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**RE: P&A CLIENT ADVISORY (2012:01)**  
**Marcus v. Newton, 462 Mass. 148 (2012)**  
**Impact of Field Use Fees on Protection from Liability Under the**  
**Recreational Use Statute, G.L. c. 21, § 17C**

We are writing to advise our public sector clients of Marcus v. Newton, 462 Mass. 148 (2012), a recent decision by the Supreme Judicial Court which has important consequences with regard to the scope and application of the recreational use statute.

This case involved a lawsuit filed by a player in a softball league who was injured on a public field owned by the City of Newton. The City moved for summary judgment, arguing that it was immune from suit under the recreational use statute, G.L. c. 21, § 17C. This statute provides that any person “having an interest in land...who lawfully permits the public to use such land for recreational, conservation, scientific, educational, environmental, ecological, research, religious, or charitable purposes without imposing a charge or fee therefor...shall not be liable for personal injuries or property damage sustained by such members of the public...while on said land in the absence of willful, wanton, or reckless conduct by such person.” The recreational use statute further provides that “[t]he liability of any person who imposes a charge or fee for the use of his land by the public for [any of the above enumerated] purposes...shall not be limited by any provision of this section.” Id. The City argued that Marcus did not pay a fee for use of the field, and although the City did charge the league for “administrative and operational costs,” the charge was not a “fee” that deprived the City of the exemption for liability. The trial court denied the City’s motion and the City appealed.

In its decision, the SJC held that while the recreational use statute provides an exemption from liability for ordinary negligence, it does not provide immunity from suit. This holding is important going forward, because if a trial court denies a public owner’s motion for summary judgment based upon the exemption from liability provided in the statute, the public owner will no longer be able to immediately appeal the denial. The SJC found the recreational use statute provided only an exemption from liability, a right which the SJC held “could be vindicated fully on appeal after trial.” Id. The practical impact of this aspect of the SJC’s decision is that the

cost of defending lawsuits arising from injuries on recreational properties will be more expensive because unsuccessful motions to dismiss or motions for summary judgment based on the recreational use statute will not be reviewable prior to trial.

The second important aspect of the SJC's decision is the Court's holding that exemption from liability does not apply if the landowner charged a fee for the particular use to which the plaintiff put the land, regardless of whether the plaintiff paid the landowner. Although the City argued that the permit charge was to help defray operating and administrative costs associated with the maintenance of the softball field, the Court ruled that the existence of such a charge deprived the City of protection under the statute. The Court did distinguish, however, a charge imposed by a landowner solely for reimbursement of "marginal costs directly attributable to a specific user's recreational use of the property," suggesting that in the future a landowner under such a fact pattern would be immune from liability for ordinary negligence under the statute.

While the Marcus holding is an unwelcome one for municipalities, it still leaves municipalities with the ability to continue to enjoy the protections of the recreational use statute while charging a permit fee for that user's costs of using public land or facilities. Municipalities should compute costs directly attributable to the permit applicant's proposed use of the property, and then charge a "reimbursement fee" limited to the amount required to reimburse the municipalities for costs caused by that applicant's use. Some examples of permissible charges for use of land and facilities from previous decisions interpreting the recreational use statute which were cited in the Marcus decision include (1) using a youth basketball league registration fee to pay custodians to keep the gymnasium open for league games after regular hours, Seich v. Canton, 426 Mass. 84 (1997); and (2) using a one-time entertainment license charge for an event held on City Hall Plaza to pay for security and janitorial services associated with the event, Dunn v. Boston, 75 Mass. App. Ct. 556 (2009).

Please contact Christopher Petrini or any of the other attorneys at P&A should you have any questions regarding the Marcus decision, or how to implement changes in your permitting and licensing procedures and forms for use of public lands/facilities to make certain that your municipality is entitled to take advantage of the protections from liability afforded by G.L. c. 21, § 17C, the recreational use statute.