



Municipal Client Advisory
July 2009

**SUPREME JUDICIAL COURT UPHOLDS MUNICIPALITIES’
RIGHT TO IMPOSE REGULATORY FEES**

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The Massachusetts Supreme Judicial Court issued a critical decision last week which saved cash strapped municipalities from a potentially serious financial threat. In *Silva v. City of Attleboro, et. al.*, SJC-10330 (6/26/09), a funeral director sued Attleboro and other cities, arguing that a nominal charge for issuing a burial permit was an illegal tax. Reversing the Massachusetts Appeals Court, the Supreme Judicial Court agreed with the cities and decided that the burial permit charges were lawful fees, imposed to defray the reasonable expenses of regulating the disposal of human remains.

“The Supreme Judicial Court’s decision was a very important victory for Massachusetts municipalities” said Robert S. Mangiaratti of Murphy, Hesse, Toomey & Lehane, LLP, who successfully argued the case on behalf of Attleboro. “Cities and towns are responsible for protecting public health and safety in many areas ranging from alcoholic beverages to wiring. The *Silva* decision insures that municipalities will continue to recover the reasonable costs of such services from the regulated parties.”

The controversy hinged on whether the burial permit fee was a “fee” which cities and towns are free to impose, or a “tax”. In the absence of a specific grant of authority from the legislature, cities and towns may not impose taxes. In overturning the Appeals Court, and upholding the burial permit fee, the Supreme Judicial Court refined its previous decision in *Emerson College v. Boston*, 391 Mass. 415 (1984). Under the *Emerson College* criteria, fees were distinguished from taxes in that they (1) were charged for a particular governmental service benefiting the party paying the fee in a manner not shared by society in general; (2) were paid voluntarily; and (3) were not collected to raise revenue, but specifically to offset expenses incurred by the municipality in granting a permit or license. The *Silva* Court indicated that all three criteria are relevant to proprietary fees which are charged for the use of publicly owned instrumentalities such as a public water supply system. However, fees such as the one charged by Attleboro for burial permits are regulatory fees based upon the power to regulate certain businesses and activities to protect public health and safety. In *Silva*, for the first time, the Court categorically stated that the validity of regulatory fee does not require payment to be voluntary. With respect to the benefit criteria of *Emerson*, the Court concluded that funeral directors and their clients received sufficient benefit from the burial permit process in that it promotes a well-regulated burial “industry” for the



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disposal of human remains, including a level playing field for honest funeral directors, and public confidence in the funeral director profession.

Had the Supreme Judicial Court concluded differently, the ramifications could have been significant for municipalities. A whole range of municipal fees including license fees and building permit fees could have been subject to attack as illegal taxes. Combined with lower revenue receipts from taxes and from state aid, a different decision could have had a further negative impact on municipal budgets. On the other hand, the *Silva* case now provides municipalities with an opportunity to review their fee schedules to be sure that they are fully recovering the cost of important regulatory services in compliance with the decision.

“The fact that this case was pursued so aggressively all the way to the Supreme Judicial Court speaks volumes about the concerns of municipalities in pursuing streams of income in this time of reduced tax revenues”, says Arthur Murphy, partner of Murphy, Hesse, Toomey & Lehane, LLP. “Both Jim Toomey and Bob Mangiaratti, as past presidents of the Massachusetts City Solicitors and Town Counsel Association, understand the importance of such advocacy on behalf of our clients. Bob and our entire litigation and municipal departments diligently pursue these kinds of matters on behalf of a wide range of both public and private sector clients. Obtaining favorable decisions before appellate courts can have dramatic economic impacts for private business, as well as for public entities.”

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Murphy, Hesse, Toomey & Lehane, LLP is a full-service law firm with offices in Quincy, Boston, and Springfield, Massachusetts. The firm represents a wide range of public entities and private corporations throughout the Northeast. For questions about the Attleboro decision, and its impacts on municipal finance, interested parties should contact Attorney Robert Mangiaratti at (617) 479 - 5000, or the attorney assigned to your account.

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