Attachment #13 & 14
200913 & 200914.

John Long

From: Allison Gage <agage@ecseclipse.com>
Sent: Tuesday, March 15, 2016 2:40 PM
To: John Long
Subject: Somerville Flammable License Documents
Attachments: Opinion of the Attorney General.pdf

Hi John,

As discussed during our phone call, I unfortunately will not be able to attend the meeting with the Board of Aldermen this coming Wednesday at 6pm, nor will any other representative from ECS or Keolis.

However, I would like to state that the tanks in question are essential to the primary functions of the MBTA Commuter Rail, which serves the city Boston and the surrounding areas.
These tanks had not been previously registered through the city of Somerville because Flammable Licenses for state owned facilities are not required by the Massachusetts Department of Fire Services, per an Opinion of the Attorney General. A copy of the ruling, dated 10/30/2000, is attached to this email. Although this exemption applies to the facilities operated by Keolis in Somerville, we would like to ensure that your city has sufficient documentation.

Thank you again for your help with preparing the application for this license. If you require any additional information, feel free to let me know.

Allison

--

Allison Gage
Compliance Analyst
agage@ecseclipse.com

eclipse
The Petroleum industry leader
for compliance and fuel management.

588 Silver Street
Agawam, MA 01001

Office: 888-302-4875
Direct: 413-233-9322

www.ecseclipse.com

Opinion No. 00/01-1

No. 00/01-1
October 30, 2000

Jane Perlov
Secretary
Executive Office of Public Safety
One Ashburton Place

Boston, MA 02108

Dear Secretary Perlov:

You have requested my opinion on the scope of enforcement authority vested in the Office of the State Fire Marshal under the Commonwealth's comprehensive fire safety code as pertaining to state-owned and state authority-owned buildings. Specifically, you have asked whether the provisions of M.G.L. c. 148 and 527 CMR 1.00 et seq. apply to state-owned or state authority-owned buildings and, if so, whether the Marshal is responsible for enforcing the fire safety code in such buildings. You also pose a related third question of whether, if the provisions do so apply, and if the Marshal is responsible for enforcement thereof, the Marshal may delegate responsibility for such enforcement to local fire chiefs. Consistent with the unequivocal conclusion reached by former Attorney General George Fingold in a May 25, 1955, opinion given to the then Commissioner of Public Safety, 1955 Op. Att'y Gen., Rep. A.G., P.D. No. 12 at 100 (1955), and for the reasons discussed below, it is my opinion that the Commonwealth is not bound by the relevant statutes and regulations and that, therefore, such provisions cannot be enforced as against the Commonwealth. The question of state authorities is not susceptible to a categorical answer, as discussed further below.

Under M.G.L. c. 22D, § 4, as well as various provisions contained in M.G.L. c. 148, including §§ 9, 10 and 28, the Board of Fire Prevention Regulations (the "Board") is authorized to enact regulations relative to fire prevention. Pursuant to that authority, the Board has enacted a comprehensive set of regulations codified in 527 C.M.R. §§ 1.00 et seq., and commonly referred to as the State Fire Code (the "Fire Code"). These authorizing statutes, unlike some other regulatory authorizations such as G.L. c. 143, §§ 2A, 3A, 93, 94, and 95 (authorizing the establishment of a state-wide building code and discussed in greater detail below), do not specifically indicate that regulations promulgated thereunder may be made applicable to state-owned buildings. Under M.G.L. c. 148, § 4, the Marshal, local fire chiefs, and their designees have the authority to enter "any building or other premises" in the performance of the duties imposed by the Fire Code or in furtherance of the purpose of any provision of the Code or statutes relating to fire prevention.

A long line of opinions issued by my predecessors has taken the position that, absent an explicit legislative directive to the contrary, the Commonwealth and its agencies are immune from proscriptions set forth in statutes enacted by the Legislature in the exercise of its police powers. 1941 Op. Att'y Gen., Rep. A.G., P.D. No. 12 at 118 (1941) (regulations pertaining to safety devices for hot water tanks do "not apply to buildings owned and used by the Commonwealth"); see also 1942 Op. Att'y Gen., Rep. A.G., P.D. No. 12 at 88 (1942) (statute authorizing land takings by county commissioners cannot be used to take land held by the Commonwealth as a state forest); 1935 Op. Att'y Gen., Rep. A.G., P.D. No. 12 at 38 (1935) (state-owned buildings not subject to general laws relating to the licensing of plumbers); 1933 Op. Att'y Gen., Rep. A.G., P.D. No. 12 at 38 (1933) (no state license required in order for a prisoner to operate a steam shovel at a state prison colony); 1932 Op. Att'y Gen., Rep. A.G., P.D. No. 12 at 86 (1932) (statute requiring local plumbing and wiring licenses does not pertain to work done on state-owned buildings). This rule is closely related to the rule that the Commonwealth cannot be sued in its own courts except in strict accordance with statute. In that context also, "[t]he rules of construction governing statutory waivers of sovereign immunity are stringent. . . . Consent to suit must be expressed by the terms of a statute, or appear by necessary implication from them." Woodbridge v. Worcester State Hospital, 384 Mass. 38, 42 (1981). Accord C & M Construction Co. v. Commonwealth, 396 Mass. 390, 392 (1985). Under M.G.L. c. 148, § 30, which authorizes judicial enforcement of the Fire Code, there is no express or implied waiver of the Commonwealth's immunity to suit. [1]

Moreover, I note that many sections of M.G.L. c. 148 refer to "persons being subject thereto. See e.g., M.G.L. c. 148, § 9 ("Such rules and regulations shall require persons keeping, storing, using . . . explosives to make reports to the department. . . ."); M.G.L. c. 148, § 31 ("Any person aggrieved by an act, rule, order or decision of the head of a fire department . . . may appeal to the marshal, who shall make all necessary and proper orders thereon. . . ."). The Commonwealth and its agencies are not usually deemed to be encompassed by general terms such as "person." Sarvis v. Boston Safe Deposit & Trust Co., 47 Mass. App. Ct 86, 96 n. 10 (1999). For this reason, statutes applying to "persons" do not subject government entities to liability. See, e.g., Perez v. Boston Housing Authority, 368 Mass. 333, 339 (1975) (enforcement action under the state sanitary code could not be maintained against the Commonwealth and its Commissioner of Community Affairs because the Commonwealth is not an "individual, trust or corporation, partnership, association, or other person" under the provisions of M.G.L. c. 111, § 127N); Fran's Lunch, Inc. v. Alcoholic Beverages Control Commission, 45 Mass. App. Ct. 663, 665 (1998)(local police and ABCC were not "persons" within the meaning of

statute criminalizing minor's purchase of alcohol for use of another "person"; minor's participation in police/ABCC sting operation thus did not violate law); Kilbane v. Secretary of Human Services, 14 Mass. App. Ct. 286, 287-88 (1982) (affirming dismissal of action against Secretary of Human Services because Commonwealth is not a "person" within the meaning of M.G.L. c. 266, § 91, which deals with false advertising).

Absent express statutory language, there is also a well established presumption against interpreting a statute in a manner that delegates to municipalities any authority to regulate the Commonwealth. This presumption is traced back to the seminal case of Teasdale v. Newell & Snowling Construction Co., 192 Mass. 440 (1906). In that case, the City of Quincy Board of Health attempted to bar a state contractor from establishing a temporary stable to be used during its work on a project to create park land because the contractor had not obtained a stable license from the Board as required by statute. [2] The effort failed because "[i]t is not to be presumed that the Legislature intended to give to the local licensing board the authority to thwart the reasonably necessary efforts of the park commissioners to perform their duty as agents of the State." Id. at 443.

Later, in Medford v. Marinucci Bros., 344 Mass. 50, 54 (1962), the City sought "to use its delegated powers," i.e., its zoning by-laws and building code, to block a contractor and railroad from transporting fill to land owned by the Commonwealth (there to be stored temporarily for use in building a bridge across the Mystic River), alleging violations of its zoning ordinances and its building code. Following Teasdale, opinions of the Attorney General, [3] and the rule generally followed in other jurisdictions, the Court concluded that "[t]he [local] ordinance could not control action by the Commonwealth or by its agents. . . ." 344 Mass. at 54; [4] see also 1980/81 Op. Atty. Gen. No. 16, Rep. A.G., P.D. No. 12 at 143 (1981) (Department of Environmental Management was not authorized to enter into contract to acquire land from Mashpee, under which the Department would agree that rules governing use of land would conform to town's present and future rules, regulations and by-laws, because Department could not know whether future rules of the town would be consistent with Department's mandate).

Although the Legislature may elect to waive the Commonwealth's exemption from regulation in particular instances, such a waiver is not to be presumed or inferred, but must be made explicit. In Inspector of Buildings of Salem v. Salem State College, 28 Mass. App. Ct. 92 (1989), for example, the Appeals Court concluded that a provision of M.G.L. c. 40A, § 3, by which religious or educational uses on public land are subject to bulk and height restrictions imposed by zoning ordinances, applies to private religious or educational uses on public land, and not to public buildings, such as those of the state college. Referring to prior Supreme Judicial Court decisions such as Teasdale and Medford v. Marinucci Bros., the Court said: "All those cases assert the supremacy of the State over local land use regulation in connection with State construction projects, unless the Legislature has made express provision to the contrary." Id. at 97. The Court concluded that, measured against this standard, "[c]ertainly the language of § 3 does not amount to the express and unmistakable suspension of the usual State supremacy which the Teasdale, Marinucci, and County Commissioners [5] cases require." Id.

An example of the Legislature's explicit waiver of the Commonwealth's exemption from regulation is found in M.G.L. c. 143, the statute that authorizes the promulgation and enforcement of a state-wide building code. Section 2A of G.L. c. 143 indicates that "[t]he provisions of [G.L. c. 143] relative to the safety of persons in buildings shall apply to buildings and structures, other than the state house, owned, operated or controlled by the commonwealth, and to buildings and structures owned, operated or controlled by any department, board or commission of the commonwealth, or by any of its political subdivisions, in the same manner and to the same extent as such provisions apply to privately owned or controlled buildings occupied, used or maintained for similar purposes." Chapter 143 further vests inspectors in the Division of Inspections of the Department of Public Safety with authority to enforce the state building code as to buildings "owned by the commonwealth or any departments, commissions, agencies or authorities of the commonwealth." M.G.L. c. 143, § 3A. Similarly, in the context of the state-wide regulation of the siting of solid waste disposal facilities, the Legislature chose to use explicit language to indicate that the procedures regarding the Department of Environmental Protection's oversight of the location and operation of such facilities are applicable to facilities "owned or operated by an agency of the commonwealth." M.G.L. c. 111, § 150A; see also M.G.L. c. 22, § 13A (subjecting "public buildings," defined to include buildings constructed by the Commonwealth, to regulations of the Architectural Access Board).

Furthermore, even in the fire prevention arena, the Legislature has taken great care to be explicit in subjecting state-owned buildings to statutory requirements and proscriptions. In particular, the Legislature adopted a special provision to make M.G.L. c. 148, § 26A½, regarding the retrofitting of existing buildings for sprinklers, applicable to buildings and structures owned by the Commonwealth. St. 1993, c. 151, § 124 ("Notwithstanding the provisions of any general or special law to the contrary, the entire gross square footage of any building or structure owned by the commonwealth and subject to the provisions of section twenty-six A½ of chapter one hundred and forty-eight of the General Laws shall comply with the provisions of said section twenty-six A ½ not later than March thirtieth, nineteen hundred and ninety-seven."). A time-tested maxim of statutory construction is that "[a] statutory expression of one thing is an implied exclusion of other things omitted from the statute." Glorioso v. Retirement Board of Wellesley, 401 Mass. 648, 650 (1988). In other words, if the Legislature intends to make the Commonwealth subject to any provision contained in M.G.L. c. 148, it knows exactly how to accomplish this result. See Commonwealth v. Dodge, 428 Mass. 860, 865 (1999)("[W]here the Legislature has employed specific language in one [section of an act], but not in another, the language should not be implied where it is not present.") (internal quotation omitted). Each of the factors stated above supports the conclusion that the provisions of the Fire Code do not apply to state-owned buildings.

You have also asked whether the provisions of the Fire Code apply to "state authority-owned buildings." With respect to the term "state authority," I understand you to mean "authorities established to perform vital government functions for usually large geographical areas," such as the Massachusetts Bay Transportation Authority, the Massachusetts Turnpike Authority, and the Massachusetts Port Authority, as opposed to the "category of authorities" consisting "of those which are directly established by local governing bodies or officers pursuant to enabling legislation," such as local housing authorities and local redevelopment authorities. See 1978/79 Op. Att'y Gen. No. 30, Rep. A.G., P.D. No. 12 at 164 (1979),

at 165-166. Authorities which "by definition" have "expansive geographical jurisdiction or scope of functions, or both," and "whose services and functions are of vital interest to the Commonwealth as a whole," Id. at 166, are often considered to be public agencies, at least for purpose of construing and applying particular statutes. See e.g., Department of Community Affairs v. Massachusetts State College Building Authority, 378 Mass. 418, 426 (1979)(public character of college building authority require it to be included within the definition of public agency as the term appears in M.G.L. c. 79A); Massachusetts Turnpike Authority v. Commonwealth, 347 Mass. 524, 529 (1964)(statute relieving Commonwealth from payment of damages for taking public land for highway purposes applies to land owned by Turnpike Authority).

Notwithstanding this general proposition, state authorities are creatures of individual legislative enactments and, accordingly, the specific organic statute should be reviewed to determine whether or not the Code may be applicable to a particular authority. See e.g., M.G.L. c. 81A, § 1 (Massachusetts Turnpike Authority "shall not be subject to the supervision and regulation of [the Executive Office of Transportation and Construction] or any other department, commission, board, bureau or agency except as specifically provided in any general or special law to the contrary."); M.G.L. c. 161A, § 3(l) (exempting the Massachusetts Bay Transportation Authority, in providing mass transportation service, from jurisdiction and control of the Department of Public Utilities except as to safety of equipment and operations); St. 1956, c. 465, § 2 (Massachusetts Port Authority not subject to supervision or regulation of any state agency except as expressly provided in act creating the Authority).

Finally, you have asked whether, if the provisions of the Fire Code do apply to buildings owned by the Commonwealth or state authorities, the Marshal is responsible for enforcing the Code on those buildings and, if so, may such enforcement authority be delegated to local fire chiefs. Because I have opined that the Fire Code does not apply to state-owned buildings, this question does not require an answer as to such buildings. With respect to buildings owned by state authorities, the answer may once again turn on the wording of the provisions of a particular authority's organic statute, and, therefore, I can offer no categorical answer here.

In sum, based upon my review of the relevant provisions of M.G.L. c. 148, I conclude that the provisions of the State Fire Code are not applicable to buildings owned by the Commonwealth, and that such provisions may or may not be applicable to buildings owned by particular state authorities, depending upon the specific organic statute. I recognize, of course, the critical importance of ensuring that such buildings are safe both for employees and members of the public. Nothing in my opinion bars the officials controlling those buildings from voluntary compliance with the Fire Code. You and the Marshal may also wish to consider whether to propose legislation making the Code apply to such buildings and giving enforcement authority to the Marshal.

Sincerely,
Thomas F. Reilly

[1] It is unsettled in the Commonwealth whether sovereign immunity would apply when one state entity sought to bring enforcement proceedings against another. Accordingly, I do not base my conclusions on the doctrine of sovereign immunity per se but on an examination of the relevant statutes to see if they authorize application of the Fire Code to the Commonwealth with the clarity that one would expect had the Legislature intended such a result.

[2]The statute, R.L. c. 102, § 69, read: "No person shall erect, occupy or use for a stable any building in a city whose population exceeds twenty-five thousand unless such use is licensed by the board of health of said city, and, in such case, only to the extent so licensed."

[3]The Court cited the following opinions: 1958 Op. Att'y Gen., Rep. A.G., P.D. No. 12 at 60 (1958) (Boston's superintendent of wires does not have jurisdiction over wiring in state armory); 1958 Op. Att'y Gen., Rep. A.G., P.D. No. 12 at 65 (1958) (municipal inspector of wiring does not have jurisdiction over installation of wiring in and on property of the Commonwealth); 1949 Op. Att'y Gen., Rep. A.G., P.D. No. 12 at 29 (1949) (Public Works may erect building for storage of road equipment notwithstanding town's zoning by-laws); 1942 Op. Att'y Gen., Rep. A.G., P.D. No. 12 at 73 (1942) (Department of Conservation not bound to comply with local ordinances in operation of parks and forests).

[4] Indeed, the Court thought the principle so firm that it held inapplicable a provision of the contract between the Commonwealth and the contractor requiring compliance with municipal ordinances.

[5] Referring to County Commissioners of Bristol v. Conservation Commission of Dartmouth, 380 Mass. 706 (1980), in which the Supreme Judicial Court held that a proposal to build a new Bristol County jail was not subject to the Town of Dartmouth's zoning by-laws.