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May 7, 2004

BY FACSIMILE - (508)487-9560

Hon. Mary-Jo Avellar and
Members of the Board of Selectmen
Provincetown Town Hall
260 Commercial Street
Provincetown, MA 02657

Re: Board of Selectmen Policy Regarding Issuance of
Marriage Licenses to Same-Sex Couples

Dear Members of the Board of Selectmen:

As you know, in a letter dated March 12, 2004, I provided an opinion to the Board of Selectmen regarding application of Goodridge, et al. v. Department of Public Health, et al., 440 Mass 309 (2003) which legalized same-sex marriages in Massachusetts effective May 17, 2004. I am enclosing a copy of that opinion for your convenience. Following that opinion letter, the Board of Selectmen issued a policy statement saying that, as long as the same-sex couple completed the then applicable notice of intention to marry form and signed the affidavit, that the Town Clerk would issue a marriage certificate regardless of the state of residency of the couple. At the time of my prior opinion, however, I made it clear that the opinion could change depending upon what directive, if any, the state were to provide to town clerks on this issue.

As you know the Town Clerk attended the Department of Public Health ("DPH") marriage information seminar on May 4, 2004, at which time the new marriage forms were presented and instructions were given to town clerks. Attorney Lauren F. Goldberg of this office also attended the information seminar. I have reviewed the Town Clerk's memorandum of May 5, 2004, and I concur that he has correctly summarized the position of the DPH and the Office of the Governor's legal advisor with respect to the issuance of same-sex marriage certificates.

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In essence, there are three categories of same-sex marriage couples which must be addressed. The first is same-sex couples who are currently residents of Massachusetts. The second category is same-sex couples who are not currently residents of Massachusetts but intend to reside in Massachusetts. The third category is same-sex couples who are residents of another state and who do not intend to become residents of Massachusetts.

In my opinion, there is no issue with respect to categories one and two. As the Town Clerk has indicated, the DPH has agreed that marriage certificates may be issued to couples in categories one and two as long as the notice of intention to marry form is filled out completely and the affidavit is signed. Moreover, there is no obligation on the part of the Town Clerk to require proof of residency as long as the oath is signed by the applicants.

The controversy, in my opinion, arises with respect to category three. DPH and the Office of the Governor's legal advisor have indicated that marriage certificates may not be issued to category three applicants. As explained in my opinion letter of March 12, 2004, the marriage statutes which have been on the books since 1913 state that

No marriage shall be contracted in this Commonwealth by a party residing and intending to continue to reside in another jurisdiction if such marriage would be void if contracted in such other jurisdiction, and every marriage contracted in this Commonwealth in violation hereof shall be null and void. (G.L. c.207, §11)

I do not think that there is any doubt that if a marriage certificate is issued in Massachusetts to an out-of-state same-sex couple, that couple may not be able to have the marriage recognized in their state of residence if the laws of that state do not permit same-sex marriages. In my opinion, however, while the question of whether such a marriage would be legally recognized in another state is relevant to the couple obtaining a Massachusetts marriage license, such questions should not impede the Town Clerk from issuing a marriage license as long as the applicants fully and completely fill out the new notice of intention to marry form. As I previously opined, I see nothing in the marriage statutes of Massachusetts which obligates the Town Clerk to be responsible for knowing the marriage laws of all other states. I note, however, that if a couple does not fill out the form completely, i.e., does not sign the affidavit at the bottom of the notice of intention form, the Town Clerk cannot, in my opinion, issue a certificate of marriage.

It is my understanding that the DPH intends to issue a booklet providing a list of impediments to marriage in all other states. It is not clear, however, how the DPH intends to ensure that this is accurate and how it intends to provide updates with regard to the list depending upon future actions taken in other jurisdictions. Moreover, as indicated by the Governor's legal counsel at the clerk training, the Governor has requested an opinion from the Attorneys General of all other 49 states with regard to whether there is an impediment to same-sex marriage in each of their respective states. I find it highly unlikely that the Attorneys

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General of all 49 states will respond, and, in fact, several of them have indicated in press accounts that they have no intention of responding.

It would appear, therefore, that the Office of the Governor and the DPH are expecting Town Clerks to abide by a list of impediments prepared by the Governor's office which necessarily contain a legal opinion concerning the legality of same-sex marriages in other jurisdictions, a legal opinion which I would submit the Governor's office is not capable or authorized to make. Furthermore, the position which DPH has taken appears to be internally inconsistent. The DPH is saying that town clerks may rely on the oath for purposes of establishing residency or an intention to become a resident of Massachusetts (categories one and two), but town clerks may not rely on the same oath to issue category three licenses. Nowhere in the informational materials does DPH satisfactorily explain this inconsistency.

Accordingly, in my opinion, should the Town Clerk follow the directive received from the DPH by refusing to issue marriage certificates to non-resident same-sex applicants, there is certainly a possibility that the Town Clerk would be wrongfully refusing to issue marriage certificates at least in some circumstances. Of course, there is an equal possibility should the Town Clerk issue marriage certificates to all category three applicants, such marriage certificates would not be valid. I would submit, however, that this is a consideration which need not enter into the Town Clerk's decision, although I would recommend that category three couples be informed by the Town Clerk that their Massachusetts marriage certificate may not be valid under G.L. c.207, §11. Moreover, the Governor's office does not appear to be requiring opposite-sex couples who do not intend to reside in Massachusetts to provide evidence that they are not prohibited from marrying in their state of residence. Presumably, their oath is sufficient. It is certainly possible, therefore, that, under the Governor's procedures, opposite-sex couples who would otherwise be prohibited from marrying in their state of residence will be issued a certificate of marriage in Massachusetts. The same risks cited by the Governor's legal counsel relative to issuance of certificates of marriage to same-sex who intend to reside out of state would be applicable to opposite-sex couples who intend to reside out of state.

As I indicated in my prior opinion, the decision of how the Town proceeds with respect to the issuance of same-sex marriage certificates to category three applicants may very well result in litigation against both the Town and the Town Clerk. Should the Town Clerk decide to issue marriage certificates to category three applicants, it is possible that the Commonwealth would commence a civil action against the Town and the Town Clerk and request a preliminary injunction enjoining the Town Clerk from issuing category three marriage certificates. In that circumstance, the Town would be required to pay for and defend that action since such an action would not likely include claims for monetary damages for which insurance coverage would be available. If the Town Clerk decided to issue such certificates, the result as it effects the couple would be substantially similar to the result if a license was issued to a couple who would otherwise be prohibited from marrying in their state of residence based on consanguinity or

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affinity, or due to the existence of another marriage. In other words, the issue of whether the marriage was valid would be the responsibility of those issued the marriage license.

If, on the other hand, the Town Clerk were to refuse to issue marriage certificates to a category three applicant, it is equally possible that a civil rights action could be filed against the Town Clerk for which monetary damages may be sought. In such a circumstance, the Town should pursue insurance coverage and defense costs from the Town's insurer.

As I explained in detail in my March 12, 2004, opinion letter, there is also a possibility that, should the Town Clerk issue marriage certificates to category three applicants, the Commonwealth would file a criminal complaint against the Town Clerk pursuant to G.L. c.207, §50, which makes it a misdemeanor for the Town Clerk to issue a certificate "knowing that the parties are prohibited by Section 11 from inter-marrying." There is a substantial question in my mind, as explained in my prior opinion letter, whether that criminal statute would be enforceable under the circumstances described herein. In my opinion, the Town Clerk cannot be charged with "knowingly issuing a marriage certificate in violation of Section 11" merely by virtue of the fact that a list has been prepared by the DPH providing a legal opinion as to whether there are impediments to same-sex marriages in other jurisdictions. Since such a list would necessarily entail legal conclusions which, at a minimum, would be enforceable against town clerks only if the chief legal officer of the Commonwealth, i.e., the Attorney General, concurred. Even if the Attorney General were to endorse the list being prepared by DPH, it is still doubtful that c.207, §50 could be criminally enforced for the other reasons stated in this opinion.

Second, in my opinion, a question remains as to the definition and applicability of the term "intermarrying" found in G.L. c.207, §§12 and 50. If the references to "intermarrying" refers to marriages among members of a family, the only matter relevant to the issuance of a marriage certificate to out of state same-sex couples under this statute would be whether the couples are in compliance with the applicable requirements relative to consanguinity and affinity. If the reference to "intermarrying" in G.L. c.207, §§12 and 50 reflects an attempt in 1913 to enforce the laws of other states which then prohibited inter-racial marriage, in my opinion, there is a substantial question as to whether those provisions would be deemed unconstitutional by the Supreme Judicial Court. Finally, I am aware that a bill has already been filed, and, as recently as today have read newspaper press accounts indicating that there is additional movement in the General Court, to repeal G.L. c.207, §§11 and 12.

In conclusion, while the alternative which presents the least risk of legal liability to the Town and the Town Clerk may be to abide by the directive received from the DPH and not issue marriage certificates to category three applicants, in my opinion, should the Board of Selectmen decide not to change its previously announced policy, in my opinion, such a decision has a reasonable basis in law.

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If a determination is made to issue licenses to category three couples who sign the notice of intention under oath, I recommend that the Town Clerk make people aware of the risks involved, in a manner similar to that contained in the attached draft "Informational Notice." Please note that the Notice would be provided to all out-of-state couples who do not intend to reside in Massachusetts. The Notice will inform couples that if an impediment to marriage exists in the couple's state of residence there is a substantial possibility that the marriage will not be entered into the records maintained by the Registry of Vital Records and Statistics, even though the couple has been issued a certificate of marriage, and that the marriage may not be legally recognized in the couple's state of residence. The Notice also indicates that if the couple has concerns relative to such information, the couple should consult with an attorney.

Should you need any further assistance with regard to this matter, please do not hesitate to contact me.

Very truly yours,

John W. Giorgio

JWG/bp

Enc.

cc: Town Manager
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