

Legislative Privilege Recognized in Massachusetts

Under a longstanding doctrine known as legislative immunity, legislators are generally immune from liability for their official acts. A derivative doctrine, legislative privilege, creates a privilege against giving evidence on official legislative acts. Recently, in *Abuzahra v. City of Cambridge*, the Appeals Court formally recognized the legislative privilege in Massachusetts, and held that eminent domain is a legislative act.

In *Abuzahra*, the plaintiff is suing the Cambridge City Council over the taking of his property by eminent domain. The City Council plans to use the property to create affordable housing. The property owner argues that the taking was made in bad faith. During discovery, the City reviewed just over 5,700 emails and withheld fifty-six on the basis of the legislative privilege. The Superior Court judge, concluding that eminent domain is an administrative rather than legislative act, ordered the City to turn over all but one of those emails. The City filed an interlocutory appeal to avoid turning over the emails.

The Appeals Court vacated the Superior Court judge's order. First, it formally recognized the legislative privilege, which no appellate decision in Massachusetts had yet done. As the Appeals Court explained, Massachusetts has long recognized legislative immunity. In part, that derives from the Massachusetts Constitution: [Article 21](#) of the Declaration of Rights states that "freedom of deliberation, speech and debate, in either house of the legislature, is so essential to the rights of the people, that it cannot be the foundation of any accusation or prosecution" of any form. And, as numerous decisions from other jurisdictions reflect, legislative immunity implies a legislative privilege.

The Appeals Court then concluded that the taking was a legislative act. Its decision rested on the roots of the power of eminent domain. Specifically, [Article 10](#) of the Massachusetts Declaration of Rights vests the power of eminent domain in the Legislature. The Legislature then delegates that power to cities and towns. Given that delegation, the Appeals Court concluded that the taking was "legislative in character and thus protected by legislative immunity and the associated legislative privilege."

Finally, the Appeals Court remanded to the Superior Court the question of whether the emails in question were in fact protected by the legislative privilege. It left several questions to be answered on remand: the extent to which emails "between persons other than councilors" are protected, and the extent to which "legislative privilege protects against the disclosure of documents, as distinguished from depositions of legislators or interrogatories aimed at determining their motives and mental processes."

Over time, the courts will work out the scope of the legislative privilege in Massachusetts. For the moment, *Abuzahra* makes unambiguous that legislative processes – including takings proceedings, which are often contentious – have at least some insulation from litigation.

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