CHAPTER 12

Land Use

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A. EMINENT DOMAIN

§12.1. Premature announcement of taking: Right of owner to compensation for property value loss. In Cayon v. City of Chicopee, the Supreme Judicial Court was confronted with the problem of whether an owner of land should be compensated for the diminution of the value of his property resulting from announcements of its condemnation by a city agency which later failed to take the property.

Under G.L. c. 79, §12, one whose property is actually taken by eminent domain is entitled to damages equal to the value of the land as of the time the recording of the order is made. Thus in cases where the value of the land has been inflated because of knowledge of the taking, the landowner has not been allowed the advantage of this increase in the property's value. The court in Lipinski v. Lynn Redevelopment Authority held that since a landowner could not gain monetary advantage from knowledge of an upcoming taking, neither could he be disadvantaged by a decrease in the value of his property due to knowledge of the taking. In Alden v. Commonwealth, the court was again confronted with the problem of general increases of land values created by the knowledge of a taking in the area. In this case the Commonwealth took the petitioner's land to build Route 495 and its interchange with Route 9. The trial judge allowed into evidence as a "comparable" the purchase price of land adjacent to that of the petitioner but excluded testimony that the "dominant factor" which led to this purchase was the land's proximity to the anticipated project. The court in that case held that this exclusion

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was prejudicial and reasoned that only with careful limiting instructions might knowledge of the amount received on such a sale aid the jury's valuation.8 Again, the court was expressing concern that the knowledge of anticipated takings not unduly distort the value of the nearby lands and thus not be improperly considered in the award given to a landowner.

In Cayon, unlike the above cases, the land was never actually taken. The diminution in the value of the land in question resulted solely from announcements of takings which never transpired. However, the problem arising is somewhat similar to those posed by the above-mentioned cases. In all these cases, the court is called upon to consider what compensation a landowner should receive due to fluctuations in the value of his property resulting from announced governmental intentions to take his land. For several years, the City of Chicopee and the Chicopee Redevelopment Authority had publicly announced that the petitioner's property was included in an urban redevelopment area and would eventually be taken. As a result of the announcements it was alleged that the sale and rental value of the petitioner's land decreased to such an extent that the petitioner was unable to pay the taxes levied upon the property.6 The court was unwilling to accept the petitioner's argument that such action was taken pursuant to the eminent domain provisions of G.L. c. 79, §10. The court also rejected the petitioner's contention that the redevelopment authority's announcement deprived him of the use and enjoyment of his property in violation of the "due process" guarantees of the Massachusetts and United States Constitutions. The court held that the city's action in announcing that the petitioner's land would be taken for urban renewal purposes and then failing to execute the taking did not constitute a taking for which compensation should be paid.7

The central question in the case was what constitutes a "taking" within the meaning of the Massachusetts and United States Constitutions. While the court recognized that a taking of private property could occur without an actual physical invasion of the locus, it followed the traditional view that a physical disruption of some sort must occur before a compensable taking can occur. As the court stressed: "Whether property has been taken for a public use so as to require just compensation is determined by the character of the invasion, not by the amount of damage suffered."8 With regard to premature public announcements of takings and the resulting decrease in the market value of the subject land, the court commented that "changes in value due to these causes are no more than incidents of ownership in a jurisdiction such as ours where all land is subject to the exercises of the power of eminent domain."9 The court

8 351 Mass. at 87, 217 N.E.2d at 746.
7 Id. at 1787, 277 N.E.2d at 119.
8 Id. at 1789, 277 N.E.2d at 119.
9 Id. at 1788, 277 N.E.2d at 119.
seemed to reject the petitioner's contention that interference with private property which destroys or lessens the value of property, at least in the present type of case, is the infringement of a right which the court should safeguard and recognize as involving a right under the law of eminent domain.

The most persuasive argument advanced in denying the petitioner relief concerned the public policy of fostering such advance announcements of intended takings so that all interested groups in the community might have ample opportunity to articulate their case for or against a proposed taking. The public benefit of full disclosure and public response outweighs the detriment suffered by the landowners in the area designated for future taking.

The difficulties in organizing urban renewal projects at present, in view of both federal and local procedures which must be complied with and the various hazards which must be overcome, can result in the holding of land in a type of economic-use limbo for lengthy periods of time. The Legislature might well consider adoption of a method by which, if land is held in a designated area for a certain period of time, compensation would be paid for whatever reduction in economic worth occurred. This compensation would, it would seem, be based upon the difference in rental value of the land caused by the possible prospective taking. Thus a landowner, in the position of the one in the present case, could obtain some compensation if the holding period becomes unreasonable. The community, or other taking agency, may have some greater costs in such a delayed taking but it would not seem unfair to make the public pay for the economic loss of a landowner that continues for a time beyond that ordinarily required for proper public announcements and consideration.

§ 12.2. Taking of leasehold interest: Right of lessee to damages from taker. Universal Container Corp. v. City of Cambridge presented the question of whether a plaintiff lessee with a recorded property right in premises taken by eminent domain has an independent claim for damages for loss of his interest, which is different from his right to recover, from the lessor, a share of the amount paid to the lessor by the taking entity. In answering this question, the Supreme Judicial Court allowed the lessee's independent claim.

The case involved a petition for assessment of damages under G.L. c. 79, §§14, 22, for a taking by the City of Cambridge of the petitioner's leasehold estate. The petitioner, who appealed from the trial court's judgment for the respondent, was the sole tenant of land owned by the lessor, one Chapper, in accordance with a lease which ran from March 14, 1962

10 Id. at 1790, 277 N.E.2d at 119.

to March 14, 1975. The petitioner operated a business on the land up to and including the date of taking. On August 19, 1968, the city took the land and made a lump sum payment to the lessor of $217,000. Although the city had constructive notice of the petitioner’s recorded lease, the petitioner was not made a party to the transaction and was not compensated for his leasehold interest, which was valued at $30,000.

Adopting the logic of *Kahler v. Marshfield*, the Supreme Judicial Court reasoned that since payment to the lessor was made in violation of the lessee's recorded property right of which the city had constructive notice, the lessee was entitled to a direct recovery from the city. The Court held that the lessee was not limited to recourse against the lessor but had an independent claim against the city. It was furthermore stated that the lessee’s claim could not be extinguished by a settlement between the lessor and the city and that it was immaterial to the lessee’s claim against the city whether or not the lessee could recover from the lessor.

In this decision and in the earlier *Kahler* case, the court has moved away from the rule allowing a lump sum payment to be awarded to the owner of the fee in an eminent domain taking and leaving those who hold separate interests to work out the division of the award amongst themselves in later proceedings. The new rule should not be used to avoid the standard policy that the total of damages payable upon a taking shall not, except in highly unusual circumstances, differ from the value determined as if the interest taken was held in sole ownership. But it will assure that all persons with interests in land taken by eminent domain have the opportunity to participate in the determination of damages. Attorneys for the taking agencies will thus have to examine the records carefully to be certain that all parties with interests in land being taken are included in the condemnation proceedings. Otherwise these agencies will be subjected to the risk of multiple suits and the further risk, at least on facts similar to those of *Kahler*, of having to pay overlapping damages.

§12.3. Discretion of public officials: Allegations maintaining cause of action for abuse. In *Richmond Brothers, Inc. v. City of Quincy* the Supreme Judicial Court was presented with the issue of what constitutes sufficient allegations of specific facts to state a claim for abuse of official
discretion in an eminent domain taking. The court was unwilling to relax the strict rule set out in the recent cases of Poremba v. City of Springfield\textsuperscript{2} and Moskow v. Boston Redevelopment Authority\textsuperscript{3} that to state a cause of action alleging that the primary purpose of a taking is not in the public interest, the bill must set forth specific allegations of particular facts supporting the inference that the taking was improper. Consequently, it denied the plaintiff relief on the basis that his bill of complaint failed to aver "unequivocally specific" facts to maintain a cause of action.

The plaintiff's complaint in Richmond Brothers, which sought a declaratory decree that a taking by the city of Quincy of a parcel of his land was invalid, was based on the following allegations: On April 14, 1969, the State Street Bank and Trust Company published a development plan which included the plaintiff's land within its development area. The bank did not own the plaintiff's land at this time but contemplated that it would eventually buy it. On August 22, 1969, the bank offered in writing to purchase the parcel from the plaintiff, but the plaintiff declined the offer. On September 4 an attorney for the bank informed the plaintiff that if the offer was not accepted, the city would take the land. At a city council hearing held in June of 1970, the city made known the nature of its plans for a highway which was to be approximately 250 feet long and which was to lead from a public highway through the land of the plaintiff to the development area of the bank. Finally, the City Council voted to take the plaintiff's parcel for "highway purposes" on August 13, 1970. The order was approved by the Mayor on August 19 and recorded in the Norfolk County Registry of Deeds on September 18 of that year.

The plaintiff argued that the proposed public highway was in fact a private driveway access for the bank's project and that the primary purpose of the taking was thus private in nature. The plaintiff further maintained that the incidental public benefit to the employees and customers of the bank did not warrant the taking in eminent domain. On the basis of the alleged facts, the plaintiff urged that the court rule that the taking was primarily for the benefit of the State Street Bank and Trust Company and not for any overriding public purpose. Citing Poremba and Moskow, the court denied the plaintiff relief and held that the allegations set forth did not unequivocally describe action by public officers in bad faith or nor did it allege facts sufficient to show that the taking of the plaintiff's property was for a private purpose.\textsuperscript{4}

A review of the fact situations in both Poremba and Moskow would be

\textsuperscript{2} 354 Mass. 432, 258 N.E.2d 43 (1968).
helpful in understanding the holding in the present case and in evaluating the court's general policy in this area. In *Poremba*\(^5\) the court denied the plaintiff declaratory relief in connection with a taking of his land for highway purposes. The plaintiff alleged that his land was taken not for any public purpose, but for the private benefit of one Albano who owned a large tract of business-zoned land contiguous to the parcels taken. The plaintiff alleged that prior to the taking Albano tried to buy the parcels and indicated that the city would take the parcels if he refused to sell. As in the *Richmond Brothers* case, the court sustained the city's demurrers to the plaintiff's bill of complaint on the basis that the plaintiff did not unequivocally set out facts showing a case presenting a significant controversy. The court in *Poremba* stressed that wide discretion is entrusted in public officials and bodies charged with responsibility for takings in eminent domain. It stated that it was willing to review such discretion only when clear "allegations of underlying facts (as distinguished from conclusions)" have been stated which charge that a taking was not for a public purpose or that official action was in bad faith.\(^6\) In both of these cases, the court found no such specific factual allegations.

Nor were such specific allegations set forth in *Moskow v. Boston Redevelopment Authority*.\(^7\) In that case the plaintiff also alleged that the primary purpose of a taking by the Boston Redevelopment Authority was not for a public purpose but to provide a site for a new office building to be occupied by a private bank. The plaintiff alleged that when the Authority proposed to take the defendant bank's building for an access route to the Government Center Project, the bank strongly protested and made a deal with the defendant authority. The alleged deal provided that the bank would withdraw its objection, try to purchase the plaintiff's property, and if successful, convey the property to a developer to erect upon the site a new tower building in which the bank could lease the first ten floors for its banking operations. The bank was then to sell its property in the proposed access route to the Authority reserving its right to possession until the new building was ready. The alleged agreement further provided that if the bank were unable to purchase the property, the Authority would take it by eminent domain to accomplish the terms aforementioned. Again, the Court found that the allegations were "broad generalities"\(^8\) factually insufficient to sustain the complaint and com-


\(^6\) The court specifically held that:

The allegations concerning Albano's prior negotiations to purchase some of the affected parcels and his indication that the properties would be taken, if not sold to him, do not contain specific facts sufficient to describe action by public officers or bodies in bad faith.

Id. at 435, 238 N.E.2d at 46.


\(^8\) Id. at 564, 210 N.E.2d at 706.
mented that rhetoric was not an adequate substitution for allegations of specific facts.\footnote{Id. at 562, 210 N.E.2d at 705. In this regard the court stated: “A most significant omission is any allegation that the members of the Authority were to the least extent involved in any negotiations with the bank or had authorized them or even knew about them.” Id. The court also noted that: “The negotiations said to have taken place among representatives of the bank, of the Authority, and of ... [the developer] do not identify the representatives of anyone, and of the Authority in particular. We cannot supply an allegation that any representatives were authorized to bind the Authority to such an “understanding” which the plaintiffs insist was improper. We do not construe these allegations as meaning that any member of the Authority was such a representative. We infer that none was.” Id. at 564, 210 N.E.2d at 706.}

In \textit{Richmond Brothers, Poremba, and Moskow} the court has indicated its strong reluctance to interfere with the wide discretion that has been delegated to officials and agencies in exercising their powers of eminent domain. Generally, one can agree with this policy. The proper exercise of delegated authority must generally be assumed in our complex society if government is not to be hindered in proceeding in the exercise of its powers. One might well question the wisdom of the court in the present cases, however, in setting such a high standard of specificity of alleged facts. Considering the covert nature of the alleged dealings in these cases, the various plaintiffs might never have access to sufficient information early enough in the litigation to withstand a demurrer. Whether an official or agency has acted corruptly, irrationally or without justifiable basis might become obvious only at trial or at least upon pretrial interrogatories or depositions. The decisions of the court in these three cases may in some situations shield official abuse of power from redress by individuals when strong economic interests seek to ignore or override a landowner’s constitutional rights.

\section{12.4. Discretion of selectmen: Taking portion of locus when authorization was for taking of entire locus} In \textit{Russell v. Town of Canton} the issue presented to the Supreme Judicial Court was whether the order of a board of selectmen for a taking was invalid when the town authorized the taking of all of the plaintiffs’ land and the board actually took less than all of it. Affirming the judgment of the trial court, the Supreme Judicial Court held that the board’s taking was valid in all respects and was authorized by the town meeting vote.\footnote{Id. at 947, 282 N.E.2d at 429.}

The plaintiffs in \textit{Russell} owned 22 acres of land in Canton. By two separate deeds dated July 5, 1932 and January 23, 1964, they conveyed 4.86 acres of their land to the town of Canton for use as a dump. On March 9, 1964, the town of Canton voted that “the sum of $36,000 be

\footnote{\begin{tabular}{l}
\textit{Id. at} 947, 282 N.E.2d at 429.\
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raised and appropriated ... for the purpose of acquiring by eminent domain or by purchase, approximately 18 acres of land ... owned by William C. and Richard V. Russell ... for the purpose of extending the present [town] dump. ..." On May 22, 1964, in accordance with the article adopted at the town meeting vote, the selectmen voted to take 15.25 acres of the plaintiffs' land to extend the municipal dump and to award $30,500 plus a tax allowance as compensation for the taking. The petitioners refused to accept any part of the awarded damages and brought a bill in equity seeking money damages and specific affirmative relief against the town, the board of selectmen, and the treasurer and superintendent of the town's department of public works. The Superior Court found that the board of selectmen's taking was valid and consequently dismissed the bill.

On appeal to the Supreme Judicial Court the petitioners contended that the town vote expressly directed the board of selectmen to take all of their land and that the board had no discretion to take less than all of it. In rejecting this argument the court stated: "It is questionable whether a town meeting vote can operate to direct or command them [selectmen] in the discharge of their duties." The court cited several cases holding that towns may not direct public officers in the discharge of their statutory duties. It pointed out that although G.L. c. 40, §14 requires that land that is to be taken by eminent domain must first be authorized by a town vote, the power to make the taking is ultimately vested in the discretion of the selectmen. While the town could authorize the selectmen to take real estate by eminent domain it could not direct or command them to do so.

In the alternative the petitioners argued that if the town vote was an authorization and not a directive, it authorized only the taking of their entire property and not just a part of it. The court also rejected this argument on the ground that nothing in the warrant or vote of the town purported to state precisely the amount of land authorized to be taken, but rather estimated the extent of the authorized taking. Since the 15.65 acres actually taken were included in the general language of the authorization ("approximately 18 acres of land"), the court felt that the board took no land that was not covered by the authorization. The court did not pass on whether a town's authorization could limit or condition a taking by the selectmen by express language requiring that the entire authorized parcel be taken. It limited itself to the facts of the case and

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3 Id. at 942, 282 N.E.2d at 421.

4 The warrant stated: "[A]nd that the Selectmen are hereby authorized and directed to acquire the entire locus. (Emphasis added.) Id.

5 Id. at 945, 282 N.E.2d at 422.


held only that the selectmen's vote was authorized by the town and valid in all respects.

§12.5. Discretion of trial judge: Award of damages and motion for a new trial. In Loschi v. Massachusetts Port Authority,1 the Supreme Judicial Court, in a 4-3 decision, reaffirmed its policy of allowing a trial court judge almost complete discretion to grant or to refuse a new trial in cases of alleged inadequate or excessive awards of damages by a jury for eminent domain takings. The Massachusetts Port Authority made a taking of several contiguous parcels of petitioner's land with buildings located thereon in the East Boston area. In her petition for damages the petitioner testified that the fair market value of her property was $59,500 and she evidenced detailed descriptions of her property with numerous color photographs. The respondent's expert witness, by use of the income capitalization method and by determining the rental value under this method for rents actually collected on the property, valued the property at $33,300. Notwithstanding the opinions of value introduced into evidence, the jury returned a verdict for the petitioner in the amount of $76,000.

The respondent argued that the judge abused his discretion in denying a motion for a new trial in view of the unusual jury action of granting a verdict so much greater than the highest opinion of value put into evidence. The Supreme Judicial Court rejected this contention and stated: "The judge's action will be reversed only where the damages awarded were 'greatly disproportionate to the injury proved' or where 'it appears to the judicial conscience ... that otherwise a miscarriage of justice will result.'"2 While the court noted that Nichols on Eminent Domain states as a general proposition that damages for a taking should not be in excess of the amount claimed by the owner nor less than the lowest estimate offered by any witness,3 it did not read Nichols as stating a rule to which there are no exceptions. Thus it was held proper to set aside an award where there was a difference of opinion between the jury and the witnesses and where there was "other evidence" on which the jury may have independently reached its assessment of damages.4 The majority of the court was unwilling to depart from the previously established policy of not interfering with the discretion of the trial judge to grant or refuse a new trial even under the extraordinary circumstances of this case. Accordingly, the court held that the trial judge did not abuse his discretion in refusing to grant a new trial. The court reasoned that the color photographs and detailed information introduced into evidence by

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3 5 Nichols on Eminent Domain §17.3 (3d ed. 1969).
the petitioner, and the testimony of the Authority's expert, were "other evidence" by which the jury could properly have concluded that the opinions of value introduced were disproportionately low.\(^5\)

As noted above, three of the justices dissented on the basis that the verdict was not warranted by the evidence. On balance, however, the majority was probably correct in this case, even though the difference between the expert opinion and award actually made was so substantial. The landowner was not herself an expert so her opinion, although clearly admissible, has to be viewed as the opinion of one probably not as informed on property values as a true expert might be. Moreover, the Authority's expert's use of an income capitalization method, particularly when based on actual rents received rather than on market value rents, is a trifle suspect. There seems less reason than in the usual case to apply the general rule stated by Nichols on Eminent Domain\(^6\) since neither opinion of value was very compelling evidence and the other evidence may well have been more indicative of actual value.

\section*{Evidence of damages: Comparability and possibility of rezoning.}

In \textit{Lee v. Commonwealth}\(^1\) a petition for assessment of damages was brought in superior court by one Lee for the taking of certain land owned by him which was located on Route 2 in Arlington where the municipal boundaries of Arlington, Belmont and Cambridge join. Although the locus was zoned for residential use, the adjoining land on Route 2 in Cambridge was zoned and developed for business. A verdict and judgment for petitioner were returned in superior court in the amount of $35,000. To this the Commonwealth filed a bill of exceptions which was concerned solely with several evidentiary rulings made by the superior court.

On appeal to the Supreme Judicial Court the Commonwealth argued that the ability of the jury to arrive at a fair market value of the land was impaired by the trial judge's exclusion of certain documents which showed restrictive agreements that encumbered the land and thereby diminished its value. These agreements provided that if Star Market Company were the buyer of the land, the land would be free of restrictions, but if an outsider negotiated to buy the land, the market would be given up to forty-five days to meet the offer. In any case, if Star Market were not to meet the offer within the expiration of 45 days, the outsider could buy the land free of restrictions. The Supreme Judicial Court rejected the Commonwealth's argument that the forty-five-day delay would interfere substantially with the saleability of the land or considerably deter potential buyers from negotiating for the land. The court correctly

\(^5\) Id., 282 N.E.2d at 419-20.


\section*{1972 Mass. Adv. Sh. 646, 281 N.E.2d 239.}
held that these restrictions had only minimal effect on the fair market value of the land and their introduction in evidence might only have served to confuse the jury. ²

The Commonwealth maintained, as its second objection, that it was error on the part of the trial judge not to strike the opinion of the petitioner's expert witness who partly based his opinion of the value of the land on the possible likelihood that the land would be rezoned for a business use. While the Commonwealth charged that the witness was in effect "rezoning the property on the witness stand," the Court held that there was no error since "the jury could warrantably find that a willing buyer's evaluation of the land could be influenced by the possibility of a change in zoning."³

Nor did the court agree with the Commonwealth's third contention that the petitioner's expert was improperly permitted to use comparable land in Cambridge as a basis for his determination of the value of the petitioner's land in Arlington. The Commonwealth argued that although the Arlington land was separated from similar land in Cambridge only by an imaginary town dividing line, the value of the Cambridge land might be considerably different from that in Arlington since Cambridge is forced to minimize zoning restrictions and foster tax-yielding uses to compensate for all its tax exempt property.⁴ Unconvinced by this argument, the court held that the trial judge's refusal to strike the opinion of the witness was in order and that the jury could properly find that the sales values were substantially comparable.⁵ Apparently the court felt that any difference in zoning restrictions between the adjacent lands in Arlington and Cambridge was too insignificant a factor to warrant the exclusion of evidence of the sales price of similar nearby Cambridge land.

The court was no more amenable to the Commonwealth's fourth argument that it was improperly restricted in the use of evidence showing unfavorable soil conditions on the land. Between the date of the taking in 1962 and the date when the evidence on soil condition was determined in 1969, the Commonwealth had placed fill on the property. The court affirmed the ruling of the trial judge that the evidence could not be properly admitted since the jury would have had no way of differentiating between the condition of the land in May of 1969, when the borings

² Id., 281 N.E.2d at 240.
³ Id.
⁴ More specifically, the Commonwealth argued that even though the petitioner's land was similar in almost every other respect to the adjacent land in Cambridge, the land in Cambridge was inherently more valuable as commercial property due to less stringent zoning restrictions in Cambridge. Thus, maintained the Commonwealth, the introduction in evidence of the value of the Cambridge land as an index of value for the petitioner's land was improper and misleading. Id.
⁵ Id.
were made, from the condition of the land in 1962, when the land was taken.

§12.7. Evidence of value: Comparability and Hatch Act limitations. In Quirk v. Town of Maynard,1 the Supreme Judicial Court, in a rescript opinion, upheld the admission of certain types of valuation evidence in the taking of land for water purposes. Between May 18, 1965 and March 15, 1967, the Town of Maynard purchased water from the petitioners' land. In 1969 the town decided to take one portion of the locus (Lot A) for a water supply and another portion (Lot B) for a public domain to protect the water supply. The petitioners received a substantial verdict with respect to Lot A on their petition for assessment of damages in the Superior Court. The jury returned a total verdict of $253,000 which was divided as follows: $175,000 for Lot A; $71,000 for Lot B; and $7,500 for the loss of the use of Lot B between March of 1967 and March of 1969.

The town appealed from the verdict contending that Quirk and his expert based their opinions as to the value of the locus on inadmissible and improper grounds. At trial Quirk and his appraiser based their opinions as to the value of the land on the cost to the town of one year's water from the locus projected over a period of ten to fourteen years. The town argued that this capitalization method of valuation did not represent the fair market value at the time of taking since both the demand for water by the town and the amount of water present were conjectural. The petitioners contended that their valuation method was proper as it reflected the income-producing capacity of the locus accurately in view of the town's need for water. The Supreme Judicial Court agreed with the petitioners and held that the evidence was properly admitted at the discretion of the trial judge, since it had a direct bearing on the fair market value of the land as a source of water.2

The town also contended on appeal that it was prejudicial error for the petitioners to testify that they had spent $15,000 for the installation of a temporary well and $22,000 for engineering costs in subdivision planning on the grounds that such testimony could lead to an unfair double recovery against the town for depriving petitioners of mutually conflicting uses of their land. The petitioners argued that it was the jury's prerogative to consider all uses to which the land was adaptable. The Supreme Judicial Court held that this evidence was admissible since it was relevant to a determination of the fair market value of the locus.3

The town also challenged the trial judge's allowing the petitioners to introduce in evidence, on cross-examination of the respondent's appraiser, the fact that certain sales of land near Lot A considered by the appraiser

2 Id. at 1325, 274 N.E.2d at 343.
3 Id.
had a higher per acre value than the locus in question. The town maintained that this was prejudicial hearsay evidence since no effort was made to show that this nearby land was in any way similar to the locus. The Supreme Judicial Court held that a judge in his discretion could allow a witness to be asked on cross examination whether the sale of land in proximity to the locus had been at a higher unit price. However, the court commented that the judge in his discretion might appropriately have required preliminary proof of the comparability of Lot A to the other land.

The town also excepted to the trial court's refusal to grant several specific instructions. First, the town asked that the jury be charged not to consider any speculative future development of the land in awarding damages. The town argued that the judge should have instructed the jury not to increase damages by speculating that the petitioners might obtain authorization to carry water to neighboring towns in the future since the town's zoning by-law permitted water from the locus to be sold only to the town of Maynard. Second, the town sought instructions that the jury not consider the market value of the water as such since only the town could legally buy the water. Third, the town contended that since the locus was largely a swamp, the jury should have been instructed on statutory restrictions on filling the locus since this directly affected the land's marketability. The petitioners argued that since all the evidence presented concerned the value of the water to the town of Maynard, no instruction was needed concerning the necessity for legislation to permit the petitioners to sell water to other towns. The petitioners maintained that since the income producing properties of the land had been established, no instruction was necessary concerning future development of the land. The petitioners lastly contended that no instructions concerning the Hatch Act (containing prohibitions on the filling of swamp land) were needed as the locus was not a swamp. The court agreed with the petitioners on all counts and held that the trial judge's charge was adequate in view of the evidence presented and that there was an insufficient basis in the evidence to require instructions with respect to the Hatch Act.

§12.8. Agricultural lands: Expansion of exemption from taking under eminent domain. Section 5B of G.L. c. 79, which restricted the taking of certain agricultural lands, has been modified in several respects by chapter 148 of the Acts of 1972. The words "agricultural purposes" were replaced by the more precise language of "agricultural and farming as defined in" G.L. c. 128, §1A, and easements over such land were specifically included within the ambit of the new statute. The evidence of the

4 Id.
5 Id.
6 G.L. c. 131, §117C.
availability of other land for taking for a public use has been limited by the requirement in chapter 143 that "occupied buildings" not be situated in the alternatively available land. The amendment also specifically added the requirement that the taking authority, if it accepts the landowner's evidence of the availability of other land, shall exempt the original land from the taking.

The policy of this statute is somewhat doubtful since it is limited to takings by agencies other than the Commonwealth and since it excludes takings for highway purposes and takings ordered by the Department of Public Utilities. The change which prohibits the substitution of land on which occupied buildings are located for agricultural and farming land will also, as a practical matter, tend to limit the effect of this section.

§12.9. Historic or ancient landmarks: Preservation by taking through eminent domain. Section 5A of G.L., c. 79, prohibits the taking of certain historic landmarks or other historic property except by specific leave of the General Court. Chapter 29 of the Acts of 1972 added a paragraph to this section that permits the taking of property that has been certified by the Massachusetts Historical Commission as having historic interest, so long as it is not presently certified, owned or maintained by an historical organization or society. The taking may be by the Commonwealth or by a city or town. The amendment clearly establishes that the taking must be for a public purpose and, by its requirement of certification of its historic value, assures that no abuse will occur.1

§12.10. Anti-snob zoning legislation: Constitutionality and coverage.

The new Massachusetts Anti-Snob Zoning Act allows qualified applicants interested in building low income housing to apply for a comprehensive permit in lieu of applying to all the local boards or officials.

§12.9. 1 One might claim that his property is of "historical interest" as a subterfuge to get condemnation proceeds for an otherwise unprofitable building or site. If he were successful public money would thus be wasted on property with little or no historical interest. Requiring certification by the Massachusetts Historical Commission assures that property taken will be of genuine historical interest. Presumably, the Commission has some expertise in the area and can accurately make a determination of genuine, bona fide "historical interest."


2 G.L. c. 40B, §20 defines "applicants" as "public agencies, non-profit corporations, and limited dividend organizations."

3 G.L. c. 40B, §20 defines "low and moderate income housing" as "any housing subsidized by the federal or state government under any program to assist construction . . . [of such housing] whether built or operated by any public agency or any nonprofit or limited dividend organization."

4 See G.L. c. 40B, §21.
having jurisdiction over the proposed construction. The statute provides for the issuance of a comprehensive permit after a public hearing is held at which the opinions and recommendations are received of all the local officials who would have had jurisdiction except for the statute. If the board does not act within the statutory period, the application is deemed allowed and the permit is issued. Any person aggrieved by the issuance of a comprehensive permit may seek relief through traditional appeal channels.

If the local board of appeals denies the application for a comprehensive permit, or if it issues the permit with "uneconomic" conditions, the applicant may seek relief by appealing to the Housing Appeals Committee of the Department of Community Affairs. The committee must conduct a full evidentiary hearing to determine if the board's action was "consistent with local needs." If the committee finds that the board acted contrary to local needs, it may order the board to issue the permit or modify its approval so as to remove the uneconomic conditions imposed. If the committee finds that the board acted correctly then it must affirm the decision. The committee's decision may in turn be reviewed in the superior court pursuant to G.L. c. 30A.

In Board of Appeals of Hanover v. Housing Appeals Committee a qualified applicant filed with the Board of Appeals of Hanover an application for a comprehensive permit to build eighty-eight units of low and moderate income housing for the elderly. After holding public hearings, the board denied the permit and filed its report with the town

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6 G.L. c. 40B, §21 provides that the hearing will be held within thirty days of the receipt of the application and a decision will be rendered within forty days after the termination of the public hearing unless the time limit has been extended by mutual agreement of the applicant and board.
7 G.L. c. 40B, §21.
8 G.L. c. 40A, §21 permits any such aggrieved person to appeal to the district court within twenty-one days of the decision or to the superior court within twenty days.
9 See G.L. c. 40B, §20 for a definition of "uneconomic."
10 G.L. c. 40B, §§22-23 grants this alternative appeal opportunity; G.L. c. 23B, §5A establishes the Housing Appeals Committee.
11 G.L. c. 40B, §20 includes explicit mathematical formulae for determining the maximum land area a community with a demonstrated need for low and moderate income housing must devote to such housing; it also indicates that the regional need for such housing shall be considered as the local need by the board and by the committee.
13 Id.
14 G.L. c. 30A is the State Administrative Procedure Act.
16 Public hearings are required by G.L. c. 40B, §21, and G.L. c. 40A, §17.
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clerk, stating the reasons for the denial.\textsuperscript{17} In December of 1970, the applicant appealed to the committee which, after public hearings, overruled the board and ordered issuance of the comprehensive permits subject to specified conditions.\textsuperscript{18} The board then filed bills for review in the superior court.\textsuperscript{19} The superior court judge reserved his ruling on the case and reported it to the Supreme Judicial Court.\textsuperscript{20}

The case, which was the first to test the Anti-Snob Zoning Act, presented the following issues to the Court: (1) whether chapter 774 confers power upon the committee and the boards to override zoning regulations which hamper the construction of low and moderate income housing; (2) whether such power to override zoning regulations, if it exists, is constitutional; and (3) whether the exercise of such power by the committee in the present case was proper, or was, on the contrary, an impermissible form of spot zoning.\textsuperscript{21}

The petitioner boards of appeals, both from Concord\textsuperscript{22} and Hanover, questioned their own and the committee's power to override or modify local zoning by-laws which inhibit the implementation of chapter 774. They contended that the Legislature enacted this chapter merely to provide a "streamlined procedure for processing applications for the necessary local approvals of construction of low and moderate income housing."\textsuperscript{23} The respondent committee, on the other hand, argued that the text, history, and context of the chapter showed a clear legislative intent to allow both the board and the committee to ignore any local by-laws that prohibit the construction of such housing which is "consistent with local needs." In addressing itself to this issue, the court entered into a lengthy examination of the legislative history of chapter 774,\textsuperscript{24} and ultimately disposed of the question by concluding that the primary purpose of the chapter "was to provide relief from exclusionary zoning practices which prevented the construction of badly needed low and moderate income housing."\textsuperscript{25}

With this legislative intent in mind, the court proceeded to interpret the ambiguous passages of the chapter that were in controversy.\textsuperscript{26} The boards argued that the Legislature's failure to specify that local zoning

\textsuperscript{17} For a list of these reasons, see 1973 Mass. Adv. Sh. at 492 n.1, 294 N.E.2d at 400 n.1.
\textsuperscript{18} 1973 Mass. Adv. Sh. at 520 n.22, 294 N.E.2d at 416 n.22.
\textsuperscript{19} Suit was brought under G.L. c. 40B, §22 and G.L. c. 30A, §14.
\textsuperscript{20} The Supreme Judicial Court's decision encompassed not only the Hanover case, but also a similar case in which a comprehensive permit had been denied by the Board of Appeals of Concord.
\textsuperscript{22} See note 20 supra.
\textsuperscript{24} See id. at 496-503, 294 N.E.2d at 402-07.
\textsuperscript{25} Id. at 502, 294 N.E.2d at 406.
\textsuperscript{26} Id.
ordinances could be ignored if they were inconsistent with local needs indicates that no power to override local ordinances or by-laws was conferred. In this respect the boards contended that the phrase “requirements and regulations” as it appears in G.L. c. 40B, §20 should not be construed to include local zoning ordinances or by-laws. The court disagreed, however, and ruled that “requirements and regulations,” include local zoning by-laws which will be applicable if they are “consistent with local needs” and ignored or modified if they are not. 27 By implication, the court ruled that the boards as well as the committee have the same power to overrule or modify zoning by-laws, for if the boards did not have this power the initial application would be a meaningless gesture. Further, to “avoid a construction of statutory language which produces irrational results”, 28 the court construed G.L. c. 40B, §21, which grants the board the power to issue permits and approvals, as not excluding the additional powers to override local requirements and regulations conferred by sections 22 and 23. 29 Since the board’s interpretation of chapter 774 would completely negate the legislative intent, the court rejected it and held instead that the chapter confers on both the boards of appeals and the Housing Appeals Committee the power to override local requirements and regulations, including zoning by-laws, which are not “consistent with local needs,” as well as the power to issue comprehensive permits in lieu of other permits which would be required were it not for the special procedure prescribed in the chapter. 30

The second of the petitioners’ arguments focused on the relationship of chapter 774 with the Home Rule Amendment of 1966. 31 Prior to 1966, there was no question that the state legislature was “supreme” in matters of zoning. The boards and an amicus curiae contended that the adoption of the Home Rule Amendment prevents the General Court from interfering with local zoning ordinances and that it invalidates all pre-1966 decisions regarding state supremacy in zoning.

The court sought to resolve this issue by ascertaining the source of local authority to adopt zoning ordinances subsequent to the passage of the Home Rule Amendment. It concluded that zoning power is one of a locality’s independent municipal powers permitted by the amendment which provides for adoption of ordinances or by-laws for the protection of public health, safety, and general welfare. But this power is not to be exercised “inconsistently with the laws enacted by the general

27 See G.L. c. 40B, §23.
29 Id. at 503, 294 N.E.2d at 407.
30 Id. at 503-04, 294 N.E.2d at 407.
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court in conformity with §8."  

Section 8 provides in relevant part: "the general court shall have the power to act . . . by general laws which apply alike to all cities . . . ." Thus, while municipalities can pass zoning by-laws, these by-laws must not frustrate the purpose of implementation of general or special laws enacted in accordance with section 8. Hence, said the court, chapter 774 does not violate the Home Rule Amendment since it is a general law which applies to all cities and towns in the Commonwealth.

The amicus curiae argued that if the local board overrode local zoning by-laws in favor of local needs, it would be engaging in illegal spot zoning. In rejecting this contention, the court relied on the test for spot zoning stated in Lamarre v. Fall River. That test hinges on a determination of whether there was "a singling out of one lot for different treatment from that accorded similar surrounding land indistinguishable in character, all for the economic benefit of the owner of that lot." Under that test, "spot zoning is deemed objectionable only when the economic gain of an individual property owner is the sole result of a spot zoning change. Conversely, if the public welfare is also served by any spot zoning, then such zoning is permissible. The question is thus to determine whether the special treatment afforded to qualified applicants under chapter 774 serves the public welfare. In the Lamarre case, the court found that zoning changes to promote the construction of multi-family dwellings in a city with housing shortages promoted the public welfare. Likewise, in Henze v. Building Inspector of Lawrence, the court held that the need for low and moderate income housing justified the re-zoning of a particular parcel. The regional need for housing had also been demonstrated in the instant case so that it could properly be said that reclassification to encourage low and moderate income housing would definitely promote the general welfare. In addition, the court observed that chapter 774 contains satisfactory standards (i.e., "consistent with local needs") as well as ample provisions for review to safeguard the public's interest in any overriding of local zoning by-laws. It can thus be said that the exercise of chapter 774 power to over-

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35 Newton Civic and Land Association.
38 324 Mass. at 546, 87 N.E.2d at 215.
40 Id. at 903, 269 N.E.2d at 712.
ride local zoning by-laws which are inconsistent with local needs does not constitute illegal spot zoning. The boards further claimed that chapter 774 was unconstitutionally vague because its provisions fail to give standards sufficient to guide administrative action, and that the Act itself makes provision for an improper delegation of legislative power. The court dealt with both challenges simultaneously by applying the standard test of vagueness, namely, whether the statute is so vague that “men of common intelligence must necessarily guess at its meaning and differ as to its application.” Such vagueness could lead to arbitrary and capricious administrative action in violation of due process. In upholding the constitutionality of chapter 774, the court viewed the Act as a whole and reasoned that a board is to use the same standards in reviewing an application as is the committee in reviewing the boards’ decisions, namely, whether the application is “consistent with local needs” and whether contemplated conditions imposed on the permit would be “uneconomic.” If a board’s decision does not reflect the same standards used to judge the decision on appeal to the committee, then the initial application to the board would be a meaningless requirement. The court also cited the detailed definitions of relevant terms set out in section 20 of the Act in dismissing the vagueness claim. The court dismissed the impermissible delegation of power argument by citing several cases in which broader delegations of power and less definite standards were held to be constitutional.

The boards’ next argument centered on the procedural implementation of the statute. Specifically, they questioned whether the statute authorized a de novo review by the committee of an application for a permit. The Hanover Board claimed that the committee was empowered only to decide whether the result reached by the board was justified by the evidence. The Concord Board argued that the review should be a “re-examination . . . for the purpose of preventing a result not based on unbiased and reasonable judgment.” Both boards argued that the committee review should not be a de novo hearing.

42 Most state and federal courts agree that spot zoning is permissible where it alleviates a demonstrated housing shortage. See 1973 Mass. Adv. Sh. at 511 n.16, 294 N.E.2d at 411 n.16.
45 G.L. c. 40B, §20.
The court rejected these contentions by noting that the committee must render a written decision ("facts, conclusions, and reasons therefor") and make a stenographic record of the hearing.\textsuperscript{48} In order to fulfill its legislative mandate, the committee is required to determine whether the board's decision was consistent with local needs. In order to do so, said the court, a de novo evidentiary hearing was the proper procedure since it is possible that the board might have overlooked vital considerations as being irrelevant.\textsuperscript{49}

The boards next argued that the alternative methods of review afforded to applicants and to aggrieved parties violated the equal protection guarantees of both the Massachusetts and the United States Constitutions. The court dismissed this argument by finding that there was no substantial difference between a de novo evidentiary hearing before the committee and the traditional hearing before a court.\textsuperscript{50}

The Hanover Board then contended that the committee exceeded its authority in ordering the board to issue a comprehensive permit with conditions that (1) stated that sanitary facilities must be approved by the appropriate state authorities, (2) empowered the board to require the applicant to make disclosure of its leasing arrangements, and (3) set no time limits for completion of the project.\textsuperscript{51} The court, citing G.L. c. 40B, §21, disagreed, stating that since the committee had the power to order the board to issue the permit, and since the board had the power to place conditions on the issuance of the permit, the committee's order to the board to issue the permit with conditions was valid.\textsuperscript{52} In making its argument, the Hanover Board mistakenly relied upon \textit{Weld v. Board of Appeals of Gloucester},\textsuperscript{53} in which the court ruled that a board of appeals had over-stepped its statutory authority in attaching certain conditions to a special permit. The court in \textit{Hanover} stated that while certain conditions may be so vague as to be constitutionally impermissible, no such vagueness or lack of definitiveness could be found in the conditions attached to the comprehensive permit granted in the instant case.

The last of the petitioners' arguments concerned the sufficiency of evidence upon which the committee based its decisions to reverse the boards. The court answered the petitioners in a lengthy, unsympathetic examination of the evidence before the committee in which it disagreed with each contention of lack of substantial evidence. In doing so, the court eliminated the last obstacle to affirming the committee's decision.

\textsuperscript{48} G.L. c. 40B, §22.
\textsuperscript{50} The court essentially nullified this argument by previously ruling that the review by the committee under chapter 774 must be in the form of a de novo evidentiary hearing.
\textsuperscript{52} Id. at 522, 294 N.E.2d at 417-18.
In concluding its opinion, the court made the following statement with citation to the case of Simon v. Needham.\textsuperscript{54}

A zoning by-law cannot be adopted for the purpose of setting up a barrier against the influx of thrifty and respectable citizens who desire to live there . . . nor for the purpose of protecting the large estates that are already located in the district. The strictly local interests of the town must yield if it appears they are plainly in conflict with the general interests of the public at large, and in such cases the interest of “the municipality would not be allowed to stand in the way.” [Citations omitted.]

The judicial response to the housing shortage and exclusionary zoning was that chapter 774 was a “reasonable means to serve a legitimate purpose” and that the provisions of the Act were properly implemented in the instant proceeding.\textsuperscript{65} The decisions of the Housing Appeals Committee were thus affirmed in both the Hanover and Concord cases.

\textsection{12.11.} Public hearing on adoption of urban renewal plan: Legislative rather than adjudicatory. The Park Plaza project in Boston has been, and no doubt will be for some time to come, the subject of political and legal dispute. One of the issues raised in this continuing battle between partisans and opponents was determined in Duncan v. Acting Commissioner of the Department of Community Affairs.\textsuperscript{1} The issue before the court was whether the public hearing required by the sixth paragraph of G.L. c. 121B, \textsection{48} contemplates an adjudicatory proceeding as defined in G.L. c. 30A, \textsection{1(1)}. The critical provision of section 48 is as follows:

The department of Community Affairs may hold a public hearing upon any urban renewal plan submitted to it, and shall do so if requested in writing within ten days after submission of the plan to the urban renewal agency, by the mayor or city council of the city . . . in which the proposed project is located, or twenty-five or more taxable inhabitants of such city . . . .

The court held that the text of section 48 indicates that the proceeding contemplated is not adjudicatory and that the findings required by the statute strongly suggest that the appropriate type of hearing is legislative.\textsuperscript{2}

On July 15, 1971, the Boston Redevelopment Authority approved the Park Plaza Urban Renewal Project plan and submitted it to the mayor

\textsuperscript{54} 311 Mass. 560, 42 N.E.2d 516 (1952).
\textsuperscript{65} For judicial responses from other jurisdictions, see 1973 Mass. Adv. Sh. at 535, 294 N.E.2d at 423.

\textsuperscript{2} Id. at 1212, 284 N.E.2d at 247.
and city council of Boston. In December of 1971, both the city council and the mayor approved the plan. The authority then submitted the plan to the Department of Community Affairs on January 13, 1972. In accordance with G.L. c. 121B, §48, the petitioners, who are owners of residential and business property within the project area, made a request for a public hearing on the plan. On January 27, 1972, the petitioners requested that the department conduct the hearing as an adjudicatory proceeding. The department refused the request and announced that the hearing would be held on February 9, 1972. The petitioners then sought a temporary restraining order to enjoin the department from holding the hearing unless it were conducted as an adjudicatory proceeding. On February 9, a judge of the superior court ordered that a permanent injunction be entered against the hearing scheduled for that day. The hearing was recessed following the service of the order. The respondents filed petitions on February 11, 1972, praying that the order be vacated and that the court hear argument concerning the nature of the proceeding. The petitions were allowed and the order vacated on February 14, 1972. The intervening respondents included in their answers prayers for a declaratory judgment that the proposed public hearing was not adjudicatory. After a hearing, a second superior court judge granted this prayer and the petitioners appealed.

In arriving at its decision, the Supreme Judicial Court reviewed the facts of the case in light of the standards set out in G.L. c. 30A, §1(1), for an adjudicatory proceeding. According to that statute:

An adjudicatory proceeding means 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.

With regard to the subject hearing in the present case, the court posed two questions: first, whether the rights of specifically named persons were to be determined; and second, whether the determination was required to be made after an opportunity for an agency hearing.

The petitioners argued that the rights, duties, and privileges of four classes of "specifically named persons" were to be determined and that if any of these fit the definition in section 1(1), they would be entitled to an adjudicatory proceeding under section 48. The court agreed that the city and the redevelopment authority were specifically named persons under G.L. c. 30A, §1(4), and had a right under section 48 to have their

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3 The four classes mentioned by the court were the city, the authority and its designated redeveloper, the twenty-five or more taxable inhabitants of the city and the owners and tenants in the project area. The petitioners were included in the latter two groups.
rights, duties or privileges determined. However, the court distinguished the rights, duties and privileges to be determined on these facts from those contemplated in Section 1(1):

But the rights, duties, and privileges in question are those of a public agency acting in its capacity in proposing a broad social program. Whatever might be the situation if the city asserted rights as a creditor or property owner, we do not think a proceeding becomes 'adjudicatory' merely because it may affect the public, political or legislative functions of the city."

The court considered the rights of the authority and the designated redeveloper to be the same as those of the city.

The court thereupon viewed the legal rights, duties, or privileges of the twenty-five or more taxable inhabitants as no greater than those of any taxpayer who shares a general public interest in a city's financial affairs. Taxpayers' suits were regarded as a "classic form" of action that is taken to vindicate public, not individual private, rights. It can therefore be stated as a general proposition that taxpayers' rights to request a hearing on a public issue do not require an adjudicatory proceeding. The court thus distinguished between the general rights of a taxpayer and the legal rights, duties or privileges of specifically named persons contemplated by section 1(1).

The court admitted that the private rights of the owners and tenants of the land in the project area were most clearly affected by the proceedings under section 48. However, the Court did not determine whether theirs were the "legal rights" of "specifically named persons." It avoided this question by pointing out that, since section 48 does not specifically require that opportunity be given to them for an agency hearing before the plan is considered by the Department of Community Affairs, the statute does not fall within section 1(1). Irrespective of whether the rights involved were those of specifically named persons within the meaning of section 1(1), the landowners and tenants were not entitled to an adjudicatory proceeding under section 48, since it contained no provision for a prior agency hearing as to them before the approval of the plan.

The court also commented that the list of findings required by section 48 was a further indication that the proceeding contemplated was not adjudicatory. Under section 48,

\[\text{findings are not required with respect to such "adjudicative facts" as the facts about the parties and their activities, businesses, and}\]

5 Id. at 1213-14, 284 N.E.2d at 248.
6 Id.
7 Id.
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properties," as "who did what, where, when, how, why, with what motive or intent," or as "the kind of facts that go to a jury in a jury case."8

The court also found that the legislative history of section 48 is not in any way contrary to its decision.9

The Duncan case is, of course, more of an administrative law case than a purely urban renewal one. But the holding that a section 48 hearing is not adjudicatory, at least not necessarily so, does point out the political and thus the legislative nature of urban renewal. While it was recognized that the land owners and tenants in the project area could be "clearly affected" by the section 48 hearing, it was nonetheless held that the statutory pattern of that section provides for a required public hearing only if requested by the mayor or city council or by twenty-five or more taxable inhabitants. No part of that section requires a public hearing at the request of land owners and tenants in the project area who may be the ones individually affected. The thrust of section 48 concerns the vindication of public interests rather than private rights and thus does not fit into the section 1(1) requirements for an adjudicatory hearing.

§12.12. Regional planning: Extension of coverage and public hearing requirements. Chapter 361 of the Acts of 1972, in amending G.L. c. 40B, §5, updates that section to reflect a growing awareness of social and public problems in the zoning area. Section 5, which governs the powers and duties of the regional planning commissions, has not been amended since its original adoption in 1955. The new language of that section adds the word "problems" to the list of those factors which each regional commission must consider in regard to its own district before it takes action. Thus the coverage of a commission's investigations is increased over and above its traditional function of considering only the "resources," the "possibilities" and the "needs" of the district over which it has jurisdiction. "Necessary" (as differentiated from the prior "advisable") studies of district plans are to be undertaken, "governmental" improvement of the district is added to "physical," "social" and "economic" improvements as the goals to be achieved, and a new stress is laid upon the best interests of the "inhabitants" of the district rather than the district itself. Also, rather than attempting to enumerate every area to be included in the board's plans and recommendations, the new act uses broader language, i.e., "public utilities," "public facilities," "public places," and "public institutions," in an effort to extend coverage to as many areas as possible in promoting the general welfare and prosperity of the district's people.

8 Id. at 1215, 284 N.E.2d at 249.
9 It also cited numerous cases in other jurisdictions that support its decision, with only one case to the contrary. Id. at 1217, 284 N.E.2d at 250.

http://lawdigitalcommons.bc.edu/asml/vol1973/iss1/15

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Apart from this attention to the general needs and welfare of the population within the district, perhaps the most important aspect of the statute is the addition of new notice and hearing provisions. These guarantee to the inhabitants of the district at least one public hearing before the adoption of any regional plan and require notice of the time, place and subject of the hearing. Written notice is to be given to each planning board, board of selectmen, and city council within the district. Notice of the time, place and subject of the hearing is also to be published ten days before the hearing in a newspaper having substantial circulation in the region.

§12.13. Improperly approved plan: Rescission limitations. In Bingham v. Planning Board of North Reading,¹ the individual plaintiffs, the Binghams, owned land subdivided into seventeen house lots under a subdivision plan approved by the respondent planning board in January of 1961. The plaintiff Melrose Savings Bank held the mortgage on the land. In March of 1951, the town adopted a zoning by-law which provided that the minimum lot size in the area of the locus was 15,000 square feet. The town increased this minimum lot size to 20,000 square feet in 1955 and then to 40,000 square feet in March of 1960. In December of 1954, the Binghams applied for a permit to subdivide their land and submitted a definitive plan to the board. In April of 1955, the planning board voted its approval of the Bingham's plan which contained lots of less than the 20,000 square feet minimum. In September of 1960, the Binghams filed with the planning board another petition for the subdivision of the land in question and also executed several covenants that they would install certain public utilities on the land within two years. Although none of the lots in the plan contained 40,000 square feet, the planning board again approved the Binghams' subdivision plan in January of 1961. By September of 1962, the two-year covenants signed by the Binghams had expired, and they then executed a second covenant for another two years. In January of 1963, the 1960 plan was recorded in the Registry of Deeds.

In December of 1963, the Binghams borrowed $40,000 from the Melrose Savings Bank and executed a mortgage to the Bank on the land covered by the plan. It was later found that the Bank acted in good faith² in granting the mortgage which was recorded in December of 1963. In January of 1965, the Binghams executed a third covenant to complete all ways and to install all municipal services and in December of that year they executed a fourth covenant which was later extended to January of 1968. In December of 1966, the Binghams took out a successor mortgage on the property with the Melrose Savings Bank, thus discharging the first mortgage on the property.

² Id. at 1334, 285 N.E.2d at 409.
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In October of 1967, the respondent planning board voted to rescind the approved plan on two grounds: first, the original approval was in violation of the town's then existing zoning by-law; and second, the Binghams failed to comply with the conditional covenant dated December of 1962 which required them to complete all ways and to install all municipal services on the subdivided land within two years.

The superior court reversed the board's decision to rescind its prior approval given in January of 1961 and ruled that any breach of the covenant had been waived by extensions granted by the board in the later covenants. The lower court further ruled that the bank, having granted a mortgage on the property in good faith and in reliance on the records, was entitled to the protection afforded by G.L. c. 41, §81W which states:

No . . . rescission of the approval of a plan of a subdivision or change in such plan shall affect the lots in such subdivision which have been . . . mortgaged in good faith and for a valuable consideration subsequent to the approval of the plan, or any rights appurtenant thereto, without the consent . . . of the holder of the mortgage or mortgages, if any, thereon.

Having found that the board acted in excess of its authority in rescinding its approval, the court ordered the board to rescind its vote purporting to invalidate the subdivision plan.

On appeal, the planning board raised several issues. The board argued that even if the 1960 plan was properly approved, the plan expired by the terms of the covenant executed by the parties to the plan and recorded in the Registry of Deeds. The Supreme Judicial Court agreed with the Binghams, however, and found that subsequent extensions granted by the board in later covenants served to waive this condition. 8

The board also argued that the 1960 plan was properly rescinded because it did not meet the applicable area lot size requirements in effect in September of 1960. The board argued that since the plan, when approved, was in violation of the town's zoning by-law, it had a right to rescind the earlier approval. The Supreme Judicial Court held that the rescission was a nullity since the bank's consent was mandatory under G.L. c. 41, §81W. 4 The court reasoned that irrespective of the reasons the board might have had for rescinding its prior approval, it had to follow the statutory procedures and obtain the bank's consent. Lastly, the board questioned the standing of the Binghams to question its decision to rescind approval. In interpreting G.L. c. 41, §81BB, 5 the court found

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3 Id.
4 Id.
5 G.L. c. 41, §81BB states in relevant part: "Any person . . . aggrieved . . . by any decision of a planning board concerning a plan of subdivision . . . may appeal to the superior court sitting in equity . . ."
that the Binghams were within the class of persons “aggrieved” by the board’s decision, and that they therefore had standing to bring suit.

In reaching its decision the court insisted that section 81W of G.L. c. 41 be interpreted literally and adhered to exactly. While one can sympathize with the present plight of the planning board, it clearly had created the situation by its earlier approval of the plan in violation of the town’s zoning by-laws and its extensions of the original covenants to complete the ways and utilities installations within two years of the date of approval. The opinion thus stands as a caution to planning boards that they not place themselves in positions in which rescission is desirable but cannot be obtained.

§12.14. Subdivision subject to conditional approval: Time limits. In Costanza & Bertolino, Inc. v. Planning Board of North Reading, the Supreme Judicial Court faced the issue of whether the respondent planning board had exceeded its authority in refusing to endorse the petitioner’s plan with the notation “approval under the subdivision control law not required.” The board found that the plan constituted a subdivision under G.L. c. 41, §S1U, for which approval under the Subdivision Control Law was required, and thus refused to make the endorsement.

In September of 1960 one Lucci submitted a definitive plan to the board. The board signed the plan and endorsed it as “conditionally approved in accordance with G.L. c. 41, §S1U, as shown in the agreement, recorded herewith.” The agreement was a covenant providing for the construction of all ways and the installation of all municipal services within two years. Failure to fulfill this agreement, it was stated, would result in the automatic rescission of the plan’s approval. In March of 1962, Lucci executed a second covenant identical in its terms to the earlier one. One week after executing this second covenant, Lucci sold the lots in question to the plaintiff Costanza.

Costanza submitted his plan on April 3, 1969 and requested the board to endorse it as not requiring approval under the Subdivision Control Law. Although the lots shown on the Costanza plan were identical with those shown on the conditionally approved Lucci plan, the planning board declined to endorse it. On appeal the Superior Court held that the board’s decision was null and void and ordered the board to endorse the plan as requested by the plaintiff. This decision was reversed by the Supreme Judicial Court.

Costanza argued that sections 81L and 81P of G.L. c. 41 supported his request for endorsement of his plan. Section 81L provides that

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2 See G.L. c. 41, §S1U which describes preliminary plans and the definitive plans which evolve therefrom.
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the division of a tract of land into two or more lots shall not be
deemed . . . a subdivision . . . if . . . every lot within the tract so
divided has frontage on . . . (b) a way shown on a plan theretofore
approved and endorsed in accordance with the subdivision control
law.

Section 81P provides that

if the board finds that the plan does not require such approval, it
shall . . . endorse thereon . . . 'approval under the subdivision control
law not required' . . . Such endorsement shall not be withheld unless
such plan shows a subdivision.

Costanza argued that the prior approval of the Lucci plan brought his
plan within the terms of clause (b) of section 81L. He stated that his
scheme fit within this exception since the plan consisted of a portion of
lots shown on a definitive plan approved and endorsed by the planning
board in 1960. However, as the Supreme Judicial Court noted, the plan
he referred to was in fact only “conditionally approved” in accordance
with an accompanying agreement. The Court found that this agreement,
which required the construction of all ways and municipal services within
two years, was a condition that had to be met in order for approval to
be complete. It further ruled that the covenant fixing a time period for
completion of the work was consonant with the purposes of the Sub-
division Control Law. Section 81U(1) specifically permits a planning
board to set a time limit when imposing a bond or deposit to insure the
completion of construction and installation of the facilities and services
required in a conditionally approved plan. While Section 81U(2), refer-
ing to the imposition of covenants to insure performance, does not
specifically mention a time limit, the court held that the Legislature
could not have intended any difference in result as to time limits among
these methods of accomplishing the required construction. The court
found that the board acted within its authority in refusing the requested
endorsement because the approval of the plan, being conditional, was
rescinded when the condition was not met. It was thus held that the
property did not fit within the exception of subsection 81L(b) and that
it for that reason constituted a subdivision.

The result in this case was, as the opinion indicates, the only sensible
one. To permit the imposition of time limits under one method of secur-
ing performance, and not to permit it under another, would result in a

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4 Id. at 1895, 277 N.E.2d at 513.
5 Id.
6 The exception in subsection 81L(b) is for those lots within a tract which have
frontage on a way shown on a plan previously approved and endorsed in accordance
with the Subdivision Control Law.
disturbance that has no justification as far as the difference of the
method used is concerned. In the broader policy sense, planning boards
should be permitted to require prompt development of subdivisions to
assure that paper subdivisions, created a number of years earlier, do
not continue to have legal effect and thus bar a more satisfactory use
of land in accordance with land use policies as they develop in the
community.

§12.15. Amendments: Spot zoning. In 1970 the town meeting of
Rockland adopted an amendment rezoning a particular locus from resi-
dential to limited business. In Martin v. Town of Rockland,1 the plaintiff
sought a declaratory judgment under G.L. c. 231A, that this amendment
was invalid on the ground that the town had exceeded its statutory
authority in adopting the zoning change.2 The plaintiff appealed from a
judgment of the superior court upholding the validity of the amend-
ment. The Appeals Court found that since the locus in question was
situated between a business district and a residential district, the par-
ticular parcel could be zoned as either residential or commercial depend-
ing upon the wishes of those voting at the town meeting.3 So long as
the classification chosen bore a rational relation to public convenience
and welfare, and was a logical use for the land, there could be no chal-
lenge to its validity. The Appeals Court supported its finding by empha-
sizing that zoning is a matter appropriately dealt with by municipal
legislation. The wisdom of the local voters cannot be challenged unless
it is shown beyond a reasonable doubt that the amendment conflicted
with the enabling act.4

The plaintiff's argument that the amendment constituted spot zoning
was dismissed by the court since there was no singling out for special
treatment any one lot indistinguishable from others in the same zoning
district.5 The locus was distinguishable from other lots in the same district
because of its proximity to the established business districts6 and its dis-
tance from other residentially zoned property in the area. The zoning
change was thus a reasonable extension of the existing business district.7
The court therefore refused to substitute its judgment for that of the
town.

2 The statutory authority for zoning changes can be found in the Zoning Enabling
Act, G.L. c. 40A, especially §§2, 3.
4 Id. See also Lanner v. Board of Appeals of Tewksbury, 348 Mass. 220, 202 N.E.2d
Mass. at 229-30, 202 N.E.2d at 619.
at 638, 294 N.E.2d at 298.
As far as can be determined from the court’s opinion, the suit in this case should not have been brought in the first place. Precedent has firmly established the right of Massachusetts communities to rezone parcels of land that are sufficiently different from similarly zoned adjoining land so that the communities’ judgment cannot be considered either arbitrary or unreasonable. Some states require a finding of a change in conditions or a previous error in the original zoning before an amendment can be validly adopted but Massachusetts has never adopted such an unduly restrictive view of municipal legislative powers.

§12.16. Special permit: Discretion in granting. The discretionary decision of a board of appeals in denying a special permit was presented to the Appeals Court in Pioneer Home Sponsors Inc. v. Board of Appeals of Northampton.1 Pioneer had applied for a special permit to construct a development of multi-dwellings. After a public hearing the board denied the application despite the fact that Pioneer had met all the conditions set forth in the relevant section of the city ordinance.2 The superior court judge, erroneously assuming that the board’s function was limited to mechanically determining if the technical requirements were met by the applicant, reversed the decision of the board. The intervenors brought this case before the Appeals Court claiming that unless the city zoning ordinance were interpreted in its entirety the board would be effectively stripped of its discretionary power to grant or deny special permits.

The city’s ordinance explicitly provides, in a section other than the specific one relating to multi-dwellings permits, that special permits “shall be in harmony with . . . general intent of the ordinance,” and it adopts the statutory phrasing of G.L. c. 40A, §4, which provides that a board “may, in appropriate cases . . . grant . . . a special permit . . . .” Hence, the board’s power to grant or deny special permits is discretionary even though the facts show that technically a permit could be lawfully granted. Absent any evidence that the board acted whimsically, unreasonably, or on a legally untenable ground, its decision must stand.3 The case was remanded to the board for further consideration in light of the court’s opinion, with an indication that a further public hearing could be held at the board’s discretion.

§12.17. Special permit: Consultation with planning board. In Caruso v. Pastan,4 the Appeals Court was confronted with the issue of the propriety of the granting of a special permit5 by a local board of

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2 Section 12f of the Northampton zoning ordinance.
5 See G.L. c. 40A, §4, which deals with “special permits.”
appeals after it had privately consulted with the local planning board following the conclusion of the required public hearing. In 1970 the Saugus Board of Appeals issued a special permit that exempted a proposed apartment complex from meeting certain provisions of the town zoning by-law. The plaintiffs, who were nearby landowners, appealed this decision to the superior court which found the proposed construction to be "in complete harmony with the . . . intent of the by-law." The trial judge also found nothing to suggest that the board's action was "unreasonable, whimsical, capricious, or arbitrary," and refused to alter the decision of the Saugus board. The Appeals Court also refused to substitute its judgment for that of the local board in the absence of a clear showing of legal insufficiency of supportive evidence or whimsical or capricious decision-making.

In Caruso the applicant met all the procedural requirements for obtaining the special permit. After the conclusion of the public hearing, the board of appeals met with the planning board, which had jurisdiction over the locus under the Subdivision Control Law. At this meeting, which was conducted without the knowledge of either the applicant or the plaintiffs, the members of the two boards discussed the imposition of an unconditional requirement on the permit that a particular sewer connection be made, and that a performance bond be posted to insure completion of the plan as submitted and approved. The merits of the special permit application were apparently not discussed at this meeting. The Appeals Court noted the impropriety of such a meeting prior to the issuance of the board of appeals' decision but did not find that this was sufficient legal grounds for overturning the decision. Hence, the board's grant of the special permit was upheld.

The Appeals Court ignored the extensive argument of the plaintiffs that contested the wisdom of the board's decision, and limited its decision solely to the issue of improper consultation. It is arguable that the deference shown the local board's decision represents a rather careful limitation of the strict compliance with the standard of review set up in Josephs v. Board of Appeals of Brookline. Josephs required that in reviewing grants of special permits, the superior court must hear the matter

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8 The "planned unit development" was allowed to vary the by-law provisions of lot sizes, usable land area, percentage of lots covered, street frontages, and proximity of off-street parking.
6 Id. at 31, 294 N.E.2d at 502.
7 G.L. c. 41, §§81K-81GG.
§12.18. Amendment of board of appeals decision: Effect on original denial. In *Potter v. Board of Appeals of Mansfield,* the petitioner Potter applied in August of 1970 for a special permit to build a sixty-nine unit apartment complex. The board of appeals denied the special permit, after compliance with the statutory notice and hearing requirements, on November 3, 1970 and recorded the decision with the town clerk on November 17, 1970. The petitioner did not seek judicial review

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9 Id. at 1409, 285 N.E.2d at 439.
11 Id. at 31, 294 N.E.2d at 503.

2 G.L. c. 40A, §§4, 17, 18.
within the statutory period allowed for appeals. The board, on December 1, 1970, before the statutory appeals period had expired, rendered an amended decision which included concrete reasons for its denial of the special permit. A copy of this decision was not filed with the town clerk's office until January 25, 1971. The petitioner filed a revised plan with the board on January 25, 1971, which he claimed met all the requirements set forth in the revised decision. The board refused to issue a special permit on the ground that the November 3, 1970 decision was final and appealable, and that the board had lost jurisdiction in the case, and that the December 1, 1970 amended decision was of no legal force or effect.

Potter then sought a writ of mandamus to compel further action by the board of appeals on his revised application for a special permit. He chose to file the present action for a writ of mandamus rather than file for a new application since a town meeting had voted zoning changes which prohibited the desired use. The town meeting had taken this action subsequent to the original application and prior to the board's refusal to consider the amended application.

The Appeals Court ruled that the original decision of November 3, 1970, was to be construed as the final decision, that the December 1, 1970, amended decision was of no force or effect, and that the present mandamus action was, therefore, barred by Potter's failure to pursue the exclusive remedy of judicial review provided by section 21 of the Zoning Enabling Act. The court found that nothing suggested that the board intended any further proceeding after taking the case under advisement at the conclusion of the first hearing. By qualifying their decision with the words: "disapprove . . . until . . . planning board approval [is] obtained," the board of appeals made the effort to meet the requirements of the zoning by-law, which provides that reasons for denial must be given, and G.L. c. 40A, §18, which also requires reasons for a decision. The petitioner claimed that the above phrase should be read as an expression of present intention to approve a future application if that application should be approved by the planning board, without future consideration by the zoning board of appeals. However, to give the above words the meaning claimed by the petitioner would necessarily lead to one of two illegal conclusions: either an improper delegation of its power to the planning board of determine if requirements for granting

8 G.L. c. 40A, §21 allows twenty days for an appeal to the superior court and twenty-one days for an appeal to the district court.
4 See G.L. c. 40A, §18, which provides that the decision should be filed within fourteen days of the proceeding.
6 Id. at 101, 294 N.E.2d at 590.
7 Section V F1 of the Mansfield zoning by-law which was enacted to meet the requirements of G.L. c. 40A, §18.
§12.19 LAND USE

the permit were met, or an attempted conditional grant of a permit on consideration of plans and other evidence not before the board.8

A board of appeals may amend its decisions by the filing of additional reasons9 as long as no one is prejudiced by the late filing10 and the amendment does not change the result of the original decision.11 In the present case the amended decision could not be given its claimed effect of conditionally granting the permit since the permit application was specifically denied by the original decision. Nor, alternatively, could the amended decision have been construed as an entirely new decision, since the notice and hearing requirements of G.L. c. 40A, §§4, 17, and 18 were not met.

Once the court had properly determined that the amended decision could not be effective either as a conditional permit, an amendment to the first decision, or an entirely new decision, that decision ceased to have any effect except as a means of stating reasons for the original denial of the permit. Thus, the original decision had to be appealed under the Zoning Enabling Act's exclusive method of judicial review,12 and since it was not, Murphy was precluded from obtaining relief by mandamus in the present action.13

§12.19. Building permit: Action to avoid effect of zoning amendment. In Murphy v. Board of Selectmen of Manchester,1 the Appeals Court considered the effect of section 11 of the Zoning Enabling Act.2 In January of 1965, a building permit was issued to the plaintiff Murphy's predecessor in title, authorizing the construction of fifty-four apartment units. Sometime after June of 1965, construction began on twenty-four of the authorized units and was substantially completed by May of 1966. In August of 1966, amendments to the Manchester by-laws caused the proposed construction to be in violation thereof. The issue presented to the Appeals Court was whether the permit was still effective in light of the new zoning amendments. The court ruled that failure to comply literally with the provisions of G.L. c. 40A, §11, which exempts building permits from the effect of zoning amendments, invalidated Murphy's authorization to construct the remaining thirty apartment units.3


2 G.L. c. 40A.
Section 11 provides that

no zoning ordinance or amendment thereof shall affect any permit issued or construction lawfully begun before notice of the hearing [on the proposed ordinance or amendment] . . . or before the issuance of the warrant for the town meeting at which such by-law is adopted . . . provided that construction work under such permit is commenced within six months after its issue, and . . . proceeds in good faith to completion so far as reasonably practicable under the circumstances.

During 1966 Murphy leveled off a section of land known as the Stone Mill property and did some preliminary excavation work on some of the other buildings. The court held, however, that this type of activity did not qualify as construction as that word is used in section 11.4

The petitioner also argued that construction of the first twenty-four units satisfied the six-month requirement of section 11 and that two legal actions caused the delay in construction of the remaining authorized units. Murphy further urged that further construction while legal actions were pending would not have been "reasonably practicable under the circumstances." The court ruled that the petitioner had not proceeded in "good faith continuously to completion" as provided in section 11, since the two legal actions cited for the construction delay were both instituted by the petitioner.6 Neither of the two suits could reasonably be said to have any bearing on the long delay in construction; the first suit, brought to confirm title, was completed in August of 1966, while the outcome of the second action, concerning a right of way, would have had no material effect on the location or construction of any proposed buildings.

While the court declined to allow actions to confirm title or rights of way instituted by the permit holder to have such a tolling effect, it conceded that certain types of litigation might delay the effect of time periods under section 11.6 However, to qualify as a special "circumstance" under section 11, the litigation must be such as can be characterized an incident of the construction process.7 To allow delays for any and all litigation would mean that the effects of zoning amendments could be thwarted.

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6 The court indicated that an appeal from the issuance of the permit or from litigation enjoining the construction would be examples of such actions with tolling effects. 1973 Mass. App. Ct. Adv. Sh. at 487-88, 298 N.E.2d at 887.
§12.20. **LAND USE**

for years. The court also noted that when, as in the *Murphy* case, the permit covered a number of buildings, the six-month period might well be applicable to each of the buildings. Since, however, the court found that the six-month period had not been complied with as to any of the units in the group of thirty apartments, it was not necessary to decide this issue.

§12.20. Appeal from decision of board of appeals: Standing as "person aggrieved." The question of standing in a zoning appeal under G.L. c. 40A, §21, was presented to the Appeals Court in *Amherst Growth Study Committee, Inc. v. Board of Appeals of Amherst*.

The plaintiff was an organization formed after the board's decision to grant a special permit but before the appeal period had expired. The plaintiff committee claimed to be the successor to an organization which had opposed the development in question. The plaintiff neither held an interest in property nor had any express purpose other than to oppose the proposed development. Since the plaintiff was unable to establish any legal rights in either the pleadings or the evidence at the trial, the court affirmed the interlocutory decree dismissing the plaintiff's bill.

In reaching its decision, the Appeals Court relied on *Circle Lounge and Grille, Inc. v. Board of Appeal of Boston*, which denied standing to the owners of a restaurant who sought review of the granting of a variance to a competitor. In *Circle Lounge and Grille* the Supreme Judicial Court found that, despite the fact that the plaintiff would be injured by the granting of the variance because of increased competition and possibly increased congestion and litter, it was not a "person aggrieved" entitled to appeal under G.L. c. 40, §30. The court continued its policy of restricting access to judicial review to those persons with legally recognizable injury, and it declined to find that a landowner in a commercial zone could sustain a legally recognizable injury by way of reclassification of other nearby land as commercial.

In support of its ruling, the court also cited *Sierra Club v. Morton*, a landmark decision in which the plaintiff was denied standing in a suit

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§12.20. 1 G.L. c. 40A, §21 grants "persons aggrieved by the decision of the board of appeals" opportunity to appeal that decision to either the district or superior court within twenty-one or twenty days, respectively. "Persons aggrieved" specifically includes "any municipal officer, planning board, or city council." See 19 Ann. Surv. Mass. Law §22.7.


4 In the *Circle Lounge* case, the Howard Johnson Company was granted a variance to build a restaurant approximately 400 feet from the plaintiff's restaurant. The plaintiff alleged legal interest in that the competition would reduce his profits. The court replied with the comment that zoning laws were not intended to promote monopolies.

5 G.L. c. 40, §30 was the predecessor of G.L. c. 40A, §21.

6 405 U.S. 727 (1972).
brought by it to prevent the commercial development of certain recre­
ational areas. The United States Supreme Court, while admitting that the
interest alleged may have reflected "aesthetic, conservational, and recre­
ational as well as economic values,"7 denied the status of an aggrieved
party to the Sierra Club. The Court closed the door on all special interest
groups regardless of how firmly they were established or how noble was
their cause unless they alleged legally recognizable injury to the group or to
some of its members. It was noted, however, that once standing has been
established, the plaintiff is free to argue the interests of the general
public in support of his position.

This rescript opinion of the Appeals Court precludes special interest
groups (or individuals) from enforcing their individual value preferences
through the judicial process unless they can show a direct, legal interest
in the subject matter of the case. Only if they can show such a direct,
legal interest will they be able to seek judicial review in zoning appeal
cases. To be considered "aggrieved" a party must have special interests
affected that are different from the general rights of the public. It is, of
course, possible for municipal agencies (e.g., planning boards, municipal
officers, and city councils)8 in appropriate cases to represent general
public interests but no unofficial private parties are given this recognition
under the Zoning Enabling Act.

§12.21. Appeal from grant of special permit: Availability of mandam­
us. The question presented to the Appeals Court in Saab v. Building
Inspector of Lowell1 was whether mandamus can be used to attack the
grant of a variance (or special permit) after the statutory appeal period
has expired. At some time prior to the present action, the Board of
Appeals of Lowell granted two valid variances for the construction of an
apartment complex. Saab did not appeal from these actions of the board
although he apparently was entitled to do so as a person aggrieved.
Having failed to avail himself of his appeal rights within the statutory
time limit, Saab then brought a motion to intervene in an appeal brought
by other aggrieved parties in the superior court. This motion was denied
and Saab did not appeal from the denial. The petitioner, Saab, then
sought a writ of mandamus to compel the building inspector to revoke
the building permits for the apartment complex which was then under
construction. The respondent building inspector demurred on the
grounds, inter alia, that a remedy will not lie in mandamus actions when
other effective remedies are available. The trial court sustained the
demurrer and Saab appealed.

The Court of Appeals upheld the demurrer, ruling that the petitioner

7 Id. at 738.
8 See note 1 supra.

had forfeited his rights by ignoring the statutory avenues of appeal. The petitioner's argument that alternative remedies were not available was somewhat ludicrous since he had neglected two obvious statutory appeal channels.

The Appeals Court distinguished the *Saab* case from the earlier decisions in *Brady v. Board of Appeals of Westport* and *Gamer v. Zoning Board of Appeals of Newton*. In *Brady* the petitioner sought enforcement of a zoning ordinance by a writ of mandamus. The Supreme Judicial Court ruled that Mrs. Brady's failure to treat a letter from the town counsel as an appealable decision of the building inspector did not foreclose the traditional public right to seek immediate enforcement by mandamus. In *Gamer* the plaintiffs had only five days to appeal from the building commissioner's denial of a permit. The Supreme Judicial Court ruled that this was an unreasonably short appeal period and that under the circumstances mandamus relief was appropriate. The Appeals Court viewed the present case as one in which the traditional appeals procedures were readily available and fully adequate, unlike the *Brady* and *Gamer* cases in which traditional appellate routes were non-existent or unreasonable. The court thus affirmed the order sustaining the demurrer and dismissed Saab's bill for a writ of mandamus.

This case rather briefly but apparently correctly answers the question that the *Brady* case left unanswered, namely, whether the failure to use the statutory appeal route from the grant of a variance or a special permit bars a later appeal by way of mandamus upon the issuance of a building permit granted under such variance or special permit. The language of *Brady* can be interpreted to permit this "second chance" approach. The entire philosophy of the short appeal time, however, would seem to be to establish finality for the decisions in these cases. Thus, even if mandamus might otherwise seem appropriate under general principles governing its application, the Zoning Enabling Act should be interpreted so as to bar this second route of attack on decisions otherwise unappealable under the statutory terms.

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2 Id. at 96, 294 N.E.2d at 459.
5 348 Mass. at 522, 204 N.E.2d 517-18.
6 Since that time the appeal time has been extended to thirty days. See G.L. c. 40A, §16 as amended by Acts of 1965, c. 207.
7 346 Mass. at 649, 195 N.E.2d at 774.
8 The language referred to is:

*We hold that an aggrieved person may by appeal to the board under [G.L. c. 40A] §13 seek the review of a written decision that there is no violation of law in the facts complained of, but if he does not do so he does not lose his right as a citizen to invoke the public right of immediate law enforcement.*

348 Mass. at 523, 204 N.E.2d at 518.
§12.22. Time for appeal: Jurisdictional or procedural issue. In Lynch v. Board of Appeals of Boston, the Appeals Court ruled that the time limit set for an appeal to the board of appeals from the denial of a permit by the building commissioner is a procedural and not a jurisdictional issue. The question of whether an appeal was timely taken must thus be initially litigated at the trial level. The time limits on these facts are to be regarded as merely procedural devices to aid in the administration of the zoning ordinance.

One of the defendants in the Lynch case, Living and Learning Center, Inc., applied for a building permit to construct a day nursery in a single-family district. The application was denied by the building commissioner on February 24, 1971 on the grounds that the proposed rear yard depth was insufficient and that a day nursery was a conditional use in such a zoning district. A timely appeal was taken from this denial but was subsequently withdrawn without prejudice on April 16, 1971, since notice of the required public hearing had not yet been published. On May 14, 1971, the building commissioner refused the defendant's application a second time, again on the same grounds. On May 17, 1971, a second appeal was taken from the building department's decision. After a public hearing and assurances from Living and Learning Center, Inc. that the dimensions of the rear yard would be increased, the board of appeals approved the conditional use of a nursery school. Lynch and other affected property owners appealed this decision to the superior court, which upheld the board's approval of the conditional use.

The plaintiffs contended that the board lacked jurisdiction to hear the appeal from the building commissioner's denial. Their argument was based upon section 8 of the Boston Zoning Code which provides in part that "any person aggrieved by reason of being refused a permit . . . may appeal to said board of appeal within forty-five days after such refusal, order, or decision by paying to the building commissioner a fee. . . ." The plaintiffs argued that the appeal was null and void since it was filed after the expiration of the statutory forty-five day appeal period. Since this issue was not raised in the pleadings at the trial level the trial court refused to hear evidence on it in the absence of an amendment to the pleadings. The plaintiffs neither sought to amend their pleading nor

2 Id. at 417, 297 N.E.2d at 66.
3 Acts of 1956, c. 665, §8, allows forty-five days for the filing of an appeal with the board of appeals after denial of an application for a building permit.
4 The Boston Zoning Code, section 6.1, provides that the Board of Appeal may, after public notice and hearing, grant permission for certain enumerated uses which would normally be prohibited in a particular district. These specified uses for which permission may be granted are known as conditional uses.
took exception to the judge's ruling. Thus, since the argument was not part of the record below, the Appeals Court could consider the appeal only if the time limit was jurisdictional rather than procedural. Ordinarily, failure to file a timely appeal is a jurisdictional defect that may be raised at any time. The court, however, distinguished the tardy appeal of Living and Learning from the normal failure to bring a timely appeal. The building commissioner acted ex parte on Living and Learning's application and had no alternative but to deny it since the board of appeals is the only body empowered to allow a conditional use. In effect the commissioner's function is ministerial and the application denial merely a formal procedure. No issues are adjudicated by the building commissioner and thus the appeal to the board is an original hearing.

The court ruled that the statute was designed to provide an orderly procedure for bringing matters before the board. For practical purposes, therefore, the forty-five day appeal period is meaningless since it in no way forecloses an applicant's right concerning a desired conditional use. An applicant who simply resubmits his original application to the building department will be entitled to the same appeal procedure, after the requisite denial, to which an original applicant is entitled who files for the first time.

The plaintiffs also argued that failure to pay the required fee for the second appeal deprived the board of jurisdiction. The record indicated, however, that the building commissioner transferred the first appeals fee to the second appeal. Moreover, even if he had not, said the court, the plaintiffs would have no standing to challenge the lack of jurisdiction because of failure to pay the fee. The court went on to dismiss the plaintiffs' arguments concerning the sufficiency of the evidence before the board at the time it granted defendant's application. The court affirmed the trial court's decision that the conditional use granted by the board was in complete harmony with the intent and spirit of the Boston Zoning Code.

The court's decision in Lynch carries the reminder that while time limitations set out in zoning ordinances are usually jurisdictional, they are not always and in some instances must be considered procedural in nature.

§12.23. Estoppel by judgment: Prior mandamus action. In City of Boston v. Pagliaro,\(^1\) the city sought to enjoin construction of a high-rise apartment building on the grounds that it violated certain requirements of the Boston Zoning Code governing floor area ratios in the particular zoning district. A bill seeking temporary injunctive relief was denied and petitioner appealed. The Appeals Court denied the appeal and, in addition, awarded costs to the defendants.\(^2\)

The facts disclose that the suit in Pagliaro was preceded by a mandamus action brought by the defendants' predecessor in title to compel the issuance of a building permit. The Appeals Court ruled that the issue of compliance with the zoning code provisions was such a material issue in the prior case "that the judgment entered therein could not possibly have been entered without that issue having been adjudicated adversely to the party later attempting to raise it."\(^3\) Thus, estoppel by judgment was the theory employed by the Appeals Court in finding for the defendants in the city's suit for injunction. Relevant to the court's decision was the fact that the earlier mandamus proceeding resulted in the issuance of a building permit to defendants' predecessor in title. No permit could have been issued in that proceeding if the court, the building commissioner, or the zoning administrator had found any non-compliance with the relevant articles of the zoning code. Since there had been no material changes in either the zoning code or the building plan which necessitated a re-examination of the compliance issue, the doctrine of estoppel by judgment was brought into play to deny the petitioners relief.

In deciding the case, the court declined to make a definitive interpretation of certain controversial sections of the zoning regulations. Determination of this problem was not required since the earlier mandamus proceeding had been decided on a particular interpretation accepted at the hearing by all parties concerned, which found the building in compliance with the floor area ratio requirements. The new, more limited interpretation of the floor area ratio regulations had been developed by a member of the mayor's staff prior to the mandamus hearing and the building inspector had been informed of it. However, there was no evidence that the zoning administrator knew of this change in interpretation of the regulations. Moreover, the zoning administrator had testified in the mandamus action that the building complied with the zoning law.

While the court noted that res judicata rather than collateral estoppel may have been the appropriate issue on these facts,\(^4\) it decided the case on the equally effective estoppel by judgment doctrine. Although the

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\(^3\) Id. at 128 n.4, 294 N.E.2d at 554 n.4.
case resulted in approval of a building which, under subsequent interpretation by the courts of the applicable zoning regulations, may prove to have an excessive floor area ratio, the City of Boston could not complain since it had previously accepted a less restrictive interpretation of the regulations and had certified to the Federal Housing Administration that the building was in compliance with the zoning laws. Construction of the building was well under way when the issue of the validity of the building permit was first raised and construction continued in large part because the FHA financing stipulated that delays in construction of over twenty days would be at the risk of mortgage foreclosure. The city may have been properly unhappy but the court correctly found that the issue of zoning compliance had been settled between the parties in the mandamus action and could not again be litigated in the present action to enjoin construction.

§12.24. Special permit: Scope of review of denial. In Vazza Properties Inc. v. City Council of Woburn, the Appeals Court dealt with the issue of the scope of review available when a special permit has been denied. The plaintiff in this case had filed an application for a special permit to build a 144-unit apartment complex in a residential zone. The city council, acting as a board of appeals, denied the application after a public hearing. The council gave the following reasons for denial: first, the proposed construction would aggravate a periodic flooding problem; second, the municipal water supply was insufficient for such a large-scale development; and third, the increased traffic would create a safety problem. The applicants appealed to the superior court under G.L. c. 40A, §21. After a de novo review of the evidence, the trial judge reached substantially the same factual conclusions and ruled that the city council had not abused their administrative discretion. It is from this decree denying the application that the plaintiff appealed.

The plaintiff argued that the trial court’s findings of fact were not sufficiently detailed to comply with the standard of review required by G.L. c. 40A, §21, as first construed in Prendergast v. Board of Appeals of Barnstable and more recently in Josephs v. Board of Appeals of Brookline. The court distinguished the Josephs case in that it was an appeal from the grant of several special permits, as well as a variance, whereas the present case involved the denial of a special permit. In reviewing the grant of a special permit a trial court must independently make an

3 G.L. c. 40A, §21 provides for a de novo review by the superior court to determine if the board exceeded its authority, or if not, if the board reached the correct result based on all the evidence.
affirmative finding that each condition of the ordinance or by-law is met before affirming the board's decision. In reviewing the denial of a special permit, however, a court need only ascertain if the reasons for denial have substantial basis in fact. If the formal notice and public hearing requirements have been met, the council's (or board's) discretionary decision cannot be reversed "unless [it is] based on legally untenable ground, or is unreasonable, whimsical, capricious or arbitrary." Under this standard the judge's independent findings in the instant case were sufficient to uphold his conclusion that the city council did not act arbitrarily in denying the special permit. The opinion in Vazza is a clear expression of the different standards imposed upon the judge depending on whether he is reviewing the grant of a special permit or the denial of such a permit.

§12.25. Definition of use: Mobile home. The 1973 Survey year saw the Supreme Judicial Court attack the problem of defining the term "mobile home" as it was used in a local zoning by-law. In Board of Selectmen of Hatfield v. Garvey, the Court carefully limited its decision to the by-law in question and abstained from generalities that would be binding on other communities.

Since 1961 the defendants had operated a combined package store, tavern, and laundromat in a wooden building located on the land in question. In 1970 a fire completely destroyed this structure. Garvey applied for and was granted a permit to construct a one-story building of wood, aluminum, and steel to be set on a concrete block foundation. Garvey then ordered, from a manufacturer of mobile homes, a unit with an office, sales room, and storage area, and without sanitary facilities. The unit was delivered to the site on wheels that were subsequently removed when the unit was placed on the concrete block foundation. Since the defendants' land is located in a Residence A district in which mobile homes are prohibited by the local by-laws, the Board of Selectmen sought injunctive relief to force the defendant to remove the new structure. The trial court dismissed the board's bill in equity, upon modification of the master's report, and the board appealed. The Supreme Judicial Court restricted its decision to the determination of the issue of whether or not the particular structure involved was a mobile home. If the struc-

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7 Id.

§12.25. 1 A Town of Hatfield zoning by-law dealing with Business B districts was involved.
iture was a mobile home as contemplated by the local by-law, then there was no question that it was prohibited at its present location.

The court found that the building was neither designed nor built for residential purposes and hence could not be a "mobile home" as defined by the ordinance. The new structure differed in many respects from the customary five-room mobile home. There were no sanitary facilities and no windows in the rear, and the unit had reinforced floors, additional insulation, wooden doors, and a walk-in refrigerator. These vital structural differences served to distinguish the defendants' building from the normal commercially-built mobile home. The court also rejected the board's argument that specific provisions to permit "mobile homes" in Business B districts illustrated the town's recognition of the commercial uses of such units. The court viewed this provision as merely the means used to exclude mobile homes from residential districts, since otherwise the term "mobile unit" would have been utilized by the draftsmen.

The court also reviewed the issue of "mobility," an issue that had arisen in Manchester v. Phillips, which the plaintiffs argued was controlling in the instant case. The court had ruled in Manchester that a mobile home retained that classification despite the fact that it was permanently affixed to a foundation. The court found the present controversy distinguishable since the structure in question was never a mobile home but rather a modular unit constructed specifically for commercial purposes.

The court concluded its opinion with the caveat that its statements in this case and in the Manchester case were not all-inclusive definitions of the term "mobile home." As it pointed out, various statutory contexts could alter the court's interpretation of the term, as could changing social problems.

§12.26. Nonconforming use: Not personal to original owner. In City of Revere v. Rowe Contracting Co., the city sought to enjoin the use

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3 Id. at 108, 291 N.E.2d at 597.
4 Id.
6 Id. at 595-96, 180 N.E.2d at 336.
8 Id. at 109, 291 N.E.2d at 597.
9 The court in this case did, in fact, reject the argument of the defendants that the term "mobile home" must be interpreted in accordance with the definition in G.L. c. 140, §32L. It held that this statute was a licensing statute and that definitions therein were in no sense controlling in the interpretation of local zoning regulations. 1973 Mass. Adv. Sh. at 107, 291 N.E.2d at 596. A state statute could not be controlling unless specifically stated to be so, in which case it would supersede any local interpretation. Thus, for example, while a variance is a variance no matter what a local zoning regulation might call it, definitions of "use" terms will generally be held to be matters of local interpretation.

of residential-zoned land for storage of rock salt for the treatment of ice and snow conditions on highways. The Supreme Judicial Court found that as to that part of the land purchased by the defendant in 1939, the use was a protected nonconforming use, but as to the land purchased in 1949, the use was not so protected. This distinction was drawn due to the fact that the applicable Revere zoning ordinance was adopted in 1929 but, because of failure to meet certain publication requirements, was of questionable validity until 1945. The Supreme Judicial Court held that the lower court had properly followed the test set out in Bridgewater v. Chuckran for determining if a nonconforming use existed and upheld the decision below.

The city raised the issue that the Commonwealth had been the owner that had used the land originally for storage of salt thereon. The court noted, in accordance with the current standard, that a nonconforming use is not personal to a particular owner but runs with the land itself. Thus the fact that the use was originally owned by the Commonwealth as a prior owner did not prevent the present private owner from retaining the benefit.

§12.27. Nonconforming use: Right to rebuild after destruction. In Berliner v. Feldman, the Supreme Judicial Court considered the difficult question of the extent of rebuilding permitted under a local zoning by-law governing nonconforming uses. Until 1963, the Turk's Head Inn of Rockport was operated for approximately seventy-five years as a summer resort hotel. In 1951, when the town enacted its zoning ordinances, the premises were placed in a single residence district, thus becoming a protected nonconforming use. Originally the inn was a three section

2 Id. at 1805, 289 N.E.2d at 831.
3 Apparently the Revere zoning by-law had failed to meet the publication requirements of G.L. c. 40, §2. This lack of validity was remedied by Acts of 1945, c. 107 which specifically approved the Revere zoning by-law as of that date.

The original 1929 ordinance prohibited non-residential uses of the land. The court used the 1945 date to distinguish between the two parcels, one purchased in 1939, the other in 1949. Thus, the court considered any use prior to 1945 to be a protected non-conforming use at the time of the by-law's effective date, whereas uses after 1945 were required to conform to the local by-law.

4 351 Mass. 20, 217 N.E.2d 726 (1966). The Chuckran test for determining whether the current use of property fits within the exemption for non-conforming uses is threefold:

(1) whether the use reflects the nature and purpose of the use prevailing when the zoning by-law took effect, (2) whether there is a difference in the quality or character, as well as degree, of use, and (3) whether the current use is different in kind in its effect on the neighborhood.

Id. at 23, 217 N.E.2d at 727-28.
6 Id. at 1805, 289 N.E.2d at 830. See also G.L. c. 40A, §5 and its predecessors.

wooden structure, but in 1968 fire damaged the center section, and in 1969 the center section, south wing, and connecting arms were razed. In 1969 a second fire damaged the remaining north wing, and finally, in 1970, the remainder of the hotel was destroyed by fire. Thirty-four residents and taxpayers of Rockport sought a declaration of the hotel owner's rights under the existing zoning by-laws which provide that a nonconforming use may be "rebuilt if damaged or destroyed." The plaintiffs specifically challenged the validity of the by-law and further claimed that the 1969 razing of the center section, south wing, and connecting arms constituted a voluntary abandonment of the nonconforming use, at least as to those particular sections. The court was also requested, if any rebuilding were permitted, to decide whether the inn could be operated only on a seasonal basis or whether it could be operated year round. The trial judge ruled that the by-law was authorized under the Zoning Enabling Act and that the provisions of the by-law were not so vague as to render them invalid. The plaintiffs appealed from this finding.

The Supreme Judicial Court upheld the trial court's ruling that there is no statutory prohibition against a zoning by-law which permits the rebuilding of a valid nonconforming use which has been destroyed. While Section 5 of G.L. c. 40A, sets certain minimum protections for nonconforming uses, it does not prohibit municipalities from giving extensive rights to rebuild, reconstruct or alter such uses. In addressing itself to the plaintiffs' contention that the by-law provided insufficient standards to guide the discretionary actions of the local board of appeals, the Supreme Judicial Court ruled that the language of the Rockport by-law grants an absolute right to the owner of a nonconforming use and does not therefore involve the exercise of discretion by the board.

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2 Section 8.1 of the Rockport zoning by-laws.
3 The trial court did not decide the issue of whether or not there had been a voluntary abandonment of the nonconforming use nor did it rule on the question of whether the inn could be operated all year round.
6 Section 8.1 of the Rockport zoning by-law provides in relevant part that "any lawful . . . building, structure, or premises existing at the time this bylaw is adopted, even if not in conformity with its provisions, may be continued [and may be] rebuilt if damaged or destroyed . . . and, if authorized by the Board of Appeals, may be enlarged."
Hence, the standards sought by the plaintiffs were unnecessary in this type of by-law.\(^7\)

The court next faced the issue of the voluntariness of the 1969 demolition of the center section and connecting arms. The plaintiffs argued that the demolition was based on economic rather than on safety considerations. Unable to find sufficient evidence in the record to rule on this point, the court remanded the case to the trial court for further hearings on the voluntariness of the demolition. In doing so, the court suggested that demolition for economic or possible planning reasons could be construed as a forfeiture of the absolute right to rebuild and as an abandonment of the nonconforming use, while no such dire consequences would attach to a decision based on public safety considerations.\(^8\)

The court also gave a declaration of the rights of the owner of the inn in regard to the nature of permissible reconstruction of the inn. The plaintiffs argued that if rebuilding were permitted any new structure must conform to the original 1888 use, and they urged the court to place restrictions on the rebuilding to prohibit the installation of central heating, private baths, and convenient corridors. The owner urged that the only restrictions should be that the new building be used as an inn and that the external dimensions coincide with the original building. The court found support for the owner's argument in previous cases in which it had been held that modernization of a nonconforming structure\(^9\) and interior alterations\(^10\) do not constitute a change in the original nonconforming use. Therefore, the owner was entitled to build a modern hotel.\(^11\) The by-law grants an absolute right to rebuild a damaged or destroyed nonconforming use and in that respect goes beyond the minimum tolerance of nonconforming uses required by G.L. c. 40A, §5. This unusually permissive standard was noted by the court and was applied by it to the question of year-round use of the rebuilt structure. The court, relying on Rockport's liberal attitude toward nonconforming uses, ruled that the business of the new building may, as of right, be carried on throughout the year, and may not be limited to seasonal use only.\(^12\)

\(^8\) Id.
\(^11\) Feldman cannot build a motel as he originally desired since the Rockport zoning by-law distinguishes between a motel and a hotel. See 1973 Mass. Adv. Sh. at 955 n.1, 298 N.E.2d at 155 n.1.
\(^12\) Id. at 963, 298 N.E.2d at 159. In McAleer v. Board of Appeals at Barnstable, 1972 Mass. Adv. Sh. 496, 280 N.E.2d 166, the court indicated that absent any explicit guidance in the local by-law as to the expansion or enlargement of a non-conforming summer use, the issue would be decided by the "spirit" expressed in the by-law towards nonconforming uses.
The case was remanded to the trial court for further proceedings on the issue of the voluntariness of the 1969 demolition. Upon resolution of this issue the trial court was instructed to render a final decree consistent with the opinion of the court.

This case is somewhat special because of the thrust of the Rockport by-law which the court properly categorized as "permissive." Most local regulations tend to restrict nonconforming uses by limiting any rebuilding, remodelling or extensive alteration. Nonconforming uses in a given zone may, depending upon the nature of the permitted uses and the area involved, be either basically compatible or basically incompatible with the permitted uses. It may be appropriate to legislate in such a way that those uses that are not offensive or basically undesirable be permitted to remain and those that are troublesome or out-of-place be severely restricted. Apart from some equal protection problems, the attitude on which the Rockport by-law is based represents rather an abdication of the planning process. If a hotel is not incompatible with the zone in which it is located, would it not be preferable for the special permit provisions to govern its use, extension and rebuilding, than that there exist a blanket "permissive attitude" type of nonconforming use regulation? The Rockport by-law, it is submitted, represents poor planning and a failure to meet the issues of mixed but possibly compatible uses head-on.

§12.28. Nonconforming use: Use, quality of use and difference in kind. In Powers v. Building Inspector of Barnstable,¹ the Supreme Judicial Court was again confronted with a nonconforming use problem. The plaintiffs, adjoining landowners, petitioned for a writ of mandamus to compel the local building inspector to enforce the local zoning by-law. The town's first zoning by-law, adopted in 1949, classified the two parcels in question (Parcel 1 and Parcel 2) as Residence A. A subsequent revision of the by-law in 1956 reclassified the parcels to a Residence C district. Both by-laws included saving clauses for nonconforming buildings and uses.² The two parcels are occupied by several buildings in which Old Harbor Candle Co., an intervenor in this case, operates a business for the manufacture of candles, and the wholesale and retail sale of candles and other gift items. The plaintiffs alleged that the current use has changed in such a degree since the original adoption of the zoning by-law in 1949 (and revision in 1956) that it is no longer a privileged nonconforming use. The owners and lessee, both intervenors, denied any substantial "change" of use which would subject the parcel to the requirements of the zoning by-law. Basing its decision on the differences in the use of the two parcels, the superior court denied the

² See G.L. c. 40A, §5.
relief sought as to one parcel but granted it as to the other. The adjoining landowners, the candle company and the realty trust all appealed. 8

The Supreme Judicial Court outlined the three tests for “determining whether current use of property fits within the exemption granted to non-conforming uses.” 4 These tests are:

1. Whether the use reflects the “nature and purpose” of the use prevailing when the zoning by-law took effect; (2) Whether there is a difference in the quality of character, as well as degree of use; and 3. Whether the current use is “different in kind in its effect on the neighborhood.” 5

The court noted that the development and application of the law governing nonconforming uses has been on a case-by-case basis and it gave a synopsis of the most frequently cited cases that have either upheld, rejected or limited claims of valid nonconforming uses. 8

The building in Powers which was used for the manufacture and sale of candles and other merchandise was located on Parcel 1. It had been used continuously since 1946 for the same business purposes although the management had changed several times. The court found that the trial judge correctly ruled that the present use represents a continuation of the use prevailing at the time of the adoption of the . . . [zoning] by-law; that . . . such use was lawful at the time of adoption; [and] that there is a difference in degree of such use, but not in the quality or character thereof. 7

On the other hand, Parcel 2 was improved by two buildings, the “Schoolhouse” and the “Warehouse.” The Schoolhouse is a two-story wooden structure. The first floor was utilized as storage during the 1950’s while the second floor was occupied as living quarters at least until 1959. The first floor is still used for miscellaneous storage while the second floor has been converted into the administrative offices of the candle company. The court held that the present use of the first floor of the Schoolhouse as a storage area is a lawful continuation of a nonconforming use, but that the use of the second floor as administrative offices is unlawful since it is not a protected nonconforming use. 8

8 The owners of the two parcels were the trustees of the realty trust and the lessee was the candle company.
7 Id. at 830, 296 N.E.2d at 499.
8 Id. The second floor of the Schoolhouse was previously used as living quarters; hence it was only protected for that use.
The Warehouse is a large, corrugated metal building, erected in 1912, that had been used for a variety of storage purposes until 1962 when it was sold to the present owner. The building is currently used as a shipping depot for the candle company, an operation that involves three or four trucks per day visiting the premises. Using the test outlined above—which was first developed by the court in Bridgewater v. Chuckran—the court in Powers held that the present use of the warehouse is not entitled to protection as a valid nonconforming use. The Warehouse, at the time of the 1956 amendment, was used as “dead” storage which involved very little activity. The Warehouse is now an essential element of the candle company’s wholesale trade that accounts for about ninety percent of its total revenues. This increase in activity—especially the trucking activity to and from the Warehouse—was a determining factor in the court’s ruling that the present use of the Warehouse was not protected under the Chuckran test.

Hence, the Supreme Judicial Court upheld the trial court in denying a writ of mandamus as to Parcel 1, on which the manufacture and sale operations are housed; upheld the trial court in issuing a writ to compel the building inspector to enforce the zoning by-law as to the Warehouse; and modified the degree as to the Schoolhouse by refusing to issue a writ as to the first floor storage area, but issuing one as to the second floor administrative offices.

As is often the situation in nonconforming use cases, the questions in this case were largely factual. The court’s review of the more prominent earlier nonconforming uses is valuable as a guide to its thinking on the tests it developed earlier in Chuckran. It has occurred to this writer often that legislative reworking of the entire area of nonconforming uses should be given substantial priority over other legislative undertakings. Local governing bodies should be permitted, by amendment of the Zoning Enabling Act, to develop amortization procedures when considered appropriate. Local planning, and thus local zoning regulation should recognize that some types of mixed uses are compatible with other differing uses that are the main uses permitted in a given zone, while others are clearly noncompatible. All constitutionally permitted machinery should be made available to localities seeking to terminate these latter uses. In addition, a landowner seeking to establish the nature and quality of a nonconforming use should have a less expensive and more informal procedure made available to him so that this can be done when evidence is available and not later when the information is in-

10 G.L. c. 40A, §5 does not, by its terms, permit the termination of nonconforming uses over a period of time by amortization. This procedure, however, has been implemented in other states. See C. Haar, Land Use Planning 267-68 (1959). See also Stoner McCrory Sys. v. Des Moines, 247 Iowa 1315, 78 N.W.2d 843 (1956); City of Los Angeles v. Gage, 127 Cal. App. 2d 442, 274 P.2d 34 (1954).
complete and inexact. These suggestions, if implemented, would at least make this area of zoning law less of a morass of expensive litigation.

§12.29. Earth removal: Conditions imposed upon grant of permit.
The Appeals Court, in Kelleher v. Board of Selectmen of Pembroke,\(^1\) enumerated several issues which it held to be beyond the legitimate concern of a board of selectmen when ruling on an application for a permit under a local earth removal by-law. In 1970, the plaintiff's predecessor in title, one Walsh, acquired a large tract of land primarily situated in Pembroke. The tract was bisected by a dead-end dirt public road. During April of 1971 the plaintiff, Kelleher, began extensive earth removal operations and in May of that year purchased the entire parcel from Walsh. None of the plaintiff's activities were prohibited by any existing zoning by-law; however, aerial photographs revealed that the large tract was becoming a barren wasteland, and that a small brook was threatened with extinction. The earth removal was accompanied by the frequent movement of heavy equipment and trucks on the streets surrounding the tract. This heavy traffic of approximately one truck per minute continued throughout the daylight hours during the period from April to October 1971.

At a special town meeting in September of 1971, the town adopted a comprehensive earth removal by-law\(^2\) which prohibited all earth removal unless done in compliance with a permit granted by the board of selectmen. The by-law provided for an extensive, detailed application for any new or existing earth removal and also provided for a hearing on each application. The by-law allowed the board to condition the grants of any permits for the continuance of existing earth removal with provisions to restore areas of past removal.

After the effective date of the by-law the selectmen, by having the police stop the plaintiff's trucks, caused the plaintiff's operation to cease. Walsh, acting for the plaintiff, applied for a permit, submitting site plans which were originally drawn in March of 1970 but which were no longer accurate because of the large alterations caused by seven months of earth removal. In addition to the present inaccuracy of the submitted plans the application was incomplete in other details required by the by-law. The selectmen denied this application after the

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\(^2\) The by-law provides, in relevant part:
All removal of soil, loam, sand, gravel or rock from land . . . is hereby prohibited unless done in strict compliance with a permit granted hereunder by the board of selectmen. Removal shall mean stripping, digging, or excavating the foregoing earth material from one lot and removing or carrying it away from said lot.

required public hearing and issued a written decision which specifically stated that the denial was without prejudice.

The plaintiff in the present case then sought injunctive relief to prohibit further interference with his earth removal operation as it was conducted immediately prior to the effective date of the zoning by-law. The Appeals Court held that, absent any showing of intentional misapplication of law by the board, there were grounds which justified the board’s action. The court found that the board’s concern over the plight of the public road intersecting plaintiff’s property, the public nuisance created by plaintiff’s trucks, and the lack of available loam to cover proposed excavation were legitimate grounds for the denial of plaintiff’s application. There was thus no basis for reversal of its decision and an injunction would not issue. The court also held that the retroactive application of the earth removal by-law to an existing operation was constitutional.

Although the court found sufficient grounds for the board’s denial of the plaintiff’s application, it also noted several matters which the board had improperly considered during its review of the plaintiff’s application for a permit. The court found that it was improper for the board to base its denial of the permit on the “likelihood that truck traffic would create or continue a hazard” on a street adjacent to the excavation site. Additionally the board should not have considered the destruction of that portion of the plaintiff’s property zoned for residential purposes, since this was a matter for the owner’s discretion. The plaintiff had the right to choose to sacrifice the value of the smaller portion of the tract in order to reap the great benefit of a single use of the entire area. The board also erroneously considered sanitary and disposal conditions, and grading of the land in connection with future industrial uses of the property. These were premature matters said the court, which should have been left for future decision by the appropriate agencies, which, under the Subdivision Control Law, are the planning board and the health board.

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4 Id. at 200-01, 294 N.E.2d at 520.
7 Id. These were considered premature matters since the only issue before the board was whether or not the plaintiff would excavate the land. If, at some future date, the plaintiff sought a building permit to construct an industrial building, the local agencies would have had ample opportunity to examine the suitability of the land for the desired use. See also Daley Constr. Co. v. Planning Board of Randolph, 340 Mass. 149, 163 N.E.2d 27 (1959); Caruso v. Planning Board of Revere, 354 Mass. 569, 238 N.E.2d 872 (1968), noted in 1968 Ann. Surv. Mass. Law §12.9; G.L. c. 41, §81M, as amended by Acts of 1969, c. 884, §2.

http://lawdigitalcommons.bc.edu/asml/vol1973/iss1/15
The court also rejected as improper the board's attempt to impose conditions as to reseeding and grading of those areas that had been excavated by the plaintiff prior to the effective date of the earth removal by-law. This would have been an impermissible retroactive penalty for actions lawful at the time they were taken. The inclusion of this type of provision in the local by-law was therefore improper.

Despite these misapplications of the law, there were no fatal errors in the board's actions requiring reversal absent a showing of "unreasonable, arbitrary, whimsical or capricious" behavior by the board. The court quickly dismissed the petitioner's contention of unconstitutional application of the by-law by referring to the numerous cases decided under the Zoning Enabling Act which permit a zoning by-law to impose reasonable regulations on the conduct and expansion of existing earth removal operations. The court then concluded that since a town may act under either the Zoning Enabling Act or the Earth Removal Enabling Act in drafting regulations to control earth removal, the constitutional principles that apply to zoning by-laws should also apply to earth removal by-laws.

**STUDENT COMMENT**

§12.30. "Anti-Snob Zoning Law": Power of the Housing Appeals Committee and zoning boards of appeals to override local zoning restrictions in granting comprehensive permits for construction of low and moderate income housing: *Board of Appeals of Hanover v. Housing Appeals Committee in the Dep't of Community Affairs.*

In April 1970, Country Village Corporation [the Hanover applicant] filed an application with the Hanover Board of Appeals [the Hanover Board], in accordance with chapter 774 of the Acts of 1969 [the "Anti-Snob Zoning Law"] for a comprehensive permit to build eighty-eight units of low and moderate income housing. G.L. c. 40B §21 provides in part:
moderate income housing for the elderly. After a public hearing, the Hanover Board denied the application for the permit, citing, *inter alia*, the failure of the applicant to submit adequate drainage and sewerage plans, traffic problems that would be generated by the proposed project, and the "apparent conflict between chapter 774 of the Acts of 1969 and the zoning by-laws of the town of Hanover in regard to zoning districts and permissible uses in different zoning districts." The Hanover applicant subsequently appealed to the Housing Appeals Committee pursuant to section 22 of chapter 40B.4

In January 1971, the Concord Home Owning Corporation [the Concord applicant] filed with the Board of Appeals of Concord [the Concord Board] an application for a comprehensive permit to construct sixty garden apartment units of low and moderate income housing. The Concord Board denied the permit, stating that the construction of the project would be in violation of Concord’s zoning by-law and that, at any rate, the severe subsurface water conditions affecting the area in which the housing was proposed to be built rendered the denial of the application “reasonable and consistent with local needs” in that the project “could be detrimental to the health and safety of the future occupants of the project and the residents of the Town in the vicinity

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Any public agency or limited dividend or nonprofit organization proposing to build low or moderate income housing may submit to the board of appeals ... a single application to build such housing in lieu of separate applications to the applicable local boards. The board of appeals shall forthwith notify each such local board, as applicable, of the filing of such application by sending a copy thereof to such local boards for their recommendations and shall, within thirty days of the receipt of such application, hold a public hearing on the same. ... The board of appeals shall render a decision based upon the majority vote of said board, within forty days after the termination of the public hearing and, if favorable to the applicant, shall forthwith issue a comprehensive permit or approval. If said hearing is not convened or a decision is not rendered within the time allowed, unless the time has been extended by mutual agreement between the board and the applicant, the application shall be deemed to have been allowed and the comprehensive permit shall forthwith issue.

4 C.L. c. 40B, §22 provides in part:
Whenever an application filed under the provisions of section twenty-one is denied, ... the applicant shall have the right to appeal to the housing appeals committee in the department of community affairs for a review of the same. ... The committee shall forthwith notify the board of appeals of the filing of such petition for review and the latter shall, within ten days of the receipt of such notice, transmit a copy of its decision and the reasons therefor to the committee. Such appeal shall be heard by the committee within twenty days after receipt of the applicant's statement. A stenographic record of the proceedings shall be kept and the committee shall render a written decision, based upon a majority vote, stating its findings of fact, its conclusions and the reasons therefor within thirty days after the termination of the hearing.
of the project." The Concord applicant then exercised its right of appeal to the Housing Appeals Committee under section 22 of chapter 40B.

After holding hearings as required by section 22, the Housing Appeals Committee in each case vacated the decision of the board of appeals and ordered issuance of a comprehensive permit for the project, subject to specified conditions, notwithstanding the fact that the relevant zoning regulations in each town prohibited construction of the housing for which approval was sought. Both the Hanover Board and the Concord Board then filed bills in superior court for review of the committee's decisions. The superior court judge reserved judgment in the cases and reported them without decision to the Supreme Judicial Court, where the cases were argued and decided together.

The Supreme Judicial Court saw three basic issues presented for decision: (1) does Chapter 774 of the Acts of 1969 [the Massachusetts "Anti-Snob Zoning Law"] confer power upon both the Housing Appeals Committee and the local boards of appeals to override zoning regulations which hamper the construction of low and moderate income housing? (2) is such power to override local zoning regulations, if it exists, constitutional? (3) was such a power to override local zoning regulations, if it exists, properly exercised by the Housing Appeals Committee in the instant cases? In a lengthy opinion the court HELD: (1) that chapter 774 does confer upon both the committee and boards of appeals the power to override local "requirements and regulations," including

5 1973 Mass. Adv. Sh. at 493 n.3, 294 N.E.2d at 401 n.3. G.L. c. 40B, §23 describes the issues to be reviewed and the standard to be applied by the Housing Appeals Committee in any appeal taken under G.L. c. 40B, §22, quoted in note 4 supra, by an applicant for a comprehensive permit under G.L. c. 40B, §21. Section 23 states in part:

The hearing by the housing appeals committee in the department of community affairs shall be limited to the issue of whether, in the case of the denial of an application, the decision of the board of appeals was reasonable and consistent with local needs . . . . If the committee finds, in the case of a denial, that the decision of the board of appeals was unreasonable and not consistent with local needs, it shall vacate such decision and shall direct the board to issue a comprehensive permit or approval to the applicant.

G.L. c. 40B, §23. The statutory test of whether a "requirement or regulation" is "consistent with local needs," set out in G.L. c. 40B, §20, requires a balancing of "the regional need for low and moderate income housing" with, among other factors, "the need to protect the health or safety of the occupants of the proposed housing or of the residents of the city or town." See G.L. c. 40B, §20, quoted in text at note 54 infra.

6 See G.L. c. 40B, §22, quoted in note 4 supra.

7 Id.

8 G.L. c. 40B, §22 provides, inter alia, that decisions of the Housing Appeals Committee rendered under that section may be reviewed in the superior court in accordance with the provisions of G.L. c. 30A.

9 G.L. c. 40B, §§20-23 and G.L. c. 23B, §5A.

zoning ordinances or by-laws, which are not “consistent with local needs,” as defined by the act;\(^ {11}\) (2) that this power to override local zoning regulations neither violates the 1966 “Home Rule Amendment”\(^ {12}\) nor constitutes “spot zoning”\(^ {18}\) and is therefore constitutional; and (3) that there was substantial evidence to support the Housing Appeals Committee’s decisions that the denials by the Hanover and Concord boards of the applications for comprehensive permits were unreasonable and not consistent with local needs.\(^ {14}\)

This article will first outline briefly the problem of exclusionary zoning which chapter 774 was designed to confront in the area of subsidized housing. It will then analyze both the legislative history and the express language of chapter 774 in concluding that the Supreme Judicial Court was correct from both legal and policy perspectives in holding that the Housing Appeals Committee and local boards of appeals have the power under the Act to override local zoning restrictions which are not “consistent with local needs,” as defined in the statute. Finally, it will be

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\(^ {11}\) 1973 Mass. Adv. Sh. at 504, 294 N.E.2d at 407. For the Act’s definition of “consistent with local needs,” see G.L. c. 40B, §20, quoted in text at note 34 infra.


\(^ {13}\) 1973 Mass. Adv. Sh. at 511, 294 N.E.2d at 411. “Spot zoning” is the practice whereby a single lot or area: (a) is granted privileges which are not extended to other land in the same use district; or (b) has burdens imposed upon it which are more rigid than those imposed on other properties within the same district. 1 A. Rathkopf, The Law of Zoning and Planning 26-1 (3d ed. 1972). The practice has also been described as “a singling out of one lot for different treatment from that accorded to similar surrounding land indistinguishable from it in character, all for the economic benefit of the owner of that lot.” Lamarre v. Comm’r of Pub. Works, 324 Mass. 542, 87 N.E.2d 211, 215 (1949). In holding that the exercise of the power, under chapter 774, to override local zoning ordinances deemed inconsistent with local needs does not constitute spot zoning, the Hanover court emphasized that the “special treatment” accorded by chapter 774 to sites for low and moderate income housing serves the general welfare rather than merely affording an economic benefit to the owner of the land receiving special treatment. 1973 Mass. Adv. Sh. at 511, 294 N.E.2d at 411.


The court also held: (1) that chapter 774 was not unconstitutionally vague for not supplying sufficient standards for use by the boards of appeals in passing on applications for comprehensive permits (the court concluding that the standards to be applied by the boards of appeals are the same as those to be applied by the Housing Appeals Committee in reviewing the boards’ decisions, namely, whether a denial of a permit would be “reasonable and consistent with local needs” and whether any conditions imposed upon the granting of a permit would make the building or operation of the housing “uneconomic”), 1973 Mass. Adv. Sh. at 512-13, 294 N.E.2d at 412. See G.L. c. 40B, §23 and text at notes 30-32 infra; (2) that chapter 774 requires that the review by the Housing Appeals Committee be in the form of a de novo hearing, 1973 Mass. Adv. Sh. at 517, 294 N.E.2d at 415; and (3) that the Housing Appeals Committee has the power to order the issuance of permits or approvals subject to “sufficiently definite” conditions or requirements. 1973 Mass. Adv. Sh. at 521-23, 294 N.E.2d at 417-18.
submitted that although the court's decision will likely enable chapter 774 to accomplish its objective of providing sufficient low and moderate income housing for the Commonwealth, amendment of the statute is needed to guarantee the input of sound advance planning into decision-making as to the location and design of the subsidized housing. Only then will there be any assurance that the low and moderate income housing which is built under chapter 774 will be constructed on the land most suitably adapted for that purpose.15

The Massachusetts "Anti-Snob Zoning Law" was passed by the General Court in 1969 in response to the need for low and moderate income housing in the belief that a major hindrance to the construction of such housing was the use by cities and towns of "exclusionary" or "snob" zoning devices, which tended to "zone out" of some communities individuals and families with low and moderate incomes. In 1967, Senate Order No. 93316 directed the Legislative Research Council to

undertake a study and investigation relative to the feasibility and implications of restricting the zoning power to cities and county governments with particular emphasis on the possibility that the smaller communities are utilizing the zoning power in an unjust manner with respect to minority groups.17

The Council's Report, issued in 1968, studied the economic effects of eight restrictive zoning devices (minimum lot size requirements, "green space" zoning, minimum frontage and setback requirements, building height limitations, maximum floor area requirements, inspection and permit fees, and maximum buildable areas of lots) and concluded that all but the last had a significant negative impact on the construction of low and moderate income housing.18 The Council stressed that large lot zoning, for example, was being used increasingly as a zoning tool and that unless kept within sound planning limits, it not only resulted in large lots unaffordable to low and moderate income home purchasers,19 but also increased the competition for, and the prices of, available

16 See 1967 J. Senate 654.
18 Legislative Research Council Report, supra note 17, at 90-119.
19 But cf. L. Sagalyn & G. Sternlieb, Zoning and Housing Costs: The Impact of Land-Use Controls on Housing Price 48, 52 (1973) (in which the authors cite empirical data indicating that house size and the socioeconomic make-up of a municipality are more significant variables in explaining selling price variation than is minimum lot size regulation. See generally Note, 45 Notre Dame Law. 123 (1969); Note, 15 Syracuse L. Rev. 507, 514-17 (1969).
smaller lots, as well as rapidly depleting the supply of land available for future development.\footnote{20 Legislativ...17, at 16-17.}

In June 1969, the Committee on Urban Affairs, in its Report on House Bill No. 5429, found that the shortage of low and moderate income housing constituted an "emergency" situation and emphasized that the solution to the problem could not come about solely within the confines of the densely populated cities. Land in less densely populated areas would also have to be made available.\footnote{21 Report of Committee on Urban Affairs on House Bill No. 5429 (1969), reprinted in Rules and Regulations, Massachusetts Communities and Development, Rules and Regulations for the Conduct of Hearings by the Housing Appeals Committee, at 1 n.l. (1971). [hereinafter cited as Housing Appeals Committee Rules and Regulations].}

What was needed was a limitation on the use of zoning devices to exclude low and moderate income housing from individual towns, a legislative mandate that the regional need\footnote{22 Calls for a "regional approach" to land use planning to prevent individual municipalities from considering only local needs while disregarding those of the region in general, have been frequent in recent years. See, e.g., Feller, Metropolitanization and Land-Use Parochialism—Toward a Judicial Attitude, 69 Mich. L. Rev. 655 (1971); Becker, Municipal Boundaries and Zoning: Controlling Regional Land Development, 1966 Wash. U.L.Q. 1, 13; Note, 114 U. Pa. L. Rev. 1251 (1966). There has also been considerable discussion of the possibility that exclusionary zoning may run into constitutional problems with the equal protection clause of the Fourteenth Amendment because of its detrimental effect beyond the zoned community's boundaries. See Note, Exclusionary Zoning and Equal Protection, 84 Harv. L. Rev. 1645 (1971); Note, The Constitutionality of Local Zoning, 79 Yale L.J. 896 (1970).}

The suggestion, however, that there is a limit to how far local zoning can go in ignoring regional considerations is not new. Feller points out that in Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), the landmark case in which the Supreme Court upheld the general constitutionality of a local zoning ordinance, the Court paused to warn that it could conceive of situations in which the municipal interest in zoning would have to bow to larger public interests: "It is not meant by this, however, to exclude the possibility of cases where the general public interest would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in its way." 272 U.S. at 390. Few courts, however, have invalidated local zoning schemes for being at odds with the needs of the larger region. The notable exception is the Supreme Court of Pennsylvania, which has established a general rule that communities may not refuse to confront the problems of population growth by adopting zoning regulations that effectively restrict population to near present levels, and has consistently struck down zoning schemes that have an exclusionary purpose or result. See, e.g., Appeal of Kit-Mar Builders, 439 Pa. 466, 268 A.2d 765 (1970); Appeal of Girsh, 437 Pa. 237, 263 A.2d 395 (1970); National Land & Inv. Co. v. Board of Adjustment, 419 Pa. 504, 215 A.2d 597 (1965).

Massachusetts cases have at times referred to the principle that municipal restrictions which conflict with the general public interest cannot be allowed to stand. Thus, in Simon v. Town of Needham, 311 Mass. 560, 42 N.E.2d 516 (1942), involving the validity of a one acre minimum lot size requirement, the Supreme Judicial Court stated in the course of its opinion:

A zoning by-law cannot be adopted for the purpose of setting up a barrier against

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legislative bodies to determine the permissible land uses in various districts.

The approach ultimately taken by the Legislature in its attempt to curb the exclusionary housing practices of cities and towns, and to facilitate the construction of low and moderate income housing in the Commonwealth is contained in chapter 774 of the Acts of 1969.23 The chapter sets up a procedure whereby "any public agency or limited dividend or nonprofit organization proposing to build low or moderate income housing"24 may submit to a local board of appeals a single application for a comprehensive permit to construct such housing.25 The statute thus eliminates, in the case of an applicant proposing to build low or moderate income housing, the necessity of procuring separate permits from a number of different local agencies before beginning

the influx of thrifty and respectable citizens who desire to live there and who are able and willing to erect homes upon lots upon which fair and reasonable restrictions have been imposed nor for the purpose of protecting the large estates that are already located in the district. The strictly local interests of the town must yield if it appears that they are plainly in conflict with the general interests of the public at large. . . .

311 Mass. at 565-66, 42 N.E.2d at 519. For the most part, however, the court in Simon paid little heed to the task of balancing the interests of the Town of Needham with the interests of the Boston metropolitan area and of those who might want to move into Needham, and concentrated instead on balancing the individual plaintiff's interest in being free to develop his land in lots of less than one acre against the interest of the other residents of the district in having freedom from congestion, better opportunity for rest and relaxation, good children's play facilities and the chance "to attempt something in the way of flowers, shrubs, and vegetables." Id. at 563, 42 N.E.2d at 518. Under this latter test the one acre minimum lot size requirement was upheld. Id. at 567, 42 N.E.2d at 520. In Aronson v. Town of Sharon, 346 Mass. 598, 195 N.E.2d 341 (1964), where the issue was the validity of a 100,000 square foot minimum lot size, the court invoked the "law of diminishing returns" and held that attainment of the advantages of large lot size cited in Simon did not reasonably require lots of 100,000 square feet. Id. at 604, 195 N.E.2d at 345. The court's decision was based, however, not on the exclusionary effect of the 100,000 square foot minimum, but rather on the conclusion that the minimum lot size here, inspired as it was by a desire to encourage land to be kept and used for purposes of conservation, constituted a "taking" of private property without compensation. Id.

23 Chapter 774, §§1 and 2 are contained in G.L. c. 40B, §§20-23 and G.L. c. 23B, §5A.
24 G.L. c. 40B, §21. "Low or moderate income housing" is defined as any housing subsidized by the federal or state government under any program to assist the construction of low or moderate income housing as defined in the applicable federal or state statute, whether built or operated by any public agency or any nonprofit or limited dividend organization.

G.L., c. 40B, §20. The legislation itself does not define "limited dividend organization." However, the Department of Community Affairs has defined the term to mean any applicant other than a public agency which proposes to sponsor housing under Chapter 40B and is eligible to receive a subsidy from a state or federal agency after a comprehensive permit has been issued. Housing Appeals Committee Rules and Regulations, supra note 21, Rule 1(f) at 2.

construction. In this sense, chapter 774 represents a "streamlined" version of the ordinary procedure of obtaining the requisite zoning and construction permits.

If an application for a comprehensive permit filed under section 21 of chapter 40B is denied by the board of appeals, or is granted with such conditions and requirements as to make the building or operation of such housing "uneconomic," the applicant is given the right to appeal to the Housing Appeals Committee in the Department of Community Affairs for a review of the board's denial or conditional grant of the permit. Section 23 of chapter 40B states that the review by the Housing Appeals Committee shall be limited to the issue of whether, in the case of the denial of an application, the decision of the board of appeals was "reasonable and consistent with local needs." If the committee determines that the Board's denial was "unreasonable and not consistent with local needs," it must vacate the board's decision and direct the board to issue a comprehensive permit to the applicant. In the case of an approval of an application with conditions and requirements imposed, the committee must determine whether the conditions and requirements "make the construction or operation of such housing uneconomic and whether they are consistent with local needs." If the committee finds that the conditions imposed do make the construction or operation of the housing "uneconomic" and at the same time are not consistent with local needs, it shall order the board of appeals to modify or remove the condition so as to make the proposal no longer "uneconomic." The "consistent with local needs" test takes precedence over the "uneconomic" test in these situations, and if the "decisions or conditions and requirements" imposed by a board of appeals are consistent with local needs, they "shall not be vacated, modified or removed by the committee notwithstanding that such decisions or conditions and requirements have the effect of making the applicant's proposal un-

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26 Any condition "brought about by any single factor or combination of factors" is deemed "uneconomic" to the extent that it makes it impossible for a public agency or a nonprofit organization to proceed in building or operating low or moderate income housing without financial loss, or for a limited dividend corporation to proceed and still realize a reasonable return in building or operating such housing within the limitations set by the subsidizing agency of government. . . .

G.L. c. 40B, §20 (emphasis added).
27 See G.L. c. 40B, §22, quoted in note 4 supra.
28 G.L. c. 40B, §23, quoted in note 5 supra.
29 Id.
30 G.L. c. 40B, §23.
31 Id. The test of whether the condition or requirement renders the proposal "uneconomic" will vary according to the applicant. See G.L. c. 40B, §20, quoted in note 26 supra.
The statute likewise makes it clear that in no event shall the committee issue any order that would allow low and moderate income housing to be built or operated "in accordance with standards less safe than the applicable building and site plan requirements of the Federal Housing Administration or the Massachusetts Housing Finance Agency, whichever agency is financially assisting such housing."\(^{33}\)

The key to chapter 774 is its definition of "consistent with local needs," which, in effect, requires cities and towns to take into account the regional need for low and moderate income housing, as well as traditional local planning objectives, in establishing local zoning restrictions and in passing on applications for comprehensive permits under chapter 774. Section 20 of chapter 40B states:

> [R]equirements and regulations shall be considered consistent with local needs if they are reasonable in view of the regional need for low and moderate income housing considered with the number of low income persons in the city or town affected and the need to protect the health or safety of the occupants of the proposed housing or of the residents of the city or town, to promote better site and building design in relation to the surroundings, or to preserve open spaces, and if such requirements or regulations are applied as equally as possible to both subsidized and unsubsidized housing.\(^{34}\)

In each case, then, the statute calls for a balancing of the regional need for low or moderate income housing\(^{35}\) against the number of low income persons likely to take advantage of the new facility and against certain valid planning objections to the proposed construction. Moreover, since one objective of the "anti-snob zoning" provisions of chapter 774 was to force communities to share the burden of supplying enough low and moderate income housing for the region, the statute provides that once a municipality has built a specified amount of low and moderate income housing, "requirements or regulations" imposed on the construction or operation of further low and moderate income housing shall be deemed "consistent with local needs."\(^{36}\)

\(^{32}\) G.L. c. 40B, §23.

\(^{33}\) Id.

\(^{34}\) G.L. c. 40B, §20.

\(^{35}\) The statute nowhere defines the "regional need for low and moderate income housing." However, Rule 1(g) of the Housing Appeals Committee's Rules and Regulations provides that: "Regional Need" means the shortage of housing [for] families and individuals with incomes within the eligibility limits of the State or Federal Program subsidizing the proposed housing for the entire Standard Metropolitan Statistical Area of which the city or town is part, as defined by the U.S. Bureau of the Census; or if the city or town lies outside any such area for the entire regional planning district created by Chapter 40B of the General Laws, or any other special act.

\(^{36}\) G.L. c. 40B, §20. The statute states that requirements or regulations imposed
The major problem with chapter 774 is what it omitted—a clear statement that both the Housing Appeals Committee and local boards of appeals have the power to override local zoning ordinances or by-laws. Commentators early recognized this major ambiguity in the statute as passed. One writer has pointed out that while the statute creates the impression that zoning can be varied if the board of appeals so desires, the language of the statute does not expressly confer such power. Under the literal language of the Act, therefore, boards of appeals seem to have only those powers which they normally possess in zoning matters, which powers do not include broad authority to override local zoning restrictions.

It is clear that the drafters of the "Anti-Snob Zoning Law" intended that local boards of appeals would, under the act, have the power, and in many cases the duty, to override local zoning ordinances which would prevent construction of low and moderate income housing. Without the existence of such a power on the part of local boards, the purposes of chapter 774 could be wholly frustrated. Section 23 of chap-

by a local board of appeals will be deemed consistent with local needs if: (1) low or moderate income housing already existing in the city or town is either (a) in excess of ten percent of the housing units reported in the latest decennial census of the city or town or (b) located on sites comprising at least one and one-half percent of the total land area zoned for residential, commercial or industrial use; or (2) the application before the board would result in the commencement of construction of low and moderate income housing, in any one calendar year, on sites comprising more than three-tenths of one percent of the total land area in the city or town zoned for residential, commercial or industrial use, or ten acres, whichever is larger. G.L., c. 40B, §20. In computing the total land area zoned for residential, commercial or industrial use, the statute directs that land owned by the United States, the Commonwealth or any political subdivision thereof, the Metropolitan District Commission or any "public authority" shall not be taken into account. Id. These provisions were intended to completely exempt a board of appeals in a community satisfying the "minimum housing obligations" described above from the possibility of overruling by the Housing Appeals Committee under G.L. c. 40B, §23. See Rodgers, Snob Zoning in Massachusetts, 1970 Ann. Surv. Mass. Law 487, 490. Cf. 1973 Mass. Adv. Sh. at 514-15, 294 N.E.2d at 411.


38 Huber, supra note 37.

39 The powers and duties of boards of appeals are outlined in G.L. c. 40A, §15. The board's power to override local zoning is narrowly circumscribed by the variance procedures described in §15, and the board of appeals does not have the power to nullify acts of the local legislative body charged with the adoption and amendment of zoning ordinances. Bearce v. Zoning Bd. of Appeals, 351 Mass. 316, 319, 219 N.E.2d 15, 17 (1966).

40 Allan G. Rodgers, one of the principal draftsmen of chapter 774, has pointed out that "it was clearly the intention of the sponsors of the act to give the boards this power [to override zoning ordinances or by-laws], but a legislative preamble so stating, and other suitable language, were eliminated as the bill passed through the legislative labyrinth." Rodgers, supra note 36, at 491. See also text at notes 42-51 infra.
ter 40B states that the Housing Appeals Committee shall vacate a
decision of a board of appeals denying a comprehensive permit if it
finds that the decision of the board was "unreasonable and not consistent
with local needs." But if a board of appeals did not have the authority
to override a zoning ordinance effectively prohibiting the use of any
land within a town for low and moderate income housing, how could
the board's refusal to ignore the zoning restriction ever be termed "un-
reasonable" by the Housing Appeals Committee? If chapter 774 were
to be construed to confer no power on local boards to override zoning
ordinances or by-laws, a city or town could completely avoid the effects
of the statute, and its obligation to share at least some of the burden of
providing low and moderate income housing for the region, simply by
setting up a zoning scheme which prohibited all construction of multi-
family housing within its boundaries.

Although the drafters of chapter 774 could not have intended that
the purposes of the statute could so easily be frustrated, the Concord
Board argued that changes made in House Bill No. 5429 (the Urban
Affairs draft) by the Committee on Ways and Means eliminated the
original intent to circumvent exclusionary zoning provisions. In the
Urban Affairs draft, the provisions [now part of section 23 of chapter
40B] concerning the Housing Appeals Committee's review of the granting
of a comprehensive permit subject to conditions making the proposal
"uneconomic" read:

[T]he committee shall, unless the action of the board of appeals
is found to be consistent with local needs, order such board to issue
any necessary permit or approval or to modify or remove any re-
quirement, including but not limited to zoning or building code
requirements.

The Ways and Means draft (House Bill No. 5581), ultimately enacted
by the Legislature, eliminated the phrase emphasized above, the final
version providing that the committee "shall order such board to modify
or remove any such condition or requirement . . . and to issue any
necessary permit or approval." The brief of the Concord Board noted,
furthermore, that subsequent unsuccessful attempts had been made by

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41 G.L. c. 40B, §23.
42 See Rodgers, supra note 36, at 491 n.13. But some have expressed the opinion that
the term "reasonable" in the phrase "reasonable and consistent with local needs" in
G.L., c. 40B, §23 is mere surplusage. Indeed, the Supreme Judicial Court in Hanover
characterized the term "reasonable" as "surplus verbiage which does not add any
substance to the 'consistent with local needs' standard." 1973 Mass. Adv. Sh. at
514 n.17, 294 N.E.2d at 415 n.17. See G.L., c. 40B, §20, quoted in text at note 34 supra.
294 N.E.2d at 405 (court's emphasis).
44 G.L., c. 40B, §23.
individual legislators to "correct" weaknesses in the statute by amending it to provide that boards of appeals or a state agency would have the power to override local zoning by-laws.\(^\text{45}\)

The Supreme Judicial Court rejected the Concord Board's argument that the changes in the bill made by the Committee on Ways and Means indicated a legislative intent to deny the Housing Appeals Committee and boards of appeals the power to vary "requirements and regulations" in the form of zoning ordinances. The court characterized the deletion of the phrase "including but not limited to zoning or building code requirements" as an insignificant elimination of "superfluous" language.\(^\text{46}\)

The court noted that the title carried by the bill in the Urban Affairs draft—"An Act providing for the construction of low or moderate income housing in cities and towns and for relief from local restrictions hampering such construction"—was unchanged in the Ways and Means redraft.\(^\text{47}\) The court also deemed significant the fact that opponents of the bill had unsuccessfully attempted to attach amendments to it which would have made its provisions inapplicable to any town which refused to accept it, a move which, according to the court, "would not have been necessary if local zoning powers were to remain inviolate under the new law . . . ."\(^\text{48}\)

From all of the above circumstances, the court concluded that the legislative intent behind chapter 774 was to provide relief from exclusionary zoning practices which prevented construction of low and moderate income housing.\(^\text{49}\) Stating that the language of the statute must be construed in a manner which would effectuate this intent, the court held that the phrase "requirements and regulations" (in that portion of section 20 of chapter 40B which defines "consistent with local needs") includes within its scope zoning ordinances and by-laws.\(^\text{50}\) Having concluded that the Housing Appeals Committee has the power, under section 28 of chapter 40B, to override zoning requirements which are not consistent with local needs, the court stated that this power must of necessity reside also in the boards of appeals. Otherwise, stated the


\(^{48}\) 1979 Mass. Adv. Sh. at 501, 294 N.E.2d at 405. The court concluded that "[s]ince the title to a statute may be considered in its construction, the identical titles suggest that no major change of substance was intended by the redrafting of the Committee on Ways and Means." Id. (citation omitted).

\(^{49}\) Id. at 502, 294 N.E.2d at 406.

\(^{50}\) Id.

\(^{51}\) Id. at 502-03, 294 N.E.2d at 406.
court, an applicant’s hearing before the board of appeals would be a “futile procedure” in every case in which the proposed housing is not permitted by the local zoning ordinance.\(^{52}\) The court further held that the portion of section 21 of chapter 40B which states that the board of appeals “shall have the same power to issue permits or approvals as any local board or official who would otherwise act with respect to such application ...”\(^{53}\) could not be read to exclude the board’s power to override local “requirements and regulations.”\(^{54}\)

It is submitted that the Supreme Judicial Court’s decision that chapter 774 does confer on both the Housing Appeals Committee and on local boards the power to override zoning regulations which are not consistent with local needs was correct both from the standpoint of statutory construction and public policy. Any other decision would have severely frustrated the statute’s dual purpose of facilitating the construction of low and moderate income housing in Massachusetts and insuring that the burden of accommodating such housing would not be borne solely by those municipalities whose zoning already permitted construction of such housing.

One might argue that chapter 774 should be construed narrowly, as

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52 Id. at 503, 294 N.E.2d at 406-07.
53 G.L. c. 40B, §21. When reference is made in the statute to a “local board,” it means any town or city board of survey, board of health, board of subdivision control appeals, planning board, building inspector or the officer or board having supervision of the construction of buildings or the power of enforcing municipal building laws, or city council or board of selectmen.
54 1973 Mass. Adv. Sh. at 503, 294 N.E.2d at 407. The court’s decision that since the statute gives the Housing Appeals Committee the power to override local zoning restrictions that are not consistent with local needs, it must be construed to give the same power to local boards of appeals and its decision not to read the language of §21 as a limitation on this power is eminently sensible and are in accordance with the practice of avoiding construction of statutory language which would produce irrational results. See Johnson v. Commissioner of Pub. Safety, 355 Mass. 94, 99, 243 N.E.2d 157, 160 (1968). But cf. Miller v. Emergency Housing Comm’n, 330 Mass. 693, 116 N.E.2d 663 (1953), in which the Supreme Judicial Court recognized that under Acts of 1946, c. 592 (repealed by Acts of 1953, c. 284), which established the Emergency Housing Commission and an appeals procedure similar to that in chapter 774, the authority of the commission and that of the boards of appeals were not coextensive. The boards of appeals were permitted to grant variances only where a literal enforcement of the law would involve “substantial hardship to the appellant;” the Emergency Housing Commission was authorized to grant variances wherever doing so would alleviate the housing shortage. Id. at 697-98, 116 N.E.2d at 666 (1953). The difference in result between Miller and Hanover is largely attributable to differences in the language of the two housing statutes. It should be noted that the extensive statutory construction which the Hanover court engaged in is not so much an indication of “judicial legislating” on the part of the court as it is a measure of the extensive ambiguities contained in the statutory procedures established by the Legislature.
an exception to the general zoning rules and procedures described in chapter 40A or as an “exception” to the home rule powers of cities and towns under Article 89 of the Amendments to the Constitution. However, the statute must be construed at least broadly enough so as to prevent its purposes from being thwarted. At a minimum, this would seem to require a construction of the statute which includes a power in both the Housing Appeals Committee and in local boards of appeals to override zoning regulations that are not “consistent with local needs,” as defined by the statute.

The Hanover court’s judicial “gloss” on chapter 774 represents a significant departure from the traditional functions of the zoning board of appeals. The authority of boards of appeals to modify the effect of zoning regulations has historically been circumscribed by the procedures for the granting of variances, described in section 15 of chapter 40A. The power to grant variances has been narrowly construed in theory if not in practice, and courts in the past have scrupulously insisted on maintaining a clear distinction between the functions of the board of appeals and those of the city council, board of selectmen or other legislative body. Moreover, amendments of zoning ordinances or by-laws

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55 Actually, chapter 774 is consistent with the Home Rule Amendment. The Home Rule Amendment did not grant to cities and towns the right to legislate on local matters in complete disregard of the legislative policy of the state. Section 6 of the Amendment makes clear that the right of home rule was subject to limitations:

Any city or town may, by the adoption, amendment, or repeal of local ordinances or by-laws, exercise any power or function which the general court has power to confer upon it, which is not inconsistent with the constitution or laws enacted by the general court in conformity with powers reserved to the general court by section eight.
Mass. Const. amend. art. LXXXIX, §6 (emphasis added). Art. LXXXIX, §8 provides that [t]he general court shall have the power to act in relation to cities and towns . . . by general laws which apply alike to all cities, or to all towns, or to all cities and towns, or to a class of not fewer than two. . . .


57 See, e.g., Bearce v. Zoning Bd. of Appeals, 351 Mass. 316, 319-20, 219 N.E.2d 15, 17 (1966) (a board of appeals does not have the power to nullify or to assess the validity of acts of the local legislative body which is charged with the adoption and amendment of zoning ordinances); Russell v. Zoning Bd. of Appeals, 349 Mass. 532, 536, 209 N.E.2d 337, 339 (1965) (zoning board of appeals exceeded its authority in granting to municipal housing authority a variance permitting the construction of a low-rent

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require a two-thirds vote of the local legislative body. The advantage lent to the status quo in the past by this requirement and by the narrow construction of the powers of the zoning board of appeals has been reversed, at least as far as low and moderate income housing is concerned, by chapter 774 and its interpretation in Hanover.

The Supreme Judicial Court has thus supplied the boards of appeals and the Housing Appeals Committee with the powers necessary to enable the ambiguous language of chapter 774 to accomplish its apparent purpose. The Hanover decision, by rendering exclusionary zoning schemes ineffective, increases the likelihood that low and moderate income housing will now be built in cities and towns formerly able to prevent construction of such housing within their borders. But questions remain as to where the housing will be built, and as to how successful chapter 774 can ever be in guaranteeing that the housing will be constructed on the most suitable land available.

The Hanover court stressed, at one point in its opinion, what one of the draftsmen of chapter 774 had earlier stated—that the value of section 20's alternative definitions of when local "requirements and regulations" shall be considered "consistent with local needs" is that they "define precisely the municipality's minimum housing obligations under the statute and permit it to do some intelligent, long-range planning about how and where the necessary housing should be built." The idea has considerable merit. A municipality is put on notice by chapter 774 that it is under a duty to provide its "fair share" of the low and moderate income housing needed by the region. Knowing this and knowing that attempts to avoid this duty through the use of exclusionary zoning devices will be fruitless, the municipality can begin to take positive steps to plan ahead the location and even the physical nature of the housing.

This prediction of successful advance planning for low and moderate

housing project for the elderly with provision for one-sixth as many parking spaces as required by the town's zoning by-law, such modification of the by-law being essentially a legislative function); Colabufalo v. Board of Appeal, 356 Mass. 213, 214-15, 145 N.E.2d 556, 558-59 (1957) (city ordinance which purported to enable the Board of Aldermen to grant a variance was invalid, as in conflict with the enabling statute).

60 Numerous other factors unrelated to zoning (e.g., the status of government housing subsidies and economic conditions in the construction industry) will, of course, directly affect the rate at which low and moderate income housing is built. The impact of such variables, however, is beyond the scope of this article.
62 Rodgers, supra note 56, at 490.
63 See note 56 supra.
income housing might even be fulfilled in some communities where the planning board, for instance, approved individual sites for low and moderate income housing and invited developers to begin construction on the sites chosen. The language of the statute, however, does nothing to guarantee that such advance planning will take place. There is no provision that limits public agencies or nonprofit or limited dividend organizations proposing to build low and moderate income housing to sites previously approved for such housing. If such developers, public or private, do find an acceptable site specifically zoned for low and moderate income housing, and are thus spared the costly procedure of an appeal to the Housing Appeals Committee, it will be a fortuitous result, rather than one guaranteed by chapter 774. If the developer is forced to pursue the route of appeal to the committee, the "planning decision" as to the construction of low and moderate income housing will ultimately be made on an ad hoc basis by a committee of five which will have had only a relatively brief period in which to study possible problems as to the suitability of the site for the proposed construction and which will have taken no account of the possible availability of more suitable sites within the same town.

It is not surprising that the drafters of the "Anti-Snob Zoning Law" were apparently unwilling to allow local officials to dictate where low and moderate income housing could be located, it being anticipated that some local officials would be tempted to relegate low and moderate in-

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65 1974 Mass. Legis. Doc. House No. 961, approved by the Joint Committee on Urban Affairs, would amend c. 774 to allow cities and towns to restrict subsidized housing to particular locations if, with respect to the municipality's plan designating sites for low and moderate income housing, "there is in effect a certification by the commissioner [of community affairs] to the clerk of the city or town that the city or town is currently meeting its local need for low and moderate income housing and its fair share of the regional need for such housing, or that state and local requirements and regulations applicable to sites designated on the plan for such housing will allow such city or town to meet without unreasonable delay its local need and its fair share of the regional need for such housing."


66 See G.L. c. 23B, §5A.

67 G.L. c. 40B, §22 provides that the hearing before the Housing Appeals Committee shall be held within twenty days after receipt of the applicant's statement of the prior proceedings and the reasons upon which the appeal is based. The final decision of the committee is to be rendered within thirty days after termination of the hearing. "unless such time shall have been extended by mutual agreement between the committee and the applicant." Id.

68 G.L. c. 40B, §23 states that the hearing by the Housing Appeals Committee shall be limited to the issues of whether the denial of an application or the "conditions or requirements" imposed on the granting of an application are "consistent with local needs" and of whether such "conditions or requirements" make the construction or operation of the proposed housing "uneconomic." See text at notes 28-31 supra.
come housing sites to the "worst" sites in the community. The drafters might, however, have provided for review of local decisions as to the location of low and moderate income housing by the state's Regional Planning Commissions or for a cooperative effort on the part of the Regional Planning Commissions and municipalities in locating and designing the most suitable sites for the low and moderate income housing. 69 The option chosen by the drafters of chapter 774 and by the Legislature, however, largely ignored the benefits of enlightened advance planning in establishing procedures to aid the construction of low and moderate income housing.

To be sure, chapter 774 is not altogether inattentive to the need for a balance between the region's low and moderate income housing requirements and the need to apply sound principles of land-use planning in locating sites for the housing. Section 20 of chapter 40B does provide that the need "to protect the health or safety of the occupants of the proposed housing or of the residents of the city or town, to promote better site and building design in relation to the surroundings, or to preserve open spaces" will be taken into account in determining whether the denial of a comprehensive permit or the granting of a permit with "conditions or requirements" imposed thereon is "consistent with local needs." 70 It seems likely, however, that the perceived need to expedite the construction of low and moderate income housing, 71 together with

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69 At least one writer has criticized the lack of input, under the act, from the Regional Planning Commissions. Note, Snob Zoning Developments in Massachusetts and New Jersey, supra note 37, at 264. The writer points out that New York and Colorado provide that local zoning regulations must be submitted to a regional or state authority before they take effect. Id. at 253 n.33. In Colorado, however, the role of the state planning department is merely advisory. And in New York a disapproval by a regional or state authority may be overridden by a majority plus one of the members of the local governing body. Id. See N.Y. Gen. Mun. Law, Art. 12-B, §239-m (McKinney Supp. 1973); Colo. Rev. Stat. Ann. §106-2·21 (1963).

70 See G.L. c. 40B, §20, quoted in text at note 34 supra. The Supreme Judicial Court's decision in Hanover that the Housing Appeals Committee has the power to order the issuance of conditional permits and approvals, 1973 Mass. Adv. Sh. at 521-22, 294 N.E.2d at 417-18, also provides a flexibility which allows the committee to take principles of land use planning into account in ordering the issuance of comprehensive permits. For instance, one of the conditions imposed by the committee on the granting of a permit to the Hanover applicant stated: "Before beginning construction the Appellant shall provide the Board with satisfactory evidence that its proposed provisions for drainage and sewage disposal have received approval from the appropriate state authorities." 1973 Mass. Adv. Sh. at 520 n.22, 294 N.E.2d at 416-17 n.22.

71 The existence of a perception within the Housing Appeals Committee of the need to expedite the construction of low and moderate income housing is arguably supported by the committee's decision in the Concord proceeding. There the committee recognized "the existence on this site of a serious water problem" and noted that [Concord]
an understandable sympathy for the applicant who has already invested much money in architect's fees, legal fees and possibly in the site itself, might lead the Housing Appeals Committee to make this "balance" a somewhat uneven one, with the valid planning objections to the construction receiving short shrift.

One writer, in the Harvard Journal on Legislation, had predicted, shortly after passage of chapter 774, that "the decisive criterion for review [was] likely to be that of regional need for subsidized housing." Although the language of chapter 40B, section 20 suggests nothing which would lead one to conclude that the "regional need for low and moderate income housing" is to be given greater weight than the "need to protect the health or safety of the occupants of the proposed housing or of the residents of the city or town, to promote better site and building design in relation to the surroundings, or to preserve open spaces . . . ," the Hanover court cited the Harvard author and stated:

In cases where the locality has not met its minimum housing obligations, the board must rest its decision on whether the required need for low and moderate income housing outweighs the valid planning objections to the details of the proposal such as health, site design and open spaces . . . . If the regional need for such housing outweighs these objections, the board must override any restrictive local requirements and regulations which prevent the construction of the housing . . . . However, the municipality's failure to meet its minimum housing obligations, as defined in §20, will provide compelling evidence that the regional need for housing does in fact outweigh the objections to the proposal. See 7 Harv. J. on Legislation, 246.

Board's decision turned, and the hearing before the Appeals Committee largely concerned itself.

Decision of the Housing Appeals Committee in Concord Home Owning Corp. v. Board of Appeals, reprinted in Reservation and Report of the Suffolk County Superior Court, Concord Bd. of Appeals v. Housing Appeals Comm., No. 94552 Eq., at 20 (Mar. 22, 1972). The committee refused to stay the granting of a comprehensive permit until further tests could be conducted on the effect the construction would have on the subsurface water conditions in the area. See id. at 27, stating, inter alia:

we are unwilling to follow the line of least resistance by an easy concurrence in the Board's decision, insisting on engineering tests ad infinitum, thus assuaging the understandable, if unproven fears of the neighbors, and indefinitely postponing the day of decision.

Id.

Note, however, that chapter 774, as read by the Hanover court, does not require the applicant seeking a comprehensive permit to establish a present title in the proposed site. 1973 Mass. Adv. Sh. at 525, 294 N.E.2d at 420.

Note, Snob Zoning Developments in Massachusetts and New Jersey, supra note 37, at 260.

Thus the court may well have sanctioned a policy, not evident in the language of chapter 774, of considering the valid planning objections to the project of secondary importance whenever the town in question has not yet fulfilled the "minimum housing obligations" outlined in section 20 of chapter 40B. Such an approach, if strictly followed, could result in ill-considered decisions to allow construction of low and moderate income housing on land unsuited to the demands of such housing. Not only does the court's dictum that failure to meet the "minimum housing obligations" outlined in section 20 of chapter 40B will provide "compelling evidence" that the valid planning objections to a particular project are outweighed by the regional need for low and moderate income housing delineate too facile a standard for judging whether requirements and regulations are "consistent with local needs," it is also fundamentally defective as a statement of the law. The standard outlined by the court derives not from the express language, or even the legislative history, of chapter 774, but rather from the prediction of an individual commentator as to how the statutory test would be applied in practice. It should be read in the narrow context in which it was originally uttered despite its reappearance as dictum in the Hanover opinion.

The Supreme Judicial Court's decision in the Hanover case has done much to resolve the ambiguities present in the statutory language of chapter 774. The court's holding that the Housing Appeals Committee and boards of appeals have the power to override local zoning restrictions which are not "consistent with local needs" removes a significant barrier to the accomplishment of chapter 774's intended purposes—facilitating the construction of needed low and moderate income housing in the Commonwealth and spreading the burden of supplying such housing among all the cities and towns.

However, although the Hanover decision insures that low and moderate income housing cannot be blocked by the adoption of exclusionary zoning devices on the part of any city or town, the nature of the appeals procedure established by chapter 774 is such that there is no assurance that the low and moderate income housing which is built will be constructed on the land most suitably adapted for that purpose. It is

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71 It has recently been observed that a town might be able to avoid the effect of an order by the Housing Appeals Committee directing issuance of a comprehensive permit for construction of low and moderate income housing by subsequently agreeing with the developer holding the permit to rezone the site to allow construction of a shopping center, for example, which would offer the developer a larger prospective profit. Stewart, Making anti-snob zoning workable, The Christian Science Monitor, May 10, 1974, at 4C, col. 3 (New England ed.). The success of such "alternative" attempts to block construction of low and moderate income housing remains to be seen. However, nothing in chapter 774 prevents such "last minute" rezoning. A private developer, moreover, cannot be forced to build subsidized housing merely because he has sought and obtained a permit to construct such housing.
highly unlikely that the Legislature will be willing at this time to amend or replace chapter 774 to guarantee the input of sound advance planning into decision-making as to the location and design of low and moderate income housing. Until, however, such changes are made, Massachusetts will continue to be endowed with a legislative scheme, admittedly innovative, which, while it prevents individual communities from excluding low and moderate income housing from their borders, also sacrifices sound principles of land use planning in procuring the dubious benefits of an expensive procedure of ad hoc review of decisions granting or denying individual construction permits for such housing.

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