Chapter 15: Zoning and Land Use

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CHAPTER 15

Zoning and Land Use

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A. THE NEW ZONING ACT

§15.1. Effective Date. Sections 5, 6 and 7 of Chapter 808 of the Acts and Resolves of 1975 contain the effective date provisions of the new Zoning Act (the Act).1 Section 7 provides that the Act takes effect on January 1, 1976, "as to zoning ordinances and by-laws and amendments, other than zoning map amendments, adopted after said date."2 The second paragraph of Section 53 provides that zoning ordinances and by-laws in effect on January 1, 1976 continue to be governed by the provisions of the Zoning Enabling Act,4 the former Chapter 40A, until either of two events occur. First, the new Act may be accepted by cities and towns.5 Second, even if the Act has not been

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2 Section 4 of the Zoning Act requires that a zoning map be included in any zoning ordinance or by-law that divides a city or town into districts. G. L. c. 40A, § 4 (New Act). In this light, the exception of zoning map amendments from the effective date of the Act seems incongruous. However, the legislature may have intended to allow communities which had previously not mapped or had mapped incorrectly to make appropriate changes without going through a cumbersome procedural process. Since the mapping would not change the applicable land regulation, no problem of lack of notice to property owners would be presented.
3 This portion of the statute should logically be preceded by G.L. c. 40A, § 7 (New Act). There is no apparent reason why the legislature organized this part of the statute in this manner. This is one area which should be corrected by the technical revisions amendment to the new Zoning Act being considered by the legislature. Mass. H.R. 4358, 1976 Sess. §§ 17, 18.
4 Because of the overlap between the implementation of the new Zoning Act and the phase-out of the old Zoning Enabling Act, there are presently two chapters 40A in the General Laws. In order to distinguish herein between the two chapters, the designation (New Act) will appear following citations to the new Zoning Act.
5 The acceptance procedure is governed by G.L. c. 4, § 4. See also G.L. c. 4, § 6, for further provisions applicable only to action taken by a city council.
accepted, all provisions of the Zoning Enabling Act cease to be effective as of June 30, 1978. This two and one-half year period will allow communities to review their zoning regulations and make the changes necessary to bring them into conformity with the new Zoning Act. Finally, Section 6 provides for the only use specifically exempted from the operation of the new Act prior to June 30, 1978. The provisions of the Act “shall not be deemed to affect any church or other facilities used for religious purposes in existence or under construction prior to June 30, 1978.” The grounds for this limited exemption lie in the new policy toward religious facilities expressed in Chapter 808. Under Chapter 40A, section 2 of the Zoning Enabling Act, regulations prohibiting or limiting the use of land for religious purposes were invalid. The Supreme Judicial Court has interpreted this prohibition to encompass dimensional regulations, at least in certain situations, but not parking requirements. Section 3 of the Zoning Act permits localities to impose “reasonable regulations concerning the bulk and height of structures, ... open space, [and] parking” among other requirements. The two and one-half year delay in the implementation of this section affords churches and other religious associations an opportunity to discuss possible regulations with local authorities and, if necessary, to make plans for compliance with new regulations.

§15.2. Adoption and Amendment of Zoning Ordinances or By-Laws. One of the legislature’s principal purposes in enacting Chapter 808 was to “provide standardized procedures for the administra-

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6 G.L. c. 40A, § 5 (New Act). The proposed technical amendments to the new Zoning Act make substantive changes in the effective date provisions. Section 17 of the proposed amendment, Mass. H.R. 4358, 1976 Sess., would strike out the last paragraph of Section 5 of the new Zoning Act. Section 18 would strike out and replace Section 7 of the new Zoning Act. Section 18 proposes that “particular provision of zoning ordinances and by-laws in effect on [January 1, 1976] that are inconsistent with [the new Zoning Act] shall, until the Act is accepted by a city or town, continue to be governed by” the former Chapter 40A. The language of Section 7 currently in force is broader than the proposed amendment. Unlike the proposed version, it is susceptible of the interpretation that all ordinances and by-laws in effect on January 1, 1976, whether or not consistent with the new Chapter 40A, continue to be governed by the former chapter. However, a conflict would probably arise only in a situation in which an ordinance or by-law were inconsistent with provisions of the new Act. Therefore the current Section 7 could be interpreted in the narrower sense proposed by Section 18 of the amendment. In addition, the proposed amendment would delete the exemption of zoning map amendments from the effective date provisions of the new Zoning Act. See note 1 supra.


8 G.L. c. 40A, § 6 (New Act).


11 G.L. c. 40A, §3.

12 This issue is discussed in greater detail at §15.8 note 43 infra.
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zoning and promulgation of municipal zoning laws.1 Although Section 6 of the old Zoning Enabling Act mandated procedures for amendment and adoption of ordinances and by-laws,2 these provisions would not apply to municipalities that derived their zoning powers independently of the enabling statute.3 Section 5 of the new Zoning Act incorporates sections 6, 7, 8, and 9 of the former Chapter 40A.4 The new law retains most provisions of the old. It does, however, present some significant changes.

First, the new law designates those persons and groups who may initiate the adoption or amendment of zoning ordinances or by-laws.5 The previous act contained no comparable provision. Other sections of the General Laws and existing case law authorized a city council, a board of selectmen,6 a certain number of registered voters of a town,7 owners of land affected by the proposed change,8 or any person holding an option to purchase the locus of the change9 to submit proposed ordinances or amendments. All except the last of these are enumerated in Section 5.10 The significant difference is that a board of appeals, planning board or regional planning agency may now also initiate zoning proposals.11 A measure of flexibility was retained, since the section also states that other methods provided by municipal char-

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1 Acts of 1975, c. 808, § 2A.
2 G.L. c. 40A, §2.
3 There are two theories as to the source of municipal zoning powers. One is that municipalities have no power to zone except that expressly granted by the legislature. The other is that municipalities possess all zoning powers of the state except as expressly or implicitly prohibited by the legislature. The Zoning Enabling Act was illustrative of the former theory. The Home Rule Amendment, Article 89 of the Amendments to the Constitution (passed in 1966), taken in conjunction with the new Zoning Act illustrates the latter theory. Where a municipality did not derive its zoning powers from state authorization but from an independent source, the provisions of an “enabling” act are, theoretically, inapplicable.
5 Id. Proposed ordinances or by-laws may be submitted to the municipal legislative body “by a city council, a board of selectmen, a board of appeals, by an individual owning land to be affected by change or adoption, by request of registered voters of a town pursuant to section ten of chapter thirty-nine, by ten registered voters in a city, by a planning board, by a regional planning agency or by other methods provided by municipal charter.” Id.
7 G.L. c. 39, § 10.
11 Id. The inclusion of the planning agencies was specifically recommended by the report of the Department of Community Affairs. Mass. H.R. Rep. No. 5009, 1972 Sess., at 50-51. This reflects the general policy of the report that the role of planning agencies should be expanded in order to effect innovative land use regulation geared to regional rather than merely community needs.
The section should, therefore, be interpreted as a mandatory, but not exclusive, list of those persons and groups who must be allowed to initiate zoning changes.

After receiving a zoning proposal, a city council or board of selectmen must, within fourteen days, submit the proposed ordinance or by-law to the planning board for review. The only new aspect of this requirement of the Zoning Act is the specification of the fourteen-day time limit for the submission of the proposal to the planning board.

Section 5 also makes several minor changes in the hearing and notice procedure previously contained in Section 6 of the former Chapter 40A. Thus, for example, a public hearing must now be held within sixty-five, rather than sixty, days after submission of the proposed ordinance or by-law to the planning board. Further, the new Section 5 provides that a proposal may be adopted after a joint hearing before the planning board and the city council. One question raised by the old act was whether or not such a joint hearing was permissible. The plain language of the old act indicated that separate hearings were required. The hearing before the planning board was to be scheduled prior to that before the city council. The purpose of this requirement was to insure that the planning board report on the proposed ordinance or by-law would be before the city council during its hearing. However the Supreme Judicial Court, in Woods v. City of Newton, held that a joint hearing was permissible. The new Zoning Act, in requiring only a joint hearing, indicates that the Legislature has adopted the viewpoint of the Supreme Judicial Court. Section 5 does provide that no vote on the adoption of the ordinance, by-law or amendment can be taken prior to the filing of the planning board's report or the passing of twenty-one days after the hearing without such filing. Section 6 of the former Chapter 40A had provided for a twenty-day period in which to file the report. As under the Zoning Enabling Act, a city council's failure to vote within ninety

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13 Id. In a town with no planning board, the board of selectmen is required to perform this function. Id.
15 Id. The language indicated that the dual hearing requirement applied only to cities. G.L. c. 40A, § 2. Since the vote on adoption of town by-laws occurs at town meetings, the equivalent of two public hearings is held in this situation also.
19 Id. at 101-02, 217 N.E.2d at 731-32.
days makes it necessary to repeat the notice and hearing procedure.\textsuperscript{23} Similarly, the new Act requires a town meeting vote on a proposed regulation within six months.\textsuperscript{24}

The technical notice requirements for the public hearing contain several changes. Under Section 6 of the Zoning Enabling Act, notice could be published in a newspaper of general circulation according to a specified timetable.\textsuperscript{25} Alternatively, if such a newspaper did not exist, notice could be posted conspicuously in the city or town hall. This alternative is now a mandatory addition to the newspaper publication.\textsuperscript{26} Moreover, the content of the notice must not only describe the subject matter of the hearing in a manner "sufficient for identification," but must also state the place where texts and maps can be inspected.\textsuperscript{27} The addition of the latter component clarifies the Legislature's intent as to the interpretation of the phrase "sufficient for identification." In \textit{Crall v. City of Leominster}\textsuperscript{28} the Supreme Judicial Court held that a reference in the notice to a plan on file at the board's office met the requirement that the subject matter be described in a manner "sufficient for identification."\textsuperscript{29} The inclusion in the new Act of a requirement that reference be made to the location of maps and texts\textsuperscript{30} appears to conflict with this interpretation.\textsuperscript{31}

It is mandatory under the new Act that notice by mail, postage prepaid, be sent to the Department of Community Affairs, the regional planning agency, and the planning boards of all abutting cities or towns.\textsuperscript{32} Legislative history indicates that the purpose of this requirement is to facilitate input from agencies outside the community.\textsuperscript{33} Section 5 also provides an optional plan by which notice of pending zoning matters may be given to nonresident property owners pursuant to annual request and payment of reasonable fees.\textsuperscript{34} Finally, the new Act

\textsuperscript{23} G.L. c. 40A, § 5 (New Act).
\textsuperscript{24} Id.
\textsuperscript{25} G.L. c. 40A, § 2.
\textsuperscript{26} Id.
\textsuperscript{27} Id.
\textsuperscript{28} 362 Mass. 95, 284 N.E.2d 610 (1972).
\textsuperscript{29} Id. at 99-100, 284 N.E.2d at 613.
\textsuperscript{30} G.L. c. 40A, § 5 (New Act).
\textsuperscript{31} It should be noted that in \textit{Crall v. City of Leominster} the subject matter had been fully described in the notice for the public hearing. 362 Mass. at 99, 284 N.E.2d at 613. The court characterized the planning board hearing as being only of an advisory nature. \textit{Id.} at 99-100, 284 N.E.2d at 613. Since it also concluded that interested parties had been afforded adequate notice of the proposed zoning change, \textit{id.}, the notice requirements for the planning board hearing were more leniently interpreted.
\textsuperscript{32} G.L. c. 40A, § 5 (New Act).
\textsuperscript{33} H.R. Rep. No. 5009, 1972 Sess. at 51-52. The department's report had advocated that individual planning boards, at their discretion, notify communities as to what they thought would be affected by the proposed change.
\textsuperscript{34} G.L. c. 40A, § 5 (New Act). As currently set out, this provision applies only to boundary or use changes. \textit{Id.} The technical revisions amendment pending before the legislature would add density changes. Mass. H.R. 4358, 1976 Sess., § 4.
codifies existing case law on the issue of whether defects in the notice procedure are jurisdictional. Section 5 provides that 

"[n]o defect in the form of any notice under this chapter shall invalidate any zoning by-laws or ordinances unless such defect is found to be misleading."  

Section 7 of the Zoning Enabling Act contained extraordinary majority voting provisions for the enactment of zoning amendments. The Department of Community Affairs report noted that this requirement gave a minority a veto power. Thus, zoning became inflexible as a tool for innovative land use planning and regulation. This forced the boards of appeals to engage "in ad hoc rezoning through an improper use of the variance granting power." In addition, there exists no logical reason for distinguishing between initial enactments and amendments of ordinances and by-laws. The legislature has responded by making the two-thirds majority requirement applicable to both the initial adoption and the amendment of ordinances and by-laws. The so-called "twenty per cent" clause, however, still applies only to amendments. It has been modified so as to limit its application to city or town councils of fewer than twenty-five members. More importantly, the unanimity requirement for councils of fewer than nine members has been dropped. The written protest of landowners must be submitted prior to final action by the council rather than prior to the close of the council's first hearing as was mandated by the Enabling Act. Those eligible to protest are limited to owners of land either included within the change or immediately adjacent thereto. The changes brought on by the new Act will undoubtedly facilitate passage of protested zoning regulations in small cities in which the council consists of fewer than nine members. However, the retention of the two-thirds majority voting requirement for amendments and the addition of the requirement for initial adoption will continue to permit a minority to prevent progressive zoning change. It is probable that the legislature intended that its new policy with regard to special

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37 G.L. c. 40A, § 2. This provision, which did not apply to initial adoption of ordinances or by-laws, provided that "[n]o change of any zoning ordinance or by-law shall be adopted except by a two-thirds vote of all the members of the city council ... or ... a town meeting ...." Id. Where, however, a written protest was signed and filed by owners of twenty percent or more of the area proposed to be included in the change or closely adjacent thereto, the number required for approval rose to three-fourths or more depending upon the size of the city council. Id.


39 Id. at 52.


41 Id.

42 Id.
permits, particularly for cluster zoning and planned unit development, would supply the flexibility needed to foster innovative land use.\textsuperscript{43}

An important characteristic of Section 5 of the new Zoning Act is that it generally applies to both initial adoption of ordinances and by-laws and to amendments. Thus, the portion of the section dealing with the limitation on the reconsideration of proposed regulations following unfavorable action applies to both categories.\textsuperscript{44} Its predecessor, Section 8 of the former Chapter 40A, applied only to proposed amendments.\textsuperscript{45} Apart from this modification, the provision remains substantially the same as Section 8. Similarly, the substance of the provisions of Section 5 relating to submission of by-laws and amendments to the attorney general, previously addressed by Section 9 of the former Chapter 40A,\textsuperscript{46} remains unchanged.

Prior to the passage of the new Zoning Act, newly adopted ordinances, by-laws and amendments were effective in cities upon their publication and in towns when published and approved by the attorney general.\textsuperscript{47} The seventh paragraph of Section 5 of the new Zoning Act changes prior law and provides that the effective date of adoption or amendment of zoning regulations is the date on which the adoption or amendment was voted on by the municipality’s legislative body.\textsuperscript{48} In towns there is the added requirement that “publication in a town bulletin or pamphlet and posting has been made or publication in a newspaper pursuant to section thirty-two of chapter forty”\textsuperscript{49} have taken place. On the surface, this provision appears to indicate that the legislature intended that publication of a town by-law occur prior to the taking of the vote in order for that date to be the effective date of adoption or amendment. However, this portion of Section 5 must be read in conjunction with Section 32 of Chapter 40 of the General Laws. Thus, it could be concluded that if the publication did not occur prior to the date of the vote then the effective date of the by-law would be the date of the attorney general’s express or implied approval, providing that publication pursuant to Section 32 has occurred. In the event that publication occurred after the attorney general’s approval, the by-law would become effective after publication. This interpretation, although warranted by the language of the Act, appears to be self-defeating. It is probable that by-laws could be amended in the process of voting at the town meeting. Any substantial change in the subject matter would render the prior publication in-

\textsuperscript{43} This subject is fully discussed at § 15.9 \textit{infra}.
\textsuperscript{44} G.L. c. 40A, § 5 (New Act).
\textsuperscript{45} G.L. c. 40A, § 2.
\textsuperscript{46} Id. at § 9.
\textsuperscript{47} See G.L. c. 40, §§ 32, 32A and G.L. c. 43, §§ 20-23.
\textsuperscript{48} G.L. c. 40A, § 5 (New Act).
\textsuperscript{49} Id.
valid. The new language in Section 5 would, in effect, become meaningless. At least one factor militates against this interpretation. The technical revisions amendment,\(^{50}\) which is intended to clarify ambiguities in Chapter 808, proposes to substitute the words “is subsequently” for the words “has been” in Section 5.\(^{51}\) This change would make it clear that the effective date of ordinances and by-laws, as well as amendments, adopted by both cities and towns, is the date upon which a vote was taken by their respective legislative bodies. In the event of subsequent disapproval of a new by-law by the attorney general the zoning by-law previously in effect would relate back to the date of the vote. Finally, after the adoption of by-laws and ordinances, the city or town clerk is required to mail a copy of the new regulation to the Department of Community Affairs.\(^{52}\)

Another ambiguity is present in Section 5. The last paragraph of the section creates a one-hundred-and-twenty day statute of limitations on any claim of invalidity based upon procedural defects in the adoption or amendment process.\(^{53}\) Sections 32 and 32A of Chapter 40, as most recently amended,\(^{54}\) contain the publication requirements for towns and cities. They require that the published or posted notice shall contain a statement that claims of invalidity based upon procedural defects must be made within ninety days of the posting or second publication.\(^{55}\) When these sections are read in conjunction with Section 5 of the new Zoning Act, it is apparent that their respective periods of limitation may expire on different dates.\(^{56}\) This contradiction obviously creates great confusion for anyone seeking to institute legal action based upon a procedural irregularity in the adoption or amendment process. Once again the proposed technical revisions amendment seeks to clarify this problem. Sections 1 and 2 of the amendment would amend Sections 32 and 32A of Chapter 40, respectively, to mandate that the publication and posting contain the

\(^{50}\) MASS. H.R. REP. NO. 4358, 1976 Sess.

\(^{51}\) Id. at § 7.

\(^{52}\) G.L. c. 40A, § 5 (New Act). This requirement is another illustration of the emphasis on coordinated statewide planning and land use regulation.

\(^{53}\) Id.

\(^{54}\) Acts of 1975, c. 808, §§ 1, 2.

\(^{55}\) G.L. c. 40, §§ 32, 32A.

\(^{56}\) For instance, a town might publish the by-law prior to the town meeting vote. The ninety-day period of G.L. c. 40, § 32, would run from the second publication and expire during the ninety days allowed for the attorney general’s approval. The one hundred-and-twenty day period would run from the date of the vote and would probably extend beyond the attorney general’s ninety days. In this hypothetical situation, the period of challenge afforded by G.L. c. 40, § 32, would expire prior to the time at which it could be known whether the attorney general intended to approve or disapprove the by-law. Alternatively, a town might publish the by-law after the vote was taken, at the same time the by-law was submitted to the attorney general for his approval. Once again, the one-hundred-and-twenty day period could extend beyond the ninety-day period allowed by G.L. c. 40, § 32.
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same one-hundred-and-twenty day limitation period required by Sec­tion 5 of the new Zoning Act.\(^{57}\)

§15.3. Variance and Special Permit Granting Procedure. An in­novative change in the variance and special permit granting proce­dure concerns those persons or groups authorized to grant variances and special permits. Section 13 of the new Zoning Act creates the po­sition of zoning administrator.\(^1\) The administrator may be delegated the authority to hear petitions for variances, applications for special permits, and other matters.\(^2\) Prior to this change only the board of appeals, with certain exceptions, was empowered to hear these ac­tions.\(^3\) In the formal terminology of the Act, those persons or groups authorized to grant variances are referred to as “permit granting au­thorities” and those authorized to grant special permits as “special permit granting authorities.” The former category includes the board of appeals and zoning administrator.\(^4\) The latter is comprised of “the board of selectmen, city council, board of appeals, planning board, or zoning administrator as designated by zoning ordinance, charter or by-law for the issuance of special permits.”\(^5\)

The hearing, notice and other requirements are located in various sections of the Act. Sections 11, 15 and 16 contain requirements gen­erally applicable to both variances and special permits. These sections incorporate some portions of Sections 16, 17, 18, 19 and 20 of the former Chapter 40A. They also make significant modifications and additions to the procedural requirements of the former act. Sections 9 and 10 contain both substantive and procedural requirements applicable only to special permits and variances, respectively.\(^6\)

One of the first questions which arises under the new procedure is


\(^1\) G.L. c. 40A, § 13 (New Act).

\(^2\) A complete enumeration of the administrator’s duties and limitations thereon is found in Section 13.

\(^3\) G.L. c. 40A, § 15. In certain circumstances the legislative body of a municipality or its delegated committee may function as a board of appeals. See G.L. c. 40A, § 14, and G.L. c. 40A, § 12 (New Act). In addition, G.L. c. 40A, § 4, had authorized a board of selectmen or city council to grant special permits.

\(^4\) G.L. c. 40A, § 1 (New Act). The proposed technical revisions amendment, Mass. H.R. 4358, 1976 Sess., § 3, would amend G.L. c. 40A, § 1 (New Act), by adding the following phrase to the definition of permit granting authorities: the word “administrator” would be followed by the words “unless otherwise provided by ordinance, by-law or charter.” Section 1, as currently in force, could be interpreted as a mandatory, but not exclusive provision. It could also be interpreted as a conclusive list of permit granting authorities. The amendment would clarify the legislature’s intent as to this matter.

\(^5\) G.L. c. 40A, § 1 (New Act). The technical revisions amendment would also alter this definition by adding the conjunction “or” after the word “administrator” and before “as designated.” Thus it would be clear that municipalities were free to authorize other persons or groups as special permit granting authorities.

\(^6\) Sections 4 and 15(3) of the Zoning Enabling Act were the predecessors of these sec­tions.
with whom an application or petition is filed. The answer to this ques-
tion and similar ones arising under the new Zoning Act may vary with
the particular person or administrative body that has jurisdiction over
the particular action. Section 9 of the new Act requires an application
for a special permit to be filed with the special permit granting au-
thority, and a copy of the application to be given by the applicant to
the city or town clerk. However, Section 15 now requires that all ap-
plications for special permits or petitions for variances over which the
board of appeals or zoning administrator exercises original jurisdi-
cion be filed by the petitioner with the city or town clerk. The clerk
must then transmit a copy of the application or petition to the board
of appeals or the zoning administrator. In the case of variances, only
the board of appeals or zoning administrator are considered to be
permit granting authorities. Therefore, a petition for variance must
originally be filed with the city or town clerk. In the case of special
permits, an application must be filed with the city or town clerk if the
board of appeals or zoning administrator is the special permit grant-
ing authority. If any other group designated in Section 2 of the new
Zoning Act is the special permit-granting authority, the application
must originally be filed with the authority and a copy must be given to
the city or town clerk.

The new Act also contains significant changes with regard to the
time within which a hearing must be held on a petition for variance or
an application for a special permit. Section 17 of the former Chapter
40A had required that a hearing before the board of appeals be held
within a reasonable time of filing. The length of this time period was
limited by the provisions of Section 18 which mandated that the
board's decision be made within sixty days of the filing of an appeal
application or petition with the board. Under the new Chapter 40A,
the computation of the time period within which a hearing must be
held is far more complex. This is particularly so with respect to situa-
tions in which the zoning administrator or board of appeals is the
permit or special permit granting authority. Section 9 requires that a
public hearing on an application for a special permit be held within
sixty-five days after the filing of the application with the special per-
mit granting authority. In the situation in which the board of appeals
is the special permit granting authority, Section 15 contains a separate
provision that a public hearing must be held within sixty-five days
from the date of the transmittal of the application to the board by the
city or town clerk. This requirement also applies to the hearing on pe-
titions for variances.

If the zoning administrator is the granting authority, however, prob-
lems arise irrespective of whether the application is for a variance or
for a special permit. In the former case, since there are no distinct provisions concerning the hearing procedure for variances, Section 13 would seem to apply. Section 13 mandates that a zoning administrator render a decision within thirty-five days after the date of filing of the application. On the other hand, if a special permit is at issue, the thirty-five day limitation mandated by Section 13 is in direct conflict with the sixty-five day period allowed to special permit granting authorities by Section 9. In view of the publication and notice requirements for hearings on both variances and special permits, it would appear to be difficult to provide acceptable notice and hold a hearing within the thirty-five day period. However, since as a general rule of statutory construction the specific controls the general, the thirty-five day period would appear to take priority. Alternatively, the sixty-five day period in Section 15 could be interpreted as applying to the zoning administrator. The proposition would be that the administrator, as the delegate of the board's authority, should be subject to the same requirements concerning the hearing process as the board of appeals. However, given the specific provisions of Section 13, it is unlikely that this argument would prevail.

Section 11 of the new Zoning Act contains the basic notice requirement concerning variance and special permit granting procedure. The timetable for newspaper publication of notice prior to the public hearing remains unchanged. It is now mandatory, however, that notice of the hearing also be posted in a conspicuous place in the city or town hall. The newly adopted Sections 9 and 10 require that notice of hearings on special permits and variances be sent by mail to all parties in interest. The term "parties in interest," as defined in Section 11 and applicable to all of Chapter 40A, means "the petitioner, abutters, owners of land directly opposite on any public or private street or way and owners of land within three hundred feet of the property line, the planning board of the city or town, ... and the planning board of every abutting" city and town. The parties must be determined by their appearance on the most recent applicable tax list, a requirement carried over from Section 17 of the former act. A new component requires that the assessors maintaining the tax lists certify the names of all parties in interest.

10 The same question arises as to which filing is referred to here, the date of filing with the city or town clerk or the date of transmittal to the administrator.
11 See text at notes 13-14 infra.
13 The former Act provided for newspaper publication in each of two successive weeks, the first such publication to be not less than fourteen days before a hearing of any petition for a variance, appeal or other matter. G.L. c. 40A, § 17.
and addresses of parties in interest to the permit or special permit granting authority. This certification is conclusive for all purposes. Section 11 also contains a new procedure by which notice may be waived.

The statutory requirements for the content of the notice have been altered. Section 17 of the former Chapter 40A had required that the notice contain the petitioner’s name, the location of the premises subject to the petition and the date and place of the public hearing. In addition, it provided that the hearing could not be held on the day of a state or municipal election, caucus, or primary. The new Zoning Act retains these four provisions. As compared to the earlier statute, however, the new Act indicates more specifically what are considered the adequate methods of identifying the subject property. A street address, for instance, is sufficient. Finally, Section 11 adds the requirement that the subject matter of the hearing and the nature of the relief requested, if any, must be specified.

The time within which a granting authority must take action on an application or petition has been altered by Sections 9 and 15 of the new Zoning Act. As noted previously, the former Section 18 had required a decision on either a petition for a variance or an application for a special permit within sixty days after the date on which the action was filed. The new Section 9 requires that a special permit granting authority must act within ninety days following the public hearing.\(^\text{15}\) Failure to take final action\(^\text{16}\) within this time period is deemed to be a grant of the relief sought.\(^\text{17}\) The voting requirements for this action, formerly addressed by Section 19, have been somewhat modified. A unanimous vote of a board of three members and a vote of four out of five members of a five-member authority are still required. However, the new Act reduces to two-thirds extraordinary majority requirements for authorities of more than five members, which called for the concurrence of all but one vote. This change will undoubtedly make the granting of special permits by large authorities more feasible.

According to Section 15 of the new Act, action on variances must be taken by the board of appeals within seventy-five days of the filing of the petition with the city or town clerk. Similarly to the provisions for special permits, Section 15 provides that failure of the board to act on

\(^{15}\) G.L. c. 40A, § 9 (New Act). If the special permit authority is a city council, it may appoint a committee of its members to hold the public hearing. \textit{Id.}

\(^{16}\) \textit{Id.} Mass. H.R. 4358, 1976 Sess., § 14, would amend G.L. c. 40A, § 9 (New Act) by substituting the word “act” for the words “take final action.” This indicates that the legislature anticipates problems of interpretation as to the meaning of “final action”, and that its intent was not to require final action within 90 days. Also indicative of the legislature’s intent is the fact that the analogous requirement of variance procedure mandates that the board of appeals “act” within a specified time limit. \textit{See} G.L. c. 40A, § 15, (New Act).

\(^{17}\) G.L. c. 40A, § 15 (New Act).
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the petition within this time period is deemed to be a grant of the relief sought. Confusion will undoubtedly arise as to the time within which a zoning administrator, the other designated permit granting authority, is required to act. The previous discussion of the provisions pertaining to the period within which a hearing on a special permit or variance must be held noted that Section 13 of the new Act requires the zoning administrator to render a decision within thirty-five days of an applicant's or petitioner's filing and action. This is the only provision which specifically pertains to this aspect of the zoning administrator's function as a permit granting authority. The same argument which was considered in the previous discussion could be raised here as well. As the delegate authority of the board of appeals, the administrator arguably should be subject to the same time requirements as the board. This position is further bolstered by the argument that the procedural requirements for the granting of a variance should not vary with the identity of the granting authority. However, the chances of this interpretation's prevailing are probably slight. There is one compelling argument in favor of placing different time limitations on the zoning administrator. That position, unlike the board of appeals, would be full-time. The administrator would not be bound by the convention of weekly, bi-weekly or monthly meetings and, therefore, might be expected to deal with actions more expeditiously. The voting requirements for the board of appeals remain unchanged. 18 Section 15 requires a unanimous vote of a board of three members and a vote of four out of five members of a five-member board. 19

There were particular requirements in the former Zoning Enabling Act pertaining to the board of appeals' keeping and filing of a detailed record of its proceedings. These have been carried over into Section 15 of the new Act, with only one significant modification: it is no longer necessary for a copy of the detailed record to be filed with the office of the local planning board. However, Section 11, which is applicable to both special permit and permit granting authorities, does require that the decision be filed with the planning board. The new Act has, in general, been modified to reflect the creation of alternative authorities empowered to hear petitions for variances and applications for special permits. Section 15, however, refers to requirements such as those concerning the detailed record, which apply only to the board of appeals regardless of whether it is functioning as a permit or special permit granting authority. Thus, according to the new Act, only if an ordinance or by-law has designated the board of appeals as the

18 These requirements were formerly addressed by G.L. c. 40A, § 19, and are noted in the discussion of special permit requirements.

19 The voting requirements for the board of appeals have been tailored to the new size requirements for the board contained in G.L. c. 40A, § 12 (New Act). This may well cause difficulties in any situation in which the city council or board of selectmen acts as a board of appeals pending its appointment.
permit or special permit granting authority is it necessary for a detailed record of the proceedings to be kept. In the case of both variance and special permit hearings before a zoning administrator, it could be argued that this requirement should apply. Again, however, it is unlikely that this interpretation would be accepted.

An even more serious problem arises under the new Act concerning the application of the "detailed record" requirement to special permit proceedings before a city council, a board of selectmen, or any other designated authority. Section 4 of the former Chapter 40A had mandated that the procedural requirements of Section 18, as well as those of Sections 17, 19, 20 and 21, be followed by the city council or board of selectmen if those bodies were empowered to entertain special permit proceedings. This provision is conspicuously absent from the new Zoning Act. Therefore, a facial examination of the Act would indicate that different procedures must be followed depending not upon the type of action involved, but upon the authority empowered to hear the action. Although this interpretation appears warranted by the omission of the above mentioned provision, it is more reasonable to assume that procedures should be uniform for a particular type of action. Resolution of this specific problem as well as the others discussed previously must await the attention of the judiciary, or preferably, that of the legislature by way of amendment.

Another area in which the new Zoning Act creates requirements generally applicable to permit and special permit granting authorities, and others specifically applicable only to the board of appeals, concerns notice following decisions on variances and special permits. The former Section 18 had required that notice of decisions of the board of appeals, the usual variance and special permit granting authority under the former act, be sent to the parties in interest and to each person present at the hearing who requested notice and supplied his address. An analogous notice provision which applies only to the board of appeals is now found in Section 15 of the new Act. There are some slight modifications, however. Section 15 specifies the "petitioner, applicant or appellant" as parties to whom notice must be sent. There are changes in the composition of parties in interest as they appear in Section 11 of the Act. The most significant, and potentially troublesome, requirement is that the notice contain a statement that judicial appeals must be brought pursuant to Section 17, and must be filed within twenty days of the filing of the notice of the decision with the city or town clerk.21

The notice provisions of Section 18 of the Zoning Enabling Act, which took effect only upon the granting of a limited or conditional

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20 "Parties in interest" was defined in G.L. c. 40A, § 11 (New Act). See text at note 14 supra.

21 See G.L. c. 40A, § 17 (New Act). Problems created by this provision are discussed in § 15.4 infra, which deals with judicial appeals.
variance or special permit, appear to be the source of the more generally applicable notice provisions of the new Section 11. Further, not only does the provision now apply to the decisions of any permit granting or special permit granting authority, but it also adds substantive requirements concerning the content of the decision. According to Section 11, the decision must not only contain the name and address of the owner and identify the land affected, as required under the prior act; it must also set forth compliance with the appropriate statutory requirements for issuance, and must certify that copies of the decision and all plans referred to therein have been filed with the planning board and the city or town clerk. Section 15, as was noted earlier, requires only that decisions of the board of appeals be filed with the town or city clerk. It could be assumed that since the filing requirements of Sections 11 and 15 do not actually conflict, the generally applicable filing requirements of Section 11 would be effective as to the board of appeals. Thus, it would be necessary to file the decision in both offices.

Section 11 also specifies the date upon which the variance or special permit shall take effect; such variance or permit becomes effective upon certification by the city or town clerk with the appropriate registry of deeds. The portion of the effective date provision which will be problematical concerns the city or town clerk's certification of the passage of the appeal period. A problem arises because the legislature omitted to specify the time from which the clerk must certify that the appeal period has run. The provision merely requires that the clerk certify that “twenty days have elapsed and no appeal has been filed or if [it] has been filed, that it has been dismissed or denied.” The proposed technical amendments revision to Chapter 808 of the Acts of 1975 would clarify this requirement by adding the phrase “after the decision has been filed in the office of the city or town clerk” after the word “elapsed.” In addition, Section 17 of the new Act, which pertains to judicial appeals, mandates that appeals must be taken within twenty days of the filing of the decision with the city or town clerk. It would, therefore, appear that the period requiring certification should be calculated from this date.

However, this conclusion is placed somewhat in doubt when Section 11 is read in conjunction with the specialized notice requirements re-
lating to the board of appeals contained in Section 15 of the new Act. That section requires that the notice of the board's decision contain a statement that judicial appeals must be taken within twenty days after the filing of the notice of the decision in the clerk's office, not within twenty days after the filing of the decision itself. If these two documents were filed simultaneously then no uncertainty would arise as to the commencement and expiration dates of the appeal period. Consequently, there would be no confusion as to the effective date of the variance or special permit. If they were not filed on the same date, however, and the board of appeals is the permit or special permit granting authority, then the notice of appeal sent to the parties would specify one appeal period according to Section 15, and the city or town clerk would certify another period pursuant to Section 11. Thus, assuming proper recording, in this situation the variance or special permit might be technically effective under Section 11 prior to the expiration of the appeal period under Section 15. If the specialized requirements for notice by the board of appeals are to govern the general requirements, then it would seem that the clerk should be required to calculate the period within which board of appeals decisions must be appealed from the date on which notice of its decision, rather than the decision itself, was filed.

There has been a major rewriting of the provisions concerning reconsideration of any petition for variance or application for special permit which has been acted upon unfavorably. Section 16, which contains these provisions,\(^2\) is generally applicable to permit and special permit granting authorities. The section presents several major changes in the reconsideration procedure. Formerly, a matter which had been unfavorably acted upon could not be reconsidered by the board of appeals within two years from the date of the unfavorable action. The exception to this rule occurred when all but one of the members of the planning board, or board of selectmen if there was no planning board, consented to the reconsideration. The requirements of the new Act are far more demanding. Not only must all but one member of the planning board consent, but there must be a finding by the special permit or permit granting authority that there have been "specific and material changes in the conditions upon which the previous unfavorable action was based."\(^2\) Moreover, the authority must describe the changes in the record of its proceedings. Notice of the time and place of the planning board's meeting concerning its consent must now be given to all parties in interest.\(^2\)

\(^2\) G.L. c. 40A, § 20 was the parallel section of the Zoning Enabling Act.
\(^2\) G.L. c. 40A, § 16 (New Act). The voting requirements for this finding are: (1) a unanimous vote of three-member board; (2) a vote of four out of five members of a five-member board; and (3) a two-thirds majority of a board of more than five members. This third provision would only apply to special permit granting authorities which may be composed of more than five members. See G.L. c. 40A, §§ 1, 9 (New Act).
\(^2\) G.L. c. 40A, § 16 (New Act).
Section 16, in addition, contains a new procedure by which petitions or applications which have been transmitted to the proper authority may be withdrawn without prejudice. If the withdrawal occurs subsequent to the publication of notice of the public hearing, it requires approval of the authority in order to be deemed without prejudice. No approval is required if the withdrawal occurs prior to the publication of notice. A problem of interpretation may arise concerning the meaning of "publication" in this context. The word could refer to either the first publication or the completed process of publication. If the purpose of the provision is to prevent misinformation and inconvenience to potential parties in interest, then the former interpretation would appear more plausible. Moreover, attempted withdrawal of an action subsequent to the first publication would require a factual determination of the inconvenience caused and the effects of the withdrawal. The fact that the section provides the mechanism by which this factual determination can be made further supports the interpretation of "publication" as meaning first instance of publication.

§15.4. Appeals Procedure: Administrative Appeals: Judicial Appeals. The procedure for administrative appeals pursuant to the new Zoning Act is contained in Sections 8, 13, 14, 15, and 16. The new Zoning Act retains several of the appeals provisions of Section 13 of the former act. Thus, any person aggrieved by his inability to obtain a permit, or by any order or decision of the building or other administrative official, is still entitled to take an administrative appeal. Any officer of the city or town may also appeal to the board of appeals. Section 8 of the new Act, in addition, specifies several categories of potential "aggrieved persons." These include any person aggrieved by his inability to obtain enforcement action from administrative officers, the regional planning agency in whose area the city or town is situated, or an officer or board of an abutting city or town.

Under the new Act, an administrative appeal may be taken either to the zoning administrator or to the board of appeals. Under the

29 Id. 1 This procedure was previously addressed by Sections 13-20 of the former Chapter 40A.

2 Controversy had previously arisen concerning the interpretation of language of the former G.L. c. 40A, § 13 concerning the "order or decision." The question was whether the statutory language included the denial of enforcement by a building inspector. The Supreme Judicial Court has held that a denial of a request for enforcement is an order or decision only if the denial is evidenced by a "writing." Williams v. Inspector of Bldgs., 341 Mass. 188, 190, 168 N.E.2d 257, 259 (1960) noted in 1960 ANN. SURV. MASS. LAW §§ 13.5, 13.6. The inclusion of the inability to obtain enforcement as a potential grievance obviates the necessity of construing "order or decision" so as to encompass this situation. In addition, the section of the new Act concerning enforcement, Section 7, requires that if a request to a building inspector is made, he must act or respond in writing within fourteen days after receipt of the request.
former zoning statute, only the board of appeals was empowered to hear appeals. A common situation in which appeals arise is that following the denial of a permit by the building inspector. In localities following the suggestion of the new Act, this type of appeal would be taken to the zoning administrator. The decision of the administrator may, in turn, be appealed to the board of appeals.

There has been significant reorganization and some modification of the appeals provisions of the former zoning statute. Sections 15 and 16 of the new Act address the basic requirements. Pertinent provisions, however, are also found in Sections 13 and 14. Under Section 15 the time within which an appeal may be taken continues to be thirty days from the date of the order of decision in question. Both Sections 13 and 15 contain specific provisions concerning appeals from the zoning administrator to the board of appeals. An aggrieved person may appeal within thirty days after the administrator's decision is filed with the city or town clerk. If the administrator makes no decision within thirty-five days from the date of the original filing of the petition, application or appeal, the matter is deemed denied. It is thereafter subject to appeal to the board of appeals. The requirements contained in the second paragraph of Section 15 are identical to those of the first paragraph with one exception. In a case in which the appeal arises under Section 8, the city or town clerk must transmit copies of the notice of appeal "to the officer whose decision was the subject of the initial appeal" to the zoning administrator.

The new Section 15 also incorporates provisions of the former act concerning the scheduling of meetings and hearings, voting requirements, and the keeping of records. Generally, these provisions apply not only to appeals, but also to variances and special permits. The board of appeals is now required to hold a hearing within sixty-five days of the transmittal of the appeal from the city or town clerk to the board. The former Section 17 had required the board to schedule a hearing within a "reasonable time." Notice of the hearing

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3 G.L. c. 40A, § 13 (New Act) creates the position of zoning administrator. See § 15.3 supra for a discussion of this position.
5 Id.
6 The procedural requirements of appeals were found in Sections 16 through 20 of the former Chapter 40A.
7 The only alteration is the use of the appropriate terminology, "permit granting authority," and "zoning administrator," introduced by Chapter 808 of the Acts of 1975.
8 G.L. c. 40A, § 13 (New Act). The statute does not clearly indicate to which filing date is referred. This interpretation seems to be the most sensible one.
11 These provisions were found in Sections 18 and 19 of the former Chapter 40A.
12 See § 15.3 supra.
13 The board was limited by the sixty-day period in which it was required to render its decision. G.L. c. 40A, § 18.
must be provided in accordance with Section 11 of the new Act. In conjunction with the requirement of holding a hearing within sixty-five days, the board has seventy-five days from the date of the filing of the appeal in which to make a decision rather than the sixty days previously provided by Section 18. A substantive change worked by the new Act is that the board's failure to act within the seventy-five days is deemed to be a grant of whatever relief was being sought.

This is, of course, subject to judicial appeal.

The voting requirements of former Section 19 are substantively unchanged. They have been modified, however, to conform to the size requirements of the board of appeals, either three or five members, contained in the new Section 12. Thus, in a board of three members, all must concur, and in a board of five members, four must concur, in order to reverse an administrative official's decision under Chapter 40A. The language of the former act making the requirements applicable to decisions in favor of the applicant in any zoning matter has been deleted from the new Act. In exercising any of the powers granted to it by the new Section 14, the board of appeals has all the same powers formerly designated in Section 19 of the Zoning Enabling Act. The only new component is that the board may specifically "make orders of decisions." The board is required to keep a record of its proceedings in the same manner provided for in the former Section 18. According to that section, a copy of the record had to be filed with the city or town clerk and become a matter of public record. It is no longer necessary, under Section 15 of the new Zoning Act, for a copy of the record to be filed with the planning board.

There is a slight modification in the provisions for mailing notice of the board's decision. Section 18 had specified that notice be sent to all parties in interest, as well as to those present at the hearing who requested notice and stated their addresses. The latter is unchanged. The definition of parties in interest, however, has been modified. The former definition included the petitioner, abutters, those owning land adjoining the land of abutters, the municipality's planning board and possibly the board of the adjoining municipality. The new Act deletes abutters of abutters as parties in interest. It adds owners of land directly opposite the property in question on any public or private street or way, and owners of land within three hundred feet. It also appears to require that the planning board of every abutting city and town be notified. Section 15 of the new Zoning Act also explicitly provides that the petitioner, applicant, or appellant be notified. The former Sections 17 and 18, read in conjunction, required notice only to a "pe-
petitioner". This explicit provision shows a legislative intent not to restrict the notice provision only to petitions for variances. There is also a new requirement concerning the content of the notice. Judicial appeals must now be made according to Section 17 and must be filed within twenty days after the notice is filed with the office of the city or town clerk.\footnote{This provision is potentially troublesome. It appears to create two differently calculated appeal periods. One would run from the date of filing the decision in question according to Sections 11 and 17. The other would be calculated from the date of filing notice according to Section 15. This problem is discussed in relation to the effective date of variances and special permits in § 15.3 supra.}

Section 16 of the new Zoning Act contains the limitations on the reconsideration of appeals, petitions for variances, and special permits.\footnote{This matter was previously addressed by Section 20 of the former Chapter 40A.} The significant changes in the procedure have been fully discussed in the preceding section concerning variance and special permit granting procedure.

A question exists under the new Act as to the propriety of the mandamus remedy. Under the prior act, it was generally agreed that a mandamus action would lie to require the local official to enforce an ordinance or by-law. This would short-circuit the more arduous route of the administrative appeal. However, Section 7 of the new Act, which addresses the subject of enforcement of ordinances and by-laws, mandates, among other things, that no action, suit or proceeding be maintained in any court except in accordance with that section, Section 8 and Section 17. Thus, Section 7 can be read as eliminating the mandamus remedy. The last paragraph of Section 7, however, contains a statement of the jurisdiction of the superior court to enforce the provisions of the chapter, and is a brief version of the mandate contained previously in Section 22 of the former act. This may well indicate that, despite Section 7's broad language, the legislature did not intend to alter the availability of the mandamus remedy.

The basic framework of the judicial appeal process contained in the former Section 21 has been carried over into Section 17 of the new Zoning Act. There are, however, several new requirements relative to the content of the complaint and notice. The most significant change is the omission of appeals to the district court. As under the former act, appeals may be taken from decisions of the board of appeals to the appropriate superior court, the Land Court pursuant to Chapter 240, Section 14A of the General Laws, and in Hamden County, to the Housing or superior court of that county.\footnote{A provision for the transfer upon motion of a bill in equity from the Supreme Court to the Housing Court has been deleted from Section 17.} In accordance with other changes in the new Act, appeals are also authorized from any other special permit granting authority. Any person aggrieved by the decision of the board of appeals or other authority, or by any municipal
officer or board, has standing to appeal the decision. Under Section 17 of the new Act, the city council no longer automatically has standing to appeal.

The requirement that actions be brought within twenty days after the decision is filed with the city or town clerk has been retained. Notice to the city or town clerk of the appeal must be given so as to be received within twenty days from the date of the filing of the decision.

There are important new provisions concerning the contents of the complaint. It is now mandatory that the complaint contain an allegation that the decision exceeds the authority of the board of appeals or other permit or special permit granting authority. The complaint must, in addition, state any facts pertinent to the issue. It should be carefully noted that this is an exception to the notice-pleading requirements of the Massachusetts Rules of Civil Procedure. Finally, it must contain a prayer that the decision be annulled. As under the former Section 21, there must be annexed to the complaint a certified copy of the decision from which the appeal is taken. When the complaint is filed by a person other than the original applicant, appellant or petitioner, that person and all members of the board or other authority must be named as parties defendant. The new additional requirement is that their addresses be included in the complaint. This provision had recently been deleted from Section 21 of the former act by Chapter 1114, Section 4 of the Acts of 1973. In place of the service of process required by the former act, the plaintiff is now required to send written notice to all defendants, including board members, within fourteen days of filing the complaint. This can be accomplished by certified mail or by delivery. An affidavit of notice must be filed with the court within twenty-one days after the entry of the complaint. The only alteration of this requirement is the change in the time from which the twenty-one days runs. Section 21 had required filing of the affidavit within twenty-one days after the commencement of the action. The commencement of the action and the entry of the complaint may denote the same time. However, it would also be possible to construe the time of commencement as the date of the service of the complaint on the defendant. The language of the new Act more precisely indicates which time is meant. The provisions as to dismissal of the complaint for failure to file the affidavit on time have been retained. The requirement has been construed as directory rather than

21 See § 13.3 supra.

22 This represents a change from the wording of the former Section 21 which required notice to be given within a twenty-one day period. Substantively, however, the new language works no change. It merely reflects the longstanding perception that the notice must be received within the twenty-one day period; see Bjornlund v. Zoning Bd. of Appeals, 353 Mass. 757, 231 N.E.2d 365 (1967), the "new" language had also appeared in a previous version of the statute, G.L. c. 40A, § 21.
mandatory. There is no reason to expect that interpretation to be changed.

Finally, when it is necessary to give notice in the manner specified above, the applicant or board members who receive notice are not required to file an answer. However, Section 17 also provides that if an answer is filed, notice of the filing together with a copy of the answer and affidavit of notice must be sent within seven days after the filing of the answer, to all parties by certified mail or by delivery. The section also requires that notice of the hearing be given to all parties by the clerk of the court whether or not they have appeared in the action.

There is no change in the type of hearing to which the appellant is entitled except that the court can now make any "decree" rather than any "judgment" as was specified by the former Section 21. The parties retain the rights of appeal and exception as in other equity cases. The provisions pertaining to appointment of counsel to an officer or board for the purposes of appeal contain slight modifications. Counsel must be "independent." The provision of counsel for subsequent action is limited to action that the parties are authorized to take. The former Act had limited this to action that the parties were permitted to take. The significance of this alteration may be that the new term connotes positive action while the former term may have required only acquiescence of a municipality. The portions of Section 17 concerning allowance of costs against parties, and the precedence of appeals over other civil actions, are virtually identical to their predecessors in Section 21.

There is an important new provision in Section 17 as to which defects in procedure or notice are jurisdictional. This change reflects the Supreme Judicial Court's decisions in this matter. Even the specified defects must be challenged by a proceeding commenced within ninety days after the decision in question has been filed in the office of the city or town clerk.

§15.5. Enforcement of Zoning Ordinances and By-Laws. There are two types of procedures by which zoning ordinances and by-laws may be enforced, administrative and judicial. In the former Chapter 40A, the provisions pertaining to these procedures were located in separate sections. Section 12 had addressed the administrative, and Section 22 the judicial. In the new Zoning Act they are located together in Section 7.

Administrative Enforcement. The most effective method of enforcement is the withholding of building permits in situations in which a
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zoning violation would occur. A mandatory building permit system is a prerequisite to this mode of enforcement. Such a system was not required by the General Laws prior to January 1, 1975. In order to understand the changes that have been made in the former Section 12, a portion of which has been incorporated into the new Section 7, it is first necessary to comprehend the changes that have been worked in the law relating to building codes. Prior to January 1, 1975, Section 3 of Chapter 143 of the General Laws had provided that municipalities were permitted, but not required, to establish their own building codes and a permit system designed to enforce them. Section 2 of Chapter 143 of the General Laws had authorized the regulation of uses. The former Section 12 had to be read in conjunction with those sections. If a municipality had promulgated a building code and required permits, then Section 12 mandated that permits be withheld if the proposed construction or alteration of a building or structure would have been in violation of the zoning laws. Similarly, Section 12 required denial of a permit if the new use of a building, structure or land would have violated zoning ordinances or by-laws. On the other hand, if a municipality had no building code, then the establishment of a system of permits to prevent zoning violations was merely permissive.1

Chapter 143 of the General Laws was thoroughly revised by Chapter 802 of the Acts of 1972, which became effective on January 1, 1975. The effect of this revision and that of a companion statute relating to the state building commission2 was to mandate the promulgation of a compulsory state building code. The Commonwealth of Massachusetts State Building Code is applicable to virtually all buildings in Massachusetts.3 The Code promulgates a mandatory system of permits for construction and alteration,4 as well as changes in existing uses.5 The provisions of the State Building Code relating to specified aspects of construction and use of materials take precedence over any zoning regulations which purport to regulate these areas.6

The language of Section 7 of the new Zoning Act reflects these changes in the building code law. The first sentence of the former Section 12, which mandated withholding of building permits for construction, alteration, or change in use that would violate zoning regulations, has been retained with two significant alterations. The terminology used to describe building permit issuing authorities now correlates to the language of Chapter 143 of the General Laws. It is explicitly required that a permit for the moving of a structure which

3 Commonwealth of Massachusetts State Building Code §100.1.
4 Id. at §108.11. See also id. at §§113.1, 114.0.
5 Id. at §105.0.
6 Id. at §101.3. See G.L. c. 40A, §3 (New Act), which contains similar provisions.
would violate zoning ordinances or by-laws be withheld. The second sentence of the former Section 12, which provided for the situation in which a municipality had no building code, has been deleted from the new Section 7 since this situation could no longer exist. Therefore, the final result of the amendments discussed above is to provide municipalities with a mandatory building permit system, and, consequently, a mandatory system of withholding permits in order to enforce zoning ordinances and by-laws.

Section 7 also provides a new procedure by which any person may request enforcement of zoning ordinances and by-laws. The provision is designed to bring such requests within the administrative appeals process. First, a person must make a written request for enforcement. In the event that the official or board charged with enforcement declines to act, he or it is required to notify the party who made the request in writing. This response must occur within fourteen days of the receipt of the request. The denial of the request is then subject to administrative appeal pursuant to Section 8 of the new Act. The procedure incorporates elements of both judicial decisions and the existing practices of some municipalities.

The final aspect of administrative enforcement procedure contained in Section 7 is the authorization of criminal penalties for violations of zoning ordinances and by-laws. A municipality may provide a penalty of up to one hundred dollars per violation, each day that the violation continues constituting a separate offense. Although this provision is a new component of the Zoning Act, it has its basis in a decision of the Supreme Judicial Court. The Court held, in Commonwealth v. Sostilio, that the power to impose fines for violations of zoning ordinances and by-laws was contained in Section 21 of Chapter 40 of the General Laws. Legislative history indicates that the new Act's explicit provision for this power was intended to make communities aware of this option.

Judicial Enforcement. Section 7 contains a new provision that explicitly limits all actions resulting from alleged violations of zoning laws to

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8 Williams v. Inspector of Bldgs. of Belmont, 341 Mass. 188, 190, 168 N.E.2d 257, 259 (1960), noted in 1969 Ann. Surv. Mass. Law §§13.5,13.6. This case required a "writing" as evidence of an order or decision in order to bring a denial of enforcement within Section 13 of the former G.L. c. 40A. Id.
11 Id. at 421-22, 221 N.E.2d at 765-66. Section 21 contains a general authorization directed to cities and towns which empowers them to both make orders and by-laws and to affix penalties for the violation thereof. St. 1975, c. 107, increased the $50.00 fine discussed in the Sostilio case to a $200.00 maximum. Since the legislature has explicitly provided for the power to fine in G.L. c. 40A, the rationale of the Sostilio decision would appear to be unnecessary and no longer applicable to penalties for zoning violations.
those allowed by Section 7, 8, and 17 of the new Act. Generally, the provisions of the former Section 22 pertaining to the jurisdiction of the superior court have been retained, although in a somewhat modified and reorganized form.13 There is, however, one exception: that portion of the section authorizing the attorney general to bring an information in equity has been deleted. The retention of the jurisdiction provision indicates that remedies previously available under the former section 22 will continue to be available under the new Zoning Act. In particular there is no reason to doubt that a citizen may compel local enforcement officials to act by petitioning for a writ of mandamus.14 There may be less occasion for the use of this action in view of the new emphasis on the use of the administrative appeals process. The action will, however, remain available.

The new Zoning Act also retains the statute of limitations provision of the prior act,15 with several important alterations. Section 22 of the former statute created a six-year statute of limitations for maintaining certain actions. If real property had been improved and used pursuant to a duly authorized and issued building permit, then no action based upon an alleged zoning violation could be brought pertaining either to the use or to the structure itself after six years had elapsed from the issuance of the permit. Under Section 7 of the new Act, the six-year statute of limitations runs from the commencement of the alleged violation rather than from the date on which the permit was issued. There is the added requirement that, within the same period, notice of the action must be recorded in the registry of deeds for each county or district in which the land is located. The notice must contain "names of one or more of the owners of record, the name of the person initiating the action, and adequate identification of the structure and the alleged violation."16

§15.6. Substantive Changes in Variance Granting Procedure. The section of the new Zoning Act governing the granting of variances, while it retains some of the provisions of Zoning Enabling Act, is generally more restrictive than the parallel section of the former statute. The new statute, as did its predecessor, provides that a variance from the applicable zoning ordinances or by-laws shall not be granted unless three requirements are met.1 First, the conditions on

13 Thus, for example, the statement of the superior court's jurisdiction no longer contains any reference to equity. This change reflects the tenor of the revised Massachusetts Rules of Civil Procedure which abolished the traditional procedural distinction between equitable and legal actions. Mass. R. Civ. P. 2.


16 Id.

§15.6. These requirements, previously contained in Section 15(3) of Chapter 40A, are found in the new Section 10.
which the petition is based must especially affect the land or building
in question, but not generally affect the zoning district in which it was
located. Second, a literal enforcement of the zoning regulation must
involve substantial hardship, financial or otherwise, to the petitioner.
Finally, it must be possible to grant the variance "without substantial
detriment to the public good and without nullifying or substantially
derogating from the intent or purpose of [the] ordinance or by-law."

In addition to the three requirements that have been retained, how­
erver, Section 10 includes several new substantive provisions regulating
the granting of variances. The circumstances which lead to the peti­
tion for a variance must now relate to the "soil conditions, shape, or
topography of such land or structures." It can be expected that this
 provision will not only make it more difficult to obtain a variance, but
that it will also cause problems of interpretation. These will include
the definition of the term "topography" and its application to a "struc­
ture" as required by the Act.

Unlike the former Chapter 40A, the new Section 10 places limita­
tions on the granting of use variances. Thus, unless a local ordinance
or by-law expressly permits variances for use, such variances may not
be authorized for a use or activity not otherwise permitted in the dis­


2 G.L. c. 40A, § 10 (New Act).
3 Id. The former Section 15 had contained not only the standards for grant of a vari­
ance, but also the powers of the board of appeals. Unlike that section, the new Section
10 is devoted solely to the subject of variances.
4 Id.
5 WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY defines "topography" as it ap­
pears to be used in Section 10 as "... the configuration of a surface including its relief
and the position of its natural and man-made features ... ." It is also defined as "the
physical or natural features of an object or entity and their structural relationships." It
appears unclear whether or not the term may be appropriately applied to "structures." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2411 (G. & C. Merriam Co., 1963).
6 G.L. c. 40A, § 10 (New Act). For an explanation of the change and the reasons
7 G.L. c. 40A, § 10 (New Act).
8 Id.
9 Id.
the land or structure for which the variance is granted. This codifies previous decisions of the Supreme Judicial Court which have held that conditions must relate to the land or structures and not to particular persons.

Finally, there is a new provision which has the effect of requiring that the rights authorized by a variance be exercised within one year after granting. If this is not done, then all procedural requirements must be complied with again in order to re-establish the variance.

§15.7. Creation and Powers of Board of Appeals: Creation of Office of Zoning Administration. Sections 12 and 14 of the new Zoning Act concern the appointment and powers of the board of appeals. These sections with few changes reflect the provisions of the former Chapter 40A contained in Sections 14, 15 and 19. As under the former Section 14, zoning ordinances or by-laws are required to provide for a board of appeals. That section had, in addition, provided that a previously existing board under either local building or planning ordinances would fulfill the requirement, and alternatively that a zoning board could act under those ordinances. These provisions are absent from the new Act. Instead it allows departure from the requirements only where "otherwise provided by charter."

Other significant changes in the new Act concern the permissible number of board members, the board's authority to employ experts and clerical assistants, and the board's duty to promulgate and file rules. The Zoning Enabling Act had required that a board of appeals contain at least three members. Section 12 now mandates that the board be composed of three or five members. The second change,
explicit inclusion of the board's authority to employ assistants, was presumably calculated to advise communities of their option to do this rather than to clarify any dispute over the propriety of such action. Finally, the requirement that the board adopt rules "... for the conduct of its business and for the purposes of this chapter . . ." and file a copy with the city or town clerk is a necessary and expected corollary to the legislative purpose of the Zoning Act: standardization of procedures for the administration of zoning regulations. The administration of zoning ordinances and by-laws is often an informal process. A board, although aware of procedural and substantive statutory standards, may deviate from them. Not only might the promulgation of rules put property owners on notice as to board procedures, but also it might make the board itself more conscious of them. Both of these results would effectuate the legislative goal.

The powers of the board of appeals are collected in Section 14 of the new Act. They appeared previously in Sections 15 and 19. The board retains the power to hear appeals from the action or inaction of administrative officers, chiefly building inspectors, and to hear applications for special permits and petitions for variances. In accordance with the creation of the position of zoning administrator, appeals from his or her decisions are also authorized. The specific types of action which the board may take are enumerated. It "... may, in conforming with the provisions of [Chapter 40A], make orders or decisions, reverse or affirm in whole or in part, or modify any order or decision . . ." While doing so it possesses all the powers of the individual whose decision is appealed and "... may issue or direct the issuance of a permit." The creation of the office of zoning administrator is one of the most important features of the new Act. Authorization of the position is not mandatory. Once an ordinance or by-law gives such authorization, however, the appointment is the responsibility of the board of

14 G.L. c. 40A, § 14 (New Act). These are now denoted "section 8 appeals" and are substantially the same as appeals under G.L. c. 40A, § 13, prior to the passage of the new Zoning Act.
15 G.L. c. 40A, § 14 (New Act). This is, of course, subject to the requirement that the board be empowered to act as a special permit-granting authority by ordinance or by-law. G.L. c. 40A, § 1 (New Act).
16 Id. at § 14.
17 Id.
18 Id.
19 Id.
20 Id. at § 13.
appeals unless the charter provides otherwise. The appointment of the zoning administrator is subject to confirmation by the appropriate legislative body, which may establish qualifications pertaining to the office. The administrator then serves at the pleasure of the board. Some of the board's powers may be delegated to the administrator subject to voting requirements. The fact and scope of the delegation must be recorded in the board's rules and regulations. As noted above, Section 14 authorizes appeals from the administrator's decisions to the board. This new position has the potential for bringing both efficiency and expertise to zoning administration. Unlike the board of appeals, the administrator's position would presumably be a full time, exclusive occupation. As a result he could hear more zoning actions and undertake more sophisticated analysis of zoning laws than can part-time boards. The procedures specifically applicable to the administrator reflect the legislature's intent that this occur. Since the position is not mandated but only permitted it is now up to local communities to put this change into effect.

§15.8. Purposes of Zoning: Limitations on Zoning Regulations. The purposes of zoning regulations, which were contained in Sections 2 and 3 of the former Chapter 40A, are now found in the preamble to the new Zoning Act ("the preamble"). This consolidation of the permissible objectives of zoning in one section also represents a reorganization in which the purposes of zoning regulations have been separated from the limitations imposed on them.

Purposes of Zoning Regulations. The first and most obvious change follows from the theoretical shift of which the Zoning Act is illustrative. Rather than mandating the purposes of zoning, the preamble suggests a non-exclusive list of general objectives. This reflects, first, the notion that cities and towns have inherent zoning powers limited only by general law. Secondly, it is indicative of the legislature's intent that zoning be used as a flexible tool for innovative land use. Such a conception of zoning mandates a good deal of discretion on the part of municipalities. The suggested objectives include all of the purposes of zoning enumerated in the former Section 3 and several

21 Id.
22 Id.
23 Id. If the board has three members all must concur; if five, then all but one must concur. Id.
24 Id. at § 12.

2 See discussion in note 3, §15.2 supra.
3 "Zoning regulations and restrictions shall be designed among other purposes to lessen congestion in the streets; to conserve health; to secure safety from fire, panic and other dangers; to provide adequate light and air; to prevent over crowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks and other public requirements; to conserve
additional ones. The preamble has modified that part of the former Section 3 concerning the adequate provision of certain public requirements by expressly including water supply, drainage and open space. To the provision addressing the conservation of land, the preamble added the objectives of the conservation of natural resources and the prevention of blight and pollution of the environment. Encouragement of appropriate land use should now include "consideration of the recommendations of the master plan, if any, adopted by the planning board and the comprehensive plan, if any, of the regional planning agency." An entirely new suggested objective is to encourage housing for persons of all income levels.

The preamble then enumerates specific areas which may be restricted, prohibited, permitted or regulated. Many of these areas were addressed by the former Section 2. The preamble has modified or deleted some provisions, and added some new areas that are spec-

the value of land and buildings; to encourage the most appropriate use of land throughout the city or town; and to preserve and increase its amenities." G.L. c. 40A, §3 c. 808.

There has been a slight change in two of these purposes which does not seem significant. The provision to "prevent overcrowding of land; to avoid undue concentration of population; ..." is separated by a comma rather than a semicolon in the preamble, 1975 Mass. Acts c. 808, § 2A. These phrases could be read to mean that the prevention of overcrowding should be for the purpose of avoiding an undue concentration of population rather than as two separate purposes of zoning.

For a discussion of this change, see MASS. H.R. REP. NO. 5009, 1972 Sess., 12-13. Consideration of the regional agency's comprehensive plan comports with other changes in the Zoning Act that facilitate regional cooperation concerning zoning regulations which affect a community larger than the city or town promulgating the regulations. See G.L. c. 40A, §§5, 8 (New Act).

This section apparently attempts to clarify the legislature's intent to authorize the prohibition of particular areas. There had been some confusion as to whether the words "regulate" and "restrict" used in the former Section 2 encompassed outright prohibition.

Section 2 provided in relevant part:

For the purpose of promoting the health, safety, convenience, morals or welfare of its inhabitants, any city, except Boston and any town, may ... regulate and restrict the height, number of stories, and size of buildings and structures, the size and width of lots, the percentage of lot that may be occupied, the size of yards, courts and other open spaces, the density of population and the location and use of building, structures and land for trade, industry, agriculture, residence or other purposes; ... For any or all of such purposes a zoning ordinance or by-law may divide the municipality into districts of such number and shape and area as may be deemed best suited to carry out the purposes of this chapter, and within such districts it may regulate and restrict the erection, construction, reconstruction, alteration or use of buildings, and structures, or use of land, and may prohibit noxious trades within the municipality or any specified part thereof .... A zoning ordinance or by-law may provide that lands deemed subject to seasonal or periodic flooding shall not be used for residence or other purposes in such a manner as to endanger the health or safety of the occupants thereof.

G.L. c. 40A, §2.
§15.8 ZONING AND LAND USE

cifically subject to zoning regulations. There is no longer any express authorization for the division of a city or town into zoning districts. Given the theoretical change of the new Act this may well have been superfluous, since such division is, at least in theory, fundamental to the concept of zoning. In addition, the provision authorizing the regulation of the erection, construction, reconstruction and alteration of buildings and structures has been deleted. This change reflects decisions of the Supreme Judicial Court concerning the respective spheres of operation of zoning laws and building codes. The former are designed "to stabilize the use of property and to protect an area from deleterious uses.... [whereas] a building code 'relates to the safety and structure of buildings.'" 7 There is a corresponding change in Section 3 of the new Act which prohibits ordinances or by-laws from regulating or restricting materials or methods of construction governed by the state building code. 8

As under Section 2 of the former act, the preamble provides that uses of land, including certain flood plains, may be regulated. 9 The provision that lands subject to flooding not be used in such a manner as to endanger the occupants' health or safety, however, has been omitted. The preamble also specifically mentions that wetlands are an area subject to zoning regulation. 10 In this case, also, there was a corresponding limitation in Section 3 that municipalities cannot exempt land or structures from the state's flood plain or wetlands legislation. 11 Of the particular aspects of buildings and structures which may be regulated the preamble omits only the number of stories and the enumeration of the particular uses of structures which may be regulated. 12 The bulk of a building or structure is expressly subject to regulation, and signs are included within the meaning of the word "structure." 13 Further, the preamble expressly recognizes that signs are subject as well to the law relating to outdoor advertising. 14

According to the preamble, noxious uses remain susceptible to zoning regulation, 15 as do the areas and dimensions of land to be occupied or unoccupied courts, yards and open spaces. 16 The latter pro-

8 G.L. c. 40A, §3 (New Act).
10 Id.
11 G.L. c. 40A, § 3.
13 Id., § 2A(2).
14 Id. See G.L. c. 93, §§ 29-33; G.L. c. 93D. See § 15.15 infra for a discussion of John Donnelly & Sons, Inc. v. Outdoor Advertising Bd., a case in which the Supreme Judicial Court considered the interrelationship between the outdoor advertising statutes and local zoning regulations.
vision appears to be a new characterization for three areas delineated by the former Section 2: size and width of lots; size of yards, courts and other open spaces; and percentage of lot that may be occupied.17

The preamble also authorizes the regulation of density of population and intensity of use.18 New provisions in the preamble specifically allow regulation of uses of bodies of water, including water courses;19 areas and dimensions of bodies of water;20 accessory facilities and uses;21 and the development of the natural, scenic and aesthetic qualities of the community.22

Limitations of Zoning Ordinances and By-Laws. The limitations of zoning ordinances and by-laws under the Zoning Enabling Act23 included the exception of Boston from the operation of the act; the exemption of religious and educational uses from zoning ordinances and by-laws which prohibited or limited such uses; a maximum floor area requirement, 768 square feet, for a single family residence; the requirement of uniformity within a district; and the requirement of uniformity among districts with similar characteristics. Section 5 of that act24 contained special provisions limiting the application of zoning regulations to agricultural, horticultural and floricultural uses. The creation of “floating zones” was prohibited by Section 6.25 Exemptions for public service corporations were provided for in Section 10.26

Sections 3 and 4 of the new Zoning Act27 have omitted a few of these limitations, significantly modified others, and added three new limitations. The prohibition of floating zones in Section 328 remains substantially similar to the one contained in the former Section 6. The requirement of uniform treatment within a district for each class and

rather than “other open spaces” as in the former Chapter 40A, see MASS. H.R. REP. NO. 5009, 1972 Sess. at 13-14, 16-17.

17 G.L. c. 40A, § 2.
18 1975 Mass. Acts c. 808, § 2A(6). While population density was within the scope of regulation of the Zoning Enabling Act, intensity of use was not, G.L. c. 40A, § 2.
20 Id., § 2A(5).
21 Id., § 2A(7). Such facilities and uses were implicitly subject to regulation under G.L. c. 40A, since they were dependent upon the main use. See Town of Needham v. Winston Nurseries, Inc., 330 Mass. 95, 101, 111 N.E.2d 453, 457 (1953).
23 G.L. c. 40A, § 2.
24 Id., § 5.
25 Id., § 6.
26 Id., § 10.
28 Id., § 3. “The term ‘floating zone’ refers to a zone or district originally created by a legislative act, the boundaries of which are not located at the same time on the zoning map.” MASS. H.R. REP. NO. 5009, 1972 Sess. at 24-25.
kind of structure or use permitted, now contained in Section 4, has not significantly changed in the new version.

The most serious and conspicuous omission from the new Act is that the city of Boston is not specifically excepted from its operation. The legislative history, however, indicates that although the inclusion of Boston within the purview of Chapter 40A was considered, it was not recommended. In addition, the proposed technical divisions amendment to chapter 808 would amend the new Zoning Act to except Boston. Moreover, it is unlikely that the legislature's omission would be construed as a repeal of the Boston Zoning Act, the separate enabling legislation for Boston. Thus it seems doubtful that the new Zoning Act would be applied to the city of Boston. A second requirement omitted from the new Zoning Act mandated that zoning regulations “shall be the same for zones, districts or streets having substantially the same character.” This requirement may have been dropped because it was considered to be at odds with the legislature’s intent that zoning be utilized as a more flexible tool for land use planning.

Under Section 5 of the former Chapter 40A, cities and towns were prohibited from regulating the non-use of nonconforming land previously used for agricultural, horticultural or floricultural purposes, if the condition of non-use had existed for less than five years. Furthermore, they could not prohibit, among other things, the expansion of nonconforming buildings or land used primarily for those purposes. The new Act omits the five-year nonconforming use protection. Although the new Section affords greater protection for the initial establishment of these uses, it also imposes less stringent limitations on the zoning powers of municipalities relating to agricultural, horticultural and floricultural uses. It provides that no zoning ordinance or by-law shall prohibit, unreasonably regulate or require a special permit for the use of land for such primary purposes, or prohibit or unreasonably regulate the expansion or reconstruction of existing structures on the land. These provisions are subject to the exception that agriculture, horticulture and floriculture may be limited to parcels greater than five acres in areas not zoned for those purposes.

29 Id., § 4.
32 St. 1956, c. 665.
33 G.L. c. 40A, § 2.
34 G.L. c. 40A, § 5.
35 Id.
36 G.L. c. 40A, § 3 (New Act).
37 Id.
38 Id.
39 Section 3 also provides that land divided by a public or private way or a waterway be considered as one parcel for determining the five-acre minimum. G.L. c. 40A, § 3 (New Act).
In a departure from the maximum floor area requirement, 768 square feet, allowed by the former Section 2, under the new Act municipalities may no longer regulate or restrict the interior area of a single family residential dwelling. The provisions applicable to religious and educational uses have also been changed in two important respects. Land or structures used for such purposes are still afforded protection from zoning ordinances or by-laws which would prohibit or limit them. They may be subjected, however, "to reasonable regulations concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements." Secondly, the educational purposes which qualify for Section 3's protection are more clearly defined. Section 2 of the former act had defined them as religious, sectarian, denominational or public. Section 3 defines the relevant educational purposes in terms of the ownership of the land on which they are carried on. Specifically, if the land is owned or leased by the state, its agencies, subdivisions or bodies politic, or by a religious sect or denomination, or by a nonprofit educational corporation, the use falls within the ambit of Section 3. This change may eliminate whatever confusion was generated by the use of the terms religious, sectarian and denominational as separate categories. Its major effect seems to be to require that an association which might have fallen into one of those categories, but not "religious sects or denominations," must be incorporated for nonprofit educational purposes. The intention of the

40 G.L. c. 40A, § 2.
42 G.L. c. 40A, § 3 (New Act).
43 Id. This change is in accordance with two cases decided upon the issue by the Supreme Judicial Court. In Sisters of the Holy Cross v. Town of Brookline, 347 Mass. 486, 494, 198 N.E.2d 624, 631 (1964), noted in 1964 ANN. SURV. MASS. LAW § 14.5, the Court held that the town of Brookline's imposition of dimensional requirements applicable to single family dwellings on a proposed dormitory, chapel and student center of a sectarian college would limit the use of the order's land within the meaning of G.L. c.40A, § 2. The Court suggested, however, that some type of dimensional requirements might be imposed that might not limit land use for religious or educational purposes. Id. at 492, 198 N.E.2d at 629. A second case, Radcliffe College v. City of Cambridge, 350 Mass. 613, 618, 215 N.E.2d 892, 896 (1966), noted in 1966 ANN. SURV. MASS. LAW § 15.1, allowed the application of off-street parking requirements to the college's use of the land. The language of Section 3 of the new Zoning Act appears to be an adoption and clarification of these two cases. It is suggested that the dimensional requirements authorized therein must be particularized to the educational or religious use to remain within both Section 3 and Holy Cross. For the applicable effective date provisions as to this part of Section 3, see §15.1 supra.
44 G.L. c. 40A, § 2.
45 G.L. c. 40A, §3 (New Act).
The legislature was probably to insure that only bona fide educational uses were exempted from otherwise applicable zoning requirements.\(^{47}\) Although this may result, it does not necessarily follow that the class of beneficiaries will be decreased by making the standard of the state’s nonprofit corporation laws\(^ {48}\) applicable.

There has been a significant modification in the provisions of the new Zoning Act allowing exemptions for structures and land used for public service corporations.\(^ {49}\) The former Section 10 had stated that a public service corporation\(^ {50}\) could petition to the Department of Public Utilities in order to gain an exemption from local zoning ordinances or by-laws. In order to grant the exemption the department had to find, after public notice and hearing, that the present or proposed situation of the building, structure or land was reasonably necessary to the convenience or welfare of the public.\(^ {51}\) Section 3 of the new Act adds to these requirements that the exemption may be directed to particular aspects of the zoning ordinance or by-law rather than the entire regulation.\(^ {52}\) In addition, the required notice by the Department of Public Utilities must be given according to Section 11 of the new Act,\(^ {53}\) and the hearing must be held in the city or town in question. The change in notice procedures rejects a recent ruling of the Supreme Judicial Court under Section 10 of the former act, which held that notice given pursuant to department regulations was sufficient.\(^ {54}\) The new standard to be applied by the department in considering the exemption requires not only a finding that the present or proposed use of the land or structure is reasonably necessary for the public convenience or welfare, but also a determination that the exemption is required.\(^ {55}\) The new Zoning Act, unlike its predecessor, contains specific provisions by which a consolidated public hearing may be held in one municipality in situations in which the corporation has structures or lands located in more than one city or town.\(^ {56}\) Notice

\(^{47}\) The legislature apparently has assumed that the application of the standard of the state’s non-profit incorporation laws would result in a determination of a group’s bona fide educational purpose.

\(^{48}\) G.L. c. 180.

\(^{49}\) G.L. c. 40A, §3 (New Act).


\(^{51}\) G.L. c. 40A, §10.

\(^{52}\) G.L. c. 40A, §3 (New Act).

\(^{53}\) Id. §11.

\(^{54}\) Save The Bay, Inc., v. Department of Pub. Util., 1975 Mass. Adv. Sh. 139, 152, 322 N.E.2d 742, 751 (1975). But since the actual issue in \textit{Save the Bay} was whether abutters of abutters were entitled to notice and since Section 11 omits this class as parties in interest for notice purposes, the narrow holding of the decision with respect to notice has not been disturbed.

\(^{55}\) G.L. c. 40A, § 3 (New Act).

\(^{56}\) Id.
to all affected communities is required, presumably in addition to notice pursuant to Section 11. The requirements of Section 3 for this special situation are otherwise the same as those of its predecessor.

The new Act, as was the former Chapter 40A, is silent as to whether local zoning regulations apply to governmental property use. The Supreme Judicial Court has interpreted this silence to mean that the state is generally immune from local zoning control. There appears to be no reason to assume that this interpretation will change under the new Act.

The new limitations contained in Section 3 prohibit zoning ordinances or by-laws from regulating or restricting the use of materials or methods of construction of structures regulated by the state building code. A second limitation prohibits localities from exempting land or structures from flood plain or wetlands regulations enacted by the legislature. Finally, Section 4 of the Zoning Act requires that zoning districts shall be mapped in a manner sufficient for identification, and that zoning maps shall be part of zoning ordinances or by-laws.

§15.9. Zoning: Special Permits. Section 9 of the new Zoning Act performs two distinct functions. First, it makes several substantive and procedural changes in the law relating to special permits previously contained in Section 4 of the Zoning Enabling Act. Second, it presents a significant number of innovative ways in which municipalities may utilize the special permit device. The former Section 4 provided that:

A zoning ordinance or by-law may provide that exceptions may be allowed to the regulations and restrictions contained therein, which shall be applicable to all of the districts of a particular class and of a character set forth in such ordinance or by-law. Such ex-

57 Id.; see id., § 11.
60 G.L. c. 40A, § 3 (New Act).
61 Id., § 4.

§15.9. 1 G.L. c. 40A, § 9 (New Act).
2 The procedural changes are discussed in § 15.3 supra.
4 Most of these uses of the special permit device had been utilized by some municipalities previously. The thrust of the new section is apparently to foster more widespread use of these techniques for innovative land use. See Mass. H.R. Rep. No. 5009, 1972 Sess. at 30.
exceptions shall be in harmony with the general purpose and intent of the ordinance or by-law and may be subject to general or specific rules therein contained. The board of appeals [or other authority]...may, in appropriate cases and subject to appropriate conditions and safeguards, grant to an applicant a special permit to make use of his land or to erect and maintain buildings or other structures thereon....

Section 9 of the new Act makes several changes in, and additions to, these basic provisions. It mandates, rather than permits, that zoning ordinances or by-laws provide for "...uses which shall only be permitted in specified districts upon the issuance of a special permit...." In addition, the term "exception," which was used in the former act to describe this traditional function of the special permit, has been deleted. It is no longer required that specially permitted uses be applicable to all districts sharing the same class or character. As under the former law, the use of the special permit power by the designated permit-granting authority is discretionary unless otherwise provided by local ordinance or by-law.

The standard applicable to the granting of special permits has been changed in part. The use must still be found to be in harmony with the general purpose and intent of the ordinance or by-law. According to the new Section 9, however, it is also mandatory that the use be subject to general or specific provisions set forth in the ordinance or by-law. The former Section 4 had made this provision permissive. This had resulted in judicial decisions striking down local zoning ordinances on the grounds that they did not provide "...standards sufficient to channel the discretion exercised by the local board in the issuance of permits...." Section 9's mandatory character should obviate this problem. The former Section 4 had also provided that the board of appeals could impose conditions and safeguards upon the issuance of a special permit. Section 9 expands this language to include not only conditions and safeguards, but also limitations which may be imposed on "time" as well as "use."

5 G.L. c. 40A, § 4 (emphasis added).
7 The legislative history indicates that the term was considered a misnomer since no exception was usually involved. "Rather, the special permit is granted only for uses specifically authorized by the ordinance where it is appropriate to 'condition' the use or control its density or location...." MASS. H.R. REP. NO. 5009, 1972 Sess. at 31 (emphasis in original).
8 G.L. c. 40A, § 9 (New Act).
9 Id.
10 Id.
Finally, the section also addresses the questions of the period for which special permits remain effective and the treatment of accessory uses to scientific research, development, and related production.\textsuperscript{13} As to the first question, Section 9 mandates that zoning ordinances or by-laws provide that a special permit shall lapse within a designated period of time from the time it was granted unless a substantial use has commenced or, when appropriate, construction has begun prior to the expiration date.\textsuperscript{14} The time period, which may not exceed two years, includes the time required to pursue or await determination of a judicial appeal.\textsuperscript{15} In reference to the second question, Section 9 requires that ordinances or by-laws provide special permits for a class of uses accessory to scientific activities subject to several qualifications. To fall within the statutory provision the proposed use must be accessory to activities permitted as a matter of right.\textsuperscript{16} These activities, in turn, must be necessary in connection with scientific research, development, or related production. The use need not, however, be located on the same parcel as the activities permitted as a matter of right. The accessory use may then be specially permitted following a finding by the granting authority that it does not substantially derogate from the public good.\textsuperscript{17}

In furtherance of its second function, suggesting flexible uses for the special permit device, Section 9 lists four distinct categories for which the device is appropriate: the development bonus, the permitting of multi-residential uses in nonresidentially zoned areas, the cluster development, and the planned unit development.\textsuperscript{18} If a community provides for these types of special permits in its ordinances or by-laws, it must comply with further provisions of Section 9 which govern their implementation. The first category, the development bonus, essentially provides for an increase in permissible density or intensity of use in return for specified amenities from a developer.\textsuperscript{19} The types of amenities, the provision of which condition the grant, include "... open space, housing for persons of low or moderate income, traffic or pedestrian improvements, or other amenities...."\textsuperscript{20} It is mandatory that ordinances or by-laws that adopt this device designate the improvements, amenities, or locations of proposed uses that condition the granting of the special permit. "[T]he maximum increases in density of population or intensity of use which may be authorized" must also be specifically stated in the local law.\textsuperscript{21}

\textsuperscript{13} Id.
\textsuperscript{14} Id.
\textsuperscript{15} Id.
\textsuperscript{16} Id.
\textsuperscript{17} Id.
\textsuperscript{18} Id.
\textsuperscript{19} Id.
\textsuperscript{20} Id.
\textsuperscript{21} Id.
The second suggested use for the special permit device, allowing multi-family residential use in a nonresidentially zoned area, is governed by a three-pronged standard.\(^{22}\) First, the mixing of these uses is subject to the general requirement that the public good be served. Secondly, prior to issuing a special permit the permit-granting authority must find that the nonresidential area would not be adversely affected by the residential use. Finally, the authority must also find that the permitted uses in the nonresidential district are not noxious to the proposed residential use.

The third permissible category, the cluster development, is defined by Section 9 as "... a residential development in which the buildings and accessory uses are clustered together into one or more groups separated from adjacent property and other groups within the development by intervening open land. ..."\(^{23}\) If adopted, this particular type of use is subject to several mandatory provisions that are contained in Section 9 and Section 2 of the new Act. First, Section 9 permits cluster developments only on a plot of land that is divided into building lots and open land. More specifically, the plot must be of a minimum size, which the ordinance or by-law may specify, and dimensional control, density and use restrictions of the lots must be at variance with those otherwise permitted by local regulation.\(^{24}\) Secondly, the total land area of the open space and the building lots must be at least equal to the area required for the total number of units proposed in the development.\(^{25}\) Sections 9 and 2 contain somewhat redundant provisions requiring conveyance of the open land in a cluster development. Section 9 requires that "[s]uch open land shall either be conveyed to the city or town and accepted by it for part [sic] or open space use, or be conveyed to a non-profit organization the principal purpose of which is the conservation of open space, or to be conveyed to a corporation or trust owned or to be owned by the owners of lots or residential units within the plot. ..."\(^{27}\) Section 2 is substantially similar except that it specifically requires that the special

\(^{22}\text{Id.}\)

\(^{23}\text{Id.}\)

\(^{24}\text{Id.}\)

\(^{25}\text{Id. This particular requirement would be struck by the technical revisions amendment to Chapter, 808 Mass. H.R. 4358, 1976 Sess. § 9. As now in force the provision may have two undesirable effects. The first effect might be to foreclose the use of the "development bonus" in the cluster development. The second corollary effect might be to remove the incentive for developers to pursue cluster developments, an arguably more attractive alternative to the standard rectangular tract method of development. This is particularly so not only in light of the provision's conflict with the "development bonus" concept, but also in view of the further requirement of Section 9 relating to the mandatory conveyance of open land. See text at notes 26-27 infra.}\)

\(^{26}\text{G.L. c. 40A, § 9 (New Act). Mass. H.R. 4358, 1976 Sess., § 10, the technical revisions bill, would amend the word "part" to read "park."}\)

\(^{27}\text{G.L. c. 40A, § 9 (New Act).}\)
permit for the cluster development provide for a conveyance, and in reference to the last type of conveyance describes "lots or residential units within the land" rather than within the "plot." The legislative purpose for this repetition is unknown. It would be corrected, however, by the proposed technical revisions amendment which would strike Section 2 in its entirety.

Section 9 further provides that if a corporation or trust owned by residential lot or unit owners is the alternative chosen, then "ownership [of the corporation or trust] shall pass with conveyances of the lots or residential units..." Finally, in order to guarantee the preservation of the open land in situations in which it is not conveyed to the city or town, Section 9 mandates that "a restriction enforceable by the city or town shall be recorded..." The restriction must provide that the "land shall be kept in an open or natural state and not be built [sic] for residential use or developed for accessory uses such as parking or roadway."

The fourth category of special permits, the planned unit development, although also a flexible zoning tool, is qualitatively different from the cluster development. Unlike the clustering method, it may combine on one plot a mixture of uses—residential, open space, commercial, industrial or others—and a variety of building types. This type of development is also subject to further requirements under Section 9. The plot of land for a proposed development must be of a minimum size, "the lesser of sixty thousand square feet or five times the minimum lot size of the zoning district..." A larger size may be required by the local ordinance or by-law. The statutory standard by which the authorization of a planned unit development must be measured requires a determination that a mixture of uses and a variety of building types are "sufficiently advantageous" to render a departure from the usual requirements appropriate, to the extent that such a departure has been authorized by ordinance or by-law. Thus, Section 9 does not mandate in the first instance the degree to which municipalities may waive normal requirements in order to accommodate planned unit developments. It does implicitly require that some standards for such accommodations be included in ordinances or by-laws. Particular applications of these standards are then to be tested by the standards of "sufficient advantage" and "appropriateness" contained in Section 9.

28 Id. § 2.
31 Id.
32 Id.
33 Id.
34 Id.
35 Id.
36 Id.
The primary goal of Section 9, the promotion of the special permit as a tool for flexible and innovative zoning, will only be achieved if municipalities allow it to be. The section’s effectiveness, therefore, cannot be measured at the present time.

§15.10. Nonconforming Uses: Permits Issued Prior to Notice: Status of Undeveloped Lots. Under the former Chapter 40A, there were three basic situations in which zoning ordinances or by-laws did not become effective as to particular buildings, structures, lots and uses. Section 5 rendered ordinances, by-laws, and amendments inapplicable to existing nonconforming structures, or uses of structures and land. Sections 5A and 7A protected undeveloped lots. Finally, Section 11 provided that under specified circumstances ordinances or by-laws could not affect permits issues or work begun prior to notice of the hearing on their adoption or amendment. The new Zoning Act, in Section 6, addresses all three situations.

The first paragraph of Section 6 combines the subjects of nonconforming uses and structures, and the application of ordinances and by-laws to permits and work in progress prior to notice of an impending change. The main purpose for this consolidation was apparently to make the operative date for both protections the same. That date now coincides with the first publication of notice for the public hearing required by Section 5 of the new Act. Since there are different changes in the law affecting each situation, however, they will be treated separately here. The former Section 57 had provided, in part, that newly adopted or amended zoning ordinances or by-laws were not applicable to buildings, structures, or land, or uses thereof in existence at the time of adoption or amendment. Such ordinances or by-laws did apply to any change of use or alteration that amounted to reconstruction, extension, or structural change, or to alterations for the purposes of either a substantially different use or for use for the same purpose to a substantially greater extent. In addition to these limitations, Section 6 of the new Zoning Act expressly provides that ordinances or by-laws shall apply to substantial extensions of use independent of structural extensions or alterations. This change appears to be in accordance with the standards applied to nonconforming uses by the Supreme Judicial Court. Furthermore, an exception is

§15.10. 1 G.L. c. 40A, § 5.
2 Id., §§ 5A, 7A.
3 Id., § 11.
4 G.L. c. 40A, § 6 (New Act).
5 Id.
6 Id.
7 G.L. c. 40A, § 5.
8 G.L. c. 40A, § 6 (New Act).
9 See Powers v. Building Inspector, 363 Mass. 648, 662-63, 296 N.E.2d 491, 500 (1973), noted in 1973 ANN. SURV. MASS. LAW § 12.28. Under this new language, a question still remains as to when or if a change in the degree of use, as opposed to the quantity or nature of use, will constitute an extension of use.
indicated for the alteration, reconstruction, extension or structural change of one- or two-family residences that do not increase their nonconforming nature.\textsuperscript{10} Under Section 6 a pre-existing use is permissible, but must be preceded by a finding by the permit- or special-permit-granting authority that it “shall not be substantially more detrimental than the existing use to the neighborhood.”\textsuperscript{11} As has been previously decided by the Supreme Judicial Court, the protections for nonconforming uses do not apply to billboards, signs and other advertising devices.\textsuperscript{12}

Section 5 had also provided that cities and towns could regulate the nonuse of nonconforming structures so as not to prolong unduly the life of nonconforming uses.\textsuperscript{13} Applications of this provision have been unsuccessful because the Court required a showing of intent to abandon the use rather than of mere nonoccupancy and lapse of time.\textsuperscript{14} The new Act, however, has resolved this issue by permitting municipalities to define and regulate nonconforming uses and structures that have been abandoned or not used for two years or more.\textsuperscript{15}

The former Section 11,\textsuperscript{16} unlike Section 5, provided that zoning ordinances or by-laws were not effective as to permits issued or buildings or structures lawfully begun before notice of the hearing before the planning or zoning board or, in towns, issuance of the warrant for the town meeting. This protection was subject to two conditions: first, construction under the permit was required to commence within six months after issuance of the permit; second, the work had to proceed “in good faith continuously to completion so far as is reasonably practicable under the circumstances.”\textsuperscript{17} So long as the city or town proceeded without unreasonable delay to adopt or amend the ordinance or by-law in question, its violation subsequent to notice would not be justified. Section 6 modifies these provisions. First, it specifies that building permits and special permits\textsuperscript{18} are included within the section’s protection. Second, the conditions upon which the statutory pro-

\begin{footnotes}
\item[11] Id.
\item[16] G.L. c. 40A, § 11.
\item[17] Id.
\item[18] G.L. c. 40A, § 6 (New Act). It is to be noted that Section 6 uses the language “building or special permits issued before the first publication...” Id. (emphasis added). The effective date for special permits, on the other hand, is the date of certification by the city or town clerk. Id., § 11. See § 15.3 supra for a discussion of the effective date. Some problem of interpretation may arise as to whether the date of issuance is the date the special permit is granted—the date of the granting authority’s decision—or the effective date according to Section 11 of the new Zoning Act.
\end{footnotes}
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tection continues have been altered. According to Section 6, the use or construction authorized by the permit must commence "within a period of not less than six months" after its issuance. The intent of the legislature was undoubtedly that the activity must commence within a period of not more than six months as formerly provided by Section 11. This alteration appears to have been unintentional. The language requiring continuous completion of construction has been slightly modified by omitting the words "in good faith" and requiring instead that the work proceed "expeditiously." It is doubtful that this change is significant since the Court has already held that the failure to proceed continuously under Section 11 was not excused simply because a lack of good faith was not found. Finally, the requirement that the city or town proceed without unreasonable delay to enact the ordinance or amendment has also been omitted. It is possible that this provision was considered unnecessary in view of the time limits, in Section 5 of the new Act, within which adoption or amendment must take place.

B. Decisions

§15.11. Open Housing: Snob Zoning. Open housing advocates met with success in both state and federal courts during the 1976 Survey year. In three Massachusetts cases, the Supreme Judicial Court continued to delineate the scope of the Massachusetts Anti-Snob Zoning Act.

The statute was read broadly in Board of Appeals of Maynard v. Housing Appeals Committee in which the Court rejected all eight challenges to a comprehensive permit ordered by the Housing Appeals Committee (HAC). First, the Court held that a decision by only three members of the Committee was valid when two of the usual five members were no longer active at the time of the decision. The HAC's order was also upheld under the Massachusetts Administrative Procedure Act. A majority of the three deciding officials

20 G.L. c. 40A, § 11.

3 Id. at 904, 345 N.E.2d at 384. Under G.L. c. 23B, § 5A, the Housing Appeals Committee is to consist of five members.
4 That act, G.L. c. 30A, § 11(7), provides in pertinent part:
If a majority of the officials of the agency who are to render the final decision have neither heard nor read the evidence [there must be a] tentative or proposed

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had either heard or read the evidence, and the board had received "a document tantamount to a proposed decision"\(^5\) and was given an opportunity to object. Thus, the Court concluded that both alternative prongs of the Administrative Procedure Act's validity standard had been satisfied.\(^6\)

Next, the Court acknowledged the Housing Appeals Committee's authority to require compliance with the Massachusetts Environmental Protection Act.\(^7\) As to the town's claim that the site was a "wetland" requiring approval under the Hatch Act,\(^8\) the Court directed the objection to the remedial provisions of that statute.\(^9\)

Turning to the eligibility of the developer, the Court liberally construed the term "limited dividend organization,"\(^10\) thus permitting the project to qualify as "low or moderate income housing."\(^11\) Although the developer had not become a "duly organized limited partnership"\(^12\) until after its application had been denied by the town Board of Appeals, the HAC considered it an "organization" as of the time of its application to the board. Consequently, because it was an organization eligible to receive a subsidy, the developer was a "limited dividend organization" under HAC Rules and Regulations \S (f).\(^13\) The Court affirmed this interpretation of the term.

In another aspect of the case, the Court allowed the Housing Appeals Committee to avoid a local veto power by modifying the permit.\(^14\) Under the Anti-Snob Zoning statute, local regulations are deemed "consistent with local needs" if "the application ... would result in commencement of construction ... on ... more than ... 10 acres ... in any one calendar year."\(^15\) In such cases, only the local board can override local requirements and regulations in order to grant a comprehensive permit. Here, the permit was requested for a tract exceeding 16 acres. However, the HAC's order limited the development to 10 acres, thus exempting the developers from local regulations.\(^16\)

Finally, the Court rejected the town's contention that a sewer extension required by the Committee would not receive the approval of

\(^6\) Id.
\(^7\) G.L. c. 30, §§ 61-62.
\(^8\) G.L. c. 131, § 40.
\(^10\) Id. at 905-06, 345 N.E.2d at 385. See G.L. c. 40B, § 20.
\(^12\) Id., 345 N.E.2d at 385.
\(^13\) Id.
\(^14\) Id. at 906, 345 N.E.2d at 385.
\(^15\) G.L. c. 40B, § 20.
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local voters, as was required by town law. If a successful vote was impossible, the Court stated, that requirement could be dispensed with by the HAC as a regulation not consistent with local needs.\(^{17}\) The Court's rulings on each facet of the \textit{Maynard} case indicate its reluctance to allow the Anti-Snob Zoning Act to be easily circumvented. Challenges more substantial than those presented in \textit{Maynard} were considered and rejected in \textit{Bailey v. Board of Appeals of Holden.}\(^{18}\) There, the board of appeals had granted the Holden Housing Authority a comprehensive permit for the construction of housing for the elderly.\(^{19}\) The petitioners owned a portion of the situs and challenged the permit on constitutional and statutory grounds. First, the Court held that the authority was not constitutionally required to hold a public hearing before selecting a site for the construction.\(^{20}\) The Court stated, "t\[he determination of what property is to be taken and used for public housing is a legislative function, not requiring a prior hearing as a matter of constitutional right."\(^{21}\) In a footnote, the Court added that the board's decision had not been arbitrary.\(^{22}\) Next, the Court reaffirmed an earlier ruling\(^{23}\) that an applicant for a comprehensive permit under chapter 40B need not own the site at the time the application is made. Thus, the \textit{Bailey} Court held that it was sufficient that the housing authority had taken serious steps toward completion of the requirements for a permit.\(^{24}\) Third, the Court held that a local housing authority is "not required to file an environmental assessment form and an environmental impact report before seeking a comprehensive permit ...."\(^{25}\) Although the authority had filed an environmental assessment form, the Court did not examine the procedure followed because of its holding that the authority is exempt from the environmental regulations.\(^{26}\) Finally, the findings made by the board, although conclusory, were held sufficient to support its decision. The board's finding that the permit would be "reasonable and consistent with local needs"\(^{27}\) was supported by a further finding that the town's obligations to provide low and moderate income housing for the elderly had not been met

\(^{17}\) \textit{Id.} at 907-08, 345 N.E.2d at 385-86.
\(^{19}\) \textit{Id.} at 945, 345 N.E.2d at 368. \textit{See also} Reid v. Acting Comm'r of Dep't of Community Affairs, 362 Mass. 136, 284 N.E.2d 245 (1972).
\(^{21}\) \textit{Id.} at 947, 345 N.E.2d at 369.
\(^{22}\) \textit{Id.} at 947 n. 4, 345 N.E.2d at 382 n.4.
\(^{25}\) \textit{Id.}
\(^{26}\) \textit{Id.} at 949 n.5, 345 N.E.2d at 370 n. 5.
\(^{27}\) \textit{See} G.L. c. 40B, § 23.
and that there was a demonstrated need for such housing.\textsuperscript{28} While the Court accepted these findings as an adequate basis for the granting of the permit, it warned that "the board's opinion would have been more satisfactory if it had recited subsidiary facts on which those ultimate findings of fact were based ...."\textsuperscript{29} This admonition suggests that, while the Court will be vigilant to uphold the purpose of the Anti-Snob Zoning Law, applicants must be equally careful to fulfill the statute's requirements.

A limitation on the scope of Chapter 40B, sections 20-23 was recognized in \textit{Town of Chelmsford v. DiBiase}.\textsuperscript{30} The Court in that case held that the Housing Appeals Committee's authority to override local "requirements and regulations" does not include the power to override a town's good faith exercise of its power of eminent domain.\textsuperscript{31}

In June and November, 1971, the Chelmsford town meeting considered taking a certain tract of land by eminent domain for conservation purposes.\textsuperscript{32} On December 6, 1971, the owners of the tract applied for a comprehensive permit to build low and moderate income housing. Three weeks later, a special town meeting voted to take the proposed site. The board of appeals subsequently denied the pending permit application.\textsuperscript{33} However, the developers' appeal to the Housing Appeals Committee was successful, and the comprehensive permit was granted on April 10, 1974.\textsuperscript{34} Subsequently, the superior court, in a separate action, found that the taking was valid and voided the comprehensive permit.\textsuperscript{35} The developers and the HAC appealed. The Supreme Judicial Court granted direct review and affirmed, holding that the power of the local board and the HAC to override local "requirements and regulations" does not include authority to override a taking made in good faith and for a public purpose.\textsuperscript{36} The Court distinguished between a taking and "requirements and regulations." While the latter are limitations on an owner's use of his own property, a taking is a transfer of ownership. "If [a taking] is overridden, the effect is not to remove limitations on the rights of the owner but to change the ownership."\textsuperscript{37} If the legislature had intended to allow a permit-granting authority to abridge the inherent sovereign taking power, the Court concluded, it would have been specific.\textsuperscript{38} Consequently, the Court upheld the taking as well as the voiding of the comprehensive permit.

\textsuperscript{29} \textit{Id.} at 950, 345 N.E.2d at 370.
\textsuperscript{31} \textit{Id.} at 938, 345 N.E.2d at 374.
\textsuperscript{32} \textit{Id.} at 938, 345 N.E.2d at 374.
\textsuperscript{33} \textit{Id.} at 939-40, 345 N.E.2d at 374.
\textsuperscript{34} \textit{Id.}
\textsuperscript{35} \textit{Id.} at 941, 345 N.E.2d at 384.
\textsuperscript{36} \textit{Id.} at 938, 345 N.E.2d at 374.
\textsuperscript{37} \textit{Id.} at 943, 345 N.E.2d at 375.
\textsuperscript{38} \textit{Id.} at 944, 345 N.E.2d at 375-76.
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The Maynard, Holden and Chelmsford cases give some indication of how far the Court is willing to go to assure the efficacy of the Anti-Snob Zoning Law. In Maynard and Holden the Court construed the statute broadly so as to allow its provisions and intent to be implemented. Nevertheless, the Court drew the line in the Chelmsford case and refused to read into the statute a restriction on a fundamental attribute of sovereign power.39

On the federal level, the United States Supreme Court, in Hills v. Gautreaux,40 sanctioned interdistrict remedies for discrimination in public housing even when there was no finding of an interdistrict violation. The suit was brought against the Chicago Housing Authority (CHA) and the Department of Housing and Urban Development (HUD) by black tenants in and applicants for federally funded housing in Chicago.41 The plaintiffs alleged that the CHA placed tenants and selected sites for public housing in a racially discriminatory manner.42 In affirming metropolitan area relief the Court distinguished Milliken v. Bradley,43 in which the Court had rejected a metropolitan school desegregation order. The Court stated that the Milliken order was impermissible not because it extended beyond the city in which the violation occurred, but because it restricted the operation of school systems "that were not implicated in any constitutional violation."44 In Hills, however, both the CHA and HUD had authority to operate beyond the borders of Chicago. Accordingly, the Court found that the relevant geographic area for purposes of the available housing options was the Chicago housing market, not the Chicago city limits.45 The order was intended to guide HUD's determination of which locally-authorized developments should receive federal assistance. Thus, the Court concluded, the regulation would not impose federal orders upon unwilling localities, since participation in the federal funding program was voluntary.46

The Court's emphasis on the scope of federal involvement is significant in light of its decision last term in Warth v. Seldin,47 which se-

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39 A comprehensive review of the Anti-Snob Zoning Law, G.L. c. 40B, §§ 20-23, was published in May, 1976 by the Citizens Housing and Planning Association of Metropolitan Boston. The Report recognizes that the law does override some other valid planning considerations, such as environmental concerns and the primacy of local control. Nevertheless, the authors conclude that the statute "is a valuable instrument for the state to provide needed housing for its lower-income residents." CITIZENS HOUSING AND PLANNING ASSN OF METROPOLITAN BOSTON, OVERRIDING THE SUBURBS: STATE INTERVENTION FOR HOUSING THROUGH THE MASSACHUSETTS APPEALS PROCESS 57 (1976).


41 Id. at 286.

42 Id.


44 425 U.S. at 296.

45 Id. at 299.

46 Id. at 303.

47 422 U.S. 490 (1975).
verely narrowed standing requirements for parties seeking to challenge the zoning regulations of a neighboring locality. The Hills decision indicates that, despite the Supreme Court's backslide on the standing issue, the federal courts will, in the proper circumstances, act against discrimination in housing.

§15.12. Zoning: Destruction of Structures Erected in Violation of Zoning By-laws and Ordinances. During the Survey year the Supreme Judicial Court in Building Inspector of Falmouth v. Haddad (Haddad II) reversed part of an Appeals Court decision in the case of the same name rendered last year (Haddad I). The narrow issue before the Court in Haddad II was whether the Court of Appeals was in error in affirming a final decree ordering the removal of a substantially completed building which had been erected by the defendants in knowing violation of a zoning by-law. The defendants, trustees of a realty trust, had acquired a single parcel of land in a district zoned for a single family residential use. Located on the parcel was a large ten-room single family residence, which was subsequently destroyed by fire. The trustees applied for and obtained a building permit to erect a similar structure and shortly thereafter submitted a subdivision plan for the parcel. As a result, the structure at issue was located on Lot 4 of the plan, the original tract purchased having been divided into four lots. Instead of the permitted single family residence, however, defendants began constructing on Lot 4 a twenty-unit motel. Upon learning of this, the building inspector revoked the permit and issued a stop-work order. Moreover, he and other town officials gave repeated notice to the defendants that a special permit was required for construction of the type of building they had been erecting. Despite such notice, the trustees never applied for a special permit. After issuance of the stop-work order the defendants were allowed to "close-in" the building to protect it from inclement weather. The work done in this "closing-in" substantially completed the exterior of the building and included shingling exterior walls, installing decks, sliding glass doors and windows, and putting a roof on. Shortly thereafter the building inspector brought suit to enjoin the trustees from further construction and to require removal of the structure. The superior court ordered such removal and the trustees sought further review.

The Court of Appeals recognized that destruction of buildings erected in violation of zoning laws was a drastic remedy. It found,
however, two compelling reasons for affirming the superior court’s decree. First, the trustees had in bad faith intentionally violated the town’s zoning by-law. Second, the court concluded that the defendants had not met the applicable standard to avoid the remedy of removal, in that the structure was neither usable in conformity with the applicable by-law nor modifiable and usable.\(^9\)

The Supreme Judicial Court rejected both grounds of the decision in *Haddad I* and held that the trustees “must be given . . . an opportunity [to attempt to obtain any permit necessary to adapt the structure to a use permitted as of right or by special permit, and to perform work pursuant to such permit] before being compelled to demolish the present structure . . . .”\(^10\) The trustees’ bad faith, although obvious, did not warrant destruction of the building. It was, however, “. . . unquestioned that . . . the trustees may be enjoined from using the building for any purpose other than a single family residence.”\(^11\) Moreover, the Court of Appeals was in error in undertaking to make a finding as to the possibility of whether the structure was legally usable or modifiable to that end when the superior court had made no findings or rulings on that issue.\(^12\) As a result the Court held further that the superior court should hold additional hearings as necessary directed towards a determination of the issue. If the court made a determination favorable to the trustees, it was to retain jurisdiction of the case in order to insure that the defendants proceed without unreasonable delay. Should the trustees fail, neglect or refuse to make application for permits or to complete work authorized by permits granted, then after hearing the court could order removal of the building.\(^13\)

The Court’s decision in *Haddad II* reflects the reluctance with which the Court approaches the destruction of structures which are in violation of zoning laws and the resultant economic waste. It is characteristic of, and supported by, previous decisions on the issue.\(^14\) However, the new aspect of the standard illustrated by *Haddad II* is that the good or bad faith of the violator is irrelevant, at least when significant economic waste may result. The only indispensable consideration is whether the structure is in some manner usable or adaptable for a use conforming to the applicable zoning regulations. One possible excep-

\(^9\) Id.
\(^11\) Id.
\(^12\) Id. at 68, 339 N.E.2d at 897.
\(^13\) Id. at 68-69, 339 N.E.2d at 897.
tion to this lenient policy may be deduced from the Court's characterization of the defendant's building as "incomplete, but substantial."\textsuperscript{15} It is conceivable, therefore, that the Court would give less weight to considerations of economic waste in situations in which a structure had not reached a substantial stage of completion. The facts in \textit{Haddad II} give some indication of what constitutes a "substantial" structure. The defendants' building had roofs and decks on both stories, all exterior doors and windows had been inserted, and shingles had been applied to exterior walls.\textsuperscript{16} At one end of the spectrum, therefore, is exterior completion. Presumably at the other would be the laying of a foundation. If, in subsequent cases, bad faith violations similar to those in \textit{Haddad II} were found, and the stage of completion of the structure tended towards the lower end of the spectrum, it is conceivable that a different result might obtain. Exactly where the boundaries of substantial completion will be fixed, if at all, must await the further attention of the Court.

\textsection{15.13.} Special Permits: Excavation and Filling of Coastal Marshlands. In \textit{MacGibbon v. Board of Appeals of Duxbury}\textsuperscript{1} (\textit{MacGibbon III}), the Supreme Judicial Court annulled, for the third time in thirteen years, a town's denial of a special permit to fill and excavate certain coastal marshlands. The Court reviewed the facts presented to the superior court\textsuperscript{2} and concluded that the outright denial of the permit by the board of appeals was inappropriate when the environmental problems involved could be solved by imposing certain conditions and safeguards.\textsuperscript{3} The Court thus ordered the board to grant the permit.\textsuperscript{4} \textit{MacGibbon III} is treated in detail later in this chapter.\textsuperscript{5}

\textsection{15.14.} Zoning Appeals Procedure: Non-Jurisdictional Defects. In \textit{Pierce v. Board of Appeals of Carver},\textsuperscript{1} the Supreme Judicial Court considered whether a plaintiff's failure to comply with the requirement of the Zoning Enabling Act that he "shall cause each of the defendants to be served with process within fourteen days after the filing of the complaint ..."\textsuperscript{2} was a procedural defect requiring dismissal of the appeal. The plaintiff had filed an appeal from the board of appeals' decision to grant a special permit.\textsuperscript{3} He had complied with

\textsuperscript{16} Id. at 64, 339 N.E.2d at 895.

\textsection{15.13.} \textsuperscript{1} 1976 Mass. Adv. Sh. 143, 340 N.E.2d 487.
\textsuperscript{2} Id. at 144-47, 340 N.E.2d at 488-89.
\textsuperscript{3} Id. at 155, 340 N.E.2d at 492.
\textsuperscript{4} Id.
\textsuperscript{5} See \textsection{15.16 infra.}

\textsection{15.14.} \textsuperscript{1} 1976 Mass. Adv. Sh. 572, 343 N.E.2d 412.
\textsuperscript{2} G.L. c. 40A, § 21. This section was amended by St. 1975 c. 808, § 3, which superseded the entire Zoning Enabling Act. The requirements for maintenance of judicial appeals are now contained in Section 17 of the new Zoning Act. See \textsection{15.4 supra.}
the provisions of the Zoning Enabling Act which require first, that the complaint be filed in the superior court within twenty days after the date on which the Board’s decision is filed with the town clerk; and second, that notice of the appeal be given to the town clerk within the same period. Four days after the date of filing the plaintiff sent summonses and copies of the complaint to the deputy sheriff in order that they be served on the defendant members of the Board and the applicant. The postal service mistakenly treated them as second-class mail although plaintiff had sent them first-class. As a result they did not reach the deputy sheriff until sixteen days after the date on which the complaint was filed. The sheriff made service on the defendants upon receipt of the summonses and complaints.

The applicant, J. M. & J. Corporation, moved to dismiss Pierce’s appeal on the grounds that the superior court lacked subject matter jurisdiction because process had not been served within the statutory fourteen-day period. The motion was allowed by the superior court and judgment entered for the defendant. The plaintiff unsuccessfully appealed to the Court of Appeals. Upon consideration, the Supreme Judicial Court held that failure to comply with the fourteen-day service requirement did not as a matter of law require dismissal of the plaintiff’s appeal. Although it was within the discretion of the superior court to dismiss the action in the present case, the Court found that “no significant issue of discretion could be presented in the circumstances . . .” and therefore reversed the superior court’s judgment and ordered the complaint reinstated.

The result reached in the Pierce case is consistent with the Court’s recent trend in decisions concerning procedural defects in appeals of administrative actions, particularly zoning decisions. In its actual holding, however, the Court distinguished language contained in Shaughnessy v. Board of Appeals of Lexington to the effect that giving notice to defendants within the statutorily prescribed time was juris-

\[\text{\textsuperscript{4}}\] G.L. c. 40A, § 21.
\[\text{\textsuperscript{6}}\] Id. at 575-76, 343 N.E.2d at 414.
\[\text{\textsuperscript{7}}\] Id. at 576, 343 N.E.2d at 414.
\[\text{\textsuperscript{8}}\] 1975 Mass. App. Ct. Adv. Sh. 874, 883, 329 N.E.2d 774, 778. The Appeals Court’s rationale was based upon an analysis of the plaintiff’s obligation “to deliver” copies of the summons and complaint to the sheriff. G.L. c. 40A, § 21 and Mass. R. Civ. P. 4(a) were read together to place the risk of mailing on the plaintiff and, in essence, to require that the plaintiff make actual physical delivery of the summons and complaint to the sheriff in order to comply with Section 21. Id. at 879-83, 329 N.E.2d at 776-78.
\[\text{\textsuperscript{10}}\] Id. at 583, 343 N.E.2d at 417.
\[\text{\textsuperscript{11}}\] Id.
This language was distinguished in that it had been invoked in an attempt to distinguish the essential action of giving notice from the less important one of filing an affidavit of notice, which was the primary issue in that case. For that reason and in view of the fact that *Shaughnessy* allowed a curative joinder upon a finding of no prejudice, the Court in *Pierce* found the statement in *Shaughnessy* to be a source of confusion rather than guidance.

The Court's approach to procedural defects exemplified by *Pierce* does not, however, condone disregard of procedural requirements. When considering the effect of an omission or error, it has recognized that "[s]ome errors or omissions are seen on their face to be so repugnant to the procedural scheme, so destructive of its purposes, as to call for dismissal of the appeal." *Pierce* implies that with respect to the procedural requirements of the former Zoning Enabling Act, such jurisdictional errors or omissions would include failure to commence the appeal within twenty days after the board of appeals' decision has been filed, and failure to file notice of the appeal with the town clerk during the same twenty-day period. "With respect to other slips in the procedure . . . the judge is to consider how far they have interfered with the accomplishment of the purposes implicit in the statutory scheme and to what extent the other side can justifiably claim prejudice." In such cases it is within the trial court's discretion to allow the appeal to go forward. Defects which fall under this type of analysis include failure to attach a copy of the board of appeal's decision to the copy of the complaint served on the defendants or filed with the clerk, and failure to name the original applicant or a board member as a defendant, resulting in lack of service on those parties. The failure to file an affidavit reciting that all parties have been appropriately notified also falls within this category.

The decision in *Pierce* adds to this collection of possibly non-jurisdictional defects the failure to serve all defendants within the

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14 *Id.* at 13, 255 N.E.2d at 369.
16 *Id.* at 580, 343 N.E.2d at 416.
17 *Schulte v. Director of Div. of Employment Security, 1975 Mass. Adv. Sh. 3247, 3254, 337 N.E.2d 677, 680. Schulte* reviewed the entire issue of jurisdictional and non-jurisdictional defects on filing an appeal from an administrative decision. The effect of that decision was to harmonize recent Supreme Judicial Court decisions in this area and to reduce technical but not meaningful defects to non-jurisdictional ones.
21 *Id.*
23 *Id.* at 579, 343 N.E.2d at 415.
24 *Id.* at 580, 343 N.E.2d at 415.
25 *Id.* at 581, 343 N.E.2d at 416.
fourteen-day period prescribed by the Zoning Enabling Act.26 However, the decision should not be viewed as giving a carte blanche to those who fail to comply with that provision. Rather, the case is properly interpreted as holding that a failure to meet the fourteen-day requirement does not as a matter of law require the trial court to dismiss the appeal; in other words, it is not per se a jurisdictional defect. Moreover, Pierce leaves within the trial court's discretion the question of whether plaintiff's failure to comply is prejudicial and, therefore, grounds for dismissal of the appeal. It is to be expected that a reviewing court will afford great deference to the trial court's judgment on this question.

Pierce has been applied by the Court of Appeals in this manner in Raia v. Board of Appeals of North Reading.27 In Raia, the plaintiff appealed the board's granting of a variance from minimum lot frontage requirements.28 The plaintiff complied with the time requirements for filing and giving notice of appeal, but failed to give notice of the action to the original petitioner, Hashem, within the statutory fourteen-day period.29 Hashem did not receive notice of the action until seventy-eight days after its commencement.30 He raised the issue by plea in abatement which was overruled by the superior court judge.31 The Court of Appeals, relying on the recent decision in Pierce, held that the superior court was not deprived of jurisdiction by reason of the plaintiff's failure to give notice, since the record did not contain any evidence of prejudice to Hashem because of the late service. The Court of Appeals, therefore, could not "say that the judge abused his discretion in refusing to sustain the plea in abatement."32 It appears from Pierce and Raia that the length of the delay is not determinative. Instead, the determinative issue is whether or not there is sufficient evidence showing actual prejudice to the defendant. If the trial court finds that there is insufficient evidence of prejudice, the defendant faces the difficult task of persuading the reviewing court that the trial court abused its discretion.

§15.15. Municipal Regulation of Billboards: Aesthetic Zoning: Commercial Free Speech: Consistency of Local Regulation with State Law. In John Donnelly & Sons, Inc. v. Outdoor Advertising Board1 (Brookline) the Supreme Judicial Court for the first time squarely held

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28 Id. at 606, 347 N.E.2d at 696.
29 Id. at 609, 347 N.E.2d at 697. The Raia court held that the fact that Pierce was decided under the repealed Zoning Enabling Act was of no consequence. Id. at 609 n. 4, 347 N.E.2d at 697 n. 4.
30 Id. at 609, 347 N.E.2d at 697.
31 Id. at 610, 347 N.E.2d at 697.
32 Id.

that aesthetic considerations constitute a constitutionally adequate basis for local regulation of billboards. In reaching this result, the Brookline court has expanded the scope of the permissible objectives of the police power.

The plaintiff, a corporation engaged in the business of maintaining and leasing commercial billboards, maintained twenty-two such billboards in nonresidential districts in Brookline. The billboards were maintained pursuant to annual permits issued by the defendant Outdoor Advertising Board (the board), the state agency responsible for the regulation of outdoor advertising. In 1972 a town "sign by-law" as well as an amendment to the town's zoning by-law took effect. These by-laws had the effect of prohibiting all off-premises advertising in Brookline. Upon notice from the town of the by-laws' effect, the board held an adjudicatory hearing to determine whether further permits should be issued to the plaintiff. The plaintiff alleged that the by-laws were invalid on three grounds. First, the plaintiff alleged that the outright prohibition of off-premise signs was not within the town's zoning power and was inconsistent with the state constitution, as well as statutes and regulations pertaining to outdoor advertising. Further, the plaintiff contended that the by-laws violated due process in that they were not reasonably related to a legitimate objective of the police power. Finally, the by-laws' prohibition of billboards throughout the entire town was claimed to be an unconstitutional abridgement of the First Amendment guaranty of free speech thereby violating the due process clause of the Fourteenth Amendment. The board rejected all three grounds and denied further permits to the plaintiff.

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2 Id. at 3451, 339 N.E.2d at 711.
3 Id. Municipalities are also empowered to regulate outdoor advertising, including billboards, in a manner not inconsistent with state statutes and regulations. For a discussion of this issue see text at notes 12-20 infra.
4 Id. at 3451-53, 339 N.E.2d at 711-12. The sign by-law was adopted and became effective in 1967. Id. at 3451, 339 N.E.2d at 711. Although it did not by its term prohibit all off-premise advertising, that was its effect. Id. at 3453, 339 N.E.2d at 712. It contained a five-year grace period for the removal of nonconforming signs. That grace period expired in 1972. Id. at 3452, 339 N.E.2d at 711. The zoning by-law, passed in December, 1971, and effective in January 1972, did expressly prohibit all off-premise signs throughout the town. Id. at 3451-53, 339 N.E.2d at 711-12. No distinction was made in the opinion between the town's power to zone and its power to enact general by-laws. Id. at 3463-64, 339 N.E.2d at 716.
5 Id. at 3453, 339 N.E.2d at 712. Off-premise or nonaccessory signs advertise goods or services having no relation to the premises upon which they are located. On-premise or accessory signs advertise the goods or services available on the premises. Their function is basically incidental to the operation of the business.
6 Id.
7 Id. at 3450, 339 N.E.2d at 712.
8 Id. at 3463, 339 N.E.2d at 715-16.
9 Id. at 3478, 339 N.E.2d at 721.
10 Id. at 3454, 339 N.E.2d at 712.
This decision, in turn, was upheld by both the superior court and the Supreme Judicial Court.\footnote{Id.}

In its affirming opinion, the Supreme Judicial Court first rejected the plaintiff’s contention that the by-laws were inconsistent with state law in that state law impliedly precludes a total prohibition of billboards by a municipality.\footnote{Id. at 3463, 339 N.E.2d at 715.} The Court's initial inquiry concerned Chapter 93 of the General Laws.\footnote{G.L. c. 93, §§ 29-33. The Court initially recognized that the legislature’s authority to enact chapter 93 was conferred by art. 50 of the Amendments to the Constitution, 1975 Mass. Adv. Sh. 3455, 339 N.E.2d at 712-13.} That chapter authorized the board to regulate outdoor advertising and, in addition, empowered cities and towns to regulate such advertising in a manner consistent with the state statute and board regulations.\footnote{Id. G.L. c. 93, § 29.} The Court in its inquiry as to whether the Brookline by-laws were inconsistent with Chapter 93 or the board rules and regulations, applied the somewhat relaxed standard which it had adopted in earlier cases.\footnote{1975 Mass. Adv. Sh. at 3457-58, 339 N.E.2d at 713-14.} According to that standard, a local by-law or ordinance is upheld unless it is found to conflict sharply with state law or board regulations.\footnote{Id., citing Bloom v. City of Worcester, 363 Mass. 136, 154, 293 N.E.2d 268, 279 (1973).} Applying the standard, the Court found no inconsistency between the by-laws and the state laws and board regulations, particularly since the relevant board regulation, Regulation 9k, allowed towns and cities considerable discretion in regulating off-premise advertising.\footnote{Id., citing 1975 Mass. Adv. Sh. at 3459-61, 339 N.E.2d at 714-15.} Such grant of discretion, the Court reasoned, implied that municipalities may impose regulations more stringent than those imposed by the board.\footnote{Id.} Further, the Court found support in General Outdoor Advertising Co. v. Department of Public Works\footnote{289 Mass. 149, 197, 193 N.E. 799, 821, appeal dismissed, 296 U.S. 543 (1935).} for the proposition that the regulatory authority of municipalities includes the power to prohibit outdoor off-premises advertising. Thus, the Court rejected the plaintiff’s contentions of the invalidity of the Brookline by-laws under state law.\footnote{1975 Mass. Adv. Sh. at 3463, 339 N.E.2d at 715.}

Turning to the plaintiff’s due process argument, the Court invoked a two-stage analysis. In the first stage, the Court inquired whether the by-laws bore a reasonable relation to the public health, safety, morals, or general welfare.\footnote{Id.} The Court in Brookline assumed that the purpose

\footnote{11 Id.\footnote{Id. at 3463, 339 N.E.2d at 715.} \footnote{Id. at 3457-58, 339 N.E.2d at 713-14.} \footnote{Id., citing Bloom v. City of Worcester, 363 Mass. 136, 154, 293 N.E.2d 268, 279 (1973).} \footnote{Id., citing 1975 Mass. Adv. Sh. at 3459-61, 339 N.E.2d at 714-15.} \footnote{Id.} \footnote{289 Mass. 149, 197, 193 N.E. 799, 821, appeal dismissed, 296 U.S. 543 (1935).} \footnote{1975 Mass. Adv. Sh. at 3463, 339 N.E.2d at 715.} \footnote{Id. at 3464, 339 N.E.2d at 716. In setting forth this due process standard, the Court stated that "[t]he by-law is to be presumed valid and, if its reasonableness is fairly debatable, the judgment of the local legislative body must be sustained." Id., citing Caires v. Building Comm’r of Hingham, 323 Mass. 589, 594-95, 83 N.E.2d 550, 554 (1949).}
of the by-laws was primarily or solely aesthetic.\footnote{22}{1975 Mass. Adv. Sh. at 3464, 339 N.E.2d at 716. The board in its decision upholding the by-laws had made the same assumption. \textit{Id.}} Having thus squarely framed the issue in terms of the permissibility of the aesthetic objective, the Court concluded that the by-laws passed constitutional muster in that such objective is properly viewed as encompassed by the term “general welfare.”\footnote{23}{Id. at 3466-69, 339 N.E.2d at 717-18.} The Court’s expansive reading of that term, in turn, was justified on the basis of the need of the judiciary to respond to changing societal values.\footnote{24}{Id. at 3466, 339 N.E.2d at 717.} Specifically, the Court concluded that its expansion of the concept general welfare was justified by the enhanced recognition of environmental and aesthetic values by both the United States Supreme Court\footnote{25}{Id. at 3467, 339 N.E.2d at 717, \textit{citing} Berman v. Parker, 348 U.S. 26, 33 (1954. \textit{See also} Village of Belle Terre v. Buraas, 416 U.S. 1 (1974).} and the Massachusetts Legislature.\footnote{26}{1975 Mass. Adv. Sh. at 3468, 339 N.E.2d at 717. The Court cited the legislature’s adoption of Article 97 of the Amendments to the Constitution of the Commonwealth, an article which enunciated a right of the people to “the natural, scenic, historic, and esthetic qualities of their environment ….” \textit{Id.} In addition, the Court found evidence of legislative recognition of the aesthetic factor in the Zoning Enabling Act, G.L. c. 40A, § 3, which provided that zoning regulations shall be designed to “preserve and increase … amenities” within a city or town. 1975 Mass. Adv. Sh. at 3468, 339 N.E.2d at 717.} Further, the Court stated that its approach did not constitute a sharp break with the past. Specifically, the Court noted that it had expressed a similar view, by way of dicta, in a 1935 case, \textit{General Outdoor Advertising Co. v. Department of Public Works.}\footnote{27}{289 Mass. 149, 187, 193 N.E. 799, 816, \textit{appeal dismissed}, 296 U.S. 543 (1935). In \textit{General Outdoor Advertising Co.}, the Court had stated: Even if the rules and regulations of billboards and other advertising devices did not rest upon the safety of public travel and the promotion of the comfort of travellers by exclusion of undesired intrusion, we think that the preservation of scenic beauty and places of historical interest would be a sufficient support for them. Considerations of taste and fitness may be a proper basis for action in granting and in denying permits for locations for advertising devices. \textit{Id.}}

In the second phase of its due process analysis, the Court considered and rejected the plaintiff’s argument that even if aesthetics constitute a permissible purpose of local regulation, the by-laws in question did not bear a reasonable relationship to that purpose.\footnote{28}{1975 Mass. Adv. Sh. at 3472-76, 339 N.E.2d at 719-21.} In rejecting Donnelly’s argument that the total prohibition of off-premises billboards from an urban community such as Brookline was an unreasonable exercise of the police power, the Court mustered several means of justifying the prohibition. First the Court declined to accept the view that, while billboards may be totally banned from a rural area, in urban areas such a prohibition is unjustified. Urban residents, the Court reasoned, are just as entitled to protection of their aesthetic environment as are rural residents.\footnote{29}{Id. at 3473, 339 N.E.2d at 719.} Further, the Court found no
merit in distinguishing, for the purposes of due process, between a prohibition of billboards in residential areas and a prohibition of billboards in business areas.\textsuperscript{30} Specifically, the Court concluded that in a densely populated area such as Brookline, the aesthetic quality of business districts impacts directly on the aesthetic quality of residential areas.\textsuperscript{31} Moreover, the Court reasoned that municipalities have a legitimate interest in improving the aesthetic quality of business as well as residential areas. In conclusion, the Court found Brookline's outright prohibition of off-premises advertising rationally related to the aesthetic objective and, accordingly, found the town's by-laws to comport with due process.\textsuperscript{32}

Finally, the Court turned to and rejected Donnelly's contention that the sign and zoning by-laws violated its right to free speech under the First and Fourteenth Amendments.\textsuperscript{33} Recognizing that commercial speech has been afforded some degree of protection under the First Amendment, the Court analyzed the free speech issue in terms of whether governmental interests outweighed the plaintiff's First Amendment rights.\textsuperscript{34} First the Court noted that Donnelly's billboards were commercial, as opposed to ideational, in nature. Thus, the Court found the recent United States Supreme Court decision in Bigelow \textit{v. Virginia},\textsuperscript{35} in which the prohibition of a newspaper advertisement relating to the availability of abortions was struck down, not controlling in the instant case.\textsuperscript{36} Further, the Supreme Judicial Court reasoned that in \textit{Brookline}, because of the "intrusive" quality of billboards, passers-by are effectively compelled to read them.\textsuperscript{37} The protection of passers-by from such compulsion, the Court implied, is a significant

\textsuperscript{30} Id. at 3475, 339 N.E.2d at 720.
\textsuperscript{31} Id.
\textsuperscript{32} Id. at 3477, 339 N.E.2d at 721.
\textsuperscript{33} Id. at 3478, 339 N.E.2d at 721.
\textsuperscript{34} Id.
\textsuperscript{35} 421 U.S. 809 (1975).
\textsuperscript{36} 1975 Mass. Adv. Sh. at 3478-79, 339 N.E.2d at 721. The Supreme Court recently decided Virginia State Bd. of Pharmacy \textit{v. Virginia Citizens Consumer Council, Inc.}, 425 U.S. 748 (1976), involving the validity of a Virginia statute that had the effect of totally prohibiting the advertisement of prescription drug prices in the state, \textit{id.} at 749-50. This opinion has to some extent clarified the Court's previous decisions in this area. Specifically, the \textit{Bigelow} decision, 421 U.S. 809, had left open the standard for determining the degree of first amendment protection to be afforded purely commercial speech. In \textit{Virginia Bd. of Pharmacy}, the standard for evaluating the "commercial speech" interest and balancing this with the state's interest in protecting its citizens focused upon the absolute prohibition placed upon the advertiser and, more importantly, upon the absolute deprivation of information to the consumer. \textit{id.} at 761-65. The validity of time, manner, and place restrictions on commercial advertising was reaffirmed. \textit{id.} at 770-73. Brookline's prohibition of billboards, therefore, appears to fall within the category of permissible restrictions. The factor of absolute deprivation of information is also lacking from \textit{Brookline}. It would seem that the analysis of the Supreme Judicial Court in \textit{Brookline} is bolstered, to a degree, by \textit{Virginia Board of Pharmacy}.
\textsuperscript{37} Id. at 3479-81, 339 N.E.2d at 721-22.
governmental interest. Then the Court concluded that a municipality may legitimately favor the rights of persons not to be compelled to read the plaintiff's commercial messages, over the right of the plaintiff to convey such messages.38

The primary significance of the Brookline case is to be found in the Court's outright recognition that aesthetic factors alone may constitute a permissible objective of zoning. Historically, the Massachusetts judiciary, along with a majority of state courts, has been reluctant to accept aesthetics as a permissible objective of the police power.39 At

38 Id. at 3481, 339 N.E.2d at 722. A potential equal protection issue raised by the distinction between off-premise and on-premise advertising in a by-law based solely on aesthetics was not discussed by the Court. The crux of this issue is whether a classification totally prohibiting off-premise advertising is discriminatory, particularly when on-premise advertising is not subject to some restriction. The rationale of the distinction has focused upon two separate points: (1) The right to maintain a business or on-premise sign is a corollary of the right to maintain the business; and (2) that billboards are of a unique nature and foster particularly undesirable effects. Although the Supreme Judicial Court has noted the second point, the rationale is most clearly articulated by the New Jersey Supreme Court in United Advertising Corp. v. Raritan, 11 N.J. 144, 93 A.2d 362 (1952), noted in Holme, Billboards and On-Premise Signs: Regulation and Elimination Under the Fifth Amendment, INSTITUTE ON PLANNING, ZONING AND EMINENT DOMAIN 247 (1974).

The distinction has been upheld by the Supreme Judicial Court in the General Outdoor Advertising case, 289 Mass. 149, 168, 193 N.E. 799, 808, appeals dismissed, 296 U.S. 543 (1935). In fact, the distinction has been upheld in most jurisdictions both before and after judicial acceptance of purely aesthetic regulations. See 4 N. WILLIAMS, AMERICAN LAND PLANNING LAW c. 122 (1974). General, however was rendered in the period in which billboard regulation was supported only by traditional police power objectives. Since, in the wake of Brookline, such prohibition is supported by a judicially recognized aesthetic objective, the equal protection question has acquired a different focus. Specifically, an on-premise sign may be as unattractive and aesthetically offensive as an off-premise sign. As a result, it would appear that the total prohibition or strict regulation of off-premise advertising unaccompanied by similar although less stringent regulation of on-premise advertising violates the equal protection guaranty of the fourteenth amendment. This view has found support in the dissenting opinion of Judge Frederick Hall, of the New Jersey Supreme Court, in United Advertising Co. v. Borough of Metuchen, 42 N.J. 1, 12-13, 198 A.2d 447, 453-454 (1964) (Hall, J., dissenting). On the same basis a Florida court has invalidated size regulation of off-premise advertising based on solely aesthetic considerations when on-premise signs could be of unlimited size, Sunad, Inc. v. City of Sarasota, 122 So. 2d 611, 615 (Fla. 1960).

However, a contrary view may be inferred from the United States Supreme Court decision in Railway Express Agency v. New York, 336 U.S. 106 (1949). There, the Court held that it was not a violation of equal protection for a municipality to eradicate perceived evils in a piecemeal fashion. This approach was adopted by the California Court of Appeals for the Second District in a case involving the prohibition of advertising, Coast - United Advertising, Inc. v. City of Long Beach, 51 Cal. App. 3d 766, 770, 124 Cal. Rptr. 487, 490 (1975). In that case, in response to the plaintiff's equal protection claim the court held that when a city was "trying to improve the aesthetic appeal of its public streets, it need not abolish all unaesthetic elements immediately." Railway Express was cited in support of this proposition.

39 Id. at 3465, 339, N.E.2d at 716; 1 R. ANDERSON, AMERICAN LAW OF ZONING § 7.21-22 (1968); 4 N. WILLIAMS, AMERICAN LAND PLANNING LAW c. 119 (1974).
present aesthetics is generally held to be a proper auxiliary consideration in support of a zoning regulation. However, except in a minority of states, it is not sufficient in itself to support an exercise of the police power. Massachusetts adhered to this view prior to the Brookline case. Judicial reluctance to recognize aesthetics as a permissible police objective has been related to several factors: the requirements of the common law of nuisance, (an historical antecedent to zoning), the use of the word 'aesthetic' itself, and the difficulty of defining 'aesthetic'. This last factor has probably been the foremost problem in the history of aesthetic zoning. There are two approaches to defining aesthetics. The first draws upon the professional viewpoint of the trained artist, architect or planner, and the second, upon the conventional viewpoint of the community's members. These viewpoints will not necessarily coincide. For the purpose of aesthetic controls over off-premise advertising it appears that the latter approach prevails.

43 I R. ANDERSON, AMERICAN LAW OF ZONING § 7.14 (1968). The relevance of the common law of nuisance stems from the fact that the plaintiff was required to prove substantial interference with the use of his property. Noxious odors and loud noises were fairly susceptible of proof. However, it was more difficult to prove a substantial invasion by reason of an unsightly or ugly use. This characteristic appears to have carried over into zoning law.
44 Id. It has been suggested that the choice of the word aesthetic was unfortunate as it brought to mind the effeminate, the esoteric, and the fringes of personal preference. The judiciary was, therefore, skeptical of its place in a court of law.
47 At least one author has suggested that it is unnecessary to define aesthetics per se, but that it is only relevant to determine what is aesthetically desirable in any particular community or environment. Dukeminier, supra note 46, at 226-27. However, this does not preclude discussion of the standard available to determine what is aesthetically desirable in different contexts.
The billboard cases have not discussed the relevance of this distinction. However, this particular area may be one of the few in which the professional and conventional viewpoints converge, thereby obviating the need for discussion.

As noted previously, the courts' perception of aesthetics as a purely subjective factor had relegated it to a subordinate position in zoning law in a majority of the states.\(^49\) Even this is a marked improvement over the initial reception given to aesthetics. Originally, aesthetic considerations were thought of as merely a question of good taste.\(^50\) Subsequently, a majority of state courts accepted aesthetics as a valid secondary consideration. However, in order to find an ordinance or by-law valid it was necessary that it be related to one of the traditional police power objectives.\(^51\) This period in the history of aesthetic zoning has been referred to as the "era of legal fiction."\(^52\) Billboards, subjects of the earliest aesthetic cases, were found to provide shelter for criminal and immoral acts, to present fire hazards, and to affect traffic safety.\(^53\)

The Supreme Judicial Court, however, has never resorted to such outlandish legal fictions in supporting advertising or other aesthetically motivated regulation. Rather, prior to \emph{Brookline}, the Court gave weight to the aesthetic factor to the extent that it related to more established societal—usually economic—values. Thus, for instance, in \emph{General Outdoor Advertising Co. v. Department of Public Works}\(^54\) the Court upheld a Concord by-law that prohibited off-premises advertising, stressing the importance of the preservation of places of historic interest and of scenic beauty.\(^55\) However, although this reasoning is interrelated with aesthetics, it draws economic factors into the analysis, thus diluting the importance of purely aesthetic considerations.\(^56\) Similarly, in \emph{Opinion of the Justices to the Senate}\(^57\) concerning architectural controls in Nantucket, the Court emphasized the preservation of historic areas. In that decision the economic interest in maintaining the tourist attraction to the island was clearly articulated.\(^58\) Town of

\(^{49}\) See note 39 \emph{supra}.

\(^{50}\) \textit{See}, e.g., \emph{Commonwealth v. Boston Advertising Co.}, 188 Mass. 348, 351, 74 N.E. 601, 602 (1905).


\(^{52}\) \textit{4 N. Williams, American Land Planning Law} c. 119 (1974).

\(^{53}\) \textit{Id.}

\(^{54}\) 289 Mass. 149, 193 N.E. 799 (1935).

\(^{55}\) \textit{Id.} at 213, 184-89, 193 N.E. at 833, 814-17.

\(^{56}\) It could be argued that the aesthetic argument is not distinct from the economic argument. Holme, \emph{Billboards and On-Premise Signs: Regulation and Elimination Under The Fifth Amendment}, \textit{Institute On Planning, Zoning and Eminent Domain} 257 (1974).


\(^{58}\) \textit{Id.} at 780, 128 N.E.2d at 562.
Lexington v. Govenar\(^{59}\) emphasized another facet of the economic factor, the maintenance of district property values. In that case advertising signs, with limited exceptions, were prohibited in residential areas.\(^{60}\) The defendant, an attorney, was found to have violated the ordinance by maintaining a professional sign at his residence.\(^{61}\) The relevance of aesthetic considerations was acknowledged; however, the protection of the value of residences was specifically noted.\(^{62}\)

The Brookline case, however, did not render itself particularly appropriate to the foregoing economic analyses. The prohibition against off-premise advertising as applied to the plaintiff concerned billboards in nonresidential areas, i.e., industrial and commercial districts. Although the property-value argument could be raised, it would have less impact when considered in these districts rather than residential districts.\(^{63}\) Additionally, the record in Brookline was devoid of any reason other than an aesthetic one for the passage of the by-law.\(^{64}\) These two factors made it necessary for the Court squarely to face the question of the validity of purely aesthetic zoning controls. When it did face that question, the Court's decision to uphold aesthetic zoning found its rationale in the flexible nature of the term "general welfare," a term whose meaning, the Court suggested, shifts with the times. This rationale appears to rest ultimately on the Court's subjective perception of the spirit of the times. However, it is at least arguable that earlier opinions purporting to reject aesthetic zoning, while they were justified in terms of various legal fictions,\(^{65}\) were in fact based largely on courts' subjective perception of the significance of the aesthetic factor. Thus, rather than as a step in the direction of greater judicial subjectivity, Brookline can be viewed primarily as a step in the direction of increased judicial candor on the issue of aesthetic zoning.

More generally, billboard case law is a significant indicator of judicial attitudes concerning regulations designed to affect community appearance.\(^{66}\) Although the Brookline opinion is somewhat ambigui-
ous. It could be fairly read to recognize aesthetics as a permissible objective of all zoning controls. The impact of the decision, however, remains uncertain. There are characteristics of billboards that render them particularly appropriate objects of aesthetic regulation. Land use controls, similar to their predecessor, the common law of nuisance, are in large part the product of a balancing process. A particular land use is evaluated in terms of the degree to which it infringes upon neighboring uses and the degree to which it serves or benefits the community. If the detrimental effects do not outweigh the beneficial effects, the use may be sanctioned by the community or the courts. Billboards infringe upon neighboring uses without providing any service to the community. In General Outdoor Advertising Co. v. Department of Public Works the Supreme Judicial Court described their unique nature. Their value is totally derived from their location on or near major public ways constructed at public expense. Their profitability is derived from capitalizing upon this public expenditure. In addition, they are objects that command the attention of passersby who are unable to tune them out. As noted above, the undesirable nature of billboards appears to be one subject upon which all elements within the community can agree. On this basis, it could be argued that aesthetic regulation should be confined to land uses exhibiting the following characteristics. First, there must be a consensus of the community as to their aesthetically unpleasing nature. Second, the use must offer little or no public benefit to offset its detrimental impact on surrounding uses.

Nevertheless, the Brookline case provides communities with the precedent for implementing other types of zoning controls directed to solely aesthetic objectives. In view of suburban resistance to multi-unit dwellings and mobile homes, they are likely prospects for future regulation. In some states, single family residences have been the subject of architectural controls designed to preserve the character of the

67 The precise holding of the case was "that aesthetics alone may justify the exercise of the police power; that within the broad concept of 'general welfare', cities and towns may enact reasonable billboard regulations designed to preserve and improve their physical environment." 1975 Mass. Adv. Sh. at 3466, 339 N.E.2d at 717. The Court also characterized the recognition of aesthetics as "in no way mark[ing] a radical departure from [its] prior cases dealing with outdoor advertising regulation." Id. at 3469, 339 N.E.2d at 718. This leaves open the avenue for a narrow reading of the opinion in the future.

68 The Court's reasoning focused upon the demands of modern society for a generally pleasing environment. 1975 Mass. Adv. Sh. at 3467-68, 339 N.E.2d at 717. The recent legislative concern expressed in Art. 97 of the Amendments to the Massachusetts Constitution and noted in support of the decision is directed to the aesthetic qualities of the environment generally, not specifically to billboards.

69 See generally 1 N. WILLIAMS, AMERICAN LAND PLANNING LAW c. 17 (1974).


71 Id. at 167-68, 193 N.E. at 808.

72 See 1975 ANN. SURV. MASS. LAW §19.1 (exclusionary zoning).
Despite the possible vulnerability of these areas to regulation solely for aesthetics, there are both legislative and judicial safeguards that could prevent indiscriminate application of the aesthetic principle. In the case of prohibitions aimed at multi-unit dwellings, the legislature has indicated its intent in the Anti-Snob Zoning Law. And, unlike billboards, apartment buildings benefit the general community. These two factors should mitigate against any abuses of aesthetic controls. Mobile homes are considered to be one of the few remaining forms of low cost single-family detached housing. In the past, they have been severely restricted by Massachusetts municipalities for health, economic, and aesthetic reasons. Considering the Court's willingness to uphold restrictions on mobile homes, its newly acquired acceptance of aesthetics will probably lend greater support to regulation in this area. Finally, single-family architectural controls are rooted in those aspects of aesthetics that are basically economic, the preservation of property values. This type of control has been achieved in the past through private restrictive covenants. Although there is a governmental interest in achieving these objectives, significant First Amendment questions may arise from the regulation of architectural style. However, it can be expected that misuse of the aesthetic principle in any of these areas could be effectively controlled by a reading of Brookline strictly confined to its facts. Close judicial scrutiny of aesthetic regulations directed to apartment buildings and architectural design appears to be warranted.

STUDENT COMMENT

§15.16. Zoning and Land Use—Environmental Law—Zoning to Prohibit the Filling of Coastal Wetlands: The Taking Issue: Mac-

73 I A. RATHKOPF, THE LAW OF ZONING AND PLANNING § 14.04 (4th ed. 1975). See also Crumplar, Architectural Controls; Aesthetic Regulation of the Urban Environment, 6 URBAN LAWYER 622 (1974). In Opinion of the Justices to the Senate, 333 Mass. 773, 128 N.E.2d 557 (1955), the architectural controls discussed were designed to preserve historical areas. They did not apply to housing design in any area regardless of its historical significance. The controls referred to herein would have that effect.


75 2 N. WILLIAMS, AMERICAN LAND PLANNING LAW c. 57 (1974).


77 But cf. Donoghue v. Pynnewood Corp., 356 Mass. 703, 255 N.E.2d 326 (1970), in which a private covenant requiring a developer's approval of house design was not enforced. This result was reached because there was no uniformity of house styles in the area and the proposed home would not detrimentally affect property values. For a discussion of the case see 1970 ANN. SURV. MASS. LAW § 17.10.

Gibbon v. Board of Appeals of Duxbury.\(^1\) With the intent of preserving the natural resources of the town, the town of Duxbury in 1960 changed its zoning by-law to restrict the filling of the town’s remaining wetlands.\(^2\) Plaintiffs, owners of seven acres of coastal marshland, applied to the town board of appeals in 1962 for a special permit to fill their land in order to make it suitable for residential development.\(^3\) This application began a fourteen year battle between an environmental protection-oriented board of appeals and a private landowner seeking the profits of development which would ultimately be considered by the Massachusetts Supreme Judicial Court on four occasions.\(^4\)

The first time it considered the application, the board of appeals denied the permit to fill the land because it found that the land was unsuitable for the installation of an adequate sewage system.\(^5\) After the superior court decreed that the decision of the board of appeals did not exceed the board’s authority, the plaintiffs appealed to the Supreme Judicial Court.\(^6\) The Supreme Judicial Court, in *MacGibbon I*, annulled the board’s decision by holding that the board’s decision was not responsive to the plaintiffs’ petition.\(^7\) Insofar as the permit was sought for the purpose of filling and excavating the land, the Court ruled that it ought not be denied on the ground that the land was unsuitable for the installation of sewerage.\(^8\) The Court decided that sewage considerations were only relevant to the issuance of a


\(^2\) Id. at 144, 340 N.E.2d at 488. The amendment to the zoning by-law stated, "[the by-law] is also for the purpose of protecting and preserving from despoliation the natural features and resources of the town, such as salt marshes, wetlands, brooks and ponds. No obstruction of streams or tidal rivers and no excavation or filling of any marsh, wetland or bog shall be done without proper authorization by a special permit issued by the Board of Appeals."

\(^3\) Id. Special permits were allowed under section 8(d) of the by-law which provided that, "[t]he Board of Appeals may, in appropriate cases and subject to appropriate conditions and safeguards, make special exceptions to the terms of the by-law in harmony with their general purpose and intent, and in accordance with the specified rules contained in this by-law." In 1971 the town amended the by-laws and § 8(d) became § 9(d). The parties stipulated that the by-law prior to the 1971 amendments was controlling in the case at bar. Id. at 144 n.1, 340 N.E.2d at 488 n.1.

\(^4\) Id. at 690, 200 N.E.2d at 254.

\(^5\) Id. at 691, 200 N.E.2d at 255.

\(^6\) Id. at 692, 200 N.E.2d at 256.
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building permit, which the petitioners were not seeking.\(^9\) The Supreme Judicial Court directed the board to hold further proceedings to consider facts relevant to the denial of plaintiffs' petition to fill their land. In addition, the Court instructed the board to make a definite statement of the rational causes and motives, based upon adequate findings of fact, for the board's decision.\(^10\)

At rehearing, the board again denied the plaintiffs' petition to fill their land. This time the board ruled that the special permit provision of the zoning by-law was never intended to allow the granting of permits to fill coastal wetlands but only applied to the filling of small interior wetlands which would not significantly violate the wetlands preservation purpose of the by-law.\(^11\) The superior court affirmed the board's decision.\(^12\) The Supreme Judicial Court, in \textit{MacGibbon II}, again reversed the superior court and annulled the decision of the board.\(^13\) The Court found that the board erred in interpreting the by-law as limiting special permits to inland areas and that the board failed to comply with the Supreme Court's directive in \textit{MacGibbon I} to state the rational motives, founded upon adequate findings of fact, for the board's decision.\(^14\)

The Court in \textit{MacGibbon II} not only held that the special permit provision of the by-law applied to coastal wetlands, but that the board could not refuse to issue a special permit to fill wetlands based solely on the town's desire to maintain the land in its natural state. In this context, the Court stated that "[i]t appears that the board, acting under the guise of zoning, intends to grant no special permits for any physical changes or improvements on any coastal wetlands in the town, and thereby to protect and preserve them in their natural state."\(^15\) The Court held that such a preservation of privately owned land in its natural state for the benefit of the public by preventing the owner from using it for any practical purpose was not within the scope of authority delegated to municipalities under the Zoning Enabling Act.\(^16\) In dicta, the Court indicated that the deprivation of all practical use of the land in order to maintain the land in its unspoiled condition would not only exceed the bounds of the Zoning Enabling


\(^10\) \textit{Id.} at 692, 200 N.E.2d at 256.


\(^12\) \textit{Id.} at 636, 255 N.E.2d at 349.

\(^13\) \textit{Id.} at 642, 255 N.E.2d at 352.

\(^14\) \textit{Id.} at 639-40, 255 N.E.2d at 350-51.

\(^15\) \textit{Id.} at 640, 255 N.E.2d at 351.

\(^16\) \textit{Id.} at 640-41, 255 N.E.2d at 351; \textit{The Zoning Enabling Act, G.L. c. 40A.}
Act, but also would constitute a taking of property without compensation in violation of the fifth and fourteenth amendments to the Constitution of the United States and the Constitution of the Commonwealth.\(^\text{17}\) The Court directed the board to hold further proceedings, in light of *MacGibbon II*, to determine if a special permit should be granted to the petitioners.\(^\text{18}\)

The board held a third hearing and again denied the plaintiffs' application for a special permit to fill their land, basing its decision on environmental protection grounds and the prevention of flooding and erosion.\(^\text{19}\) The superior court affirmed the board's decision, holding that both the environmental protection of coastal wetlands and prevention of flooding and erosion were valid grounds under the Zoning Enabling Act upon which the town could zone to prohibit the filling of the land.\(^\text{20}\) The superior court also held that practical uses remained in the land, so that the denial of the permit was not tantamount to an unconstitutional taking without compensation.\(^\text{21}\)

On direct review, the Supreme Judicial Court in *MacGibbon III* reversed the superior court and directed the board to grant the permit to fill the land.\(^\text{22}\) The Supreme Judicial Court agreed with the superior court that the prevention of flooding and erosion was an appropriate issue for the board to consider in deciding whether or not to grant the permit to fill the land. The Court, however, applied a least restrictive means test and ruled that the board could not deny the permit on the basis of flooding and erosion since these problems could be reduced to an acceptable level by requiring safeguards which the board had the power to order.\(^\text{23}\)

The only remaining ground for the denial of the special permit was the protection of the environment. The superior court found that a restriction for environmental protection purposes was not the same as a denial of a permit "solely to preserve the area in its natural state for the enjoyment of the public," which *MacGibbon II* had held was not a valid purpose for zoning under the Zoning Enabling Act.\(^\text{24}\) The Su-

\(^\text{17}\) *Id.* at 641, 255 N.E.2d at 351-52. Appropriation of private property for a public use is expressly forbidden by the just compensation clause of the fifth amendment and implied in the due process clause of the fourteenth amendment. Olson v. United States, 292 U.S. 246, 254 (1934). For the purpose of this note the prohibition on the taking of private property will be discussed as a fourteenth amendment protection. The Massachusetts State Constitution also forbids the taking of property without compensation. Mass. Const. pt. 1 art. 10.

\(^\text{18}\) *Id.* at 642, 255 N.E.2d at 352.


\(^\text{20}\) *Id.* at 149-52, 340 N.E.2d at 490-91.

\(^\text{21}\) *Id.* at 149, 340 N.E.2d at 490.

\(^\text{22}\) *Id.* at 143, 340 N.E.2d at 489. The Supreme Judicial Court ordered direct review on its own initiative pursuant to G. L. c. 211A, § 10(A).

\(^\text{23}\) *Id.* at 151-54, 340 N.E.2d at 491-92.

\(^\text{24}\) *Id.* at 149, 340 N.E.2d at 490. In *MacGibbon II* the purpose claimed was to preserve the area in its natural state. The purpose was expanded in *MacGibbon III* to the protection of marine fisheries and the preservation of coastal wetlands. The former purpose is
preme Judicial Court agreed that the protection of coastal wetlands for environmental reasons was not covered by the *MacGibbon II* decision and that it constituted a proper public purpose for zoning under the Zoning Enabling Act. However, the Court held that zoning for the purpose of protecting the environment would only be valid if the effect of the restriction was not so harsh as to deny the landowner all practical use of the land.

Upon consideration of the effect of the zoning restriction on the MacGibbons' land, the Supreme Judicial Court rejected the trial court's finding that practical uses remained in the land. The uses the trial court had found, such as agriculture, recreation, birdwatching, kite flying, protection of a view, and conservation, were ruled not to be practical. In light of its finding that no practical uses remained in the land, the Supreme Judicial Court held: The preservation of wetlands in their natural state for environmental purposes is not a "legally tenable ground" for the use of zoning regulations to prevent the filling of wetlands where the landowner is denied all practical use of the land.

If the landowner had not been deprived of all practical use of the land, then the zoning regulation could have been used for en-

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not a valid justification for zoning whereas the latter is a proper public purpose for zoning. *Id.* at 149-50, 340 N.E.2d at 490.

*Id.* at 149, 150, 340 N.E.2d at 490.

*Id.* at 151, 340 N.E.2d at 491.

*Id.* at 150-51, 340 N.E.2d at 491.

*Id.* at 151, 340 N.E.2d at 491. The Court did not explain why the uses found by the superior court were not practical. Presumably the court reached this result because none of the stated uses provided the land with any significant marketable economic value. The prohibition on the filling of wetlands does usually deprive the land of any marketable value. However, the facts found by the superior court indicate that the effect was not so severe in the *MacGibbon* case. MacGibbon bought the land in 1961 for $1,000. *MacGibbon III*, 1976 Mass. Adv. Sh. at 144, 340 N.E.2d at 489. The superior court found the land was now worth $5,300 unfilled and if developed would have a value of $44,000. *Id.* at 149, 340 N.E.2d at 490. The speculative future value of the land should not be considered in determining the extent of plaintiff's loss. Steel Hill Dev., Inc. v. Sanbornton, 469 F.2d 956, 963 (1st Cir. 1972). Since the market value of the land as restricted was more than five times what MacGibbon paid for it, he suffered no out of pocket loss. By using the market value of the land to determine the uses left, the court should have ruled there were adequate uses remaining to avoid a taking.

The *MacGibbon* case actually could have been decided on a much simpler basis. The plaintiffs bought the land after the zoning law went into effect. 1976 Mass. Adv. Sh. at 144, 340 N.E.2d at 488-89. The plaintiffs still had the right to challenge the validity of the zoning ordinance. See Vernon Park Realty, Inc. v. Mount Vernon, 307 N.Y. 493, 121 N.E.2d 517, 520 (1954). However, once the zoning law was declared to be a valid exercise of the police power, MacGibbon's notice as to the possible uses of the land when purchased should have been determinative of the taking issue. Since the plaintiffs did not buy the right to property which could be filled, the town was not taking a right the plaintiffs ever had. See Michelman, *Property, Utility, and Fairness: Comments on The Ethical Foundations of "Just Compensation"* Law, 80 Harv. L. Rev. 1165, 1238 (1967)
environmental purposes to stop the filling of the wetlands. However, the finding that no practical uses remained in the land resulted in the zoning restriction being held invalid.

The full significance of the Court's decision in *MacGibbon III* was unclear because the Court did not expressly state whether its holding was based on a finding that the zoning regulation constituted an unconstitutional taking or whether it merely reflected a decision by the Court that the restriction exceeded the authority granted to the town under the Zoning Enabling Act. As a result of the Court's failure to specify the grounds for its decision, the holding in *MacGibbon III* is open to two reasonable interpretations. First it may be interpreted that the denial of all practical use of the land so interfered with plaintiffs' property rights as to constitute an unconstitutional taking of the plaintiffs' land by the state. Second, the holding may be interpreted as merely defining the scope of the Zoning Enabling Act and not reaching the constitutional issue. Under this latter interpretation, *MacGibbon III* stands for the more limited proposition that although zoning to protect wetlands is permissible under the Zoning Enabling Act, when the zoning regulation results in a deprivation of all practical use of the land the authority granted by the statute is exceeded.

In order to resolve the issue of the grounds for the Court's holding in *MacGibbon III*, the town petitioned the Court for a rehearing. In

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31 The relevant provisions of the Zoning Enabling Statute are G.L. c. 40A, §§ 2, 3.

32 U.S. CONST. amend V and XIV; see also MASS. CONST. Pt. 1 art. 10.

33 Insofar as Massachusetts had previously decided that the denial of all practical use of the land resulted in an unconstitutional taking of the property, see Commissioner of Natural Resources v. S. Volpe & Co., 349 Mass. 104, 107, 109, 206 N.E.2d 666, 669, 670 (1965), *MacGibbon III* was generally interpreted as finding an unconstitutional taking. See Brief for Massachusetts Attorney General as Amicus Curiae at 5, Brief for Massachusetts Association of Conservation Commissions as Amicus Curiae at 2, *MacGibbon IV*, 1976 Mass. Adv. Sh. 768, 344 N.E.2d 185. This interpretation placed in jeopardy other state statutes providing for similar restrictions on wetland filling, since these restrictions would similarly interfere with all practical use of the land and therefore result in takings. The statutes potentially affected would be G.L. c. 130, § 105 and G.L. c. 131, § 40A, which provide for the protection of coastal and inland wetlands, respectively, and give the Commissioner of Environmental Management the power to prevent the filling of marshlands. Also affected might be G.L. c. 131, § 40, which allows local communities to restrict the filling of wetlands, and the Zoning Act, G.L. c. 40A, §§ 1-17, which explicitly gives municipalities the power to enact zoning restrictions to conserve natural resources and prevent pollution.

34 *MacGibbon IV*, 1976 Mass. Adv. Sh. 768, 344 N.E.2d 185. Amicus Curiae briefs were submitted by the Massachusetts Attorney General's Office, the Massachusetts Association of Conservation Commission, the Conservation Law Foundation of New England, Inc. with the Massachusetts Audubon Society, the Environment Committee of the Boston Bar Association, and Stuart DeBard. These groups were concerned that *MacGibbon III*, particularly if it were interpreted as reaching the constitutional issue, would prevent the state from restricting the filling of valuable wetlands under the authority of the various environmental protection statutes identified in note 33 supra.
denying the petition for rehearing in *MacGibbon IV*, the Court stated that it had not decided any constitutional issues in *MacGibbon III*, but rather had merely defined the extent of the power granted to the town under the Zoning Enabling Act. In this context, the Court stated: "[*MacGibbon III*] held that the uses of the plaintiffs' land, as testified to by the board's expert, are not 'practical' in the sense used in *MacGibbon II* in defining the power of a town under the Zoning Enabling Act." Thus the Court indicated that its consideration of whether any practical use remained in the land was only for the purpose of determining whether the restriction went beyond the power granted to the town under the Zoning Enabling Act, and not for the purpose of deciding a constitutional taking issue. It should be noted, however, that the Zoning Enabling Act, upon which the *MacGibbon III* decision was based, was replaced in 1975 by a new zoning act. Since

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35 Id.
36 See id. at 771, 344 N.E.2d at 187. *MacGibbon III* held the zoning restriction was invalid because it denied the plaintiffs all practical use of their land. The significance of this holding was unclear because *MacGibbon II* had applied a practical use standard to determine both whether the statutory authority was exceeded and whether the restriction on the land constituted an unconstitutional taking.

First, the Supreme Judicial Court in *MacGibbon II* used the fact that no uses remained in the land to determine that the restriction exceeded the town's authority under the statute. According to the Court:

The preservation of privately owned land in its natural, unspoiled state for the enjoyment and benefit of the public by preventing the owner from using it for any practical purpose is not within the scope and limits of any power or authority delegated to municipalities under the Zoning Enabling Act. 356 Mass. at 640-41, 255 N.E.2d at 351. This did not necessarily mean that the Court found an unconstitutional taking, since the restriction could exceed the power granted under the Zoning Enabling Act and still be within the degree of restriction allowable by the Constitution. Confusion developed when the Court stated in the next paragraph that there would be an unconstitutional taking if the restriction "deprives the plaintiffs' land of all practical value ...." Id. at 641, 255 N.E.2d at 352. This constitutional standard was the same as the standard used to define the extent of the power granted by the Zoning Enabling Statute.

After *MacGibbon II*, on remand the zoning ordinance was found not to be grounded in the purpose of preserving the "land in its natural, unspoiled state for the enjoyment and benefit of the public," but in protecting marine fisheries and the environmental protection of coastal wetlands. 1976 Mass. Adv. Sh. at 149, 340 N.E.2d 490. When the Supreme Judicial Court found this latter purpose to be a legitimate purpose for zoning under the statute, the only question remaining appeared to be whether the restriction amounted to a taking. Therefore, the finding in *MacGibbon III* of no practical uses remaining in the land was interpreted as deciding the constitutional taking issue. Such an interpretation could not be reconciled with the rehearing denial opinion which held that no constitutional issues were decided in *MacGibbon III*. 1976 Mass. Adv. Sh. at 769, 344 N.E.2d at 186.

38 Id.
39 See note 36 supra.
MacGibbon III held only that the authority granted by the old act was exceeded, the possibility remains that a prohibition on the filling of wetlands to protect the environment may be constitutional and the town may have the authority to implement such a restriction under the new zoning act.\textsuperscript{41}

Allowing the restriction under the new zoning act is possible because the new statute expands the purposes for which a municipality may zone specifically to include "the conservation of natural resources and the prevention of blight and pollution of the environment."\textsuperscript{42} One of the methods set forth for accomplishing the act's objectives is "restricting, prohibiting, permitting, or regulating: 1. uses of land, including wetlands ...."\textsuperscript{43} Since protection of the environment and regulation of wetlands are now express purposes of the zoning act, the Court could decide that the new zoning statute gives towns the power to restrict the filling of wetlands for the purposes of protecting the environment, even where the uses of the land are as restricted as they were in MacGibbon.

The rehearing denial opinion, MacGibbon IV, indicates that the Supreme Judicial Court wanted to keep open the possibility that a prohibition on the filling of wetlands without compensation could be constitutional. In addition to emphasizing that the MacGibbon III decision was based solely on the old Zoning Enabling Act and not the new Zoning Act of 1975,\textsuperscript{44} the Court stated that MacGibbon III did not decide anything with respect to other state statutes governing the protection of wetlands.\textsuperscript{45} Therefore, a prohibition on the filling of wetlands may be constitutional when implemented under proper statutory authority, such as the new Zoning Act or the statutes which give the Commissioner of Environmental Management the power to prevent the filling of marshland.\textsuperscript{46}

Since MacGibbon III did not exclude the possibility that other statutes, aside from the old Zoning Enabling Act, may provide valid authority for a MacGibbon III-type restriction, the courts will still have to decide whether sufficient uses remain in such restricted land to avoid an unconstitutional taking. Therefore, even if the MacGibbon III opinion is limited to defining the power granted to the towns by the old Zoning Enabling Act, the significance of MacGibbon III cannot be dismissed. Although such a limitation would mean that the MacGibbon III holding would not be directly applicable to restrictions placed on wetlands under other statutes or even the new zoning act, still MacGibbon III exhibits the concern of the Court for protecting an individual's

\textsuperscript{41} See G.L. c. 40A, §§ 1-17.
\textsuperscript{42} The Zoning Act, St. 1975, c. 808, § 2A.
\textsuperscript{43} Id.
\textsuperscript{44} 1976 Mass. Adv. Sh. at 768-69, 344 N.E.2d at 186.
\textsuperscript{45} Id. at 770-71, 344 N.E.2d at 187.
\textsuperscript{46} See note 33 supra.
property rights. Additionally, it should be noted that the taking issue is not dismissed in *MacGibbon III*, but merely avoided by basing the decision on the now defunct Zoning Enabling Act. Eventually the courts will have to confront the unconstitutional taking issue. *MacGibbon III* provides an indication of the standard the Massachusetts Court will apply when deciding if a regulation constitutes an unconstitutional taking, and also foreshadows a shift in the court’s approach to the problem.

This note will first examine the various tests courts have adopted for determining when a zoning regulation results in an unconstitutional taking. In this context, the conflict between police power regulation and the fifth and fourteenth amendments’ protection of individual property rights will be considered. The note will then analyze various approaches to the taking issue to determine which approach Massachusetts should adopt in light of the conflicting interests of wetlands protection and private property rights. It will be submitted that a balancing test is best suited to the proper resolution of the taking issue, and that this is the test which the Commonwealth approaches in *MacGibbon*. Finally, the shortcomings of the balancing test will be considered and recommendations as to the future direction of the Massachusetts Court will be made.

I. UNCONSTITUTIONAL TAKING: POLICE POWER AND FIFTH AND FOURTEENTH AMENDMENT CONSIDERATIONS

The roots of the taking issue lie in the United States Constitution, as well as in many state constitutions, which proscribe the taking of property by the government without compensation.\(^{47}\) If the government uses private property for a public purpose the owner must receive just compensation.\(^{48}\) However, judicial interpretation has shown that the proscription is not an absolute one. For example in *Mugler v. Kansas*,\(^ {49}\) the United States Supreme Court held that a state need not provide compensation when regulating the uses of land under an exercise of its police power to promote general public welfare and to protect health, morals and safety.\(^ {50}\) The exercise of a state’s police power, however, can in some instances conflict with the fourteenth amendment’s prohibition against the taking of property without com-


\(^{48}\) See Pumpelly v. Green Bay, 80 U.S. 166, 176-77 (1871).

\(^{49}\) 123 U.S. 623 (1887).

\(^{50}\) Id. at 669; the proper grounds for an exercise of a state’s police power were set forth in Sligh v. Kirkwood, 237 U.S. 52, 59 (1915) and Noble State Bank v. Haskele, 219 U.S. 104, 111 (1911).
Therefore, in order to preserve the protections of the fourteenth amendment, the police power must be limited. The difficulty arises in determining where the line is to be drawn between a valid exercise of the police power not requiring compensation and a taking which, if uncompensated, would violate the constitution.

Wetland regulations exemplify this conflict between a valid exercise of the police power and an unconstitutional taking. Protection of wetlands by use of the police power is appropriate because wetlands are a necessary natural resource that must be protected for the public welfare. The problem is that the restrictions on the land necessary to protect wetlands frequently deny the landowner all practical use of his land and, therefore, may amount to a taking of property requiring compensation. The courts must therefore decide the permissible degree of restriction on the use of the land before a taking results.

II. STANDARDS EMPLOYED TO RESOLVE THE TAKING ISSUE

The courts have not provided any clear guidance with respect to drawing the proper line of demarcation between a valid exercise of the police power and a taking of property. However, several tests have been formulated.

A. THE DIMINUTION IN VALUE TEST

The most prevalent test is the “diminution of value” test set forth by...
the United States Supreme Court in *Pennsylvania Coal Co. v. Mahon*.57 In *Pennsylvania Coal*, a state law prohibited certain coal mining that had caused the subsidence of homes.58 The coal company owned the rights of subjacent support of the surface owners, and the mining restriction made substantial amounts of valuable coal unrecoverable. Justice Holmes, in holding that the prohibition exceeded the police power, stated,

Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act.59

The "diminution in value" test as set forth by the Supreme Court requires that some beneficial use remain in the land or the restriction will be a taking.60 By focusing on the extent of the economic harm inflicted on the individual affected by a restrictive regulation, the "diminution in value" test determines the validity of the regulation by reference to the extent of the private loss. In applying the diminution in value test courts have based their decision solely on the degree of interference with the landowner's property rights without any consideration of the importance of the public purpose supporting the regulation.61


59 Id. at 413.


61 Connecticut is an example of one state that has adopted the diminution in value test. In *Bartlett v. Zoning Commission*, 161 Conn. 24, 29, 31, 282 A.2d 907, 909, 910 (1971), the Connecticut Supreme Court decided that marshland which by regulation could not be filled had no practical use and, therefore, the imposition of such a regulation amounted to an unconstitutional taking. Id. In that case, the market value of plaintiff's land if filled was $32,000, whereas the value if the land was not filled was $1,100. Id. at 29, 282 A.2d at 910. In light of such a diminution of value, the Court found that plaintiff had been denied all practical use of his land and therefore, the state had to pay compensation for the land. Id. at 29, 31, 282 A.2d at 910-911. Thus the Connec-
Courts began to recognize inadequacies in the diminution in value test when they attempted to apply it to situations where the individual landowner's actions had adverse effects on the public generally. The diminution in value test, by focusing narrowly on the effect of the regulation on the landowner, failed to consider the importance of the public policy control objectives of the regulation. Some restrictions on the use of the land, such as flood control regulations, must be allowed despite severe interference with the landowner's property rights since there is no other means to protect the public from harm that may result from certain activities of the individual landowner. Therefore, some courts began to move away from the diminution in value test and consider the purpose as well as the effect of the regulation.

In Goldblatt v. Town of Hempstead, the United States Supreme Court, in recognition of the need to consider the public purpose of the regulation, abandoned a strict diminution in value standard, but failed to replace it with any other definable standard. The town in Goldblatt had passed a zoning ordinance that resulted in the closing of plaintiff's gravel excavation business. The ordinance had been passed because plaintiff's excavation had created a lake that was a threat to a newly-developed residential area. Plaintiff argued that the ordinance deprived him of all economic use of the land. The Court upheld the ordinance, but did not decide exactly how far the ordinance could go in restricting the use of the land, since it found that the plaintiff had not met his burden of proving that no economic use remained in the land. While the Goldblatt Court expressed a continued belief in the importance of the degree of diminution of value in the land, it stated that such diminution was not conclusive. The

ticut Supreme Court, in properly applying the diminution in value test, ignored the environmental protection purpose of the regulation and the adverse effects a finding of a taking might have on the public.

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B. The Balancing Test

63 See notes 56-62 supra and accompanying text.
66 The Goldblatt Court stated that "[t]here is no set formula to determine where regulation ends and taking begins." Id. at 594.
67 The Court found that the regulation completely destroyed the mining utility of plaintiff's land. Id. at 592.
68 Id. at 595-96.
69 Id.
70 Id. at 594.
71 Id. The Court did not set forth the reasoning behind its conclusion but merely stated that, "Although a comparison of values before and after is relevant, see Pennsylvania Coal Co. v. Mahon, supra, it is by no means conclusive." In support of this deci-
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Court did not explain why diminution in value alone would no longer be conclusive, but presumably the Court arrived at this conclusion because it realized that in the Goldblatt situation the regulation would have to be upheld regardless of its effect on the landowner because of the need to protect the homeowners from the dangers of the excavation.

Goldblatt was significant because it recognized that the courts had to consider more than just the effect on the individual landowner. However, the usefulness of the case is limited because it failed to specify what factors should be considered in addition to the effect on the landowner. Therefore, reference must be made to other decisions to determine what other factors may be instrumental in a determination of whether an unconstitutional taking has occurred.

The Massachusetts Supreme Judicial Court, in Turnpike Realty Co. v. Dedham,72 recognized that the purpose of the regulation should be considered in addition to the effect on the landowner.73 The town in Turnpike prohibited the filling of wetlands in order to preserve a flood plain.74 The landowners claimed that no practical use was left for the land and, under the “diminution in value” test, there was a taking.75 The Court applied a “balancing test” weighing the harm prevented by the regulation against the extent of the invasion of the owner’s property rights.76 In setting forth its balancing approach the Court stated: “Although it is clear that the petitioner is substantially restricted in its use of the land, such restrictions must be balanced against the potential harm to the community from overdevelopment of a flood plain area.”77 The uses remaining in the land were considered adequate in light of the public harm prevention purposes of the restriction.

Under this balancing approach, the Court could allow the severe restriction on the use of the land because of the importance of the state’s objective in passing the regulation. If the “diminution in value” test had been followed, the Court would only have considered the ef-

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73 Id. at 235, 284 N.E.2d at 900.
74 Id. at 223-225, 284 N.E.2d at 893-94.
75 Id. at 235, 284 N.E.2d at 900.
76 Id. at 235, 284 N.E.2d at 900.
77 Id.
fect on the land. Since the land was severely restricted in its uses, a taking would have resulted despite the flood prevention objectives of the state. The balancing test continued to give consideration to the effect of the regulation on the individual landowner; however, under the balancing approach a severe diminution in value would be allowed if the importance of the state’s purpose outweighed the need to protect the individual’s property rights.

C. The Harm Prevention Test

Some courts have moved beyond the balancing approach to a test that considers only the purpose of the regulation and ignores the effect on the private landowner. Shortly after the Goldblatt decision, the California Supreme Court adopted a “harm prevention” test. In Consolidated Rock Products Co. v. Los Angeles, the Court ruled that there was no taking even though no economic uses remained in the land. Such a severe interference with the landowner’s private property rights would clearly result in a taking if the diminution in value test was applied and would require a strong public necessity to overcome a finding of a taking under the balancing approach. The Consolidated decision, however, ignored the effect on the landowner and ruled that the regulation was valid because it was based on a reasonable public purpose.

The town in Consolidated implemented a zoning ordinance that prohibited the use of plaintiff’s land for a rock and gravel operation. The trial court found that the land was very valuable if used for rock and gravel excavation, but had no value for any other purpose. The harm caused by the excavation was the creation of dust and a lowering of property values. Although the court stated that it believed safeguards could be required that would eliminate most of the harmful effects, significant amounts of dust would still be created. In light of the area’s reputation as a haven for respiratory ailment sufferers, the court found the ordinance to be reasonable. After the court determined that the regulation was a reasonable exercise of the police power to prevent a public harm caused by the spillover effects of the private use, it did not examine the effect the regulation had on the landowner’s property rights to determine if there was a taking.

80 Id. at 647-48.
81 Id. at 518, 370 P.2d at 344, 20 Cal. Rptr. at 640.
82 Id. at 519, 370 P.2d at 344, 20 Cal. Rptr. at 640.
83 Id. at 520, 370 P.2d at 345, 20 Cal. Rptr. at 641.
84 Id. at 519, 370 P.2d at 344, 20 Cal. Rptr. at 640.
85 Id. at 519-20, 370 P.2d at 344-45, 20 Cal. Rptr. at 640-41.
Rather, the court held on the basis solely of the harm prevention aspects of the regulation that there was no taking of the land. California, therefore, rejected the "diminution in value test" in favor of a "harm prevention test" where any reasonable and nondiscriminatory exercise of the police power to regulate a private use of the land that creates a public harm will not be a taking regardless of the effect on the value of the land.

The extreme position of Consolidated, that no reasonable exercise of the police power could result in a taking, effectively gave the state the power to deny the landowner all use of his land without paying compensation so long as the restriction served a reasonable public purpose. In response to the need to give some protection to the private landowner, California restored some limitations on the police power when it applied its "harm prevention test" directly to a wetlands regulation in Candlestick Properties, Inc. v. San Francisco Bay Conservation and Development Commission. As part of a comprehensive plan to protect the ecological balance of the San Francisco Bay, the Commission prohibited the filling of plaintiffs' land. The plaintiffs claimed that their land, for which they had paid $40,000 in 1964, had no practical value in its unfilled condition and that, therefore, the regulation amounted to a taking without compensation. After finding the regulation to be a valid exercise of the police power, the Court retreated slightly from the extreme position it had taken in Consolidated that no valid exercise of the police power could constitute a taking.

The Candlestick court in deference to the holding of the United States Supreme Court in Pennsylvania Coal Co. v. Mahon, admitted that, "an undue restriction on the use of private property is as much a taking for constitutional purposes as appropriating or destroying it."
To decide whether the prohibition against the filling of wetlands constituted such an "undue restriction," however, the court continued to consider the purpose of the regulation and not the effect on the individual landowner. In this context, the court stated that:

In view of the necessity for controlling the filling of the bay, as expressed by the Legislature in the provisions discussed above, it is clear that the restriction imposed does not go beyond proper regulation such that the restriction would be referable to the power of eminent domain rather than the police power.93

Applying this reasoning, the California court in Candlestick concluded that the necessity of the public purpose of the regulation justified any adverse effects on the individual landowner. The court in Candlestick therefore maintained the harm prevention test of Consolidated, but added the requirement that the harm prevented by the regulation reach some level of necessity in order to justify a severe restriction on the use of the land.94 In Candlestick, the precarious condition of the bay and the need for a regional approach were enough to satisfy the court that the restriction was necessary.95 The Court did not consider, however, what other means the state might have to protect the bay nor why requiring compensation would prevent the protection of the bay.

D. THE WISCONSIN APPROACH

The three standards which have been set forth above, the "diminution in value test", the "balancing test", and the "harm prevention
test”, all assume that some private property right has been violated by the prohibition of the filling of wetlands. The issue, then, is whether the infringement on property rights amounts to a taking. Wisconsin takes a different approach which denies that the landowner ever owned the right to fill the land. Therefore, a regulation that prohibits the filling of wetlands does not take any property rights from the landowner. This approach is based upon Wisconsin's unique definition of the collection of rights, powers, privileges and immunities that form “property.”

The Wisconsin Supreme Court in Just v. Marinette County, found that this cluster of property rights did not include a landowner's right to change the natural character of his land. The Court stated: “An owner of land has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others.” The court considered the filling of wetlands to constitute such a change in the natural character of the land. Therefore any restriction on the filling of wetlands would not interfere with the landowner's cluster of private property rights.

Since the landowner was not deprived of any property rights by the wetlands regulations, the court concluded that despite any diminution in the value of the land caused by the regulation, no taking would result. The court dismissed the importance of the diminution in value when it stated: “While loss of value is to be considered in determining whether a restriction is a constructive taking, value based upon changing the character of the land at the expense of harm to public rights is not an essential factor or controlling.”

The Wisconsin approach is based on a fundamentally different premise than the Massachusetts approach which assumes that some property right has been violated. It is unlikely that Massachusetts will adopt Wisconsin's definition of property rights which excludes the right to substantially change the natural character of the land. Nevertheless the novel Wisconsin approach is a significant indicant of where courts might be moving to protect the environment by decreasing the degree of control an individual has over his or her property. Greater public intrusion upon private property rights has been the trend of the twentieth century and it is not unrealistic to believe that the Wisconsin approach, which is a logical extension of this trend, will be the path the courts choose to follow as the need for public control over land use increases.

Earliest interpretations of the “taking of property” clause of the United States Constitution considered property to be a tangible object of ownership which could only be taken by a physical taking over of the land. Kratovil and Harrison, supra note 53 at 599. In the latter half of the nineteenth century, courts redefined property not to mean the land itself but a collection of rights, powers, privileges, and immunities. Id. at 600. See Eaton v. B.C. & M.R.R., 51 N.H. 504, 511 (1872). Determining whether a taking had occurred then became problematic and dependent mainly on the extent of the denial of this cluster of property rights.

56 Wis.2d 7, 201 N.W.2d 761 (1972). For further discussion of this case see Note, 4 Seton Hall L. Rev. 662 (1973).

Just at 17, 201 N.W.2d at 768.

Id. at 23, 201 N.W.2d at 771.
The Wisconsin court thus will not consider the possibility of filling as part of the value of the land because the rights of ownership do not include the right to change the natural character of the land in a manner that injures the public. Therefore any diminution in value caused by a prohibition on the filling of wetlands will be irrelevant to a determination of the taking issue.

The Wisconsin approach does not merely resolve the taking problem, but eliminates it entirely by a definitional process. Insofar as the Wisconsin court determined that property ownership rights do not include the right to destroy substantially the natural character of the land, the state's prohibition against the filling of wetlands cannot be deemed a usurpation of any property rights and therefore such a prohibition will not constitute a taking.101

The rules of decision employed by various courts to resolve the taking issue divide into four approaches — the "diminution in value test," the "balancing test," the "harm prevention test," and the Wisconsin definitional approach.102 The Supreme Court has not clearly decided which standard is the most appropriate for determining when a regulation constitutes a taking.103 As a result state courts have varied widely in their approaches.104 Massachusetts, like the other states, has

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101 See id. at 23-24, 201 N.W.2d at 771.
102 One other approach to the wetlands problem should be discussed for a complete understanding of the regulatory weapons available to protect wetlands. In Zabel v. Tabb, 430 F.2d 199 (5th Cir. 1970), cert. denied, 401 U.S. 910 (1971), the Secretary of the Army prohibited the filling of plaintiffs' wetlands property to protect fish and wildlife. The Secretary imposed the restriction on the authority of section 10 of the Rivers and Harbors Act of 1899, c. 425 30 Stat. 1121, 1151, which was originally designed to protect navigable water under authority of the commerce clause. Id. at 202-03. The United States Court of Appeals for the Fifth Circuit ruled that a national policy favoring environmental protection had given the Secretary the power to prohibit the filling of non-navigable wetlands solely on environmental grounds. Id. at 207-14. The court dismissed the taking issue as irrelevant since wetlands are subject to a paramount servitude in the federal government under power incident to the Commerce Clause. Id. at 215.

A discussion of the appropriateness of using the Commerce Clause for environmental protection is beyond the scope of this article. However, it is important to note that the federal government as a result of Zabel v. Tabb has the means to accomplish wetlands preservation without paying compensation to the landowner. Although the Commerce Clause ground of the decision in Zabel v. Tabb is not applicable to state regulation of wetlands, the case demonstrates the degree of importance federal courts have attached to wetlands protection. Also the extent to which the Secretary of the Army pursues this policy will influence the need for state regulation, but it is unlikely that this avenue alone will adequately protect wetlands. Therefore, states must still confront the problem of determining how far the police power can restrict the use of the land to protect the environment without becoming an unconstitutional taking.

For further discussion of Zabel v. Tabb, see Recent Developments, 1970 DUKE L. REV. 1299.

103 See Dunham, Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law, 1962 THE SUPREME COURT REVIEW 63, 63.
been searching for an explicit standard to apply to the taking issue. Massachusetts originally adopted the diminution in value test,\textsuperscript{105} but has found this test to be inappropriate under certain circumstances where the public need for regulation is great and the payment of compensation is not practical.\textsuperscript{106} Massachusetts is currently in the process of formulating a new test to replace the diminution in value standard.\textsuperscript{107} In formulating its new standard, Massachusetts should be aware of certain inadequacies which exist in each of the proposed tests.

The second half of this note will analyze the various tests in order to expose the problems associated with each. First, the diminution in value test will be found inadequate because it fails to consider the public purpose supporting the regulation. The harm prevention test will then be criticized for failing to apply a least restrictive means analysis to ensure that property rights are not violated unnecessarily. Next, the Wisconsin approach will be rejected because it fails to give adequate consideration to the effect on the private landowner. Then the balancing test will be critically analyzed. Finally, it will be submitted that the balancing test is the best approach to resolve the unconstitutional taking issue. In the last section of this note, Massachusetts' development toward a balancing approach will be set forth and recommendations will be made as to further refinements in this area.

III. CRITICAL ANALYSIS OF THE TESTS

A. THE DIMINUTION IN VALUE TEST—FAILURE TO CONSIDER THE PUBLIC NEED

The diminution in value test is inadequate for the purpose of determining if a taking has occurred because it only considers the effect of the regulation on the landowner. It considers neither the regulation's purpose nor whether an alternative means exists. A prohibition on the filling of wetlands almost always denies the landowner all practical use of his land. Thus, if only the effect on the individual landowner is considered, wetlands regulations will usually constitute a taking requiring compensation. The payment of compensation therefore, will be the only way to protect wetlands. This would result in many wetlands being unprotected due to a state's inability to afford to pay compensation. If these unprotected wetlands are filled, irreparable harm will be caused to the environment. Such a result cannot be tolerated. States must have the means to protect the environment for future generations. Therefore, the courts should consider not only the

\textsuperscript{106} See Turnpike Realty Co. v. Dedham, 362 Mass. 221, 284 N.E.2d 891, 900 (1972).
effect on the individual owner, but also the importance of the state's objective.

By contrast, courts that apply the "diminution in value" test are assuming that the state can afford to pay for the wetlands.\textsuperscript{108} Such an assumption is often incorrect,\textsuperscript{109} but leads the court mistakenly to believe that the individual's rights are being protected without sacrificing the environmental objectives. For example, it is doubtful that Maine can afford to pay compensation for the wetlands that must be protected.\textsuperscript{110} Yet the Maine Supreme Court, applying a diminution in value test, ruled in \textit{State v. Johnson}\textsuperscript{111} that prohibitions against the filling of wetlands for conservation purposes result in a taking.\textsuperscript{112} The court based its opinion that the costs of the taking should be publicly borne on two grounds: (1) no commercial value remained in the land, and (2) the benefits of preservation of wetlands are state-wide.\textsuperscript{113} The Maine Court failed to consider, however, the importance of the purpose of protecting wetlands, or the feasibility of a condemnation program accomplishing this objective.

After \textit{Johnson}, the only means available to Maine for protecting wetlands is acquisition. Maine does have an acquisition program,\textsuperscript{114} but the public funds are inadequate to protect wetlands.\textsuperscript{115} As one commentator has suggested, the Maine court should change its position because the condemnation doctrine fails to protect wetlands satisfactorily, and therefore an intolerable destruction of necessary wetlands results.\textsuperscript{116} The fact that a finding of a taking would in practice deprive the state of its only feasible means of adequately protecting wetlands should have been considered by the Maine court.

B. \textsc{The Harm Prevention Test—Unnecessary Intrusions Upon Property Rights}

The "harm prevention test" resolves the inadequacy of the diminution in value test by considering the public purpose justification for the regulation instead of considering simply the effect on the landowner.\textsuperscript{117} However, while the "harm prevention test" avoids the pitfall

\textsuperscript{108} See, \textit{e.g.}, Bartlett v. Zoning Commission, 161 Conn. 24, 30, 282 A.2d 907, 910 (1971).


\textsuperscript{110} \textit{Wilkes, supra} note 109, at 148-50, 172, 173.

\textsuperscript{111} 265 A.2d 711 (Me. 1971).

\textsuperscript{112} \textit{Id.} at 716.

\textsuperscript{113} \textit{Id.}

\textsuperscript{114} Heath, \textit{supra} note 55, at 367.

\textsuperscript{115} \textit{Wilkes, supra} note 109, at 148-50, 172, 173.

\textsuperscript{116} \textit{Id.} at 172.

\textsuperscript{117} See notes 78-95 \textit{supra} and accompanying text.
of the "diminution in value test", it also is too narrow in its scope because it fails to give adequate consideration to the need to protect the rights of the individual landowner. The only protection afforded the individual under the "harm prevention test" is the requirement that the purpose of the regulation be necessary for the public welfare. This protection is inadequate because it fails to include an investigation into whether the means chosen to protect the public is the least restrictive means available.

A finding that wetlands protection is necessary to protect the public from the environmental consequences of filling the land should not alone justify restricting the use of the land to the extent of making it worthless. The effect of such a regulation would be to shift the entire cost of the conservation of wetlands, which conservation would inure to the benefit of the general public, to those persons who own the property.\textsuperscript{118} The owners of once valuable coastal wetlands would be left with useless marshland. Such an inequitable distribution of the costs of protecting the environment and so severe an intrusion on private property rights should only be tolerated as a last resort when the state has no other means of protecting the public interest. Wetlands can only be preserved by prohibiting their filling, but the need for the prohibition does not resolve the issue of compensation. The "harm prevention test" does not even consider the crux of the problem which is whether a state can adequately protect wetlands, while simultaneously protecting private property rights. By considering only the purpose of the regulation and the benefit to the public, the "harm prevention test," thereby, fails to give a proper emphasis to the need to protect an individual landowner's property rights.

C. THE WISCONSIN APPROACH — INADEQUATE CONSIDERATION OF THE EFFECT ON THE LANDOWNER

The Wisconsin approach, like the "harm prevention test," ignores the substantial loss inflicted upon the landowner by the elimination of his commonly recognized right to fill his land. Wisconsin tried to avoid the problem of distributing the costs of wetlands protection by ruling that the landowner is not really losing anything.\textsuperscript{119} Such an approach is mistaken because the economic value of land has traditionally included the value of the right to fill the land. If filling is forbidden, the landowner loses property to the extent of the difference between the value of the land with the possibility of filling and the value in its natural state, a loss which is usually substantial in wetland cases.\textsuperscript{120} A prohibition on the filling of wetlands may, and usually

\textsuperscript{118} See Sax, Takings, Private Property and Public Rights, 81 Yale L. J. 149, 177-86 (1971).
\textsuperscript{119} See also Sibson v. State. 115 N.H. 124, 128-29, 336 A.2d 229, 242-43 (1975).
\textsuperscript{120} See, e.g., MacGibbon III, 1976 Mass. Adv. Sh. at 149, 340 N.E.2d at 490, where the land had a fair market value of $5,300 in its unfilled state but if it could be filled it would have a value of $44,000.
does, leave the land without any practical use. The Wisconsin approach ignores this real change in the value of the land. The problem of deciding who is going to bear the costs of the decreased land value does not disappear by redefining property rights. Although theoretically the elimination of the right to change the natural character of the land will avoid a taking, the real world economic effects should not be ignored.

In addition, if the Wisconsin approach is taken to its extreme even the cutting down of a tree could be prohibited since this would change the natural character of the land. Even the Wisconsin court would not want to vest this much power in the state at the expense of private property rights. As various land developments are challenged on the ground that the natural characteristics of the land are being changed, the Wisconsin court will have to more specifically define the point at which changes in the land exceed those authorized by property ownership. Deciding where this line should be drawn depends upon the same factors as the taking issue, i.e., the extent of the diminution in value of the land, the harm to the public from changing the land, and consideration of less restrictive means to prevent the harm caused by the change in the use of the land. Consequently, the Wisconsin approach does not define the problem away, but merely reframes it.

D. THE NEED FOR A BALANCING APPROACH

The "diminution in value test," the "harm prevention test," and the Wisconsin approach each fail to mediate adequately the conflict between public necessity and the protection of private property rights. The "diminution in value test" fails to consider the importance of the public objective and therefore its application may foreclose the only means available to accomplish a necessary public purpose.121 Conversely, the "harm prevention test" ignores the importance of protecting the landowner from interferences with his property rights. Under the "harm prevention test," a landowner may be deprived of all economic use of his land even if the state could have accomplished its objective by an alternative means which would not have usurped private property rights.122 Like the "harm prevention test," the Wisconsin approach fails to give adequate consideration to the effect on the landowner. The Wisconsin Court allows the state to prohibit any changes in the characteristics of the land regardless of the necessity for such a restriction. As a result the landowner may be deprived of the use of his land even though the state's goal could have been accomplished by a less restrictive means.123

121 See notes 108-116 supra and accompanying text.
122 See notes 117-118 supra and accompanying text.
123 See notes 119-120 supra and accompanying text.
The balancing test best resolves these problems by weighing the public need, the landowner's interests, and the availability of other means to accomplish the state's objective. The advantages of the balancing approach are threefold: it (1) allows the court to permit restrictions on land use when necessary for the public welfare regardless of the effect on the landowner, (2) provides the landowner with an independent check on the legislative decision that the regulation is necessary, and (3) permits flexibility in result as required by changing social circumstances.

The first advantage is demonstrated by the Turnpike situation. In Turnpike the State prohibited the filling of the wetlands in order to protect the public from flooding which may have resulted from the filling of the land. Despite a severe diminution in the value of the land the balancing approach allowed the Court to uphold the zoning regulation due to the importance of the public need. The balancing approach prevented the Court from focusing narrowly on the effect on the individual's land and on that basis striking down the restriction as an unconstitutional taking. Nevertheless, the balancing standard recognizes that an individual whose land is so severely restricted in use, as it was in Turnpike, should be entitled to challenge through the courts both the necessity of the controls and the reasonableness of the means chosen.

The second advantage of the balancing approach is that it provides for an independent determination of the necessity of the regulation. This independent check on the legislature's decision is necessary to protect the landowner from a legislature which may be focusing on the public need without proper regard for the private harm. Legislatures in the attempt to resolve difficult problems in a manner most beneficial to the general public, occasionally lose sight of the need to protect fundamental individual rights. To protect the individual from such abuses by the legislature the balancing approach forces the court to make an independent determination of the importance of the public purpose and the necessity of the means chosen. This determination is then weighed against the severity of the private harm. By this process, the balancing test assures that only regulations which are absolutely necessary will be allowed when the regulation results in substantial restrictions on the use of the land.

The third benefit of the balancing approach is that it provides the court with the flexibility necessary to deal with constantly changing factual circumstances and the infinite variety of combinations of pub-

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125 Id. at 235, 284 N.E.2d at 893-94.

126 See Binder, supra note 55 at 12.

127 See Kratovil and Harrison, supra note 53 at 629.

lic benefit and private detriment which may arise under the taking issue.

As the social environment changes, the degree of necessity of a public intrusion upon property rights may change. The flexibility of the balancing approach prevents the court from being trapped into a specific definition of a taking which in a rapidly changing world may not continue to resolve adequately the conflict between the public need and the private property right. For example, fifty years ago almost any court would have considered prohibition on the filling of wetlands to be a taking. However, as the environmental benefits of wetlands became more important to society, courts began to allow such a restriction on wetlands without finding a taking. The balancing approach allows for such a change in result without changing the framework of the standard applied to arrive at the result.

The advantages of the balancing approach result from its ability to combine the concern of the diminution in value test for the individual's property rights with the assumption underlying the harm prevention test that the individual's rights must be subordinate to the public interest. By weighing the necessity for the regulation against the extent of the infringement on private property rights, the balancing approach permits the court to vary the degree of diminution in value of the land allowed. In this manner the "balancing test" avoids the inflexibility of the other tests, and the courts can protect the individual's property rights as much as possible without interfering with any vital public objectives.

Nevertheless, the balancing approach does have several drawbacks. The balancing approach is attacked first for being overly subjective, thereby failing to provide a concrete basis for predictability of result, and second for involving the courts in determinations more appropriately left to the legislature.

The problem of subjectivity arises because the balancing approach places on the courts the burden of determining the importance of the policy underlying the regulation. The result under the balancing test depends to a great extent on the court's evaluation of the necessity of the regulation. Since the importance of the public purpose of the

129 See Kratovil and Harrison, supra note 53 at 610; Sax, Taking and the Police Power, 74 Yale L. J. 36, 61 (1964).
130 See Kratovil and Harrison, supra note 53 at 610.
131 See Nichols on Eminent Domain, supra note 47, at § 1.42 [18] [3], at 1-300.1; see, e.g., Just v. Marinette County, 56 Wis.2d 7, 201 N.W.2d 761 (1972); Candlestick Properties Inc. v. San Francisco Bay Conservation and Development Comm., 11 Cal. App. 3d 557, 89 Cal. Rptr. 897 (1970); Sibson v. State, 115 N.H. 124, 336 A.2d 239 (1975); Potomac Sand & Gravel Co. v. Governor, 266 Md. 358, 293 A.2d 241, cert denied, 409 U.S. 1040 (1972).
regulation is a subjective decision, courts' assessments of the importance of public purpose will vary in each case.\textsuperscript{133}

The difference in result between the superior court and the Supreme Judicial Court in \textit{MacGibbon III} illustrates the way in which the subjectivity inherent in the balancing approach can lead to varying results. The superior court considered the preservation of wetlands to be so important as to justify the zoning restriction.\textsuperscript{134} The Supreme Judicial Court, however, characterized wetland protection as a mere "public benefit" and therefore would not tolerate the degree of interference with property rights that the superior court allowed.\textsuperscript{135} Both of these results are consistent with the proper application of the balancing test, yet the decisions vary because of the particular court's perception of the importance of the public purpose. Because the line drawn between a valid exercise of the police power and an unconstitutional taking will depend under the balancing test on this subjective determination of the importance of the public purpose, the line will not be clear; it may vary from court to court and may change with the times and circumstances.\textsuperscript{136}

Aside from being criticized as being overly subjective, the balancing test can be attacked for involving the courts in legislative decisions.\textsuperscript{137} After making its determination with respect to the degree of importance of the purpose of a restriction, a court employing a balancing test would weigh the purpose and the reasonableness of the means designed to accomplish that purpose against the effect on the individual's rights. The balancing approach assumes courts can weigh these dissimilar factors of public interest and private detriment, and decide whether or not the public purpose justifies the invasion of property rights.\textsuperscript{138} It also assumes that courts can determine which method is the best way to accomplish the purpose.\textsuperscript{139}

Critics of the balancing approach argue that the legislature is better equipped to make all of these decisions. The legislature has the resources to make proper studies to determine the nature and extent of the problem which the regulation is supposed to alleviate. In addition, the legislature is structured in a manner conducive to evaluating the various proposals to cope with a problem and brokering the various interests to arrive at the most socially desirable solution.\textsuperscript{140}

The courts cannot deal as effectively with the general social problem because they are structured to deal only with the narrower prob-

\textsuperscript{133} See Harris, supra note 132 at 659.
\textsuperscript{135} Id. at 150-51, 340 N.E.2d at 491.
\textsuperscript{136} See Harris, supra note 132 at 659.
\textsuperscript{137} See Michelman, supra note 57 at 1195.
\textsuperscript{138} See Harris, supra note 132 at 659.
\textsuperscript{139} See Binder, supra note 55 at 11-12.
\textsuperscript{140} See Sax, supra note 56 at 176.
lems of the specific two adversaries before them.141 Courts do not have the time, resources, or political format to decide properly the degree of public need for the regulation or the feasibility of other means to accomplish the desired objective.

The wetlands situation demonstrates the appropriateness for legislative determination of some of the decisions the balancing test forces the court to make. For example, the court will not be able to commission studies to determine the ecological impact of filling wetlands, or the amount of wetlands that need to be preserved, or the number of people affected by such a regulation, or the costs of purchasing wetlands. Nevertheless, the balancing approach involves the court in a consideration of all these factors in deciding whether a restriction on the filling of wetlands should be considered a taking.

Despite the inherent dangers of judicial legislating and the problem of subjectivity, it is submitted that the benefits of the balancing approach outweigh these disadvantages. Although the subjective determination of the public need for the regulation can lead to varying results, it is a necessary determination to insure that an individual's property rights will not be violated unless absolutely necessary. The core of the taking problem is a conflict between individual property rights and society's needs.142 This conflict should not be made a battle of absolutes. Rather the conflict should be mediated to protect property rights but in the light of what is best for society generally.143 Such a mediatory function requires that the court become involved with making decisions as to the importance of the public objective, the availability of alternative means to accomplish that objective, and the degree of interference with property rights.144 Some of these determinations necessarily involve a subjective element; however, all of these factors must be considered if the court is going to give maximum protection to property rights and yet not place the state in a position where it will have no means to accomplish an essential public objective.

Admittedly the balancing approach involves the court in legislative-type decisions. The court, however, in applying the balancing test, should not substitute its judgment as to the proper resolution of the social problem for that of the legislature.145 Rather, the court should merely offer an added safeguard to insure that all due consideration has been given to the rights of the individuals affected.146 The legislative-type decisions which the balancing test requires constitute a

142 See Kratovil and Harrison, supra note 53 at 627-28.
144 See Nichols On Eminent Domain, supra note 47 § 33.5, at 33-38.17-33-38.18.
145 Id. at § 33.5, at 33-38.15-33-38.17.
146 See Kratovil and Harrison, supra note 53 at 629.
legitimate judicial function in this context of acting as the protector of private property rights. 147

In addition, the intrusion upon what are normally considered legislative functions is necessary for the court to understand the full ramifications of its decision. For example, the determination of the reasonableness of the means may involve consideration of the state's ability to pay for other means of accomplishing the objective. Clearly budgetary considerations are exclusively within the legislative sphere. Nevertheless, the court may have to take note of fiscal restraints in order to determine the reasonableness of the means chosen. In the area of flood plain or wetland preservation zoning, the determination of the state's ability to pay compensation will be crucial. One alternative means of protecting wetlands is for the state to take the land by eminent domain and pay compensation for the land. The reasonableness of this method of preserving wetlands depends upon the state's fiscal ability to pay compensation for the land. A requirement by a court that compensation must be paid, when the state cannot afford to pay such compensation, will have the same effect as prohibiting the regulation of the wetland filling. If the protection of wetlands is necessary to prevent a public harm, then the requirement that compensation be paid when the state cannot afford to pay compensation for all the necessary wetlands may result in irreparable harm to the environment. The balancing approach, by forcing the court to consider the availability of other means of accomplishing the public purpose, would expose to the court these ramifications of requiring compensation to be paid for the wetlands. In light of the failure of eminent domain adequately to protect wetlands, the court might choose to allow the zoning restriction on the filling of wetlands even though it denies the landowner of certain property rights.

This capacity to permit a state to place restrictions on property when necessary for the public welfare, while providing maximum protection for property rights is the touchstone of the balancing approach. Courts should not abandon their duty to protect individuals from confiscatory legislative action. However, the judiciary must also be mindful of those situations in which severe interferences with property rights without compensation must be tolerated for the public's welfare. 148 In deciding when these situations exist it is not inappropriate, rather it is essential, that the court make certain legislative-type decisions to properly balance the public need and the private right. This balancing framework allows only necessary intrusions on property rights and the individual is given the added protection that the court must agree with the legislature that the imposition upon property rights is essential and compensation cannot be re-

147 Id.
148 See Binder, supra note 55 at 45.
quired. The individual is thus protected from unwarranted intrusions upon his property rights, yet, society is not shackled by property rights when the legislature and the court agree that the public need requires that the property rights be infringed without the payment of compensation.

In light of the conclusion that the balancing test is the best approach to the taking issue, recent developments in the Massachusetts taking standard shall be considered to determine whether the Supreme Judicial Court is moving in the proper direction.

IV. MASSACHUSETTS' EVOLUTION TOWARD THE BALANCING APPROACH

In Commissioner of Natural Resources v. S. Volpe & Co.,149 Massachusetts first confronted the wetlands taking problem and set forth a diminution in value standard to resolve the issue.150 In Volpe, the Commissioner of Natural Resources sought to enjoin the defendant from filling any of his marshland.151 The purpose of the restriction was to protect marine fisheries and maintain the ecological balance of the area.152 The Supreme Judicial Court ruled that the Commonwealth's police power could be used to protect wetlands, but if the regulation deprived the landowner of all practical use of the land, an invalid taking would be found.153 The Court required that practical uses remain for the land when it said: "A crucial issue is whether, notwithstanding the meritorious character of the regulation, there has been such a deprivation of the practical uses of a landowner's property as to be the equivalent of a taking without compensation."154 Thus, in Volpe, Massachusetts adopted the "diminution in value test" and therefore looked to the effect on the landowner to determine if a taking had occurred.155

In MacGibbon II,156 the Supreme Judicial Court again held that a finding of a taking would depend on the uses left in the land.157 When considering the plaintiffs' claim that the zoning by-law amounted to an uncompensated taking, the Court stated: "[The tak-
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[Text]

ing issue] involves the question whether the power to regulate under the zoning by-law is exercised in such a manner and to such an extent that it deprives the plaintiffs' land of all practical value to them or to anyone acquiring it . . . ." The Court did not actually apply the test and decide the taking issue, since the court did not have to reach the constitutional issue because it held that the town had exceeded the power granted to it by the Zoning Enabling Statute. However, after noting the legal alternatives available to the town to preserve the land, the Court, in dicta, indicated that if it had to reach the constitutional issue it would find that the zoning restriction deprived plaintiffs' land of all practical value and therefore constituted an unconstitutional taking without compensation.

In Volpe and MacGibbon II, the Supreme Judicial Court defined an unconstitutional taking as a deprivation of all practical uses of the land. This standard was changed in MacGibbon III, where the Court examined the effect on the uses of the land in conjunction with the purpose of the restriction; that is, the protection of the environment. The zoning restriction in MacGibbon III was not held invalid solely because of its effect on the landowner's use of the land. Rather, the Court indicated that the effect on property was too substantial when zoning for environment purposes.

Once before, in Turnpike Realty Co. v. Dedham, the Supreme Judicial Court had found it necessary to consider the degree of diminution in value allowed in light of the public purpose supporting the regulation. In Turnpike the regulation had the same effect as in MacGibbon III in that it prohibited the filling of wetlands. Notwithstanding the identical effect upon the landowners in Turnpike and MacGibbon III the cases reached opposite results, with Turnpike allowing the regulation and MacGibbon III holding it invalid. The results in these two cases would be inconsistent if Massachusetts were still applying a diminution in value test. However, the opposite results can be explained under the balancing standard by reference to the two distinct public

158 Id.
159 Id. at 640-41.
160 See id. For interpretations of MacGibbon II, see Binder, supra note 55 at 40:
The implication of MacGibbon II is clear that the Massachusetts court does not approve of wetlands preservation through zoning or prohibitions on development. Consequently, it appears to be the rule in Massachusetts that if the state wishes to preserve wetlands in their natural state it will have to do so by acquisition, and not by regulation.
State v. Johnson, 265 A.2d 711, 715-16 (Me.1970); Nichols on Eminent Domain, supra note 47, at § 33.5(c) at 33-38.20 n.75.
162 Id.
164 See Dunham, A Legal and Economic Basis for City Planning, 58 Colum. L. Rev. 650, 663-69 (1958).
purposes involved. In *MacGibbon III* the purpose of the restriction was to preserve environmentally necessary wetlands. The Court characterized this purpose as a "public benefit" rather than the prevention of a private use that creates a public harm.\(^{165}\) However, in *Turnpike* the purpose of the restriction was not only to provide for the environmental protection of wetlands but also to prevent flooding. The distinction between the two cases is that the Court considered the purpose of flood control in *Turnpike* to be more important than the environmental protection purpose in *MacGibbon III*. The more important purpose in *Turnpike* justified a greater invasion upon property rights. Therefore the restriction could be upheld even though the effect of the regulation was the same as in *MacGibbon III*. The fact that the purpose of the regulation was dispositive of the taking issue in *MacGibbon III* and *Turnpike* indicates an abandonment of the diminution in value test in favor of a balancing test which makes the diminution in value permissible without a taking contingent upon the importance of the purpose of the regulation.\(^{166}\)

In conjunction with the balancing approach, Massachusetts is also moving toward a least restrictive means test. The least restrictive means test is a judicial standard that is often used when applying the balancing approach to a particular set of facts, in order to protect against unnecessary interferences with property rights.\(^{167}\) According to the "least restrictive means" analysis, if there is a reasonable alternative method available for the state to accomplish its purpose, the state must choose the method that will result in the least infringement of private property rights.\(^{168}\) Therefore, a state will be unable to restrict the use of property without paying compensation unless no other reasonable means is available to achieve the necessary public objective of the regulation.

The effectiveness of the least restrictive means test in eliminating certain claimed state objectives for a regulation was exhibited in *MacGibbon III*. In that case, the town claimed that one of its purposes in

\(^{165}\) *MacGibbon III*, 1976 Mass. Adv. Sh. at 151, 340 N.E.2d at 491. Most courts allow greater restrictions on the land when the purpose is to prevent a public harm, rather than provide a public benefit. The preservation of coastal wetlands has been considered either a public use of the land to provide the benefits of an ecologically balanced coastline to the public or the prevention of a private use, the filling of the land, which creates a public harm by its bad environmental spillover effects. *Compare* State v. Johnson, 265 A.2d 711, 716 (Me. 1970) *with* Candlestick Properties Inc. v. San Francisco Bay Conservation and Development Commission, 11 Cal. App. 3d 557, 571, 89 Cal. Rptr. 897, 905 (1970).

\(^{166}\) The balancing test, which weighs the purpose and effect of public benefits against the private burden, has also been suggested by several commentators. *See*, e.g., *Binder*, supra note 55 at 9-18; *Kratovil and Harrison*, supra note 53 at 626-29; *Dunham, A Legal and Economic Basis for City Planning*, 58 COLUM. L. REV. 650, 663-69 (1958).

\(^{167}\) *See* *Binder*, supra note 55, at 11.

\(^{168}\) *See* id. at 11, 12.
denying the permit to fill the land was to prevent flooding and erosion.\textsuperscript{169} Mac Gibbon III held that the town could not prevent the filling of the land on the grounds of flooding and erosion because less restrictive means to prevent these problems were available.\textsuperscript{170} The Court found that flooding and erosion could be prevented by appropriate conditions and safeguards which the town's board of appeals had the power to require.\textsuperscript{171} The Court then concluded that: "The danger of flooding and erosion was therefore not a legally tenable ground for outright denial of the permit. The problem should have been resolved by conditions and safeguards, and it is to be so resolved."\textsuperscript{172}

The application of this least restrictive means test provides the court with a judicially manageable standard for making decisions as to the appropriateness of restrictions on the land which would normally be considered legislative-type decisions. Moreover, the least restrictive means analysis furnishes an objective framework within which the court can construct what might otherwise appear to be a subjective decision thereby making the decision more understandable, acceptable, and more likely to be perceived as being fair. Therefore, when the least restrictive means analysis can be utilized it functions as a built-in check on the disadvantages of the balancing approach. However, the value of the least restrictive means standard as applied to the wetlands preservation problem is limited because there is only one physical method for preserving wetlands, and that is to prohibit the filling of the land. Nevertheless, the application of the least restrictive requirement in MacGibbon III to the issue of flood control and erosion provides further indication that Massachusetts is adopting the balancing approach to resolve the taking issue.

This shift to a balancing approach is a welcome improvement over the Supreme Judicial Court's earlier adherence to the diminution in value standard. Under the diminution in value standard, restrictions on the filling of wetlands would constitute unconstitutional takings because of the resulting severe interference with the landowner's use of the land. The new balancing approach will allow the Court to permit such a restriction if it is necessary for the public welfare. However, the Supreme Judicial Court does not appear prepared yet to accept wetlands protection as a public purpose which justifies severe restrictions on the use of the land.

Nevertheless, the movement toward a balancing test is significant because it involves the court in a consideration of the public purpose as well as the private effect. Therefore, supporters of a wetlands zoning restriction will be able to move the courts beyond a mere discus-
sion of the practical use left in the land to a consideration of the importance of the public objective. The fact that the Supreme Judicial Court's particular view on the importance of wetlands protection may be mistaken is not as significant as this shift to the balancing framework to resolve the problem. By use of the balancing approach the courts will be able to recognize situations where property rights must bow to public concerns and thereby avoid placing the state in a position where it has no means to accomplish a vital public objective.