Chapter 16: Zoning and Land Use

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A. ZONING

§16.1. “One family” dwellings: Limitation on number of unrelated individuals: Constitutionality. The United States Supreme Court was asked to consider an equal protection challenge to a local zoning ordinance during the Survey year in Village of Belle Terre v. Boraas. Belle Terre is a small incorporated village of about 700 people on the north shore of Long Island. By ordinance, the village limited the permissible land use to one family dwellings, “family” being defined as:

One or more persons related by blood, adoption, or marriage, living and cooking together as a single housekeeping unit, exclusive of household servants. A number of persons but not exceeding two (2) living and cooking together as a single housekeeping unit though not related by blood, adoption, or marriage, shall be deemed to constitute a family.

The owners of a house in Belle Terre leased it to two students. Four other students subsequently moved in, bringing to six the number of unrelated students residing in the house. The local authorities ordered the owners to remedy the violation of the zoning ordinance, whereupon the owners and three of the students sought an injunction under section 1983 of Title 42 of the United States Code declaring the ordinance unconstitutional. The United States District Court for the Eastern District of New York ruled that the ordinance was valid, but the Court of Appeals for the Second Circuit reversed. The case

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reached the Supreme Court on appeal.

The owners and students argued, *inter alia*, that the ordinance was violative of equal protection in that it interferes with the right to travel and the right to migrate and settle within a state, bars life styles not agreeable to the present residents (and in so doing infringes the newcomers' rights of privacy), and in general "is antithetical to the Nation's experience, ideology, and self-perception as an open, egalitarian, and integrated society."5

Justice Douglas, writing for the majority, found no merit in any of the petitioners' claims.6 The Court refused to classify the rights allegedly abridged by the ordinance as "fundamental"7 and therefore refused to apply the "strict scrutiny" or "compelling state interest" tests8 to the Belle Terre ordinance. Thus the ordinance was subjected to the traditional test in equal protection cases — namely, whether the classification made by the legislative enactment bears a "rational relationship to a permissible state objective."9 The Court did not explicitly reject the Second Circuit's intermediate test of whether the denial of equal protection by creation of a legislative classification was in fact "substantially related" to a lawful governmental objective.10 The Second Circuit suggested that this test, which it extrapolated from recent Supreme Court decisions,11 be applied when an infringed right does not reach the level of a "fundamental right" but is more basic and personal than commercial interests12 of the type involved in *Lindsley v. Natural Carbonic Gas Co.*13 and *McGowan v. Maryland*.14 This sub silentio treatment of the Second Circuit's new intermediate test indicates the Supreme Court's strict adherence, at least in the zoning area, to the established "two-tiered" formula for dealing with equal protection cases.15

5 416 U.S. at 7.
6 Id.
7 Id.
9 416 U.S. at 8. See McGowan v. Maryland, 366 U.S. 420, 425-26 (1961); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78-79 (1911). Justice Marshall, dissenting in *Belle Terre*, expressed the opinion that the ordinance's classification between related and unrelated individuals infringed on the students' fundamental rights of association and privacy guaranteed by the First and Fourteenth Amendments, and, therefore, should have been subjected to the "strict scrutiny" test. 416 U.S. at 13 (dissenting opinion).
10 See 476 F.2d at 813-15.
12 Id. at 813-14, 815.
13 220 U.S. 61 (1911) (stockholder of carbonic gas company sought injunction against enforcement of state statute which made unlawful the collection and sale of carbonic acid gas from natural mineral springs).
14 366 U.S. 420 (1961) (employees of department store challenged the constitutionality of Maryland's Sunday Closing Laws, which prohibited the sale on Sundays of all but certain specified products).
In applying the “rational relationship” test to the facts of the instant case, the Court concluded that no right of the plaintiffs had been unconstitutionally infringed. The Court found that the legitimate governmental interests in open yards, quiet streets, and a limited number of people were rationally served by the enactment and enforcement of the local ordinance in question.

Lastly, the Court rejected the contention that the controversy was moot because the students had moved out of the house. In so holding, the majority reasoned that the impact of the Belle Terre ordinance on the value of the lessors’ property created a cognizable controversy. The Court stated: “[I]t is obvious that the scale of rental values rides on what we decide today.” Thus the Court reversed the Second Circuit and upheld the ordinance as a valid exercise of the police power rationally related to permissible governmental objectives.

The majority opinion initially recited the factual situations and rationales of several historic land use regulation cases, including Euclid v. Ambler Realty Co. and Berman v. Parker. Although Euclid and Berman were essentially due process cases while the central issue in Belle Terre was equal protection—thus leaving the reasons behind the Court’s review of these cases somewhat unclear—it seems that the Court intended to indicate that it will continue to exercise restraint in dealing with zoning ordinances. This interpretation is bolstered by the majority’s refusal to elevate the deprivations alleged by the petitioners to “fundamental” right status and to apply either the “strict scrutiny” test or the intermediate “substantial relationship” test to the Belle Terre ordinance.

§16.2. Zoning by-law: Reasonableness. Challenging the validity of a zoning by-law in Massachusetts is a difficult task since a heavy burden is placed on the landowner to establish that the by-law is in conflict with either the Zoning Enabling Act or applicable constitutional provisions. In Maider v. Town of Dover, decided by the Appeals

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16 416 U.S. at 7-9.
17 Id. at 9.
18 Id.
19 Id. Justice Brennan disagreed with this analysis since, in his view, the challenge to the constitutionality of the Belle Terre ordinance was based solely on alleged infringement of the rights of tenants. Id. at 10 (dissenting opinion). Accordingly, he would have remanded the case to the district court for a determination as to whether a cognizable case or controversy still existed. Id. at 12 (dissenting opinion).
20 Id. at 8-9, 10.
21 272 U.S. 365 (1926).

§16.2. 1 G.L. c. 40A, §§ 1-22.
Court during the Survey year, the petitioner owned and operated a full service gas station as a non-conforming use in a residentially zoned district. Since 1969 petitioner had attempted to get permission to modernize and expand the non-conforming service station. In that year a request for a special permit was refused because the by-law did not contain any provision for this type of exception, and subsequent articles to amend the by-law for the purpose of rezoning the locus were defeated in town meetings.

Petitioner filed a bill for declaratory relief in superior court challenging the validity of the zoning by-law on the basis that, as applied to his land, it exceeded the scope of the Zoning Enabling Act. Petitioner asserted that increases in population, residential building, and traffic along the street fronting the locus rendered the inclusion of his land in a residential district so arbitrary and unreasonable that, as a matter of law, it resulted in confiscation. The superior court denied the requested declaratory relief and held that the town could continue to zone the locus and the surrounding area for residential use since, although a residential use of the locus might not be its best use, it was nevertheless not impractical.

The Appeals Court affirmed, holding that the mere fact that the petitioner would be unable to put his land to its most profitable use did not amount to an unconstitutional deprivation of his property and was not sufficient reason for invalidating the zoning by-law. The court distinguished Maider from cases in which application of a zoning by-law results in substantial injury to the landowner and only trivial benefit to the public.

The Appeals Court also indicated its agreement with the superior court that the Dover by-law represented a valid exercise of the police power. The trial court judge had ruled that because of dangers associated with the storage of gasoline and the detrimental effect of the noise, odors and traffic associated with the operation of a gas station, exclusion of gas stations from residential districts is reasonably related to the public health, safety, and welfare.

Acknowledging that the test of whether a zoning by-law represents a lawful exercise of the police power depends on whether it can be characterized as having a rational relation to the public health, safety, or morals, the Appeals Court stated: "If the reasonableness of the
by-law is fairly debatable, the judgment of the local legislative body responsible for its enactment must be sustained. Every presumption is to be made in favor of its validity.”

Various factors—such as location, size and physical characteristics of the locus, and the nature and use of other land in the vicinity—should be taken into consideration when determining the reasonableness of the by-law as applied to the locus. However, the court stated that “[n]on-productiveness of income and deprivation of some beneficial use, while material, are not the sole determining factors.”

§16.3. Invalid by-law: Denial of permit. In a rescript opinion in Pastan v. Board of Appeals of Billerica, the Appeals Court reversed a superior court decree holding that the board of appeals exceeded its authority in denying the plaintiff a permit for the erection of an apartment house. The Appeals Court relied solely upon Hallenborg v. Town Clerk of Billerica. That case involved a challenge to the validity of a zoning amendment which had been adopted with less than the fourteen days notice of the planning board hearing required by section 6 of the Zoning Enabling Act. The Supreme Judicial Court in Hallenborg had held that since the zoning amendment had been adopted without adequate notice, the decree of the superior court denying the mandatory relief requested by the petitioners should be reversed. The Hallenborg Court ruled in addition, however, that mandamus was not to be issued for at least nine months, in order to permit adoption of either the same zoning amendment in full compliance with section 6 of the Zoning Enabling Act or a provision to protect persons who relied in good faith on the validity of the amendment.

The plaintiff in Pastan relied upon the identical section of the town’s zoning by-law that had been the subject of the controversy in Hallenborg. The Appeals Court saw itself called upon to decide whether the Hallenborg decision had invalidated that section of the Billerica zoning by-law.
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lerica zoning by-law. The court concluded that Hallenborg had indeed had that effect notwithstanding the "protective provisions ... made for the intervenors in that decision," and noted that, in any event, Pastan had not shown that he was entitled to the benefits of those protective provisions.

§16.4. Zoning boundaries: Division of single tract into two zones. In Moss v. Town of Winchester, the petitioner challenged the validity of the town's zoning by-law which divided her 85-acre parcel into two districts. The front portion of the locus, to a depth of 150 feet, was placed in single residence district B, which required lot sizes of 15,000 square feet. The rear portion was placed in single residence district A, which required lot sizes of 20,000 square feet.

The petitioner set forth several grounds for the invalidity of the by-law. First, she argued that the differing treatment within her homogeneous parcel of real estate was unreasonable and in violation of the Zoning Enabling Act. Secondly, while the petitioner had received a permit, under sections 20-23 of chapter 40B of the General Laws, to construct low and moderate income apartments on a portion of the land, she nevertheless asserted the unconstitutionality of the zoning by-law in preventing her from using her entire tract for garden apartments. Finally, the petitioner argued that Winchester's prohibition of apartments in residential zones, while allowing such uses as hospitals and rest homes, was arbitrary and unreasonable, and that, in any case, the total exclusion of apartments from Winchester under the zoning by-law in force at the time the petition was filed violated the Equal Protection Clause of the Fourteenth Amendment.

The land court found the by-law to be valid and dismissed the petition. In affirming the land court's decision, the Supreme Judicial Court utilized a flat rule to sustain the by-law:

The test for validity of a zoning by-law is whether it furthers any purpose included within G.L. c. 40A, §§ 2, 3. ... Such a by-law is presumed valid, ... and will be upheld unless arbitrary and unreasonable. ... When the reasonableness of a zoning by-law is

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9 Id.

2 Id. at 756, 311 N.E.2d at 556. The petitioner's argument that the division of her land into two zones violated the Zoning Enabling Act, G.L. c. 40A, §§ 1-22, was based on the requirement of G.L. c. 40A, § 2 that "[d]ue regard shall be paid to the characteristics of the different parts of the ... town and the Zoning regulations ... shall be the same for zones, districts or streets having substantially the same character." Id. (emphasis added).
3 G.L. c. 40B, §§ 20-23 is the Massachusetts "Anti-Snob" Zoning Law.
5 Id. at 757, 311 N.E.2d at 557.
6 Id. at 755, 311 N.E.2d at 556.
7 Id. at 759, 311 N.E.2d at 558.

http://lawdigitalcommons.bc.edu/asml/vol1974/iss1/19
fairly debatable, the judgment of the local legislative body must be sustained. . . . The burden to prove otherwise rests on the petitioner. . . . The fact that land is made less profitable thereby does not invalidate a by-law.\footnote{8}

The Court did not directly confront the issue of differing treatment within a homogeneous parcel of real estate. Instead, the Court focused upon the fact that the petitioner's property straddled a district line. Relying on the rule that it is normal and reasonable to draw boundaries between districts with regard to the placement of major traffic arteries, the Court concluded that the town's district designation should prevail, even though the district boundaries bisected petitioner's land.\footnote{9} The Court did indicate, however, that lot sizes within the same district must be uniform.\footnote{10}

The petitioner's equal protection claim—based upon Winchester's total exclusion of apartments under the zoning by-law in force at the time the petition was filed—was mooted by the amendment of the by-law in 1972 to provide for the construction of apartments.\footnote{11} However, the Supreme Judicial Court's dictum in regard to this issue seems to indicate that it is not likely to be persuaded by the equal protection argument.\footnote{12} The Court noted that \textit{Girsh Appeal},\footnote{13} a Pennsylvania case supporting the petitioner's equal protection claim, represents only a minority viewpoint,\footnote{14} and later held that it is permissible for a zoning by-law to maintain an area as predominantly one of single family residences.\footnote{15}

Although the Supreme Judicial Court did not reach the merits of the petitioner's equal protection claim, that argument provided the most interesting issue in the case. With new single-family homes well out of the financial reach of the majority of American families, it is clear that suburban communities in the process of being built up can keep many people out by zoning solely for single-family residences. Since the great majority of racial minorities are at the lower end of

\footnote{8} Id. at 756, 311 N.E.2d at 556.
\footnote{9} Id. at 757, 311 N.E.2d at 557.
\footnote{10} Id. at 756-57, 311 N.E.2d at 556-57.
\footnote{11} Id. at 757, 311 N.E.2d at 557. The Court dismissed as immaterial the fact that the 1972 amendment did not permit construction of apartments in the zones in which the petitioner's land is situated. Id.
\footnote{12} Id.
\footnote{13} 437 Pa. 237, 263 A.2d 395 (1970) (the total exclusion of apartments through zoning laws is unconstitutional).
\footnote{15} Id. at 758, 311 N.E.2d at 557, citing G.L. c. 40A, § 3; Village of Belle Terre v. Boraas, 416 U.S.1 (1974), discussed in § 16.1 supra. Although this holding would not, of course, preclude the Court from holding, at a proper time, that the total exclusion of apartments from a town was not permissible, it is perhaps indicative of what the Court's inclination might be on the issue of total exclusion.
the economic scale, the result is de facto, if not de jure, segregation.\textsuperscript{16} Constitutional attacks on single-family and large-lot zoning are somewhat difficult to sustain, however, and the procedures of chapter 774 of the Acts of 1969,\textsuperscript{17} the so-called “Anti-Snob” Zoning Law, permitting the opening up of communities for low and moderate income housing, may be more workable.

\section{§16.5. Floating zone: Assignment to specific property.} Adoption of amendments to zoning by-laws creating a new type of use district is a legislative task which is frequently handled through a town meeting. When the purpose of such an amendment is the establishment of a new permissible use in the town generally, as opposed to intentional application to specific pieces of property, the new zoning designation is often referred to as a “floating zone.” The town of Natick in 1969 amended its by-law by creating a new “Planned Cluster Development” (PCD) use district.\textsuperscript{1} In \textit{Cerel v. Town of Natick},\textsuperscript{2} the Appeals Court confirmed the belief that a subsequent legislative procedure is essential before a so-called “floating zone” can apply to a particular locus.

Plaintiff Martin Cerel had attempted unsuccessfully to have the town meeting rezone his property as a PCD district. In this action to determine the applicability of the amendment to his land, Cerel argued that the zoning amendment’s provision that “only land areas containing 4,500,000 square feet or more shall be included in the PCD district” created a floating zone on any parcel meeting this area requirement and automatically rezoned it as a PCD district without further legislative proceedings.\textsuperscript{3} The land court rejected Cerel’s argument and the Appeals Court affirmed.\textsuperscript{4}

The Appeals Court held that this area requirement—along with those concerning design, construction, and operational criteria—was to be used only as a guide to determine eligibility for PCD designation.\textsuperscript{5} Actual rezoning would necessitate a subsequent legislative proceeding; in this case, a separate vote of the town meeting to amend the zoning map.\textsuperscript{6}

\begin{footnotesize}
\begin{enumerate}
\item Id. at 398, 309 N.E.2d at 894.
\item Id. at 398-99, 309 N.E.2d at 894.
\item Id. at 398, 309 N.E.2d at 894.
\item Id. at 399, 309 N.E.2d at 894.
\end{enumerate}
\end{footnotesize}
The Appeals Court's decision is consistent with the apparent intent of the Natick PCD amendment. Legislative decisions should not be dispensed with when clearly required. In situations where a local legislative decision does no more than create a so-called "floating zone," a subsequent legislative decision is required in order to have the designation applied to a particular tract of land.

§16.6. Variance: Use and non-use variance standards. In Massachusetts, the present Zoning Enabling Act\(^1\) contains specific guidelines and requirements for variances.\(^2\) No provisions are evident which would distinguish between different types of variances or allow application of different standards. However, the Appeals Court's response to the facts in *Tutela v. Hines*\(^3\) suggests that while the court will show a guarded concern in preserving the rigid requirements of section 15(3) of chapter 40A for "use" variances, it may assume a more relaxed attitude with respect to "non-use" variances such as signs.

The petitioner originally brought an action challenging the Foxboro board of appeals' grant of a variance to a developing industrial park for the erection and display of two signs which exceeded the size limits established in the town by-law. Without a variance, that by-law would have limited the owner of the locus to a single sign not to exceed forty square feet in area.\(^4\) The superior court upheld the board's granting of the variance which allowed the developers to construct two signs in excess of the permitted size.\(^5\) The Appeals Court affirmed the superior court's findings that the signs would not result in a substantial detriment to the public good and would not derogate substantially from the intent or purpose of the by-law.\(^6\)

It is difficult to determine the rationale for the Appeals Court's decision. Under the strict interpretation of section 15(3) of chapter 40A, the presence of hardship is essential; yet here that issue seems not to have been considered. One explanation involves the quality of the petitioner's brief. Apparently, it was sorely lacking, for the court publicly struck it from the files because it failed to "include any thing which can fairly be called argument within the meaning of Rule 1:15(1)(d) of the Appeals Court."\(^7\) The other plausible reason is that the court did not believe that a "non-use" variance should be required to undergo as stringent a test as a "use" variance. Admittedly, "use" variances are more serious in terms of their effect on zoning. This distinction may well be a valid one—as to this author it is—and the

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\(^{1}\) G.L. c. 40A, §§ 1-22.
\(^{2}\) Id. § 15(3).
\(^{4}\) Id.
\(^{5}\) Id.
\(^{6}\) Id., 304 N.E.2d at 206-07.
\(^{7}\) Id., 304 N.E.2d at 207.
General Court may wish to consider incorporating the distinction into section 15(d)(3) of chapter 40A by making the hardship rule inapplicable when a variance does not effect a change in land use.

§16.7. Variance: Derogation from zoning law. In *Hunt v. Milton Savings Bank*, the board of appeals of Milton granted a variance to the defendant allowing the building of a bank along with an associated parking lot. The piece of property on which this construction was to take place had been placed in a Residence C district, in which construction or alteration for any commercial purpose was forbidden. At the time of this appeal the locus was owned by Hoover Motors, Inc., which, with the exception of approximately 13% of the total land, had previously used the locus as a commercial enterprise for the sale, repair, and storage of automobiles. Since this activity had existed prior to the adoption of the zoning designation in 1922, its continued operation had been permitted as a nonconforming use.

Three separate actions were brought by the plaintiffs, an abutter and others who claimed to be aggrieved by the Milton board's decision granting the variance to the bank permitting a new commercial use of the property. These actions included two bills in equity to have the granted variance set aside and a petition for a writ of certiorari seeking to quash the board's decision on the ground that the board itself was illegally constituted. The three actions were joined and heard together in the superior court.

The superior court set aside the grant of the variance and dismissed the petition for certiorari. In his findings, the trial judge noted that the "entire area ... is composed of well kept homes on tree lined streets," and that he "could see no use of any of the surrounding area which would indicate that variances had been granted on other properties."

The Appeals Court initially observed that disposition of the equity cases hinged on whether the variance could be granted "without nullifying or substantially derogating from the intent or purpose ... [of the zoning] by-law," in accordance with section 15(3) of chapter 40A. The trial judge stated that he could not "rule that the [board] was warranted in finding that the variance may be granted without substantial detriment to the public good and without nullifying or substantially derogating from the intent or purpose of the zoning by-law." Although this holding was made without substantiation as far as a ruling on the evidence was concerned, it is helpful to re-

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2 Id. at 352, 309 N.E.2d at 526.
3 Id. at 354, 309 N.E.2d at 527.
4 Id.
5 Id., quoting G.L. c. 40A, § 15(3).
member that a denial of a variance does not dictate the more inclusive explanation which is demanded in a granting of a variance. Thus, the trial court should not be faulted for its decision.

Noting that the board’s decision had merely paraphrased the language of section 15(3), and that the validity of the board’s decision therefore depended on the trial judge’s making a finding that the variance could be granted without nullifying or substantially derogating from the zoning by-law, the Appeals Court set out to decide whether it could provide the missing finding. The court concluded that the evidence in the instant case did not warrant such a finding, and that the superior court decrees annulling the decision of the board should be affirmed. In reaching this conclusion, the court emphasized that: (1) the introduction of a new business into a residential area ... is commonly conceded to have a marked depreciating effect upon the value of neighboring residential property; (2) the neighborhood here was predominantly residential in character; (3) there did not appear to have been any change in the neighborhood’s basic character since the time of the adoption of the original zoning by-law; and (4) no other commercial establishment existed in the neighborhood. Finally, the Appeals Court decided that the plaintiffs’ exception to the order dismissing the petition was moot because the petition for the writ of certiorari was designed to quash the board’s decision on the variance and the variance had already been set aside.

In this case it seems that the Appeals Court is informing trial courts that reasons for a denial of a variance should approach, and perhaps meet, the same standard required in the granting of a variance. Moreover, the court seems to be warning future seekers of variances to have sufficient evidence to show that the variance could be granted without substantial derogation from the intent or purpose of the zoning by-law.

§16.8. Variance: Substantial hardship test. Satisfaction of the substantial hardship requirement of section 15(3) of chapter 40A frequently presents itself as the major hurdle in variance cases. *City Council of Waltham v. Vinciullo* is another case in which this standard was determinative. Vinciullo owned two separate four-apartment houses on a parcel of land consisting of 20,360 square feet. Because of the high cost of renovations (which would have raised rents to a figure higher than that which the present tenants would be willing to pay) and progressively lower profits from the existing structures, he

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7 Id.
8 Id. at 357-58, 309 N.E.2d at 529.
9 Id. at 356, 309 N.E.2d at 528.
10 Id. at 358, 309 N.E.2d at 529.
sought a space variance to permit the construction of a single building containing not more than thirty-one apartments. The locus was situated in a Residence C district where, for a structure of that size, 57,250 square feet was required.

After the board of appeals granted the requested variance, the city council filed a bill in equity challenging the board’s decision. The superior court found no showing of substantial hardship and ordered the entry of a decree annulling the variance. However, the court later vacated its order, holding that because of an amendment to section 21 of chapter 40A which became effective while the instant case was pending, the city council no longer had standing to maintain its suit.

The Supreme Judicial Court held that since the board’s decision was rendered prior to the effective date of the amendment, it should not have been applied retroactively to invalidate the city council’s appeal. The Court then concluded that since the dwellings could still feasibly be used in compliance with the existing zoning laws, no substantial hardship was present: “There is no substantial hardship merely because there may be expense involved in continuing an existing use ... or because higher profits may result from a nonconforming use ....” As a result, the board’s granting of the variance was determined to be in excess of its authority and the superior court decree was reversed.

While the tone of the Supreme Judicial Court’s ruling may seem harsh, the policy is indeed sound. As the Court pointed out: “To rule otherwise would make it possible for a property owner to obtain a variance merely by permitting his property to deteriorate and become unprofitable. Such a result would tend to negate the effectiveness of zoning schemes.”

The Court’s discussion of the retroactive nature of procedural and remedial statutes, while in no sense limited to zoning cases, is the most interesting aspect of this case. The Court’s determination that such statutory changes shall apply retroactively only to those cases which, on the effective date of the statute, have not yet gone beyond the pro-

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2 Id., 307 N.E.2d at 317.
3 Id.
4 Id. at 168, 307 N.E.2d at 317.
5 Acts of 1969, c. 706, which deleted the reference in G.L. c. 40A, § 21 to “any municipal ... board” as one of the parties which may appeal a decision of a board of appeals to the superior court.
7 Id. at 171, 307 N.E.2d at 319.
8 Id. at 174, 307 N.E.2d at 321.
9 Id.
10 Id. at 174 n.9, 307 N.E.2d at 321 n.9.
cedural stage to which the statute pertains\textsuperscript{11} avoids the confusion of the older rule stated by Chief Justice Rugg in \textit{Hanscom v. Malden & Melrose Gas Light Co.}\textsuperscript{12} Since the rule stated in the present case is one of statutory construction, and not of constitutional dimensions,\textsuperscript{13} the General Court can still assure retroactive application to particular cases by an express statement to that effect.

\textbf{§16.9.} Variances: Failure to state special conditions authorizing. \textit{Williams v. Building Commissioner of the City of Boston}\textsuperscript{1} exemplifies the virtually state-wide standard applicable to the granting of variances. Even under the Boston Zoning Code, before the granting of a variance can be upheld, the board of appeal must find that circumstances or conditions exist which are peculiar to the locus but not to the neighborhood.\textsuperscript{2} Additionally, hardship must be present in the sense that if the requested variance were denied, the owner of the locus would be deprived of the reasonable use of the land or structure.\textsuperscript{3}

The plaintiffs in \textit{Williams} brought a bill in equity as abutting owners, challenging the validity of two decisions of the Boston Board of Appeal granting variances to Kasanof's Baking Company, Inc. One decision allowed the erection of a warehouse-garage structure in a district zoned for apartments; the other permitted the construction of six silos for the storage of flour.\textsuperscript{4} The silos were to be constructed on the bakery locus, which existed as a nonconforming use in an area zoned for local business.

The superior court upheld the board's granting of the variances.\textsuperscript{5} However, the trial court, like the board of appeal, failed to state findings establishing the existence of special circumstances or conditions.

\begin{itemize}
\item \textsuperscript{11} Id. at 171, 307 N.E.2d at 319.
\item \textsuperscript{12} 220 Mass. 1, 107 N.E. 426 (1914). Chief Justice Rugg stated: The general rule of interpretation is that all statutes are prospective in their operation, unless an intention that they shall be retrospective appears by necessary implication from their words, context or objects when considered in the light of the subject matter, the pre-existing state of the law and the effect upon existent rights, remedies and obligations. . . . It is only statutes regulating practice, procedure and evidence, in short, those relating to remedies and not affecting substantive rights, that commonly are treated as operating retroactively, and as applying to pending actions or causes of action.
\item \textsuperscript{13} See 1974 Mass. Adv. Sh. at 169 n.5, 307 N.E.2d at 318 n.5.
\end{itemize}
warranting the variances. Citing numerous precedents, the Appeals Court held the grants invalid.\(^6\)

The case presented an additional twist when Kasanof’s argued that the decision allowing the silos could be characterized as permission for extension of a nonconforming use\(^7\) (as provided under section 9-1 of the Boston Zoning Code\(^8\)) and should, therefore, be allowed to stand. The Appeals Court answered by citing section 18 of chapter 40A (substantially adopted in section 8 of the Boston Zoning Enabling Act\(^9\)), which requires the board to “set forth clearly the reason or reasons for its decisions” that statutory and by-law standards applicable to the extension of nonconforming uses have been met.\(^10\) Section 9-1 of the zoning code\(^11\) outlines standards of maximum area and value for this type of extension, and section 6-3\(^12\) provides conditions to safeguard the neighborhood. The Appeals Court noted that the board’s decision was addressed primarily to the variance aspects of the case, and did not directly address the standards of sections 9-1 and 6-3 of the zoning code.\(^13\) Since no reference was made to these conditions, the decision permitting an extension of Kasanof’s nonconforming use was also held invalid.\(^14\) However, since the Appeals Court felt that the deficient findings as to the requirements for the extension of a nonconforming use were probably remediable at a further hearing, this issue was remanded to the board for further proceedings.\(^15\)

§16.10. Variance and special permit: Action in excess of authority. *Delgaudio v. Board of Appeals of Medford*\(^1\) reiterates the significance which the courts place upon compliance with specified requirements for variances and special permits. The substantive criteria of section 15(3) of chapter 40A must be satisfied if the granting of a variance is to be upheld. Likewise, compliance with the procedures of both the Zoning Enabling Act\(^2\) and accompanying by-laws or ordinances is essential to the validity of a special permit.

The plaintiffs in *Delgaudio* owned land across the street from the

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\(^6\) Id. at 568, 301 N.E.2d at 457.

\(^7\) See note 4 supra.


\(^10\) G.L. c. 40A, § 18.


\(^14\) Id.

\(^15\) Id. at 569-70, 301 N.E.2d at 458.


locus. According to the city's zoning ordinance, motels of over two stories were prohibited. The board of appeals granted a variance to build a six-story motel on the locus, finding that it would be economically unfeasible to build a two-story motel. The board also granted a special permit to construct a parking lot as an accessory use to both the proposed motel and to a restaurant already being operated at the same site.

The superior court upheld the board's decisions, but the Appeals Court reversed on both issues. In its rescript opinion, the court stated that "[t]he finding that it would not be economically feasible to build a two-story motel on the site is not sufficient to support the granting of the variance." Essentially, the policy which the Appeals Court is reiterating involves the coupling of the variance requirements of "hardship" and "conditions especially affecting [the locus] but not affecting generally the zoning district in which it is located." Thus, if a claim of hardship is to lie, it must be accompanied by a showing that except for the use sought under the variance, no other rational use of the locus is possible. In this case, although the zoning ordinance allowed two-story motels, it did not restrict the use of the locus to motels. The ordinance required only that if a motel were constructed, its height had to be limited to two stories. If this was not desirable, alternative rational uses of the locus were possible. Since actual construction of a motel on the locus was not barred, the requirement of substantial hardship was not satisfied and the granted variance could not be allowed to stand.

In regard to the special permit for the parking lot, section 16.4 of Medford's zoning ordinance required a finding, prior to a granting of a special permit, that the approval would result in no adverse effect upon the neighborhood. The Appeals Court held that the board's failure to comply with this stipulation in granting this special permit, and its failure to make a statement of reasons (as required by section 18 of chapter 40A) supporting its "general recitation of the statutory language of § 4 [of chapter 40A]," made its decision void. In the absence of such a finding and of a statement of reasons for the grant of the special permit, the board's decision was properly deemed to exceed its authority.

§16.11. Special permit: Compliance with local standards. The

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4 Id.
5 Id. at 772, 303 N.E.2d at 127.
6 Id. at 771, 303 N.E.2d at 127.
7 G.L. c. 40A, § 15(3).
8 Id.
10 Id.
11 See id.
courts in Massachusetts have repeatedly stressed that for the granting of a special permit to be upheld, there must be a showing of adherence to procedural requirements in order to establish compliance with statutory and by-law regulations.\(^1\) This policy was reiterated during the 1974 Survey year in *Pierce v. Board of Appeals of Carver*.\(^2\)

The board of appeals granted a special permit which would have allowed a use of a parcel of land as a mobile home park.\(^3\) Plaintiff, an abutter, brought a bill in equity challenging the validity of the board's decision. The superior court dismissed the bill\(^4\) and plaintiff appealed. The Appeals Court noted that under section VII B 2 of the Carver zoning by-law, the board of appeals' power to grant special permits was conditioned on the board's finding that the use involved would not be "detrimental to the established or future character of the neighborhood and town . . . ."\(^5\) Because this prerequisite is clearly stated in the zoning by-law, a failure to produce this finding results in a void decision. Since neither the board nor the superior court made such a finding, the decision to grant the special permit was annulled on the ground that the board acted in excess of its authority.\(^6\)

Although the Appeals Court in *Pierce* evinced a willingness to review the evidence, it indicated that consideration of the economic impact of the mobile home park on the town would not provide an adequate substitute for a finding as to the park's impact on the character of the town.\(^7\) The court also stressed the required scope of the finding, i.e., that possible detrimental effects would have to be determined for both the town and the neighborhood.\(^8\)

The decision seems to say that the court will tolerate an implied finding.\(^9\) However, where, as here, the requirement is stated in the zoning by-law, an express finding, to support the premise that a granting of a special permit is not arbitrary, should be preferred.

### §16.12. Special permits: Inferred valid uses.

Through special permits local communities are able to regulate and determine use exceptions to zoning designations. In *Board of Appeals of Webster v. Z & K*


\(^3\) Id., 307 N.E.2d at 588.

\(^4\) Id.

\(^5\) Id. at 190, 307 N.E.2d at 588, quoting Zoning By-law of the Town of Carver, § VII B 2 (emphasis added by court).


\(^7\) See id.

\(^8\) Id. at 190-91, 307 N.E.2d at 588-89.

\(^9\) "Neither the board nor the judge made a finding, express or implied, to the effect that the use of the locus for a mobile home park would not be detrimental to the established or future character of the town." Id. at 190, 307 N.E.2d at 588 (emphasis added).
Enterprises, Inc., application was made for a special permit to use certain land designated “Agricultural-Single Family Residential” as a mobile home park. The Webster zoning by-law authorized the granting of special permits for hotel or tourist courts in such a district. The town board of appeals denied the application, and its decision was upheld by the superior court. The Appeals Court, holding that the permitted exceptions listed within the special permit section of the zoning by-laws were exclusive, affirmed the decree of the superior court. Thus, the by-law could not be broadly construed to include other exceptions not specifically mentioned. “It is not enough that a use for which a special permit is sought be ‘consistent’ or ‘compatible’ with a specific use for which the by-law states such a permit may be granted.”

The court was correct in its decision not to make exceptions to local zoning by-laws. The applicant’s proper remedy is to propose an amendment to the by-law at the next town meeting.

§16.13. Building permit: Exemption from new zoning rules. Section 11 of chapter 40A exempts the holder of a building permit from the effect of any zoning ordinance, by-law, or amendment if the permit was issued prior to notice of the planning board hearing on the ordinance, by-law or amendment. Protection of the right to construct the nonconforming facility is preserved only if construction has begun within six months from the date the building permit was issued and “the work . . . proceeds in good faith continuously to completion so far as is reasonably practicable under the circumstances.” In Smith v. Board of Appeals of Brookline, the Supreme Judicial Court clarified section 11 by examining the circumstances in which the six-month period can be tolled; what constitutes construction sufficient to satisfy the statute; and with what degree of strictness the six-month limitation will be applied.

In 1968, the owner’s predecessor was granted a special permit allowing construction of an apartment building which did not conform to the height and floor area ratio requirements of the zoning by-law. On November 2, 1970, the same party filed an application for a building permit which took advantage of the dimensional variations of the 1968 special permit. A suit challenging the 1968 special permit was in-

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2 Id., 301 N.E.2d at 579.

2 Id.
§16.13 ZONING AND LAND USE

initiated on November 9, 1970. Pursuant to section 207d of the Brookline building code, the building commissioner in January 1971 gave permission "for excavation, footings and the erection of foundation forms."4 Section 207d, which allows the issuance of "excavation permits," expressly provides that the holder of such a permit "shall proceed at his own risk and without assurance that a permit for the super-structure will be granted."5 A request for extension of the excavation permit was made on June 11, 1971, and on June 15 the building commissioner responded in a letter practically identical to his January letter with the added notation that the requested extension had been granted. Ownership of the property was transferred in August 1971 and at the same time new plans were submitted. These new plans did not take advantage of the 1968 special permit provisions. Thereafter, the building inspector gave oral permission to begin construction.

On October 14, 1971, notice was given of a hearing before the planning board on the proposed new zoning provisions. Six days later, on October 20, 1971, another application for a building permit was filed based upon the new plans. That same day, the commissioner sent a new letter granting permission for excavation. He sent another letter on December 13, 1971 extending the starting time of the project for 90 days from that date. Finally, on May 26, 1972, the commissioner wrote a letter stating that the permit was granted, and he endorsed the reverse side of the October 1972 permit application noting that the permit had been granted.

The board of appeals denied the plaintiff's appeal from the granting of the building permit and the superior court annulled that decision.6 The trial judge found that neither actual construction nor excavation work had begun before the middle of December 1971, thus preventing the holders of the permits from receiving the protection granted by section 11 of chapter 40A.7

In affirming the trial court's decision, the Supreme Judicial Court sidestepped the issue of whether the building commissioner's letters of January 28, 1971 or June 15, 1971, each issued under the authority of section 207d of the Brookline building code, constituted the appropriate type of permit for section 11 protection.8 (The Court noted that the oral approval of the new plans submitted on August 5 and August 13, 1971 could not constitute a permit because sections 206b and 207a of the Brookline building code were not adhered to, i.e., "[n]o application was filed, no fee was paid, and no document of any

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4 Id. at 1388, 316 N.E.2d at 502.
5 Id. at 1389, 316 N.E.2d at 502, quoting Brookline, Mass. Building Code, § 207d.
7 Id. at 1390, 316 N.E.2d at 503.
8 Id. at 1391, 316 N.E.2d at 503.
kind was issued." Instead, the Court assumed arguendo that for the purposes of coverage under section 11 of chapter 40A, the letter of June 15, 1971 could serve as a building permit. Using this date as a starting point, the protective period under section 11 would extend only until December 15, 1971, and construction would have to have begun by that time. By determining that the trial judge was not plainly wrong in her finding as to the date when construction began, the Court held that section 11 did not exempt the owner from the new provisions of the town zoning by-law. The Court noted that even viewing the evidence in the light most favorable to the defendants, the most that occurred prior to December 15, 1971 was "preliminary excavation." While questions could be raised as to whether preliminary excavation amounts to the commencement of construction called for by section 11, the Court did not decide this issue because of the trial court's findings. From this part of the decision it is clear that the six-month period of section 11 is to be rigidly enforced.

The board of appeals, the owner, and the builder to whom the May 26, 1972 permit was issued cited Belfer v. Building Commissioner of Boston in support of their argument that the six-month period should be tolled in this case, since "real practical impediments" to beginning construction prevented them from taking advantage of the six-month period. The Supreme Judicial Court held that the six-month period should not be tolled in the instant case because the litigation here was terminated by the new owner's decision to abandon the special permit and file new plans. The Court refused to extend the standard of "real practical impediments to the use of a benefit" to a situation in which the aggrieved party has the power to remove the impediment at will. If one has the power to remove the impediment at will, then there really is no impediment.

Finally, the Court commented that section 11 should be interpreted

9 Id. at 1390 n.2, 316 N.E.2d at 503 n.2.
10 Id. at 1390, 316 N.E.2d at 503.
11 Id.
12 Id.
13 Id. at 1391, 316 N.E.2d at 504.
14 1973 Mass. Adv. Sh. 607, 294 N.E.2d 857. Belfer held that a zoning provision which caused a variance to expire within two years if not used must be tolled while the variance itself is the subject of an appeal. Id. at 612, 294 N.E.2d at 860. The Belfer Court stated:
[R]elief from time limitations ... should ... be given where an appeal from the granting of the variance creates ... real practical impediments to the use of a benefit. Otherwise a variance which was lawfully awarded can be frustrated by the delay inherent in an appeal. Unless an appeal tolls the time period, many variances would be meaningless.
16 Id. at 1392, 316 N.E.2d at 504.
17 See note 14 supra.
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as affording protection from zoning changes to good faith holders of building permits received before the first notice of zoning hearings "who proceed with some diligence to build under such permits."\(^\text{19}\) It is not intended to create "a permanent license to construct a building for a non-conforming use."\(^\text{20}\)

Section 11 is designed to afford some reasonable period of protection to a landowner who has advanced toward use of his property in a manner that no longer complies with the applicable zoning regulation. Because it constitutes an exception to the general rule that zoning is effective when adopted, it clearly should be limited. While it is clear that in some situations a landowner may not reasonably be able to meet the six-month period for commencement of construction, this probably should not result in the tolling of the statute, even though the Court in the present case intimates its probable willingness to toll the six-month period upon a showing of "real practical impediments."\(^\text{21}\) The six-month period is a period of grace and permits the landowner to use his property in a way that the legislative body of the municipality has determined should not be permitted. One can argue that the public decision should prevail over the private one, and as long as the landowner is still able to make suitable use of his land, it would appear that the Court is correct in applying this period-of-grace statute narrowly, even when the result may be an unhappy one for the landowner.

§16.14. Exemption of public service corporations from local zoning. Under section 10 of chapter 40A, the Department of Public Utilities (DPU) has the authority, following public notice and hearing, to exempt a "public service corporation" from local zoning ordinances or by-laws.\(^\text{1}\) The underlying reason for this authority is that the exemption is reasonably necessary for the convenience or welfare of the public. The plaintiff municipality in Town of Truro v. Department of Public Utilities\(^\text{2}\) raised the issue of whether a small tour corporation is a "public service corporation" for the purposes of section 10 and is thereby permitted an exemption from the town's zoning by-law.

The tour company, Drifting Sands Dune Tours, Inc., transported passengers for sightseeing purposes on a fixed route into the Cape Cod National Seashore, pursuant to a DPU certificate of public convenience and necessity, a license from the town under section 1 of chapter 159A, and a permit from the National Park Service. The

\(^{19}\) Id.
company operated three seven-passenger vehicles.

The factor initiating the controversy in the present case was the issuance by the DPU of a permit allowing the construction of a terminal and parking facility in Truro at a locus where such use was prohibited by the town’s zoning by-law. In its decision that the carrier’s use of its terminal facility was reasonably necessary for the convenience and welfare of the public, the Department apparently thought that the sightseeing carrier was within the definition of “public service corporation” enunciated in Attorney General v. Haverhill Gas Light Co. A “public service corporation” was there defined as “one private in its ownership but having an appropriate franchise from the State to provide for a necessity or convenience of the general public incapable of being furnished through the ordinary channels of private competitive business and dependent for its exercise upon eminent domain or some agency of government.” On appeal, the Supreme Judicial Court affirmed the decision of the DPU.

Recognizing that the language of Haverhill Gas was not primarily directed toward problems presented by “common carriers by motor vehicle,” the Court proceeded to establish a new standard, fashioned from precedent relating to railroads and applicable only to “motor vehicles engaged in what might be described as public service transportation.” In a variety of cases, the Court has determined the status of a public service corporation has turned upon the quasi-public character of the company and the duties owed by it to the public. Applying this test to the tour company, the Court reiterated that the company had a license from the Town of Truro under section 1 of chapter 159A and a certificate of public convenience and necessity under section 7 of the chapter. The Court noted, furthermore, that section 10 of chapter 159A established the tour company as a “common carrier,” and that regulation of such carriers rests on their similarity to street railways and railroads. Since the company was “subject to the public duties of a common carrier, bound to observe the conditions of its certificate, to observe filed rates and schedules, and to serve the public without discrimination,” the Supreme Judicial Court

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4 215 Mass. at 398, 101 N.E. at 1063. It should be noted that in Town of Wenham v. Department of Pub. Util., 333 Mass. 15, 127 N.E.2d 791 (1955), eminent domain power was held unnecessary to “public service corporation” status, for purposes of G.L. c. 40A, § 10.
5 333 Mass. at 16-17, 127 N.E.2d at 793.
9 Id.
10 Id. at 892, 312 N.E.2d at 568.
§16.15 concluded that such a common carrier of passengers by motor vehicles, like a railroad, is a "public service corporation." This conclusion essentially dismissed Truro's claims that the public service corporation must be "important," that its business must be "necessary and substantial," and that it must possess some "right of eminent domain or other large privilege." The Court's response to these arguments was brief: "[T]he carrier service involved in this case could lawfully be provided by an individual or a partnership rather than a corporation. But the statute does not disqualify a small enterprise merely by virtue of its size."

The Supreme Judicial Court's decision is logical and defensible. The General Court, however, may wish to consider whether it meant by section 10 of chapter 40A to exempt from local zoning regulations an operation of such small size and purely local importance as the carrier in the instant case.

§16.15. Business use: Separation of storage from business. In Town of Fairhaven v. Ben Prince & Sons, Inc., the town brought a bill in equity to compel compliance with the town's zoning by-laws. The defendant company used the locus, located in a business district, for the storage of old machinery and equipment. The company contended that since it salvaged and sold parts from this equipment at its retail store, its use of the locus constituted a retail business permitted under the town's zoning by-law.

After finding that the property in question was utilized as a junkyard, the superior court granted the injunctive relief requested by the town and reported the case to the Appeals Court. Based upon the

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11 Id.
12 Id.
14 The only indication in the Court's opinion that the sightseeing carrier in the present case had more than local importance is contained in the Court's statement that, while the carrier operated only within the town of Truro and the National Seashore, "it served tourists from afar." 1974 Mass. Adv. Sh. at 893, 312 N.E.2d at 569.

2 The section of the town zoning by-laws applicable to business districts permitted, inter alia: retail stores; manufacturing which is "clearly incidental to a retail business lawfully conducted on the premises" and which is not "offensive, a nuisance or hazardous;" offices; banks; restaurants; theaters; filling stations; and "garages for storage." Id. at 302, 308 N.E.2d at 917-18, quoting Fairhaven, Mass. Zoning By-laws § 7. The Appeals Court summarily dismissed the defendant's alternate contention that its use of the locus constituted "manufacturing clearly incidental to a retail business lawfully conducted on the premises," since the company's retail business was located about one-half mile from the locus. 1974 Mass. App. Ct. Adv. Sh. at 303, 308 N.E.2d at 918.
evidence, which “[gave] the impression that there [was] more junk than anything else on the premises,”\textsuperscript{4} the Appeals Court held that the defendant's use of the property was not a retail business permitted by the zoning by-laws.\textsuperscript{5} The court noted that “[u]ses of the kind found here have never been permitted by any zoning of the town in other than industrial districts.”\textsuperscript{6} Thus, a final decree was ordered enjoining defendant from using the premises for the storage of junk or for the salvaging of parts from any of the same, and requiring the removal of all equipment and machinery already on the premises.\textsuperscript{7}

\section*{§16.16. “Distribution plant”: Definition.}

In \textit{Salah v. Board of Appeals of Canton},\textsuperscript{1} the Appeals Court defined the phrase “distribution plant” as used in a zoning by-law.

The controversy arose when the defendant board denied approval of a site plan for the development of a parcel owned by plaintiff Salah. The plan provided for the erection of two buildings, surfacing of most of the remaining land, and leasing of the property to an intrastate common carrier. The principal building was to be used partly for warehousing, partly for office space, and partly as a “receiving and delivery terminal with extended loading dock facilities” and a railroad siding.\textsuperscript{2} A smaller building was to be used as a maintenance garage for servicing the lessee intrastate carrier's vehicles. The plaintiff's property was located in an area designated for limited industrial uses by the local zoning ordinance. The uses allowed “as of right” in such a district included, \textit{inter alia}, a “[w]arehouse or distribution plant for ... [certain enumerated products] or any products of manufacturing activities permitted by this paragraph (whether or not produced on the premises).”\textsuperscript{3} The board denied approval of Salah's application on the grounds that the proposed use was not within the permissible uses of the zoning by-laws.\textsuperscript{4} Based on a master's report, the superior court annulled the decision of the board and ordered the board to approve the site plan.\textsuperscript{5}

The issue before the Appeals Court was whether the proposed use was a “distribution plant” as contemplated by the by-law. The board argued that the proposed facility—a trucking terminal operated by a

\begin{itemize}
  \item \textsuperscript{4} Id. at 303, 308 N.E.2d at 918.
  \item Id.
  \item Id.
  \item Id.
  \item Id. at—, 314 N.E.2d at 882.
  \item Id. at—, 314 N.E.2d at 882.
\end{itemize}
common carrier—could not be characterized as a "distribution plant." The Appeals Court, however, refused to adopt such a restrictive meaning of the phrase.\(^6\) Relying on \textit{Kreger v. Public Buildings Commissioner of Newton},\(^8\) which indicated that a facility may be a "distribution plant" even if the operator does not own the goods being distributed, the court held that the phrase "distribution plant" fit the use proposed in the instant case.\(^9\) The court found no problem with the fact that the operator was a common carrier.\(^10\)

While upholding the superior court's decision to annul the decision of the board, the Appeals Court held that the trial court erred in ordering approval of the plaintiff's site plan and issuance of all necessary permits, since the proposed commercial building was subject to additional conditions which neither the master, the trial court, nor the board had dealt with adequately.\(^11\) Lacking any such determination as to whether the proposed use met the "general conditions for approval" imposed by the Canton by-law, the Court remanded the case to the board for further proceedings.\(^12\)

Since the parties had argued the issue, and because the question would probably arise at a rehearing before the board, the court ruled on the permissibility, under the Canton by-law, of use of the smaller building as a maintenance garage. The court held, contrary to the board's contention, that the proposed maintenance garage was a permissible "accessory use" to the proposed distribution plant.\(^13\)

Lastly, the court reversed the superior court's assessment of costs against the board, since the master's report relied upon by the trial judge did not support the conclusion, required by section 21 of chapter 40A, that the board "acted with gross negligence, in bad faith, or with malice." The court stated that the finding that the site plan was denied "arbitrarily and capriciously" was not supported by the record or by any subsidiary findings, but expressed no opinion as to whether this finding "in any way [met] the statutory standard."\(^16\)

\(^6\) Id. at—, 314 N.E.2d at 884.
\(^7\) Id. at—, 314 N.E.2d at 884.
\(^8\) 353 Mass. 622, 234 N.E.2d 283 (1968). \textit{Kreger} held that a facility consisting of oil storage tanks and loading and unloading bays for oil trucks could be characterized as a "distribution plant," even though the owner of the facility was not the owner of most of the oil distributed through the facility. Id. at 623, 234 N.E.2d at 284.
\(^10\) Id. at—, 314 N.E.2d at 884.
\(^11\) Id. at—, 314 N.E.2d at 885.
\(^12\) Id. at—, 314 N.E.2d at 885-86.
\(^13\) Id. at—, 314 N.E.2d at 886.
\(^14\) Id. at—, 314 N.E.2d at 886, quoting G.L. c. 40A, § 21, which governs the assessment of costs.
\(^16\) Id. at—n.12, 314 N.E.2d at 887 n.12. See text at note 14 supra.
§16.17. Errors in written decision: Correction by board of appeals. If a zoning board of appeals inadvertently makes a clerical mistake in the rendering of one of its decisions whereby the reported decision would be contrary to the very essence of the intended decision, a number of questions are raised. First of all, would the board have the authority to rectify the mistake without initiating a formal proceeding? Secondly, what effect would the procedural rules of section 18g of chapter 40A have upon this situation? In Burwick v. Zoning Board of Appeals of Worcester, the Appeals Court held that the board can correct its mistake without violating section 18 of the Zoning Enabling Act.

The controversy involved in the present case can be traced back to December 29, 1970, when the city council of Worcester voted to amend its zoning ordinance in such a way as to place the locus in an RL-7 zoning district, in which certain types of multi-family dwellings are permitted if a special permit is obtained. Five months later all but one of the abutters brought an action in superior court challenging the validity of the amendment. While that matter was still in litigation, Burwick applied, under the provisions of the amended ordinance, to the board of appeals for a special permit to construct a series of multi-family apartment units. The board held a public hearing and voted unanimously to grant the special permit. No formal decision was rendered at that time, however, due to the pending litigation as to the validity of the amendment. The board signed a copy of the site plan and orally agreed on the specific conditions and safeguards which would be inserted in any formal decision which might later be issued.

About a year later, the superior court issued a declaratory decree determining that the amendment was valid. Following that decision, the board’s members signed a form of decision granting Burwick the special permit. A problem resulted because the decision set out conditions and safeguards which differed materially from those which had previously been agreed upon. Realizing their mistake, all the members of the board signed another form of decision granting the special permit with conditions and safeguards which were consistent and substantially identical to those orally agreed upon by the board at the original hearing.

The superior court found that the first form of decision was null and void, and that the latter decision was valid and in full force and effect. The trial judge’s reasoning was that the first form of decision was made “through mistake and error, in the mistaken and erroneous
belief that [the board members] were signing what they had unanimously voted" at the formal hearing. The Appeals Court affirmed this ruling, stating that "[t]he board had the power, without holding a public hearing, to correct an inadvertent (and essentially clerical) error . . . so that the record would reflect the true intention of the board." The court particularly noted that the subsequent, correcting form of decision was not an instance of a "reversal of a conscious decision" nor one in which a board purported to grant relief different from that originally sought and discussed at a public hearing.

As to the further claims of the abutters concerning various violations of section 18 of chapter 40A the court appeared very hesitant to apply the statute to the letter since the abutters failed to show how they had been prejudiced by the board's failure to adhere strictly to the provisions of section 18. The court dismissed the claim that the board failed to adopt rules for conducting its business on the grounds that the evidence as to whether the board had adopted such rules was indecisive. The abutters failed to specify what subjects should have been covered by such rules or how the existence of such rules would have benefited them. Next, the court pointed out that precedent dictated that the provisions of section 18 requiring the board to make a decision within 60 days of the filing of the application for a special permit is directory rather than mandatory. The court reiterated that the reason for the delay was the board's decision to await the outcome of the pending litigation which would determine whether a special permit could be issued. Clearly the delay was not frivolous. Nor did the record offer any evidence that the abutters were adversely affected by the delay.

The Appeals Court then examined the merits of the claim that the

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4 Id.
5 Id. at 89, 94, 306 N.E.2d at 457, 459.
6 Id. at 89, 306 N.E.2d at 457.
9 The abutters sought to invalidate the second form of decision on the grounds that the board had violated G.L. c. 40A, § 18 in failing: (1) to adopt rules for conducting its business; (2) to make a decision within 60 days of the filing of the application; (3) to make a detailed record of its proceedings, showing the vote of each member and setting forth the reasons for its decision; and (4) to file a copy of its decision in the office of the planning board within fourteen days of the decision. 1974 Mass. App. Ct. Adv. Sh. at 89-90, 306 N.E.2d at 457.
11 Id. at 90, 306 N.E.2d at 457.
12 Id.
13 Id.
14 Id. at 90-91, 306 N.E.2d at 458.
board failed to make a detailed record of its proceedings. The court refused to accept the abutters' interpretation of section 18 as requiring the board to preserve, or to file with the city clerk, copies of drafts of proposed findings or of a proposed decision.\textsuperscript{15} All the records were a matter of public record and were kept and maintained by the city clerk.\textsuperscript{16} Outlining the breadth and detail of these records, the court concluded that section 18's record-keeping requirement had been satisfied.\textsuperscript{17}

The final issue in the case involved an attempt to have the trial court's decision reversed because of failure of the applicant (Burwick) and the board to introduce any evidence in support of the merits of the board's decision, and because the trial court made no independent findings in this regard. The Appeals Court refused to consider the question because it had not been raised in either of the bills filed by the abutters.\textsuperscript{18} Therefore, since it was not a jurisdictional issue, it could not be raised, as a matter of right, for the first time on appeal.\textsuperscript{19}

The Appeals Court's decision in \textit{Burwick} seems to be influenced by the attempts of the abutters to have the court penalize Burwick for possible failures of the board over which he had no control and which, as a matter of substance, did not prejudice the abutters.\textsuperscript{20} Nevertheless, it would seem that the entire controversy could have been avoided if the board had issued a tentative form of decision at the outset which would have become effective only if the pending litigation resulted in a favorable decision on the validity of the zoning ordinance amendment.

\textbf{§16.18. Zoning procedure: Appeals to Housing Court of the City of Boston.} Chapter 669 of the Acts of 1974 is designed to extend the jurisdiction of the Boston Housing Court to appeals from zoning-related decisions of the board of appeal which are "concerned with any building or place used, or intended or permitted for use, as a place of human habitation."\textsuperscript{1} The Act amends sections 11 and 12 of the Boston Zoning Enabling Act.\textsuperscript{2} It should be noted that section 3 of the 1974 Act\textsuperscript{3} also amended section 3 of chapter 185A\textsuperscript{4} of the General Laws, dealing with the jurisdiction of the housing court.

\begin{footnotesize}
\begin{enumerate}
\item Id. at 92, 306 N.E.2d at 458.
\item Id. at 91, 306 N.E.2d at 458.
\item Id. at 91-92, 306 N.E.2d at 458.
\item Id. at 93-94, 306 N.E.2d at 459.
\item Id. at 94, 306 N.E.2d at 459.
\item See id. at 92-93, 306 N.E.2d at 459.
\end{enumerate}
\end{footnotesize}
§ 16.19. Earth removal: Non-conforming use. In *Byrne v. Town of Middleborough*, the Supreme Judicial Court was asked to consider the validity, as applied, of an earth removal by-law enacted by the town in 1970 which prohibited the removal of earth from any lot in the town without a permit from the board of selectmen. Plaintiffs operated six gravel pits in the town which were subject to the by-law. The by-law provided for the adoption of regulations by the board of selectmen to govern the permit application procedure. Prior to the effective date of the by-law, the board of selectmen decided to continue certain “conditions” for the removal of soil, loam, sand, and gravel adopted under a previous by-law as “regulations” for the new by-law. These conditions provided that “the continued operation on the same parcel of an existing sand or gravel pit” was exempt from the permit requirement.

Plaintiffs argued that their earth removal operations were non-conforming uses and, therefore, were exempted by section 5 of chapter 40A from the effect of the new by-law or, in the alternative, that if their operations were subject to the new by-law, the by-law was unconstitutional since it denied due process of law in not providing for pre-existing uses.

The Supreme Judicial Court rejected the first of these two arguments by referring to the explicit language of section 5 of chapter 40A, which provides that “a zoning . . . by-law or any amendment thereof” shall not apply to an already existing use. Since the earth removal by-law was adopted pursuant to section 21(17) of chapter 40 and not pursuant to the Zoning Enabling Act, it was held not to be a zoning by-law to which section 5 applied.

The Court refused to reach the second argument advanced by the plaintiffs because the “conditions” which the board of selectmen

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1. 1973 Mass. Adv. Sh. 1485, 304 N.E.2d 194. The superior court reported the case to the Appeals Court without decision, and the case was transferred to the Supreme Judicial Court under G.L. c. 211A, § 10(A).
2. 1973 Mass. Adv. Sh. at 1486-87, 304 N.E.2d at 195-96. Small projects, town projects, and construction sites were not subject to the by-law. Id.
3. Id. at 1486, 304 N.E.2d at 195.
4. The effective date had been postponed until March 1, 1971 at the plaintiffs’ request. Id.
5. Id. at 1488, 304 N.E.2d at 196.
6. See text at notes 9-10 infra.
8. Id.
9. Id. at 1487-88, 304 N.E.2d at 196.
11. G.L. c. 40, § 21(17) empowers a town to pass by-laws: “prohibiting or regulating the removal of soil, loam, sand or gravel from land not in public use in the whole or in specified districts of the town . . . .”

http://lawdigitalcommons.bc.edu/asml/vol1974/iss1/19
adopted to govern earth removal permits exempted existing sand or gravel pit operations from the permit requirement.\textsuperscript{14} Since the board apparently intended to adhere to this exemption, and since the plaintiffs had withdrawn their applications for permits,\textsuperscript{15} the Court held that no due process claim had been presented.\textsuperscript{16} In so holding, the Court refused to speculate whether the board, in subsequent proceedings, would act in an unreasonable, whimsical or capricious manner in violation of the plaintiffs' constitutional rights.\textsuperscript{17} The Court thus ordered a decree entered declaring that the earth removal by-law was not subject to the existing use requirements of section 5 of the Zoning Enabling Act and that, because of the regulations or "conditions" adopted by the local board of selectmen, the by-law did not deprive the plaintiffs of property without due process of law.\textsuperscript{18}

B. Subdivision Control

\textbf{§16.20. Plans not requiring planning board approval: Extent of zoning amendment protection.} When a plan of development does not require approval under the Subdivision Control Law,\textsuperscript{1} section 7A of chapter 40A provides the plan with a three-year immunity from any zoning amendments which would otherwise affect the proposed use of the land.\textsuperscript{2} In \textit{Bellows Farms, Inc. v. Building Inspector of Acton},\textsuperscript{3} the Supreme Judicial Court traced the history of section 7A in determining the extent of protection afforded by this section. The issue involved in \textit{Bellows Farms} was whether section 7A provides broad immunity from any zoning amendments whatsoever or an immunity limited to only those amendments which would prohibit the proposed use altogether.\textsuperscript{4}

In March, 1970 the plaintiffs submitted a plan of the locus to the town planning board and subsequently received an endorsement that "approval under the subdivision control law [was] not required."\textsuperscript{5} At that time the locus was zoned as a general business district and the applicable by-law permitted, as a matter of right, use of the land for the erection of up to 435 apartment units. The plaintiff planned to

\begin{footnotes}
\item[\textsuperscript{14}] Id.
\item[\textsuperscript{15}] Id. at 1488-89, 304 N.E.2d at 196-97.
\item[\textsuperscript{16}] Id. at 1488, 304 N.E.2d at 196.
\item[\textsuperscript{17}] Id. at 1488-89, 304 N.E.2d at 196-97.
\item[\textsuperscript{18}] Id. at 1489, 304 N.E.2d at 197.
\item[\textsuperscript{1}] G.L. c. 41, §§ 81K-GG. See G.L. c. 41, § 81P.
\item[\textsuperscript{2}] G.L. c. 40A, § 7A (second paragraph).
\item[\textsuperscript{4}] See id. at 1401-02, 303 N.E.2d at 730.
\item[\textsuperscript{5}] Id. at 1399, 303 N.E.2d at 729. G.L. c. 41, § 81P authorizes such an endorsement on a plan which does not show a "subdivision," as defined in G.L. c. 41, § 81L.
\end{footnotes}
construct 402 units. At its 1970 annual town meeting, held after the plaintiff’s plans were submitted, the town adopted amendments with respect to: (a) off-street parking and loading requirements, and (b) the “Intensity Regulation Schedule” applicable to multiple dwelling units. At the 1971 town meeting, further amendments were adopted making the use of lands for multiple dwellings subject to a provision requiring prior approval of the “site plan” by the board of selectmen. If these amendments were to be applied to the plaintiff’s plans, the net effect would be a reduction—from 435 to 203—in the number of apartments permitted on the locus.

In its analysis of the history of section 7A from 1957 to 1965, the Supreme Judicial Court noted that neither the original version (1957)\(^6\) nor its first amendment (1959)\(^7\) had any application to those plans not requiring approval under the Subdivision Control Law.\(^8\) It was not until 1960 that section 7A became applicable to plans not requiring planning board approval. The sentence added by chapter 291 of the Acts of 1960 provided: “No amendment to any zoning ordinance or by-law shall apply to or affect any lot shown on a plan previously endorsed with the words ‘approval under the subdivision control law not required’ . . . until a period of three years from the date of such endorsement has elapsed . . . .”\(^9\) This sentence was removed by section 2 of chapter 435 of the Acts of 1961, which further amended section 7A by (a) making certain revisions in the first paragraph, dealing with plans requiring planning board approval, and (b) eliminating entirely the above mentioned protection for plans not requiring planning board approval.\(^10\) Protection for those plans “not requiring board approval” was restored by chapter 578 of the Acts of 1963, which provided:

> [T]he use of the land shown on such plan shall be governed by applicable provisions of the zoning ordinance or by-law in effect at the time of the submission of such plan . . . for a period of three years from the date of endorsement by the planning board that approval under the subdivision control law is not required . . . .\(^11\)

It is important to distinguish between the language used in the 1960 and 1963 amendments. As the Court noted: “The use of the different language in the current statute indicates a legislative intent to grant a more limited survival of preamendment rights under

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\(^7\) Acts of 1959, c. 221.
\(^8\) 1973 Mass. Adv. Sh. at 1402-03, 303 N.E.2d at 731.
\(^11\) Acts of 1963, c. 578. The language of the 1963 amendment is that contained in the present second paragraph of G.L. c. 40A, § 7A.
amended zoning ordinances and by-laws." The Court emphasized that the 1960 statute provided broad, unrestricted protection from future zoning amendments for "any lot" shown on a plan, while the 1963 statute protects only "the use of the land" shown on a plan from subsequent amendments.

To further support this distinction, the Court, while admitting that they have no controlling effect, examined the titles of the 1960 and 1963 statutes. The 1960 title was "An act exempting certain lots for which approval under the subdivision control law is not required from the effect of subsequent amendments to zoning ordinances and by-laws." The title of the 1963 statute was "An act limiting the exemption of lots shown on certain plans from the effect of zoning ordinances or by-laws becoming effective after the submission of such plans to the planning board." The Court found the differences between the declared purposes "a persuasive factor in support of a conclusion that the legislature did not intend the 1963 statute to have the same effect as the 1960 statute."

The conclusion that section 7A protects the plan for which planning board approval is not required only from amendments which would eliminate or reduce a use permitted under the zoning regulations in effect at the time of the submission of the plan led the Court to conclude that the town's amendments of 1970 and 1971 applied to plaintiff's plan. Neither amendment, when applied to the locus, infringed upon the reasonable use of the land for apartment purposes nor reduced or limited the "use of the land," notwithstanding the reduced number of units permitted under the by-law as amended.

One may well wonder if any rational explanation exists for the differing zoning protection afforded by section 7A to plans requiring approval and those not requiring approval under the Subdivision Control Law. The history of the adoption of those various acts suggests they were each designed to meet particular circumstances then involved in conflicts between communities and subdividers rather than being part of a logical and reasonable analysis of the extent of protection needed. The Court's interpretation of section 7A seems fully correct, however, and constitutional arguments based upon equal protection concepts would surely fail.

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13 Id., 303 N.E.2d at 731-32.
14 Id. at 1404-05, 303 N.E.2d at 732.
15 Id. at 1405, 303 N.E.2d at 732, quoting title to Acts of 1960, c. 291 (emphasis added by Court).
16 Id., quoting title to Acts of 1963, c. 578 (emphasis added by Court).
18 Id. at 1404, 1406, 303 N.E.2d at 731-32, 733.
19 Id. at 1408-09, 303 N.E.2d at 734.
20 Id. at 1408, 303 N.E.2d at 733-34.
21 Compare the first and second paragraphs of G.L. c. 40A, § 7A.
§16.21. Zoning changes: Protection of approved subdivision. Green v. Board of Appeal of Norwood\(^1\) further clarifies the type of protection provided by section 7A of chapter 40A for submitted plans requiring approval under the Subdivision Control Law. On the basis of the facts presented, the Appeals Court was faced with issues involving the tolling point of the statute, the effect of an official’s inaction, possibilities of a waiver of rights through a subsequent filing, the effects that a town’s procedural requirements have on section 7A, and the obligation upon the complainant to initiate actions forcing the building inspector to act.

The plaintiffs owned a parcel of land in Norwood. A subdivision plan was filed in 1964 and was approved by the Norwood planning board on March 29, 1965. In 1968, building permits were issued for two multi-family units. These permits were subsequently revoked by the board of appeal, but the revocation was eventually annulled by the Supreme Judicial Court.\(^2\)

The present controversy involved an application, made in January, 1969, for a permit to build a third dwelling unit on the property. There was no immediate decision by the building inspector on this application. Instead, on March 5, 1971, at the building inspector's request, the plaintiffs modified their plan and filed a revised application conforming to changes in the Norwood building code. This application was denied on March 15, and on May 26 plaintiffs requested that the building inspector act on their 1969 application. That application was denied on June 7. The board of appeal affirmed the building inspector's denial.\(^3\) The superior court reversed, annulling the board's decision and ordering the board to issue the building permit.\(^4\)

Before the Appeals Court, the board argued that the trial judge was "plainly wrong" in finding that the plaintiffs filed the permanent application for the third building in 1969.\(^5\) This time of filing was important because in 1965 Norwood's zoning by-law was amended to prohibit the construction of structures such as the one proposed in the plan. The protection provided under section 7A, as then in effect, covered a period of only 5 years.\(^6\) Therefore, if the 1971 application was deemed controlling, the plaintiffs would have no immunity from the amended by-law.

In determining that the trial judge was not plainly wrong, the Ap-

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\(^{3}\) 313 N.E.2d 451.
\(^{4}\) Id. at 688, 313 N.E.2d at 453.
\(^{5}\) Id. at 688, 313 N.E.2d at 453.
\(^{6}\) G.L. c. 40A, § 7A (first paragraph), as amended by Acts of 1964, c. 688. The protection given submitted plans requiring approval under the Subdivision Control Law has since been extended to 7 years by Acts of 1965, c. 366, § 1.
The Appeals Court relied upon the testimony of plaintiffs' former attorney. The witness stated that "in January of 1969, he had personally delivered a permit application for [the third building], together with construction plans and a check for the permit fee, to the office of the building inspector and at that time had requested a building permit." The Appeals Court also rejected the board's argument that even if the application was filed in 1969, the plaintiffs gained no rights under it, since section 7A's five-year period of protection had expired before the building inspector acted on the application. The court, emphasizing that "the purpose of § 7A is to protect developers from zoning changes, albeit under particular circumstances and for a limited time as set forth in the statute," concluded that the statute is tolled at the time the subdivision plan is filed, and that as long as the filing takes place within the specified time allowed, the developer is protected by section 7A. The court stressed that it would be inconsistent with the purpose of section 7A to allow the protection afforded by section 7A to be nullified by a local official's inaction: "What a town cannot accomplish with regard to subdivision plans by disapproval, it should not be allowed to achieve by inaction in the case of permit applications filed under such plans."

The Appeals Court also held that the filing of the revised application in 1971 did not act as a waiver of rights under the 1969 application because, in all material respects, the two applications were identical. The 1971 application was retyped and redated at the request of and to accommodate the building inspector. The fact that the check submitted with the 1969 application was returned to the plaintiffs did not indicate a waiver of rights to the Appeals Court, since the building inspector had informed the plaintiffs' attorney that it was the procedural practice of the town to require applicants to pay the fee only when their application was "ready" to be approved. Clearly, such a procedure should not be allowed to frustrate the rights established by section 7A. Had the plaintiffs not issued the check with the 1969 filing and if it were commonplace to do so, a question might be raised as to whether the filing was complete. However, such was not the case here.

The final issue involved the question of whether the plaintiffs lost their section 7A protection due to their failure to seek a writ of man-

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8 Id.
9 Id. at 689-90, 313 N.E.2d at 453-54.
10 Id. at 689-90, 313 N.E.2d at 453. 
11 Id. at 690, 313 N.E.2d at 454.
12 Id.
13 Id. at 691, 313 N.E.2d at 454.
14 Id.
15 Id.
damus to force the building inspector to act on their 1969 application. This was the procedure deemed proper by the Supreme Judicial Court in *Ouellette v. Building Inspector of Quincy*.\(^\text{16}\)* Ouellette was distinguished on the grounds that no purpose would have been served in the instant case by a petition for mandamus.\(^\text{17}\) The plaintiffs already had litigation pending on prior applications for permits\(^\text{18}\) and the end result would have been a duplication of the appeal then pending.\(^\text{19}\)

Although the court concluded that the board acted erroneously in refusing to give the protection of section 7A to the plaintiffs’ permit application, it nevertheless held that the trial court was incorrect in ordering the board to grant the building permit.\(^\text{20}\) A determination was first necessary as to whether the application complied with the zoning by-laws in effect at the time the subdivision plan was first submitted in 1964.\(^\text{21}\)

§16.22. Access to adjoining road: Requirements of planning board regulation. In order to protect the public safety, convenience, and welfare, one of the requirements of section 81M of chapter 41 is adequate access to a subdivision.\(^\text{1}\) To further supplement this statutory obligation, the town of Winchester adopted regulation IV A (1) (c), which requires that “[s]treets shall be continuous and in alignment with existing streets as far as practicable and shall comprise a convenient system with connections adequate to insure free circulation of vehicular traffic.”\(^\text{2}\) In *McDavitt v. Planning Board of Winchester*,\(^\text{3}\) the plaintiff argued that this regulation should be interpreted so as to assure only the continuity of travel within a subdivision.\(^\text{4}\)

The plaintiff was in the process of subdividing a thirteen-and-one-half acre tract. The planning board had approved the subdivision of three-quarters of the tract into nine lots, and the controversy in this case involved the remaining parcel of land. The plaintiff’s proposed plan for this parcel was rejected by the planning board because it had provided for a street to dead-end in the subdivision, thereby violating regulation IV A (1) (c) as interpreted by the planning board.\(^\text{5}\)

\(\text{1}^{8}\) See text at note 2 supra.
\(\text{2}^{0}\) Id.
\(\text{2}^{1}\) Id.

\(\text{16}\) G.L. c. 41, § 81M.
\(\text{4}\) Id. at 319, 308 N.E.2d at 787.
\(\text{5}\) Id. at 318-19, 308 N.E.2d at 787.
primary reason for this suit in superior court was that extending the dead-end street to join a street in the adjoining subdivision would have resulted in a sacrifice of one of the three lots in the proposed subdivision plan.

The board’s decision was upheld by the superior court and the Appeals Court affirmed. In its decision, the Appeals Court concluded that the planning board’s regulation was “reasonably related to public safety, health, welfare and convenience, and complies with the purposes of the subdivision control law.” Another basis of the court’s rejection of plaintiff’s narrow interpretation of the regulation was the precedent established by the board when it previously required the abutting subdivider to extend its road to the common boundary. The court noted that plaintiff, because of the board’s action on the prior subdivision approval of the subdivider’s land, should have known that conformity of this nature was established in previous cases and there was no basis to expect a waiver of this regulation.

This case is representative of a fundamental subdivision control problem. Since the planning board had established its policy by proper (if a trifle confusing) regulation, and since the policy conformed to the purposes of the subdivision control law, the result was to be anticipated and was proper.

C. EMINENT DOMAIN

§16.23. Damages: Sales price of comparable property. The Appeals Court in Corliss Realty Co. v. Commonwealth was faced with certain evidentiary problems arising from an eminent domain proceeding. In 1967 the Commonwealth took by eminent domain a portion of Corliss’s land. Corliss brought a petition for assessment of damages caused by the taking. In the petition Corliss alleged that the taking would curtail the operation of two quarries located on the remaining portion of its land. The two quarries, containing “Milford Pink Granite,” were identified as the Dodd Quarry, which was active at the time of the taking, and the Norcross Quarry, which had not been operated at least since 1930.

The Commonwealth called a witness who testified that in 1963 he had bought a similar quarry (the Maguire Quarry) for $10,000, with the seller retaining the right to take whatever loose stone was then on the premises. Corliss claimed that the trial judge erred in permitting

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6 Id. at 318, 308 N.E.2d at 787.
7 Id. at 319, 308 N.E.2d at 788.
8 Id., 308 N.E.2d at 787.
9 Id., 308 N.E.2d at 788.
the witness to testify to the purchase price of the Maguire Quarry because it was not comparable to the Norcross or Dodd quarries and because the price was not sufficiently definite. The Appeals Court held that the trial judge did not abuse his discretion in admitting the evidence. The court found that the similarities between the quarries were sufficient to enable the trial judge to conclude that evidence of the sales price might be helpful to the jury.

In addressing itself to the petitioner's claim that the sales price of the Maguire property was not sufficiently definite, the court first commented that had the petitioner so requested, it might have been a "wise exercise of discretion" to exclude the testimony concerning loose stone in the Maguire Quarry, which was personalty and not part of the real estate being sold. The court viewed this testimony as possibly confusing, but upheld the trial court's judgment that the lack of any encumbrances in the deed to the Maguire property indicated that the $10,000 cash paid for the quarry was the sale price and that any loose stone (as personalty) was irrelevant in determining the value of the realty.

The petitioner's final exception related to the exclusion of its attempt to elicit from the buyer of the Maguire Quarry an opinion as to whether the Maguire Quarry was comparable to the Dodd Quarry. In overruling the exception, the Appeals Court noted that the petitioner, on cross-examination, was permitted to ask the buyer about various differences between the two quarries. The court indicated that it was "much better to have the witness describe the two estates than to permit him to express his opinion on their . . . similarity." Thus the court upheld all the evidentiary rulings of the trial court.

The trial judge in eminent domain cases has great discretion in accepting or rejecting evidence of the value of property taken. Certainly the acceptance of the sales price of the Maguire Quarry was within that discretion, even though the sale had occurred in 1963. There was no evidence, so far as can be judged, that the value of such types of property had fluctuated in the intervening period.

§16.24. Partial taking: "Substantial portion" lease clause. In *Saugus Auto Theatre Corp. v. Munroe Realty Corp.*, the Appeals Court interpreted the term "substantial portion" as used in a commer-

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2 Id. at 46, 306 N.E.2d at 461.
3 Id.
4 Id.
5 Id. at 47, 306 N.E.2d at 462.
6 Id., 306 N.E.2d at 461-62.
7 Id. at 48, 306 N.E.2d at 462.
9 Id. at 48, 306 N.E.2d at 462.

cial lease provision governing the landlord’s right to evict the tenant when a portion of the premises are taken by eminent domain. The plaintiff, assignee of a twenty-five year commercial lease, sought a declaration that it was entitled to continue in possession of the leased premises—a drive-in theater. The defendant realty company relied upon a lease provision which provided, in substance, that if the “premises or any substantial portion thereof [were] taken by public authority,” the lessors would be entitled to take immediate possession and terminate the lease. 2 The trial court found that 2.15 acres belonging to the defendant, most of which was from the 13 acres subject to the lease, were taken by the Commonwealth in 1970, but ruled that the taking did not substantially affect the capacity or operation of the theater on the remaining eleven acres. 3 Thus, the trial court entered a decree for the plaintiffs because the taking was not substantial within the meaning of the lease. 4 Munroe, seeking to terminate the lease, appealed.

The Appeals Court, in a rescript opinion, first noted that the clause in question is commonly used in leases to allow the landlord to deprive the tenant of an opportunity to share in any damages awarded in an eminent domain proceeding. 5 Thus the clause creates rights the landlord would not enjoy if the clause were not included. 6 Noting that “substantial” is defined in Black’s Law Dictionary to mean “of real worth and importance; of considerable value; valuable,” 7 and indicating that the “substantial portion” clause must be construed in light of its purpose, 8 the court held that the taking of fifteen per cent of the premises was “substantial” as that term was used in the lease. 9

§16.25. New relocation benefits law. Chapter 863 of the Acts of 1973 increased state relocation benefits so that the law in Massachusetts will be in conformance with the federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970. 1 Chapter 863 amended sections 1-7, 11 and 12 of chapter 79A of the General Laws and added three additional sections. While this amendment in most respects is a duplication of the federal act, care is appropriate

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2 Id.
3 Id.
4 Id.
5 Id.
8 Id.
9 Id.

since minor differences do exist. For example, new section 7(I)(A)(1) of chapter 79A requires actual documentation of reasonable expenses incurred in moving,\(^2\) while the federal statute does not require this higher standard of documentation.\(^3\) In addition, while new section 7(III)(A) of chapter 79A provides for payments to the displaced person for "any increase in cost" required to lease or rent a dwelling place,\(^4\) the counterpart federal provision provides for payment of "the amount necessary" to enable such person to lease or rent a dwelling place.\(^5\) This difference can only lead one to assume that the Massachusetts law, unlike the federal law, expects the displaced person to be responsible for that part of the rent at his new residence which is not in excess of that which he was previously paying.

§16.26. **Boundaries: Taking of street easement.** The case of *Smith v. Hadad*\(^1\) presented the Appeals Court and Supreme Judicial Court with the opportunity to restate an accepted rule of construction in establishing boundaries when the property abuts a public way. The controversy arose when Smith petitioned the land court to register and confirm the title to his land. Smith and Hadad owned adjoining parcels, with Hadad's property also fronting on a public way sixty-six feet in width. The deeds of both Smith and Hadad described the boundary between their property as a line "running Southerly and parallel to Main Street and distant one hundred seventy-five (175) feet therefrom . . . ."\(^2\) The central issue in this case was whether the 175-foot measurement began at the western edge or at the center of Main Street. Since Main Street is sixty-six feet wide, the resolution of this question would affect title to a thirty-three foot parcel claimed by both petitioners and respondents.

The land court ordered the registration as applied for by Smith except for the thirty-three foot strip in question.\(^3\) In affirming the land court's decision,\(^4\) the Appeals Court followed the rule of construction set forth in *Dodd v. Witt*.\(^5\)

\[I\]t is a common method of measurement in the country, where the boundary is a stream or way, to measure from the bank of the stream or the side of the way; and . . . there is a reasonable presumption that the measurements were made in this way, unless

\(^5\) 139 Mass. 63, 29 N.E. 475 (1885).
something appears affirmatively in the deed to show that they began at the center line of the stream or way.\textsuperscript{6}

The Appeals Court expressly rejected Smith's argument seeking to distinguish \textit{Dodd} on the ground that evidence that measurements were actually made must be introduced before the presumption can be invoked.\textsuperscript{7} Smith's application to obtain further appellate review was granted and the Supreme Judicial Court affirmed the decision of the Appeals Court.\textsuperscript{8}

The Supreme Judicial Court's opinion adds little more than weight to the Appeals Court decision. The Court refused to overturn the established rule of construction set forth in \textit{Dodd}, noting that abandonment of the presumption would create chaos in titles to land and would result in substantial hardships to property owners.\textsuperscript{9}

\section*{D. Other Land Use Matters}

\textbf{\$16.27. Mobile home parks: Regulation.} In November 1973, the General Court dealt with the problem of mobile home parks by enacting chapter 1007 of the Acts of 1973, which amended sections 32J and 32L of chapter 140 of the General Laws,\textsuperscript{1} and added sections 32M through 32Q to the same chapter.\textsuperscript{2}

Subject to certain conditions and restrictions, new section 32J permits a mobile home park operator to recover possession of mobile home space from a tenant by summary process.\textsuperscript{3} The only reasons for which a tenancy or other estate may be terminated under this section are (1) "nonpayment of rent," (2) "substantial violation of any enforceable rule of the mobile home park" or (3) "violation of any laws or ordinances which protect the health or safety of other mobile home park residents." In order to maintain an action to recover possession, the mobile home park operator must give the resident at least thirty days written notice in which the resident is informed of the reasons for termination and notified that he has fifteen days from the date of mailing to avoid eviction by tendering past due rent or taking other curative steps.\textsuperscript{4} After such notice is given, an operator is still pre-

\begin{itemize}
  \item \textsuperscript{8} 1974 Mass. Adv. Sh. at 1287, 314 N.E.2d at 436.
  \item \textsuperscript{9} Id. at 1290, 314 N.E.2d at 438.
  \item \textsuperscript{1} Acts of 1973, c. 1007, §§ 1, 2.
  \item \textsuperscript{2} Id. § 2.
  \item \textsuperscript{3} G.L. c. 140, § 32J, as amended by Acts of 1973, c. 1007, § 1.
  \item \textsuperscript{4} Id.
  \item \textsuperscript{5} Id.
\end{itemize}
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eluded from maintaining an action unless the condition necessitating the notice remains uncured more than twenty days after receipt of the notice by the mobile home park resident. The final procedural prerequisite in the new section is that an action to recover possession, other than for nonpayment of rent, may be maintained only if it is brought within thirty days of the last alleged violation. If, however, the same "substantial violation" recurs within six months of the date on which the notice was delivered to the resident, the mobile home park operator may maintain his action. New section 32L places six specific requirements and restrictions upon all mobile home parks. The first of these requirements is that a mobile home park operator may promulgate rules governing the rental of a mobile home lot which are not unreasonable, unfair, or unconscionable. Secondly, this section requires that if any rule or change in rent does not apply uniformly to all residents of a similar class, a rebuttable presumption will be created that the rule or change in rent is unfair. The third restriction prohibits an operator who is engaged in the business of selling mobile homes and who has "sold a number of mobile homes equal to the number of spaces in a mobile home park" from imposing conditions of occupancy which restrict the resident in his choice of mobile home dealer or in his choice of fuel, furnishings, services, or accessories, unless such restrictions are necessary for health or safety reasons. This subsection permits central fuel distribution provided the rates charged by the operator do not exceed the local prevailing price for fuel and related services. The fourth restriction prohibits the operator from refusing to allow the transfer of a mobile home located in the park on the grounds that the operator has not sold a number of mobile homes equal to the number of spaces in the particular park. The fifth restriction provides that the operator may not restrict the sale of a mobile home located in the park by charging a fee or commission on such sale. The operator may, however, act as a sales agent for a mobile home resident, and may charge a fee of not more than ten per cent of the sale price. The final restriction requires a mobile home park operator to give forty-five days written notice to the occupants of the park of any changes in the rules govern-

6 Id.
7 Id.
8 Id.
9 G.L. c. 140, § 32L(1).
10 Id. § 32L(2).
11 Id. § 32L(3).
12 Id.
13 Id.
14 Id. § 32L(3A).
15 Id. § 32L(4).
16 Id.
ing occupancy. The operator must also file copies of any changes in rules with the Attorney General and the Secretary of Communities and Development at least forty-five days prior to the effective date of the change. The final two subsections of section 32L make any non-conforming, unfair, or deceptive rule or condition of occupancy unenforceable, and give mobile home occupants a remedy by making failure to comply with this section an unfair and deceptive trade practice under the Commonwealth's Consumer Protection Act.

New section 32M prohibits the operator of a mobile home park from refusing entrance to the purchaser of a mobile home located in the park if the purchaser meets the rules of the park. A violation of this section is also made an unfair and deceptive trade practice under section 2(a) of chapter 93A.

In section 32N the General Court provided a statutory remedy for mobile home park residents who are subject to retaliatory evictions or other reprisals for their actions in reporting building or health code violations or violations of sections 32L or 32M. An occupant's receipt of a notice of termination of tenancy, other than for non-payment of rent, within six months of the occupant's reporting a violation to an appropriate official creates a rebuttable presumption that the eviction is retaliatory and the presumption may be pleaded as a defense to any eviction proceeding brought within one year after the report of the violation. The damages for an attempted retaliatory eviction or other actual or threatened reprisal are the mobile home resident's actual damages or not less than one nor more than five months rent, whichever is greater, plus reasonable costs and attorney's fees.

Section 32O merely instructs court clerks to give notice to the attorney general and the board of health in the city or town in which the mobile home park is located of any judgment, decree, permanent injunction, or other court order entered in any action to enforce the provisions of section 32L or section 32M.

Section 32P compels disclosure in writing of all terms and conditions of a tenancy in a mobile home park to a prospective resident prior to the rental or occupancy. The disclosure must include the

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17 Id. § 32L(5).
18 Id.
19 Id. § 32L(6).
20 Id. § 32L(7).
22 G.L. c. 140, § 32M.
23 Id.
24 Id. § 32N.
25 Id.
26 Id.
27 Id. § 32O.
28 Id. § 32P.
amount of rent, an itemized list of charges and fees, the names and addresses of the owners of the mobile home park, and a copy of the rules.\textsuperscript{29} A statutory notice informing the prospective tenants of their rights and remedies under sections 32J, 32L, 32M and 32N of chapter 140 must also be given to prospective occupants.\textsuperscript{30}

Section 32Q defines "mobile home" in the same language previously found in section 32L. It provides that a mobile home is a "dwelling unit built on a chassis and containing complete electrical, plumbing and sanitary facilities, and designed to be installed on a temporary or a permanent foundation for permanent living quarters."\textsuperscript{31}

Section 3 of chapter 1007 amended section 8A of chapter 239 to include occupants of mobile home parks in the classes of tenants permitted to withhold rent when the rented premises are in violation of standards of fitness for human habitation.\textsuperscript{32}

\textbf{§16.28. Demolition and clearance of low rent housing projects.} Chapter 884 of the Acts of 1973 is an emergency law which authorized housing authorities to undertake the demolition, clearance, preparation for sale, and sale or other disposition of any or all of any existing, state-assisted housing project, including the payment of relocation costs for occupants of such housing projects.\textsuperscript{1} Section 1 of the Act added section 26(k) to chapter 121B of the General Laws.

Demolition and clearance of low-rent housing projects would take place only if specific conditions outlined in the Act are met. First, the Department of Community Affairs must find that a substantial portion of the existing facility no longer provides "decent, safe and sanitary housing," as determined by the Department of Public Health or the Department of Public Safety.\textsuperscript{2} The Department of Community Affairs must also find that it would not be feasible to continue to operate or renovate the facility.\textsuperscript{3} Second, if the Department of Community Affairs approves the demolition, including a relocation plan for the occupants of the existing structures and a plan to re-utilize the site for housing, the new housing must have at least twenty-five per cent of the units reserved for low income families.\textsuperscript{4} The third proviso stipulates that if the land is to be sold, it will be at the fair market value for the proposed reuse.\textsuperscript{5} The fourth and fifth provisions outline proce-

\textsuperscript{29} Id.
\textsuperscript{30} Id.
\textsuperscript{31} Id. § 32Q.
\textsuperscript{32} Acts of 1973, c. 1007, § 3, amending G.L. c. 239, § 8A.

\textsuperscript{3} Id.
dures for funding which are dependent upon a cooperation agreement between the Department of Community Affairs and the Massachusetts Housing Finance Agency. The final provision requires that representatives of the affected tenants participate in the development of the project proposal and that a public hearing be held in order to give the remaining tenants an opportunity to review the proposed project and relocation plan and to voice any opinions which they might have.

Section 2 of the Act amends chapter 121B of the General Laws by adding new section 34A. This section establishes procedures for contracts between the Department of Community Affairs and a housing authority for state financial assistance in the form of annual contributions to assist projects financed by the MHFA which are leased by the housing authority as replacement or relocation housing for tenants of housing projects which are demolished, sold or otherwise disposed of. Section 4 of the Act establishes an upper limit of ten million dollars that the Department of Community Affairs can spend for the purpose of such contracts, and section 5 authorizes the state treasurer to borrow on the credit of the Commonwealth in order to meet the payments authorized by section 4. Final maturity on notes, whether original or renewal, issued for this purpose is to be no later than June 13, 1978. Section 6 gives the state treasurer, upon request by the Governor, the power to issue and sell bonds of the Commonwealth in order to meet expenditures necessary in carrying out the provisions of section 4 or to refinance notes.

§16.29. Gardens on public land: Allocation. Chapter 654 of the Acts of 1974 is an emergency law establishing a division of agricultural land use within the Department of Agriculture. Its primary purpose is to establish a system that will allow the utilization of available vacant public land for garden or farm purposes. Priority in the allotment of vacant public land for garden purposes is given to elderly persons of low income and low income families with children between the ages of seven and sixteen inclusive. The Act also stipulates that

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9 G.L. c. 121B, § 34A, added by Acts of 1973, c. 884, § 2. Acts of 1973, c. 884, § 3 grants housing authorities the power to lease dwelling units financed by the MHFA, for a period not to exceed 40 years, for the purpose of providing replacement or relocation housing.
11 Id. § 5.
12 Id.
13 Id. § 6.

§16.30 ZONING AND LAND USE

§16.30. Public right of passage along the coast: Opinion of the Justices to the House of Representatives.1 In an advisory opinion to the Massachusetts House of Representatives, the Supreme Judicial Court expressed its belief that a proposed bill authorizing the public right of passage along privately-owned coastline of the Commonwealth would be unconstitutional if enacted as submitted.2 The Court considered and rejected three possible bases for upholding the bill, holding that there is no reserved public right of passage between the mean high water line and the extreme low water line, and that the measure could not be upheld as a proper exercise of either the state’s police power or its power of eminent domain.3

In this casenote, the bases for the decision will be examined in light of both Massachusetts law and recent decisions in other jurisdictions in which a public right of passage was found to exist. It will be submitted that the Court correctly found the bill unconstitutional as written, since it would constitute a taking of private property without compensation, and that the high cost of compensating land owners, as would be necessary to render such a bill constitutional, makes passage of such a law unlikely.

2 Id. at 1080, 313 N.E.2d at 571. The proposed bill, Mass. H.R. Doc. No. 481 (1974), which would have amended G.L. c. 91 by adding a new section, § 18B, provided in part:

It is hereby declared and affirmed that the reserved interests of the public in the land along the coastline of the commonwealth include and protect a public on-foot free right-of-passage along the shore of the coastline between the mean high water line and the extreme low water line subject to the restrictions and limitations as contained in this section.

Said public on-foot free right-of-passage shall not be exercised (1) later than one-half hour after sunset nor earlier than sunrise (2) where the Commissioner of the Department of Natural Resources ... designates and posts natural areas of critical ecological significance as areas in which ... the public not exercise the on-foot free right-of-passage (3) where there exists a structure, enclosure or other improvements made or allowed pursuant to any law or any license, permit or other authority issued or granted under the General Laws or where there exist agricultural fences ...

I. Public Use Without Compensating Private Owners

"Public trust" doctrine. Historically, title to the seas and all the lands beyond the high water mark within the jurisdiction of England was held by the King *for the use of the public* for navigation, commerce and fishing. The rights to these lands in the United States vested in the individual states after the American Revolution. Under the common law rule, any grant of shore land by a state to an individual normally gave the owner title only to land up to the high water mark, and a conveyance of land beyond that point by the state remained subject to public rights. The operation of this "public trust" doctrine was well demonstrated by the United States Supreme Court in 1892 in *Illinois Central Railroad v. Illinois*, which involved a controversy over the rights of the state of Illinois, the city of Chicago, and the Illinois Central Railroad Company in submerged and re­claimed land adjoining Lake Michigan. The Illinois legislature had granted the submerged land to the railroad, but later repealed the grant to restore title to the state. In holding that the repealer was effective, the Court stated:

The control of the State for the purpose of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining.

The Court also declared that tidal land impressed with the public trust *could* validly be granted to private parties to build wharves, docks and piers, since the public interest in navigation would thereby be promoted.

It has long been settled, however, that the common law rule was changed in Massachusetts in the 1640's by what is known as the Colonial Ordinance of 1641-47, which, in an attempt to improve navigation by encouraging the development of private means of access to the sea, provided that grants of tidal land by the state would give

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4 Shively v. Bowlby, 152 U.S. 1, 11 (1893).
5 Id. at 14-15.
6 Id. at 13.
8 146 U.S. 387 (1892).
9 Id. at 453.
10 Id. at 452.
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the owners title all the way to the low water mark. The relationship between private ownership and public rights along the shore thus took on a different character in Massachusetts than in other states. Traditionally, these public rights included only fishing, commerce, and navigation. The Supreme Judicial Court, unlike other jurisdictions discussed below, refused in Opinion of the Justices to expand these rights to include recreation. However, one might contend that the combination of the facts that the land is no longer used by most owners to promote navigation and that the modern interests of the public in the shore land are being impaired could justify legislation to protect the public’s interest in the land in accordance with an expanded public trust doctrine.

The proposed statute appears to be based on the House’s assertion that the reserved interests of the public in the coastal lands include the right to pass on foot between the high and low water marks. The Supreme Judicial Court, however, found that no such right has ever been recognized in Massachusetts, citing various cases. In 1857 in Commonwealth v. Alger, a leading case construing the meaning of the Colonial Ordinance, the Supreme Judicial Court held that the Ordinance had consistently been construed as giving owners of tidal lands title in fee all the way to the low water mark, subject to the public right of navigation. In 1907 in Butler v. Attorney General, the Court determined that under the Colonial Ordinance there was no recognition of a public right to use the beach or shore above the low water mark for bathing purposes, and in 1961 in Michaelson v. Silver Beach Improvement Association, the Court stated that the only public rights in these lands that the state may protect are navigation and fishing.

It therefore is apparent that under existing Massachusetts case law, the

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13 Commonwealth v. Alger, 61 Mass. (7 Cush.) 53, 69-70 (1851). The change in the common law rule made by the Massachusetts Colonial Ordinance was recognized by the United States Supreme Court. Shively v. Bowlby, 152 U.S. 1, 18 (1893).
15 See text at notes 32-54 infra.
18 61 Mass. (7 Cush.) 53 (1851).
19 Id. at 69-70.
20 195 Mass. 79, 80 N.E. 688 (1907).
21 Id. at 83, 80 N.E. at 689.
23 Id. at 256, 173 N.E.2d at 277. It was claimed that a beach had been created for public use incidental to a project in aid of navigation. The Court said, though, that the colonial ordinance could not be frustrated by a project having only a colorable relation to navigation or fishing, and that no power to build beaches for public bathing purposes is recognized. Id. at 256-57, 173 N.E.2d at 277.
Court was correct in finding that an on-foot right of passage is not one of the public's reserved rights in tidal lands.

The Court's finding assumes, however, that the public rights in these lands was fixed for all time by the Colonial Ordinance and past decisions interpreting it. The Court rejected the idea that the rights of the public in these lands should not be limited to navigation and fishing, but should include all significant public uses in the seashore. The Court interpreted the Ordinance as protecting certain well-defined public rights to the exclusion of all others. It is worthwhile, though, to look at the purpose of the Ordinance; although it was designed to encourage the development of private means of access to the sea, it is apparent that the colonial government did not wish to accomplish this at the expense of other rights since it provided that such grants were subject to the restriction that the owner could not hinder navigation and fishing. However, the uses to which the sea and underlying lands are put have changed considerably since the 1640's. As one commentator has noted:

Fishing and passage over the shore were probably the uses for which there was the greatest public demand and serious need at the time when the question of public rights was being determined in the various states. Since that time, the serious public demand for access to the sea has been expanded by the widespread pursuit of such recreational activities as water skiing ... and a much more widespread desire to hunt, fish, swim, and sun-bathe.

It is submitted that despite the well-settled construction of the Colonial Ordinance, the Supreme Judicial Court could have reinterpreted it consonant with its ultimate purpose—furthering the public interest—by recognizing the modern public interest in recreation. Such an interpretation, by recognizing a public right of access to the shoreland for recreational purposes, would have avoided the finding of an unconstitutional taking.

The Court also briefly discussed and rejected the exercise of the state's police power, as opposed to its eminent domain power, as a justification for the bill. The Court noted that although the line between a valid exercise of the police power, for which no compensation is required, and a "taking" of property for which compensation is required is sometimes elusive, the "permanent physical intrusion into the property of private persons, which the bill would establish, is a

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25 Id.
27 Alger, 61 Mass. (7 Cush.) at 70.
28 1 R. Clark, supra note 14, § 36.4(B), at 201-02.
taking of property within even the most narrow construction of that phrase possible under the Constitutions of the Commonwealth and of the United States.”

And although there may be a strong desire on the public’s part to use the shore area for recreation, the Supreme Court has noted that “a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.”

Other jurisdictions. Grants by the state of coastal land in Massachusetts give the owners title to the low water mark, in contrast to the great majority of the states, in which ownership normally extends only to the high water mark. This distinction is important since the area between the high and low water marks is often dry beach area suitable for public recreation and can also provide a means of access to the ocean. When a state following the general common law rule makes a grant of shore land to a private party, the interests of the public must be protected. Although the Supreme Judicial Court has interpreted the Colonial Ordinance as reserving only certain specified rights to the public, other states, not bound by such a statute, are more flexible and find that the public interests in such land includes more than just the traditional rights of navigation and fishing.

New Jersey is one of the coastal states which follows the majority rule, under which land below the mean high water mark is held for the benefit of the public, which has certain rights in the land. In Borough of Neptune City v. Borough of Avon-by-the-Sea the New Jersey Supreme Court was faced with the issue of whether an oceanfront municipality may charge nonresidents higher fees than residents for the use of its beach area. The plaintiff borough attacked a discriminatory beach use fee set up by the defendant borough, claiming a common law right of access to the ocean in all citizens based on the public trust doctrine. The court noted that “[t]he original purpose of the doctrine was to preserve for the use of all the public

30 Id. at 1075, 313 N.E.2d at 568.
32 1 R. Clark, supra note 14, § 36.3(C), at 193-94. Maine and New Hampshire follow the Massachusetts rule. Virginia, Delaware, Pennsylvania and Connecticut recognize some private interests to low water. The rest of the states extend private ownership only to the high water mark. Id., § 36.3(C), at 194.
33 The state must retain control of the land to protect the public interests, including, but not necessarily limited to navigation and fishing, unless the grant is for the improvement of navigation or other use in the public interest. Illinois Cent. R.R., 146 U.S. at 453.
34 See text at notes 4-6 supra.
36 Avon owned the land up to the high water mark, and the sand area had been dedicated for public beach recreational purposes and was used for access to the water, as well as for sun-bathing, etc. Id. at 299-300, 294 A.2d at 49.
37 Id. at 302, 294 A.2d at 51. See text at notes 4-6 supra.
natural water resources for navigation and commerce ...." The court added that "the statements in our cases of an unlimited power in the legislature to convey such trust lands to private persons may well be too broad," and that prior grants of land may be impliedly impressed with certain obligations on the grantee's part to use the conveyed lands consistently with the public rights therein. The court then discussed what public rights might exist in such lands and refused to limit itself to the traditional rights:

We have no difficulty in finding that, in this latter half of the twentieth century, the public rights in tidal lands are not limited to the ancient prerogatives of navigation and fishing, but extend as well to recreational uses, including bathing, swimming and other shore activities. The public trust doctrine, like all common law principles, should not be considered fixed or static, but should be molded and extended to meet changing conditions and needs of the public it was created to benefit.

This expansion of the traditional common law public rights in tidal land is in marked contrast to Massachusetts law, under which public rights in such land have remained static.

The traditional common law rule has also been expanded in California. In Gion v. City of Santa Cruz, the Supreme Court of California used the common law doctrine of dedication to find that certain beach areas had been impliedly dedicated to the use of the public. The Gion decision involved two consolidated cases. One was a dispute over ownership of shoreline property between the fee owner of the property and the city of Santa Cruz, which at various times had exercised control over the property in question for the benefit of the public by such acts as posting warning signs and performing repairs. The lower court ruled that although the plaintiff landowners owned the land in fee, there was a public easement for recreational purposes. In the second case, members of the public sued to enjoin

38 Id. at 304, 294 A.2d at 52. Note that these are the same public rights protected by the Massachusetts colonial ordinance. Therefore, it appears that the authors of the colonial ordinance may have recognized the necessity of protecting the public trust, and it can be argued that as the public trust doctrine expands, so should the public rights protected by the Ordinance.

39 61 N.J. at 308, 294 A.2d at 54.

40 Id.

41 Id. at 309, 294 A.2d at 54.


43 Common law dedication could be proved by showing acquiescence of the owner in use of the land that negated the idea that the use is under a license, or by establishing open and continuous use by the public for a certain period. Id. at 38, 465 P.2d at 55, 84 Cal. Rptr. at 167.

44 Id. at 34-36, 465 P.2d at 52-54, 84 Cal. Rptr. at 164-66.

45 Id. at 35, 465 P.2d at 53-54, 84 Cal. Rptr. at 165-66.
land owners from blocking access to an ocean beach.\textsuperscript{46} The lower court ruled for the defendants, holding that a mere widespread public use does not lead to an implied dedication.\textsuperscript{47}

The California Supreme Court upheld the first decision and reversed the second, finding an implied dedication of land in both instances.\textsuperscript{48} Applying the common law rule of dedication quite liberally to the facts of the cases, the court held that:

The present fee owners of the lands in question have of course made it clear that they do not approve of the public use of the property. Previous owners, however, by ignoring the widespread public use of the land for more than five years have impliedly dedicated the property to the public.\textsuperscript{49}

The California court was apparently responding to a public need for recreational areas, and expanded the concept of dedication into a new area.\textsuperscript{50} In determining whether to apply the doctrine of dedication to shoreline property, the court stated that "we must observe the strong policy expressed in the Constitution and statutes of this state of encouraging public use of shoreline recreational areas."\textsuperscript{51}

It is unlikely that the doctrine of dedication could effectively be used in Massachusetts in lieu of the proposed statute. Although common law dedication in Massachusetts is technically similar to the rule in California and other states,\textsuperscript{52} it is apparently more difficult to prove an implied dedication of land in Massachusetts.\textsuperscript{53} Furthermore, there appear to be no recent cases in Massachusetts upholding common law dedications, nor do there appear to be any which show any tendency to apply the doctrine as liberally as in \textit{Gion}. It should also be noted that whereas California law embodies a presumption in favor of public ownership of land between high and low water,\textsuperscript{54} Massachusetts

\textsuperscript{46} Id. at 36-38, 465 P.2d at 54-55, 84 Cal. Rptr. at 166-67.
\textsuperscript{47} Id. at 38, 465 P.2d at 55, 84 Cal. Rptr. at 167.
\textsuperscript{48} Id. at 43, 465 P.2d at 59, 84 Cal. Rptr. at 171.
\textsuperscript{49} Id. at 44, 465 P.2d at 60, 84 Cal. Rptr. at 172.
\textsuperscript{50} The dedication concept has been used most extensively in the area of public roads. Id. at 41, 465 P.2d at 58, 84 Cal. Rptr. at 170.
\textsuperscript{51} Id. at 42, 465 P.2d at 58, 84 Cal. Rptr. at 170. Cal. Civil Code § 830 (West 1954) states that, absent specific language to the contrary, private ownership of uplands ends at the high-water mark.
\textsuperscript{52} See, e.g., Hemphill v. City of Boston, 62 Mass. (8 Cush.) 195 (1851), where dedication is defined as "the gift of land, by the owner, for a way, and an acceptance of the gift by the public, either by some express act of acceptance, or by strong implication . . . ." Id. at 196.
\textsuperscript{53} Compare, e.g., Gion v. Santa Cruz, 2 Cal. 3d 29, 465 P.2d 50, 84 Cal. Rptr. 162, (1970) with Longley v. Worcester, 304 Mass. 580, 24 N.E.2d 533 (1940). In \textit{Longley}, the court said: "The owner's acts and declarations should be deliberate, unequivocal and decisive, manifesting a clear intention permanently to abandon his property to the specific public use." Id. at 588, 24 N.E.2d at 537.
\textsuperscript{54} \textit{Gion}, 2 Cal. 3d at 42, 465 P.2d at 58, 84 Cal. Rptr. at 170.
obviously has no such presumption, since the effect of the Colonial Ordinance is to extend private ownership to the extreme low water mark.

Additionally, the long term usefulness of the doctrine of dedication is highly questionable. After Gion, owners of coastal land will be reluctant to allow any use of it by the public, lest such use blossom into a permanent easement. Furthermore, the burden in such cases is on the public to prove an implied dedication since they are attacking the landowner's right to exclude outsiders from his property. Landowners might decide to attempt to exclude the public from their property, forcing them to go to court to prove an implied dedication, and if the public is unable to meet this burden, the present owners would be free to close off the land. The net effect, were the courts consciously to adopt such a policy in Massachusetts, might be to decrease the amount of coastal land available for public use; land owners presently lax about keeping members of the public off their beaches might suddenly decide to totally exclude them. Furthermore, the amount of shore land that courts could reasonably find "dedicated" is probably far less than sufficient to meet the recreational needs of the public.

II. Taking Under the Eminent Domain Power

After determining that the proposed bill would constitute a "taking" of property for which compensation is required, the Supreme Judicial Court went on to discuss the measure as an attempted exercise of the power of eminent domain. However, the language of the bill indicates that the House wished to grant the public a right of passage over coastal lands without compensating the owners of such lands. In view of the high cost involved, it is highly unlikely the proposed bill would be passed if compensation were required.

"Public purpose" requirement. The first constitutional requirement for taking private property is that the taking be for a public purpose. Such public purpose does not have to be explicitly mentioned in the bill, however, since an act is entitled to a presumption that the taking is for a public purpose. The Supreme Judicial Court

56 The bill talks of the on-foot free right-of-passage as being one of the reserved interests of the public in the coastal land of Massachusetts, thereby evidencing the belief of the bill's drafters that the public has a right to pass over this land which need not be purchased. Mass. H.R. Doc. No. 481 (1974).
57 This is true under both the due process clause of the Fourteenth Amendment to the United States Constitution and Article X of the Declaration of Rights of the Massachusetts Constitution. See U.S. Const. amend. XIV; Mass. Const. pt. I, art. X.
stated that the creation of the proposed right of passage would serve the recognized public interest in recreational facilities,\textsuperscript{59} a position that seems to be in accord with precedent.\textsuperscript{60}

\textit{Provision for compensation.} Having found a public purpose to validate the taking it found implicit in the bill, the Court then questioned whether the bill provided for adequate compensation to owners whose land was taken. The bill permitted a petition by a person having a recorded interest in the land to determine whether the activities authorized by the bill constituted an "injury" for which the owner was entitled to compensation.\textsuperscript{61} The Court noted that by using the word "injury" rather than "taking," the House may have intended to apply the compensation provision only to indirect injury to the upland property of tidal land owners, and not to the taking of property.\textsuperscript{62} This interpretation is consistent with the theory of the bill, which merely authorizes the exercise of reserved public rights and does not "take" anyone's property, as well as with the fact that the House undoubtedly does not wish to expend the money that would be necessary to purchase easements across all shore land held by private parties. As the Court noted, if the bill is interpreted as only providing for compensation for certain indirect injuries to the upland and not for the appropriation itself, then it is plainly deficient in failing to provide for compensation.\textsuperscript{63}

Even if the word "injury" in the bill could be construed to include the act of taking public easements, the Court held that the method the bill provided for compensation was inadequate.\textsuperscript{64} The first deficiency in the method provided for compensation was that the bill would have given only those owners who have a recorded interest in coastal land the opportunity to petition for compensation.\textsuperscript{65} Since no provision was made for compensating owners holding title by unre-


\textsuperscript{60} As early as 1913, the Supreme Judicial Court stated: "The acquirement of beaches by eminent domain and at the public expense for bathing and other purposes of general utility has never been questioned in this Commonwealth." Salisbury Land & Improvement Co. v. Commonwealth, 215 Mass. 371, 374, 102 N.E. 619, 621 (1913).

\textsuperscript{61} 1974 Mass. Adv. Sh. at 1067 n.1, 313 N.E.2d at 564 n.1.

\textsuperscript{62} Id. at 1076-77, 313 N.E.2d at 569. See Cann v. Commonwealth, 353 Mass. 71, 228 N.E.2d 67 (1967), where the Court noted that "[a] distinction between a 'taking' of property and other 'injury' to property has been developed in recognition of the fact that the Constitution compels compensation only if 'the property of any individual should be appropriated to public uses.'" Id. at 74, 228 N.E.2d at 68, citing Mass. Const. pt. 1, art. X; Connor v. Metropolitan Dist. Water Supply Comm’n, 314 Mass. 33, 36-37, 49 N.E.2d 593, 595 (1943).

\textsuperscript{63} 1974 Mass. Adv. Sh. at 1077, 313 N.E.2d at 569.

\textsuperscript{64} Id. It is not surprising that the bill is weak in this area; since the House was not intending to take private property, it was undoubtedly not concerned with complying with due process restrictions on the exercise of the eminent domain power.

\textsuperscript{65} Id. at 1067 n.1, 313 N.E.2d at 564 n.1.
corded deed or adverse possession, the proposed bill was constitutionally inadequate.\textsuperscript{66}

The second deficiency noted by the Court was that the bill seemingly allowed the courts to decide whether or not to compensate a landowner.\textsuperscript{68} Under the wording of the bill, any person having a recorded interest in affected land may petition the courts "to determine whether this section [of the proposed bill] or the activities authorized herein constitute an injury for which the owner is entitled to compensation . . . ."\textsuperscript{69} It cannot be denied that the courts have a place in the process of compensating landowners for takings of their property; for example, an act may provide that a jury assess damages incident to the exercise of the power of eminent domain.\textsuperscript{70} Nor can it be denied that the legislature may delegate its power of eminent domain.\textsuperscript{71} However, can it delegate to the courts the decision on whether or not compensation is due at all?

If the legislature delegated to the courts the power to decide whether certain land should be taken, it would be much easier to find an invalid delegation of power, since determining the necessity of taking specific parcels of land is solely a legislative function.\textsuperscript{72} Likewise, legislation which provided that courts decide whether compensation should be paid for lands taken would also be invalid, since constitutional provisions compel compensation if a taking actually occurs. However, if the legislature merely allowed the courts to decide whether certain lands had been taken, it would seem that the courts would merely be exercising their traditional function of fact-finding.

The Supreme Judicial Court's discussion of this problem is somewhat cryptic. As written, the bill was construed by the Court to amount to a taking of property for which compensation is required. Therefore, any landowner who brought a petition for compensation should be compensated if it were found that he owned land between high and low water mark. What the Court really may be concerned about, rather than an invalid delegation of power, is that by requiring landowners to bring petitions for compensation instead of directly providing for compensation in the bill, the legislature has placed the

\textsuperscript{66} Adverse possession is a sufficient interest to entitle a party to compensation for a taking, even where the adverse possession has not yet ripened into title. Andrew v. Nantasket Beach R.R., 152 Mass. 506, 507, 25 N.E. 966, 967 (1890).
\textsuperscript{67} 1974 Mass. Adv. Sh. at 1079, 313 N.E.2d at 570.
\textsuperscript{68} Id. at 1077-78, 313 N.E.2d at 569.
\textsuperscript{69} Id. at 1067 n.1, 313 N.E.2d at 564 n.1.
\textsuperscript{70} Frost Coal Co. v. City of Boston, 259 Mass. 354, 358-59, 156 N.E. 676, 677 (1927).
\textsuperscript{71} Burnham v. Mayor & Aldermen, 309 Mass. 388, 389, 35 N.E.2d 242, 243 (1941); Hingham & Quincy Bridge & Turnpike Corp. v. County of Norfolk, 88 Mass. (6 Allen) 353, 360 (1863).
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initial burden on the landowner to initiate a judicial proceeding to receive compensation. In a full and fair exercise of the power of eminent domain, the amount of compensation is set by an agency so empowered by the legislature or by a jury or commissioners in a judicial proceeding brought against the landowner to take his land, and if the owner is dissatisfied he may petition for review, or may appeal.73 This problem appears to be caused by the fact that the legislature apparently never intended this measure to be an exercise of the eminent domain power, and was merely providing that the courts determine whether the exercise of the public right of passage would constitute an actual injury to—as opposed to a taking of—the land in cases brought before it. As such, the bill seems to run afoul of the rule that an act appropriating private property to public use must reflect the intention to exercise the power of eminent domain,74 and should be declared invalid since it does not.

Adequacy of notice. The final weakness the Court found in the proposed bill was its notice provision. The bill provided for (1) notice by publication in newspapers of general circulation and (2) recording of notice in every county where coastal land is required to be recorded.75 The Court, citing applicable United States Supreme Court decisions,76 found that these methods of notice did not satisfy the due process requirement of the Fourteenth Amendment since they were not “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”77 The Court pointed out that notice by publication is “inadequate when the names and addresses of the affected persons are available”78 and that such information was available from the local assessors of the cities and towns in which the

76 Schroeder v. City of New York, 371 U.S. 208 (1962) (newspaper publication and posted notices not sufficient in condemnation proceeding); Walker v. City of Hutchinson, 352 U.S. 112 (1956) (newspaper publication not sufficient in condemnation proceeding); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) (notice by publication of a judicial settlement of accounts in a common trust fund insufficient as to known beneficiaries because not reasonably calculated to reach those who could easily be informed by other means).
77 1974 Mass. Adv. Sh. at 1079-80, 313 N.E.2d at 570, quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306-14 (1950). Of course, if the bill were held to be either a mere authorization to the public to exercise their reserved rights in the land or a valid exercise of the police power, then there would presumably be no notice problem, since no one would be deprived of property so as to trigger the due process clause of the Fourteenth Amendment.
affected land was located.\textsuperscript{79} The Court added that recording of notice would “not significantly increase the likelihood that the taking will come to the attention of affected owners before the two year period expires.”\textsuperscript{80} The bill is especially defective because the failure of a landowner to receive notice would eventually terminate his right to receive compensation altogether, rather than merely allowing the state to set a compensation figure on its own.

III. Conclusion

In conclusion, the Supreme Judicial Court seems to be on solid ground in expressing its doubts as to the constitutionality of the proposed bill. The Court could not have held that the public has a reserved right of passage in privately owned land between mean high and extreme low water lines without overruling the well-established judicial interpretation of the Colonial Ordinance of 1641-47.\textsuperscript{81} Nor does it appear that the measure can be justified as an exercise of the police power.\textsuperscript{82}

If the proposed bill is viewed as constituting a “taking” of property for which compensation is constitutionally required, it appears to be defective in a number of ways.\textsuperscript{83} As has already been mentioned, this is undoubtedly due to the legislature’s view of the bill as an authorization to the public to exercise a reserved right they have in the shore land, rather than as an exercise of the power of eminent domain.\textsuperscript{84} It seems safe to say that following this opinion, the legislature will refuse to pass the bill rather than correct it to provide for compensation to landowners whose land would be “taken” by the act.

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\textsuperscript{80} Id., 313 N.E.2d at 570.
\textsuperscript{81} Since there is no requirement that the notice be indexed or recorded on the certificate of registration of registered land, such notice will not be specifically directed to the affected land. . . . Owners rarely have recourse to the registries of deeds other than on the sale or purchase of real estate.
\textsuperscript{82} See text at notes 29-31.
\textsuperscript{83} See text at notes 55-80.
\textsuperscript{84} See text at notes 62-63.