



Town of Douglas

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MULLIN RULE STATUTE

Pursuant to G.L. c. 39, § 23D, the undersigned member of a board, committee or commission of the Town of Douglas hereby certifies that he or she has examined all of the evidence received by the said board, committee or commission at the one session of its adjudicatory hearing on the matter identified below which the undersigned member failed to attend, and that such evidence included an audio or video recording the missed session or a transcript thereof. This Certification has been executed prior to the undersigned's participating in a vote on the matter and shall be part of the record of the hearing.

Member Name:

Board, Committee or Commission:

Subject Matter of Hearing:

Date of Missed Session:

Signed under the pains and penalties of perjury this ____ day of _____, 20 ____.

Signature

Article 13: Acceptance of Pine Grove Cemetery.

The Town authorized the Board of Selectmen to acquire by gift from the Second Congregational Church that parcel of land known as Pine Grove Cemetery in the Town, described in the deed recorded with the Worcester County Registry of Deeds in Book 1248, Page 46 as land to be used only for cemetery purposes.

PASSED BY MAJORITY VOICE VOTE.

Article 14: Acceptance of M.G.L. Chapter 43D

The Town voted to accept the provisions of G. L. Chapter 43D pursuant to Section 11 of Chapter 205 of the Acts of 2006, and to approve the filing of a formal proposal with the Interagency Permitting Board for the designation of the parcel(s) of land located in the area of Route 16 near the Webster Town Line and in the area of Gilboa Street near the Uxbridge Town Line and shown on Assessors' Map 113, Lot 2, Map 115, Lot 5, Map 205, Lots 2 and 3, Map 206, Lots 1 and 2, Map 207, Lots 1 and 2, and Map 230, Lot 2, as priority development sites.

PASSED BY MAJORITY VOICE VOTE.

Article 15: Acceptance of M.G.L. Chapter 39 Section 23D

The Town voted to accept Chapter 39 Section 23D of the Massachusetts General Laws relative to allowing board members to participate and vote as part of an adjudicatory hearing even if the Board member has a single absence during a hearing process.

PASSED BY MAJORITY VOICE VOTE.

Article 16: Acceptance of M.G.L. Chapter 59 Section 5L

The Town voted to accept the provisions of Chapter 260, Section 12 of the Acts of 2006, which amends Chapter 59 of the Massachusetts General Laws by inserting new Section 5L which allows that any taxes due under this chapter by a member of the Massachusetts National Guard or reservist to be deferred while that member is on active service outside the Commonwealth and for the next 180 days after that service with no interest or penalties assessed for any period before the expiration of those 180 days.

PASSED BY MAJORITY VOICE VOTE.

Article 17: FEMA Flood Plain Map

The Town voted to amend the Zoning Bylaws by adding a map entitled "FEMA Flood Map of Douglas, Massachusetts" which is on file with the Town Clerk, and the following language to the end of the first paragraph of Section 8.3.2.1 Floodplain District Boundaries:

"The map entitled "FEMA Flood Map of Douglas, Massachusetts" and adopted at the May 7, 2007 Annual Town Meeting, on file with the Town Clerk further delineates the boundaries of the district but does not supersede the FEMA FIRM map that this bylaw applies to. It simply provides a level of clarity that may not exist on the FEMA FIRM maps. This map is hereby made part of this By-law."

PASSED BY UNANIMOUS VOICE VOTE. (2/3 required)

On May 12, 2006, Governor Romney signed H4489, An Act Further Regulating Meetings of Municipal Boards

In summary, this long-awaited bill, known as the "Mullin Rule" (see case law summary below), would enable a member of a municipal board, committee or commission (Planning Board, ZBA, Con Com) who miss testimony at one session to participate in future proceedings. Details of the bill include:

- This is local option that requires town meeting/city council acceptance;
- The municipality can pick and choose which boards, committees, or commissions it may apply to;
- Only 1 session may be missed;
- The member shall examine audio, video, or transcript of the meeting;
- The member shall provide a written certification that they have examined such evidence, and this certification must be included as part of the written record of the hearing;
- It would seem that multiple members may miss testimony on the same hearing, but rules for quorum still apply to each session of a public hearing;
- Municipalities may continue to impose a stricter standard if they so choose.
- The new law creates a new Section 23D to MGL Chapter 23D, will be cited as Chapter 79 of the Acts of 2006, and will take effect 90 days after its endorsement last Friday, May 12th, which is believed to be August 10th;
- Stay tuned for more info, this will likely get more attention as it rolls out.

Chapter 79 of the Acts of 2006

AN ACT FURTHER REGULATING MEETINGS OF MUNICIPAL BOARDS

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same as follows:

Chapter 39 of the General Laws is hereby amended by inserting after section 23C the following section:-

Section 23D. (a) Notwithstanding any general or special law to the contrary, upon municipal acceptance of this section for 1 or more types of adjudicatory hearings, a member of any municipal board, committee or commission when holding an adjudicatory hearing shall not be disqualified from voting in the matter solely due to that member's absence from no more than a single session of the hearing at which testimony or other evidence is received. Before any such vote, the member shall certify in writing that he has examined all evidence received at the missed session, which evidence shall include an audio or video recording of the missed session or a transcript thereof. The written certification shall be part of the record of the hearing. Nothing in this section shall change, replace, negate or otherwise supersede applicable quorum requirements.

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JOHN W. GIORGIO
BARBARA J. SAINT ANDRE
JOEL B. BARD
JOSEPH L. TEHAN, JR.
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DARREN R. KLEIN
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September 11, 2006

MEMORANDUM TO MUNICIPAL CLIENTS

TO: BOARD OF SELECTMEN/MAYOR/TOWN AND CITY COUNCIL
TOWN MANAGER/TOWN ADMINISTRATOR/EXECUTIVE SECRETARY

Re: Recent Legislation Applicable to Local Adjudicatory Hearings

Chapter 79 of the Acts of 2006, entitled "An Act further Regulating Meetings of Municipal Boards," took effect on August 10, 2006. The Act inserts a new section in G.L. c.39, G.L. c.39, §23D, which, upon acceptance, authorizes a member of a board, committee or commission holding an adjudicatory hearing to vote in the matter even though the individual has missed one session, provided that certain conditions are met. The Act, if accepted, overturns in part judicial precedent providing that only members present at all sessions of an adjudicatory hearing on a particular matter are eligible to vote on that matter. See Mullin v. Planning Board of Brewster, 17 Mass.App.Ct. 139, 141 (1983). Except as specifically provided in G.L. c.39, §23D, however, the so-called "Mullin Rule" will continue to be applicable.

General Laws c.39, §23D(a) provides:

Notwithstanding any general or special law to the contrary, upon municipal acceptance of this section for one or more types of adjudicatory hearings, a member of any municipal board, committee or commission when holding an adjudicatory hearing shall not be disqualified from voting in the matter solely due to that member's absence from no more than a single session of the hearing at which testimony or other evidence is received. Before any such vote, the member shall certify in writing that he has examined all evidence received at the missed session, which evidence shall include an audio or video recording of the missed session or a transcript thereof. The written certification shall be part of the record of the hearing. Nothing in this section shall change, replace, negate or otherwise supersede applicable quorum requirements.

Memorandum to Municipal Clients

Based upon the language of G.L. c.39, §23D, the statute may only be relied upon in the event that all of the listed conditions are met:

- First, the statute must be accepted either generally for all boards, committees, commissions or authorities holding adjudicatory hearings in the municipality, or for one or more particular municipal entities, as described in more detail below.
- Second, G.L. c.39, §23D may be used only when a board member is disqualified from voting solely due to that member's absence. Accordingly, if a member did not participate in the proceedings due to a conflict, the provisions of G.L. c.39, §23D may not be used to remedy the conflict, or to otherwise authorize the member to vote.
- Third, G.L. c.39, §23D may be used only if a board member is absent from a single session of an adjudicatory hearing. If a member is absent from more than one session of an adjudicatory hearing, G.L. c.39, §23D will not allow the member to vote in the underlying matter.
- Fourth, G.L. c.39, §23D may be used only if there is an available recording or transcription of the hearing at which a member is absent. General Laws c.39, §23D does not, however, require that adjudicatory hearings be recorded or that any recorded hearing be transcribed.
- Fifth, G.L. c.39, §23D may be used only if the member certifies that he or she has examined all evidence received at the missed session.

If even one of these conditions is not met, G.L. c.39, §23D will not be applicable, and the Mullin Rule will prevent the member from participating in the vote. See Mullin, 17 Mass.App.Ct. at 141 (members of a board holding an adjudicatory hearing must attend the hearing in order to be able to participate in the vote).

As noted above, G.L. c. 39, §23D is a local acceptance statute. The statute may be accepted in a town by vote of town meeting or the town council, as applicable, and in a city, by the city council. See G.L. c.4, §4. However, it is not sufficient to simply accept the new law. The statute refers to acceptance for "one or more types of adjudicatory hearings." To properly accept the statute, a municipality must specify in its acceptance vote whether it is accepting the statute for all boards that conduct "adjudicatory hearings" or for particular boards. Although the term "adjudicatory hearings" is not defined in G.L. c.39, §23D, the term is defined for purposes G.L. c.30A, the State Administrative Procedures Act, in part, as "a proceeding before an agency in which the legal rights, duties or privileges of specifically named persons are required by constitutional right or by any provision of the General Laws to be determined after opportunity for an agency hearing." The Massachusetts Appeals Court has also stated that an adjudicatory hearing is one involving "particular persons, their business or property, and their relation to a particular transaction [rather than a question involving] ... governmental policy." Mullin, 17 Mass. App. Ct. at 142-143, citing Cast Iron Soil Pipe Inst. v. State Examiners of Plumbers and Gas Fitters, 8 Mass. App. Ct. 575, 586 (1979). Many types of boards conduct adjudicatory

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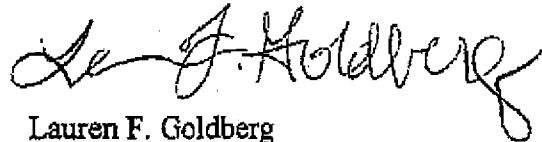
Memorandum to Municipal Clients

hearings, including boards of selectmen, city or town councils, conservation commissions, planning boards, zoning boards of appeal, boards of health, and other local licensing and permitting authorities. Examples of adjudicatory hearings include hearings on special permits, variances, licensing applications, and requests for determinations. Please note that such boards also conduct legislative hearings or meetings, to which the provisions of G.L. c.39, §23D are not applicable. Examples of legislative meetings include meetings at which regulations are promulgated, proposed warrant articles are considered, or other matters of general policy are discussed.

Once a municipality has accepted G.L. c.39, §23D for one or more types of adjudicatory hearings, a municipality may, but is not required to, adopt a bylaw or ordinance requiring minimum additional requirements for attendance at such hearings. A bylaw or ordinance could provide, for example, that G.L. c.39, §23D would be applicable only to adjudicatory hearings consisting of a minimum number of sessions or that a board member could utilize the provisions of G.L. c.39, §23D to cure an absence only a limited number of times during a fiscal or calendar year.

Enclosed are sample warrant articles and council resolutions we have prepared to address acceptance of the statute.

Very truly yours,



Lauren F. Goldberg

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KOPELMAN AND PAIGE, P.C.

Memorandum to Municipal Clients

Towns

All boards holding adjudicatory hearings

To see if the Town will vote to accept, for all boards, committees or commissions holding adjudicatory hearings in the Town, the provisions of G.L. c.39, §23D, which provide that a member of a board, committee, or commission holding an adjudicatory hearing shall not be disqualified from voting in the matter solely due to the member's absence from one session of such hearing, provided that certain conditions are met, or take any other action relative thereto.

Specific boards holding adjudicatory hearings

To see if the Town will vote to accept, for the _____ Board, the provisions of G.L. c.39, §23D, which provide that a member of a board, committee, or commission holding an adjudicatory hearing shall not be disqualified from voting in the matter solely due to the member's absence from one session of such hearing, provided that certain conditions are met, or take any other action relative thereto.

Cities/Town Councils

All boards holding adjudicatory hearings

RESOLVED: Be It Resolved by the _____ Council of the City/Town of _____ that the City/Town accept, and hereby does accept, for all boards, committees or commissions holding adjudicatory hearings in the City/Town, the provisions of G.L. c.39, §23D, which provide that a member of a board, committee, or commission holding an adjudicatory hearing shall not be disqualified from voting in the matter solely due to the member's absence from one session of such hearing, providing that certain conditions are met.

Specific boards holding adjudicatory hearings

RESOLVED: Be It Resolved by the _____ Council of the City/Town of _____ that the City/Town accept, and hereby does accept, for the _____ Board, the provisions of G.L. c.39, §23D, which provide that a member of a board, committee, or commission holding an adjudicatory hearing shall not be disqualified from voting in the matter solely due to the member's absence from one session of such hearing, provided that certain conditions are met.