KOPELMAN AND PAIGE, P.C.

ATTORNEYS AT LAW
31 ST. JAMES AVENUE
BOSTON, MASSACHUSETTS 02116-4102

(617) 556-0007
FAX (617) 654-1735

March 12, 2004

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

Re: Issuance of Marriage Certificates to Same-Sex Couples after May 17, 2004

Dear Ms. Avellar:

You have requested an opinion regarding appropriate procedures for the issuance of marriage certificates to same-sex couples after May 17, 2004, the day the stay of the decision in Goodridge, et al. v. Department of Public Health, et al., 440 Mass. 309 (2003), is expected to be lifted, assuming no further action by the Supreme Judicial Court.

In my opinion, the Town Clerk may reasonably rely on the information and affidavit contained on the notice of intention to marry without having to conduct any further inquiry as to whether the applicants are residents of Massachusetts, or whether, in the case of non-residents, there is any legal impediment to their marriage in their state of residence I must caution the Town that this opinion could change before or even after May 17, 2004, depending on further developments in the law, or specific instructions received from the Commonwealth of Massachusetts.

The Supreme Judicial Court in Goodridge held that "barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution." The Court stayed its decision for 180 days, however, to allow the State Legislature to take, "appropriate action in light of [its] decision. Since the issuance of the Goodridge decision, there have been several developments. The Massachusetts Senate asked the Justices of the Supreme Judicial Court, in SJC No. 09163, Request for Advisory N. 1-107, whether a so-called civil union bill (S. Bill No. 2175) would be

constitutional. In a decision rendered on February 3, 2004, the Court advised the Massachusetts Senate that a bill proposing civil unions did not meet the constitutional standard articulated in Goodridge. Furthermore, the General Court is holding a Constitutional Convention to consider an amendment to the Massachusetts Constitution in response to Goodridge. No such constitutional amendment could be enacted before November 2006, however. In the meantime, it is my understanding that the Town Clerk has received numerous phone calls from Massachusetts and out-of-state residents regarding the process for obtaining a same-sex marriage certificate in Massachusetts after the expiration of the stay. Furthermore, in the short time since the Goodridge decision was issued, there have been a number of fast moving developments in other states and local jurisdictions that, in my opinion, has made it increasingly more difficult for the Town Clerk to determine what the law regarding same-sex marriage may be on a given day in a particular jurisdiction.

As I previously opined, if the General Court takes no action and the stay on the Goodridge decision expires, same-sex marriages will become legal in Massachusetts. At that time, the Town Clerk may begin to accept notices of intention of marriage and issue certificates of marriage. As you know, in a letter dated March 4, 2004, we requested an informal opinion from the Attorney General on the questions addressed in this letter. He replied by declining to provide any advice, and suggested, in the alternative, that we ask the Department of Public Health, Bureau of Vital Statistics and Records to answer the Town's questions. We have since done that, but we have yet to receive a response. It is possible that Town Clerks will not receive any guidance or advice from the state prior to May 17, 2004.

In processing notices of intention and issuing marriage certificates for same-sex couples who are residents of Massachusetts, in my opinion, the Town Clerk should proceed exactly as he does for other marriages. Thus, if the notice of intention of marriage indicates that the same-sex individuals are residents of Massachusetts, the Town Clerk should issue the marriage license in the same manner as he would to opposite-sex individuals.

When completing a notice of intention of marriage, all couples must sign an affidavit affirming that the statements contained therein are true. G.L. c.207, §20. The current form contains the following certification:

> We/I hereby state that there is an absence of any legal impediment to the marriage and do hereby depose and say that all of the statements as set forth in the above notice whereof we/I, could have knowledge are true and are made under the penalties of perjury (c.4, §6, Rule 6 General Laws).

Further, G.L. c.207, §52 provides that, "Whoever violates any provision of section twenty, and whoever falsely swears or affirms in making any statement required under section twenty, shall be punished by a fine of not more than one hundred dollars." It is my understanding that if a couple lists a Massachusetts address as their residence and signs the notice of intention under oath, Town Clerks generally issue a marriage certificate without requiring any additional proof of residence. In my opinion, therefore, if a same-sex couple indicates on their notice of intention of marriage that they reside in Massachusetts by giving a residence address in Massachusetts, and thereafter signs the notice of intention under oath, the Town Clerk must treat that notice of intention the way he would treat a notice of intention filed by any other person.

The Town Clerk may, pursuant to the provisions of G.L. c.207, §35, look behind the affidavit on the notice of intention of marriage and request depositions under oath (i.e., ask additional questions under oath) if he has reason to believe that any statement made thereon is in error. Such action would only be necessary or appropriate, in my opinion, to the extent that it would be in processing any other notice of intention (for example, if the name of a town that is not found in Massachusetts is set forth on the affirmation or there is some other equally glaring error).

With regard to out-of-state residents who file a notice of intention of marriage with the Town Clerk, in my opinion, the Town Clerk may also reasonably rely on the affidavit contained in the notice. There are two provisions of the General Laws, both enacted in 1913, which address the issue of legal impediments to out-of-state residents seeking marriage certificates in Massachusetts.

Section 11 of G.L. c.207, provides as follows:

> 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.

In addition, Section 12 of G.L. c.207, provides:

> Before issuing a license to marry a person who resides and intends to continue to reside in another state, the officer having Authority to issue the license shall satisfy himself by requiring affidavits or otherwise, that such person is not prohibited from intermarrying by the laws of the jurisdiction where he or she resides.

Although up until recently, one could argue that it was "common knowledge" that no other state in the United States permits same-sex couples to marry, there has been a recent flurry of activity, including legal actions and opinions rendered by various attorneys general on the subject of the constitutionality and/or legality of same-sex marriages it is now no longer possible ,in my opinion, for a Town Clerk to be charged with knowledge of the particular laws of any given jurisdiction. Accordingly, in my opinion, it would be reasonable for the Town Clerk to rely upon an affidavit signed by the applicants that there is no "legal impediment to the marriage." This opinion, however, could change in the event that the Commonwealth's Department of Public Health, Bureau of Vital Statistics and Records issues any particular guidance to Town Clerks prior to May 17, 2004. For example, should the Commonwealth issue a directive to the Town Clerks to deny marriage certificates to residence of particular jurisdictions based upon current law, in my opinion such a directive would, at least, raise a rebuttable presumption that the individuals are prohibited from marrying in that particular jurisdiction. Since the Town Clerk has the discretion under G.L. c.207, §35, to refuse to issue a certificate "if he has reasonable cause to believe that any of the statements contained in the notice of intention of marriage are incorrect," the Town Clerk may reasonably rely on information, if any, provided by the state. Whether the Town Clerk could disregard such information and issue a marriage certificate notwithstanding information provided by the state would, in my opinion, depend upon the particular facts.

The adoption of a policy consistent with this opinion letter, however, is not without some risk, primarily to the Town Clerk. I would note that G.L. c.207, §50, provides as follows:

> Any official issuing a certificate of notice of intention of marriage knowing that the parties are prohibited by Section 11 from intermarrying, and any person authorized to solemnize marriage who shall solemnize a marriage knowing that the parties are so prohibited, shall be punishable by a fine of not less than $100 or more than $500 or by imprisonment for not more than 1 year or both.

In my opinion, Section 50 is a criminal statute and, in order to sustain an action against the Town Clerk for issuing a marriage certificate in violation of Section 50, the Commonwealth would have to show that the Town Clerk issued the certificate "<u>knowing</u> that the parties are prohibited by Section 11 from <u>intermarrying</u>." [Emphasis added]. Given the rapidly changing law on this question, in my opinion it would be extremely difficult for the Commonwealth to charge the Town Clerk with particular knowledge of the laws of all 50 states and their numerous political subdivisions. If, however, the Bureau of Vital Statistics and Records were to issue a listing of states, and perhaps even local jurisdictions, where same-sex marriage is prohibited, it

might be somewhat more difficult for the Town Clerk to justify the issuance of a marriage certificate to residents of those jurisdictions. On the other hand, Section 50 specifically references a prohibition against "intermarrying." Although Section 11 does not use the term "intermarrying," it generally prohibits a marriage contract "if such marriage would be void if contracted in such other jurisdiction." The term "intermarrying" is used only in Section 12 which requires the Town Clerk, before issuing a marriage license, to satisfy himself that the person is not prohibited from "intermarrying" by the laws of the jurisdiction where he or she resides.

In my opinion, the use of the word "intermarrying," in Sections 12 and 50 is instructive. The dictionary definition of "intermarrying" is "to marry within ones family, tribe, or clan." In the context of 1913, when these statutes were enacted, it is reasonable to conclude that the Legislature was concerned with prohibiting marriages in Massachusetts of out-of-state resident, where the laws regarding consanguinity might prohibit a certain degree of blood relatives from intermarrying. In my opinion, to read into these statutes criminal liability on the part of the Town Clerk for knowingly issuing a marriage certificate to an out-of-state same-sex couple whose state of residence does not allow such marriages, may not be appropriate, absent an amendment to these sections of the General Laws.

Please do not hesitate to contact me with further questions.

Very truly yours,

John W. Giorgio

JWG/ja
cc: Town Manager
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