previously adopted home rule charter.
- 2. Charter does not provide for a management position, although all towns referenced subsequently created such a position.
- 3. Seekonk revised its representative town meeting charter in 1995, Webster adopted a second charter in 1992, and Athol adopted a home rule charter in 2000. All of these towns discontinued representative town meeting via home rule charter replacement/revision and returned to open town meeting.
- 4. Greenfield elected a mayor and council in 2003. Prior charter provided for election of a five-member board of selectmen, a town council, and appointment of a manager.

EXHIBIT 3B

Special Act Charters, Creation of Town Manager/Administrator Position

Abington: Chapter 259, Acts of 2004, replaces home rule charter adopted in 1970

Adams*: Chapter 31, Acts of 1983

Amherst*: Chapter 216, Acts of 2001, combined representative town meeting, town manager, and related acts into one chapter

Andover: Chapter 571, Acts of 1956

Arlington*: Chapter 503, Acts of 1952

Ashburnham: Chapter 140, Acts of 2011, replaced Chapter 428, Acts of 1986

Ashland: Chapter 405, Acts of 2008, replaced home rule charter adopted 1988

Becket: Chapter 662, Acts of 1989; see also Chapter 158, Acts of 1996

Concord: Chapter 280, Acts of 1952; see also Chapter 347, Acts of 2004 (removes residency requirement for manager)

Dalton: Chapter 137, Acts of 1995, created management position

Danvers*: Chapter 222, Acts of 1997, effective December 18, 1997; prior act (St. 1949, c. 13) repealed

Dudley: Chapter 73, Acts of 2004 (subject to voter acceptance); see also Chapter 331, Acts of 2004

Foxborough: Chapter 5, Acts of 2004; had TA/ES prior to special act; see also Chapter 11, Acts of 2012

Framingham*: Chapter 27, Acts of 1996 (replaces Chapter 816, Acts of 1975); see also Chapter 350, Acts of 2004

Great Barrington: Chapter 184, Acts of 1992; had AA prior to creating manager position

Groton: Chapter 81, Acts of 2008; had AA prior to creating manager position; see also Chapter 50, Acts of 2010

Hanover¹: Chapter 67, Acts of 2009; had TA prior to creating manager position (effective upon passage)

Harwich: Chapter 18, Acts of 2006, replaces home rule charter

Holden: Chapter 406, Acts of 1951; see also Chapter 167, Acts of 2011

Hull: Chapter 8, Acts of 1989; had ES prior to special act charter

Ipswich: Chapter 620, Acts of 1966

Lee: Chapter 471, Acts of 1991, created management position

Lenox: Chapter 155, Acts of 1991; had AA prior to special act charter

Lexington*: Chapter 753, Acts of 1968; see also Chapter 120, Acts of 1984

Lunenburg: Chapter 113, Acts of 2009; rewrite of home rule charter to change administrator title to manager and create sewer commission

Medway: Chapter 303, Acts of 1991; see also Chapter 150, Acts of 1997, Chapter 84, Acts of 2008 (subject to voter acceptance)

Middleborough: Chapter 592, Acts of 1920, and Chapter 443, Acts of 1935

Needham*: Chapter 176, Acts of 2004, accepted by voters in November 2004; see also Chapter 202, Acts of 2001, Chapter 403, Acts of 1971

Norwood*: Chapter 197, Acts of 1914

Plymouth²: Chapter 358, Acts of 2004; town has operated under both home rule and special act charters

Sandwich: Chapter 106, Acts of 2009 (replaces similar legislation: Chapter 137, Acts of 2002)

Saugus*: Chapter 17, Acts of 1947; see also Chapter 134, 139-143, and 203 of Acts of 1984)

Sheffield: Chapter 15, Acts of 1989; created management position

Shrewsbury*: Chapter 559, Acts of 1953

Spencer: Chapter 186, Acts of 1998

Stoneham: Chapter 26, Acts of 1981; see also St. 1983, Chapter 16; St. 1987, Chapter 120, and St. 1994, Chapter 296

Sudbury: Chapter 131, Acts of 1994; strengthened existing management position

Swampscott*: Chapter 7, Acts of 2002; revised home rule charter, created manager

Tewksbury: Chapter 275, Acts of 1986 (see also St. 1987, Chapter 336); created TM

West Boylston: Chapter 23, Acts of 1995 (see also St. 2008, Chapter 249); had ES prior to special act

Westford: Chapter 480, Acts of 1989; had ES prior to special act

Westwood: Chapter 56, Acts of 2012; replaces home rule charter adopted in 1970

Weston: Chapter 80, Acts of 2001; had ES prior to special act

Williamstown: Chapter 55, Acts of 1956

Wilmington: Chapter 592, Acts of 1950

Winchendon: Chapter 453, Acts of 2010; revision to home rule charter adopted in 1981

Yarmouth: Chapter 133, Acts of 1997; had ES prior to special act; see also Chapter 404, Acts of 2006, Chapter 114, Acts of 2010

NOTES

* Representative town meeting serves as legislative body

1. Does not contain all the usual charter features, but includes some organizational and transition provisions as well as creating the manager position.

2. Plymouth: Home rule charter, 1973; special act charter, St. 1991, Chapter 19; home rule charter, 1999; special act charter, St. 2004, Chapter 358

KEY

AA: Administrative Assistant

ES: Executive Secretary

TA: Town Administrator

Special Acts: Creation of Town Manager/Administrator Position

Brookline*: Chapter 270, Acts of 1985 (TA); had ES prior to special act

Burlington*: Chapter 549, Acts of 1978 (TM); had ES prior to special act

Carver: Chapter 177, Acts of 1995 (TA)

Cohasset: Chapter 34, Acts of 1997; had ES prior to special act; see also Chapter 421, Acts of 1998

Douglas: Chapter 145, Acts of 2009; creates TA and finance department, subject to local acceptance

Duxbury: Chapter 353, Acts of 1987 (TM); had AA prior to special act

Hamilton: Chapter 114, Acts of 2009

Hanson: Chapter 41, Acts of 2006

Holliston: Chapter 94, Acts of 1994 (TA); had ES prior to special act

Hopedale: Chapter 550, Acts of 1983 (TM); repealed by Chapter 63, Acts of 1997

Lakeville: Chapter 416, Acts of 1998 (TA)

Manchester-by-the-Sea: Chapter 85, Acts of 1999 (TA); had ES prior to special act

Nahant: Chapter 13, Acts of 1992 (TA)

Newbury: Chapter 460, Acts of 2008 (TA)

Norfolk: Chapter 217, Acts of 1994 (TA)

Somerset: Chapter 7, Acts of 1984 (TA); created management position

Upton: Chapter 391, Acts of 2008 (TM)

Wayland: Chapter 320, Acts of 2004 (TA)

* Representative town meeting serves as legislative body

KEY

AA: Administrative Assistant

ES: Executive Secretary

TA: Town Administrator

TM: Town Manager

Special Acts Replaced by Adoption of Home Rule Charter

<u>Town</u>	<u>Citation</u>	<u>Year of home rule charter adoption</u>
Acton	Chapter 255, Acts of 1968	1982, retained OTM-BOS
Dartmouth	Chapter 358, Acts of 1992 (EA)	2000, retained RTM-BOS
West Springfield	Chapter, 339, Acts of 1973	2000, adopted mayor-council
Weymouth	Chapter 230, Acts of 1985	1999, adopted mayor-council

KEY

BOS: Board of Selectmen

OTM: Open town meeting

RTM: Representative town meeting

EXHIBIT 3C

Composite Responsibilities of a Town Manager or Administrator

- Except as otherwise provided by the charter (and subject to the approval of a majority of the full board of selectmen), the town manager/administrator shall appoint, based on merit and fitness alone, and may remove, all department heads, officers, subordinates, and employees, except employees of the school department.
- The town manager/administrator shall supervise, direct, and be responsible for the efficient administration of all officers appointed by the town manager/administrator and their respective departments, and all functions for which the manager/administrator is given responsibility, authority or control by the charter, by bylaw, by town meeting vote, or by vote of the board of selectmen.
- The town manager/administrator shall administer and enforce either directly or through a person or persons supervised by the manager/administrator, in accordance with the charter, all provisions of the laws of the commonwealth and special laws applicable to the town, all bylaws, and all regulations established by the board of selectmen.
- The town manager/administrator shall coordinate activities of all town departments and investigate or inquire into the affairs of any town department or office.
- The town manager/administrator shall attend all regular meetings of the board of selectmen.
- The town manager/administrator shall attend all sessions of the town meeting and answer all questions related to the warrant articles and to matters under the general supervision of the manager/administrator.
- The town manager/administrator shall keep the board of selectmen fully informed as to the needs of the town and recommend to the selectmen for adoption such measures requiring action by the board or by the town.
- The town manager/administrator shall ensure that complete and full records of the financial and administrative activity of the town are maintained and render reports to the board of selectmen as may be required.
- The town manager/administrator shall be responsible for the rental, use, maintenance, and repair of all town facilities, to include a comprehensive maintenance program for all town facilities, and maintain a full and complete inventory of all town-owned real and personal property.
- The town manager/administrator shall serve as the town's chief procurement officer.
- The town manager/administrator shall administer personnel policies, practices, or rules and regulations, any compensation plan, and any related matters for all municipal employees and administer and negotiate collective bargaining agreements.

- The town manager/administrator shall prepare and submit an annual operating budget.
- The town manager/administrator shall delegate, authorize or direct any subordinate or employee of the town to exercise any power, duty, or responsibility which the office of the town manager/administrator is authorized to exercise and to perform other duties as necessary, or as may be assigned by the charter, by bylaw, by town meeting vote, or by vote of the board of selectmen.

EXHIBIT 11A**Statutory and Regulatory References to Chief Legal Officer Position**

A number of state laws refer to the chief legal officer position and assign it specific duties and responsibilities. Provisions of the Code of Massachusetts Regulations also reference city solicitors or town counsel, as do provisions of the Massachusetts Rules of Court pertinent to municipal attorneys.

Service to, or Representation of, Local Boards and Officials

- Retirement Boards [G.L. c. 32, §20(4)(f)]: In communities that have a local retirement board, the city solicitor or town counsel serves as the legal advisor and representative of the board, unless the board takes steps to engage another attorney.
- Boards of Assessors [G.L. c. 41, §26A]: If a city or town has a chief legal officer, the board of assessors will be represented by that person, whose expenses incurred are to be paid under the general appropriation for the chief legal officer, unless the community makes a specific appropriation for having a special counsel. Given the variety of compensation plans for municipal counsel, it is unclear if this statutory language refers only to the actual expenses incurred in the legal proceeding or if it also includes the compensation for the attorney. In the absence of a specific limitation in the community's charter or laws, a reasonable approach would be to have the compensation for the attorney representing the assessors come out of the legal department budget.
- Treasurers and Collectors [G.L. c. 41, §43A]: Generally, the town counsel is to defend the treasurer or collector in a suit over his or her acts as such.
- Claims Panels, Indemnification of Police Officers, Firemen and Persons Aiding Them [G.L. c. 41, §100]: Under this law, a community shall indemnify its police officers and firefighters for expenses for their "reasonable hospital, medical, surgical, chiropractic, nursing, pharmaceutical, prosthetic and related expenses and reasonable charges for chiropody (podiatry) incurred as the natural and proximate result of an accident occurring or of undergoing a hazard peculiar to his employment, while acting in the performance and within the scope of his duty without fault of his own." Towns may provide by bylaw that determining whether to pay the expenses is to be done by a special local board, having the town counsel among its members.
- Claims Panels, Indemnification of Retired Police Officers and Firefighters [G.L. c. 41, §100B]: In towns where this law is applicable, the town counsel is a member of a local panel that reviews claims from retired employees for indemnification of certain medical expenses relating to the retiree's "hospital, medical and surgical, chiropractic, nursing, pharmaceutical, prosthetic, and related expenses, and reasonable charges for podiatry" expenses.

- K-9 Officers [G.L. c. 41, §100H]: In those communities where a police officer is assigned a police dog, and the dog causes injury resulting in a claim against the officer, the community is to indemnify the officer, and the town counsel is to make the defense or settlement.
- Panels Regarding Local Election Issues [G.L. c. 55B, §7]: In a city, objections to certain local election matters are to be heard by a panel made up of the board of registrars and the city solicitor. In towns, the board of registrars handles such objections and the town counsel is not made a part of that panel, although the board of registrars would normally consult with and be advised by the town counsel.
- County Commissioners Regarding Tax Matters [G.L. c. 59, §64]: An owner may appeal a refusal of a local board of assessors to abate taxes on certain personal or real property to the county commissioners or such other board authorized to hear such matters. The assessors or town counsel may file a notice that the community wishes to have the matter heard by the state Appellate Tax Board.
- Representation of Retirement Boards by Other Attorneys in Workers' Compensation Matters [G.L. c. 152, §73]: In situations where a municipal employee is receiving workers' compensation benefits, the retirement board may prosecute said benefits. In such situations, if the municipality is represented by the town counsel, the retirement board may hire its own attorney.
- Tort Claims [G.L. c. 258, §1]: Under the Tort Claims Act, the "public attorney" defending a town in the claim is to be the town counsel, an attorney employed by the selectmen for said purpose if there is no town counsel, or an attorney provided under an insurance policy.
- Open Meeting Law Complaints [G.L. c. 30A, §23]: Under open meeting law provisions dealing with alleged violations, a defense to the charge can be that the public body acted in accordance with advice given by municipal legal counsel.

Exclusion from Coverage of Certain Laws

- Civil Service [G.L. c. 31, §53]: In towns that accept the provisions of the state civil service law, the positions of town counsel and assistant town counsel are not covered under such laws.
- Veterans' Protection [G.L. c. 41, §112A]: In communities that accept this provision, a veteran shall not be involuntarily separated from employment except in accordance with Section 41 of Chapter 31, but the positions of town counsel and assistant town counsel are among those excluded from this protection.
- Tenure [G.L. c. 41, §127]: In any town where this statute applies, the town counsel or assistant town counsel is generally not eligible for tenure.
- Conflict-of-Interest Law [G.L. c. 268A, §18]: Under the law, a person who formerly was a town counsel is not subject to the prohibition applicable to former municipal counsel

appearing before local boards under Section 18 if he or she was paid a salary or retainer of less than \$2,000 per year.

Specific Duties and Authorities

- Approval of Contracts for Cultural Councils [G.L. c. 10, §58]: Local and regional cultural councils may enter into contracts, and those contracts must be approved by the town counsel as to form. A technical problem is that with a regional council there is not a single town counsel designated by state law to guide it. Presumably, the cultural councils making up the consortium would decide among themselves which town counsel would review its contracts.
- Charter Amendments [G.L. c. 43B, §11]: When a community is to vote on a proposed charter or charter revision following a final report of its charter commission, the town counsel is to prepare the description of proposed amendments while the charter commission is to prepare the summary of the proposals.
- Summaries of Laws Presented for Local Acceptance [G.L. c. 54, §58A]: The town counsel is to prepare “a fair and concise summary” of a general or special law being submitted for adoption by the voters of a community, unless the proposed law expressly provides otherwise.
- Presentment of Tort Claims Notices [G.L. c. 258, §4]: Under the Tort Claims Act, a claim may be initiated by presentment to, among certain specified municipal officers, the town counsel.
- Preparation of Conflict-of-Interest Opinions [G.L. c. 268A, §22]: Under the conflict-of-interest law, the town counsel shall issue an opinion on the applicability of the law to the duties, responsibilities and interests of any municipal employee who requests same.
- Authority to Terminate Certain Criminal Proceedings in District Court [G.L. c. 278, §15]: The town counsel or person so authorized to represent the community may enter a *nolle prosequi* or do anything else a district attorney may do concerning the prosecution in a district court of a violation of a bylaw, ordinance, order, rule or regulation of the community.
- Summaries of Provisions for Community Preservation Act Local Acceptance [G.L. c. 44B, §3]: If the local legislative body adopts the Community Preservation Act, the adoption is subject to approval by the voters. The law provides for the form of question to be presented, and the town counsel is to prepare a “fair, concise summary and purpose of the law.”
- Process for Obtaining Approval of Bylaws Where Certain Procedural Defects May Exist; Authority to Extend Ninety-Day Period for Attorney General to Approve Bylaws [G.L. c. 40, §32]: Under this law, certain defects in the adoption procedure can be waived by the attorney general. In addition, the ninety-day approval period may be extended by agreement between the attorney general and the town counsel.
- No Bond Required in Certain Appeals from District Court Civil Jury Trials to Appellate Division [G.L. c. 218, §19B]: Appeals in such cases made by the town counsel or other officer having similar duties are exempt from the requirement of filing a bond or deposit.

- No Appeal Bond Required in Small Claims Actions Where Municipal Attorney Represents Government [G.L. c. 218, §23]: In appeals by a municipality of an adverse judgment in a small claims action, no bond shall be required where the municipal defendant is represented by the town counsel or other officer having similar duties.
- No Appeal Bond Required in Removal of Cases from District Court to Superior Court Where Municipal Attorney Represents Government [G.L. c. 231, §107]: Where a municipality seeks the removal of a case filed against it in the district court to the superior court, no bond or deposit shall be required where the municipal defendant is represented by town counsel or other officer having similar duties.

Code of Massachusetts Regulations (C.M.R.)

- Veterans' Agent to Consult Municipal Counsel Regarding Enforcement of Lien [108 C.M.R. §6.03(2)]: The veterans' agent may enforce a real estate lien by filing a "petition in equity" in the superior court for the county where the real estate is located. The veteran's agent is to seek the legal advice of town counsel.
- Obtaining Other Permits When Applying for Order of Conditions [310 C.M.R. §10.05]: Sometimes in matters involving applying for orders of conditions from the local conservation commission, issues may arise as to what other permits are necessary. The town counsel may make a ruling regarding such other permits.
- Advisory Conflict-of-Interest Opinions [930 C.M.R. §1.03]: In certain situations, the town counsel issues advisory opinions on conflict-of-interest matters and may receive information from the State Ethics Commission. Those opinions are to be filed with the town clerk and the commission.

Massachusetts Rules of Court

- Rules of Criminal Procedure, Rule 2: Under the rules of court, a town counsel may prosecute certain matters, usually with the approval of or coordination with the district attorney.
- Rules of the Supreme Judicial Court, Rule 3.03: A senior law student may appear on behalf of a town if under the supervision of town counsel.

EXHIBIT 11B

Examples of Local Ordinances and Bylaws Pertaining to a Municipal Law Department

Town of Barnstable

Barnstable Code re: Town Attorney's Office (Law Department)

§241-47.5. Administrative Services Department.

The Administrative Services Department, located with the Administrative Branch, consists of four subordinate departments: Legal, Information Technology, Finance and Human Resources. Through these four subordinate departments, the Department provides a variety of professional services to all components of the Town.

A. Legal.

(1) Mission. The objective of the Office of the Town Attorney is to provide and/or supervise the provision of all legal services necessary to the proper conduct of the affairs of the Town.

(2) Authorities and responsibilities. The responsibilities of the Town Attorney are varied, and include the following:

(a) Title examination for all real estate and other property to be acquired by the Town, approval of deeds and other instruments in writing under which the Town takes title to the same.

(b) Draft all deeds, leases, conveyances and releases to be executed in behalf of the Town and all contracts, bonds, obligations or other agreements in writing whereby the Town assumes any pecuniary, contractual or other liability, to be executed by any Town official, board, department or committee by virtue of any special or general authorization.

(c) Draft formal orders, notices, votes, adjudications or decrees for the layout, relocation, alteration or discontinuance of Town ways and for the taking of lands or interests in lands, in behalf of the Town, by purchase or eminent domain, for any municipal purpose.

(d) Attend all Town Council meetings and, at the request of the President thereof, advise the Council on questions of law relating to the subject matter of any matter before the Council and as to the form of proposed votes or motions or the legality of any particular action proposed to be taken by the Council.

(e) Provide advice or opinion to all elective or appointive Town officers, multiple-member bodies, or departments as to any function of their respective offices or on any specific question of law in relation thereto.

(f) Appear and act as Attorney for the Town, or for any Town officer in his official capacity,

in any suit, action, complaint or court proceedings in which the Town, or such Town officer in his official capacity, is a party plaintiff or a party defendant, subject to the Town Manager's advice and consent.

(g) Appear and act for the Town and its officers, boards and committees before state and county boards and officials, executive departments and committees of the legislature, in all proceedings involving the rights, duties or interests of the Town, subject to the Town Manager's request.

(h) Appear for and defend any Town officer against whom in person any suit or proceedings in court has been brought, founded on his official action performed in good faith relative to a matter in which the Town in its corporate capacity has a duty to perform, a right to defend, or an interest to protect, provided that the Town Manager, at the request of such officer, directs the Town Attorney in writing so to do.

(i) Give his advice and consent to the Town Manager with respect to the question of whether or not to compromise and settle claims or suits against the Town.

(3) Interrelationships.

(a) Town Council. The Town Attorney interacts with the Town Council by attending all Town Council meetings and advising the Council on questions of law relating to the subject matter of any matter before the Council and as to the form of proposed votes or motions or the legality of any particular action proposed to be taken by the Council.

(b) Town Manager. The Town Attorney shall interact with the Manager to pursue the responsibilities set forth, and shall serve further to advise the Manager on matters of law and specific functions of the organization.

(c) Other departments. Interaction shall be consistent with the responsibilities set forth herein.

Town of Weymouth

Code of Ordinances

CHAPTER 3

SECTIONS-330 Town Solicitor

(a) Appointment—The Mayor shall appoint a Town Solicitor, who shall serve an indefinite term of office.

(b) Powers and duties.—The Town Solicitor shall:

1. Be responsible for all legal affairs of the Town and shall personally provide, or, shall personally supervise the provision by others, of all legal services necessary for the proper and efficient conduct of the Town's affairs
2. Supervise the drawing of and revision of or approve all contracts, deeds, bonds and other legal

instruments relating to the Town

3. Prosecute and defend all suits to which the Town or any of its officers or any administrative personnel, in their official capacity, are a party, or wherein any right, privilege, property, estate, act or franchise of the Town may be affected or brought into question, before any court, Board of Commissioners, or Committee of the General Court of this Commonwealth
4. Under the direction of the Mayor, represent the Town before any committee of the legislature, administrative board or other public official in any matter wherein the Town has an interest
5. Furnish all legal advice to the Mayor, Town Council, and all elected or appointed Town Officers, Departments, Boards and Committees pertaining to the discharge of their official duties. All requests for legal opinions, other than routine day to day questions, shall be made in writing to the Town Solicitor and routed through the Mayor's office for purposes of administrative control
6. The Town Solicitor shall have charge of and perform, under the direction of the Mayor, any and all other law business of the Town except as otherwise provided, including:
 - a. *Prosecution of cases*—The Mayor, as provided in Section 2-203, may instruct the Town Solicitor to prosecute any case of violation of Town Ordinances or to defend any proceeding brought against any officer, employee, board or committees of the Town for acts done in the discharge of his/her/its official duties.
 - b. *Employment of assistants*—The Town Solicitor, in the discharge of legal duties, may employ assistants and outside counsel, but, except as otherwise expressly authorized by the Mayor, the Town Solicitor shall be responsible for the acts of any assistants and outside counsel so employed, and such assistants shall be paid by the Town Solicitor.
 - c. *Representation of all Town departments*—The Town Solicitor shall represent all Town Departments, Boards and Committees in the conduct of their official duties, and the salary therefore shall cover all work performed, except that for the School Department, the examination of titles to real estate, all legal work in the preparation or conduct of litigation and hearings, either before administrative committees, boards, courts or other tribunals, and except work done in connection with the laying out, establishment, construction and maintenance of sewerage, water, drainage or road systems.
 - d. *Settlement of claims*—The Mayor, as provided in Section 2-203, shall have full authority, as agent of the Town, with the advice and consent of the Town Solicitor to prosecute, defend, to compromise and settle all claims and suits pending to which the Town is a party and in relation to claims and suits.
 - e. *Assignment of police*—The Chief of Police, at the request of the Town Solicitor and by order of the Mayor, shall assign a competent police officer to the legal department to act under the Town Solicitor in the investigation of all claims against the Town and to assist

the Town Solicitor in the preparation for trial and in the trial of any hearings or litigation to which the Town is a party.

- f. Approval of legal bills*—The Town Solicitor shall approve all bills or charges against the legal department before final presentation for approval and payment.
- g. Appointment of special counsel*—No Town Officer or Agency shall, unless specifically authorized to do so by the Mayor, employ, advise with or consult any attorney or counselor at law, other than the Town Solicitor, or his designee, with regard to its duties, or to any Town business. Whenever it is determined that the services of a legal specialist are necessary, or desirable, the Town Solicitor shall select such counsel after consultation with the Mayor and the office or agency involved.

