Chapter 19: Zoning and Land Use

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CHAPTER 19

Zoning and Land Use

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A. ZONING

§19.1. Exclusionary Zoning. In Wilson v. Town of Sherborn, the Massachusetts Appeals Court sustained the validity of a two-acre minimum zoning requirement. The case raises the issue, faced by other state and federal courts in recent years, of whether zoning provisions that effectively exclude significant segments of an area's population from parts of a municipality are valid exercises of a community's police power. Several states, notably New Jersey and Pennsylvania, have held such regulations to be unconstitutional on due process and equal protection grounds. Wilson, however, reveals the unsatisfactory nature of these approaches and suggests that the appropriate resolution may be legislative rather than judicial.

Exclusionary land use controls are those regulations "which appear to interfere seriously with the availability of low- and moderate-cost housing where it is needed." Building and housing codes may have exclusionary effects, but the most common devices are restrictive zoning provisions. These include minimum building requirements, the exclusion of multiple dwellings, restrictions on bedroom numbers, prohibition of mobile homes, frontage requirements, and large lot requirements. In addition, restrictions on subdivision control, site plan approval, and cluster zoning often result in increased costs for individual housing units. While the special permit requirements may allow

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2 Id. at 655, 326 N.E.2d at 927.
6 Williams & Norman, Exclusionary Land-Use Controls: The Case of North-East New Jersey, 4 Land-Use Controls Q. (Fall, 1970) at 4 [hereinafter cited as Williams & Norman].
multi-family developments, the conditions imposed on the issuance of the permit may price the housing beyond the means of low and moderate income families. Thus, even those sections of a community zoned for multiple family dwellings may be unavailable to those in the lower-income brackets. These zoning techniques result in reducing the supply of suburban low-cost housing, forcing the poor into overcrowded, less desirable housing, and ultimately preventing residential integration along socio-economic lines.7

Minimum acreage requirements alone are not a major factor in preventing the development of low and moderate income housing.8 Residential building costs do not vary proportionately with the relative lot size. The construction costs of the house itself, together with the socio-economic status of the community, are most determinative of housing prices.9 Nonetheless, the excessive *mapping* of large-lot zoning does have an impact on the housing patterns of the poor. By creating "holding zones," a community may channel urban development into other areas and thus escape spreading population growth.10

Judicial examination of the merits of an exclusionary zoning argument, on both the federal and state level, is often prevented by the doctrine of standing. On the federal level, review of exclusionary zoning practices has been severely restricted by the Supreme Court's recent decision in *Warth v. Seldin*.11 The case involved claims that a town's zoning ordinances and practices made it impossible to construct enough low and moderate income housing to satisfy the needs of the town and the metropolitan area.12 Challenges to the ordinances and practices came from three sources: (1) individual nonresidents who claimed, as low or moderate income persons, that they were excluded from the town by the zoning restrictions; (2) a group of taxpayers from a neighboring city who claimed that the town's practices resulted in a higher tax burden on city residents; and (3) an association of home builders who claimed that the town's restrictions had arbitrarily deprived them of profits.13 While finding that none of the challengers had standing, the Court established the general principle that "a plaintiff who seeks to challenge exclusionary zoning practices must al-

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10 Williams & Sternlieb, *supra* note 8, at 66, 69; Williams, Doughty, & Potter, *supra* note 8, at 185.
11 422 U.S. 490 (1975).
12 Id. at 495-96.
13 Id. at 496-97.
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lege specific, concrete facts demonstrating that challenged practices harm him, and that he personally would benefit in a tangible way from the courts' intervention." 14 In a strongly worded dissent, three members of the Court disagreed with the majority's result and rationale. Stating that the decision contained "outmoded notions of pleading and justiciability," 15 the minority saw the decision as expressing "an indefensible hostility to the claim on the merits." 16

In several exclusionary zoning cases, state courts have been willing to liberalize standing requirements in order to examine the substantive arguments. 17 A recent New Jersey case, for example, found that nonresidents living in substandard housing had standing to challenge a township's zoning ordinance on the ground that low and moderate income housing was excluded. 18 Building developers also have been allowed to challenge exclusionary zoning ordinances in some states. 19 Interestingly, it has been the developers' challenges that have focused attention on minimum acreage requirements as a prominent exclusionary technique. Because a builder's profit derives mainly from the house rather than from the land, he may increase his profit by dividing the land into smaller lots and demanding a high price for each tract. Obviously, those people seeking inexpensive housing receive no benefit from these practices. However, since profit maximization will not support a challenge to a zoning ordinance, 20 developers have asserted the interests of those excluded by large lot zoning, and courts have heard their arguments. 21

14 Id. at 508 (emphasis in original).
15 Id. at 521.
16 Id. "Warth was followed in Construction Indus. Assoc. v. City of Petaluma, 522 F.2d 897, 905 (9th Cir. 1975), where the plaintiffs, housing developers and local landowners, were denied standing to challenge a town's "growth control" measures on right to travel grounds but were granted standing to challenge the regulations on due process grounds. But see Ybarra v. City of Town of Los Altos Hills, 503 F.2d 250 (9th Cir. 1974) (standing found where claim was that zoning ordinance violated due process, equal protection, and supremacy clauses). See generally Comment, Standing to Challenge Exclusionary Zoning in the Federal Courts, 17 B.C. IND. & COM. L. REV. 347 (1976).
17 Traditionally, the plaintiff was required to have a legally protected interest in order to challenge a zoning regulation. In Massachusetts, for example, a neighboring property owner will have standing to challenge a zoning regulation under G.L. c. 40A, § 21, but will be denied such standing once he has moved. See Bradshaw v. Board of Appeals of Sudbury, 346 Mass. 558, 560, 194 N.E.2d 716, 717 (1963).
21 See, e.g., case cited in note 19 supra. In Wilson, 1975 Mass. App. Ct. Adv. Sh. at 652-55, 326 N.E.2d at 926-27, the plaintiff-landowner claimed, without any objection that he lacked standing, that the minimum acreage requirements at issue were exclusionary.
Those plaintiffs that have successfully overcome the standing hurdle have usually claimed that exclusionary zoning techniques violate either the due process or equal protection clauses of the United States Constitution.\textsuperscript{22} The due process approach is confined primarily to state courts because of the federal courts abandonment of substantive due process.\textsuperscript{23} The rationale behind the due process approach is that for government restrictions on property to be valid, they must further the general welfare.\textsuperscript{24} When the burden of proof is placed on the challenger to show that a particular zoning technique does not further the general welfare, he will almost certainly lose. Minimum acreage requirements, for example, can almost always be supported by some topographical and soil considerations.\textsuperscript{25} In some states, however, the burden of proof has been shifted to the town.\textsuperscript{26} The result has been the invalidation of exclusionary zoning techniques on due process grounds. In \textit{Concord Township Appeal},\textsuperscript{27} for example, the Pennsylvania court held that two and three acre zoning was an unconstitutional restriction on the use of landowners' and developers' property.\textsuperscript{28} The courts of both New Jersey and Pennsylvania have gone so far as to suggest that individual communities have an affirmative duty to provide adequate housing for all economic groups.\textsuperscript{29} Prior to the United States Supreme Court's decision in \textit{Village of Belle Terre v. Boraas},\textsuperscript{30} the principle claim of those challenging exclusionary zoning techniques had been that they violated the equal pro-

\textsuperscript{22} A third ground occasionally asserted as a basis for invalidating zoning techniques is the interstate right to travel. \textit{E.g.}, Construction Indus. Assoc. v. City of Petaluma, 522 F.2d 897, 906 n.13 (9th Cir. 1975). See generally Note, 81 \textit{Yale L.J.} 61, 65 n.16 (1971) [hereinafter cited as Yale Note]. In \textit{Village of Belle Terre v. Boraas}, 416 U.S. 1, 7 (1974), \textit{noted in} 1974 ANN. SURV. MASS. LAW § 16.1, at 346-48, however, the Supreme Court seems to have eliminated this as a possible rationale by suggesting that the right to travel would be infringed only by ordinances "aimed at transients."\textsuperscript{23} See, \textit{e.g.}, Ybarra v. City of Town of Los Altos Hills, 503 F.2d 250, 254 (9th Cir. 1974), where the court summarily rejected the plaintiff's due process claim as "without merit." See generally Yale Note, \textit{supra} note 22, at 65-66.\textsuperscript{24} Yale Note, \textit{supra} note 22, at 66.\textsuperscript{25} See, \textit{e.g.}, Steel Hill Development, Inc. v. Town of Sanbornton, 469 F.2d 956, 960 (1st Cir. 1972).\textsuperscript{26} In South Burlington County N.A.A.C.P. v. Township of Mt. Laurel, 67 N.J. 151, 180-81, 336 A.2d 715, 728 (1975), the court stated: [When it has been shown that a developing municipality in its land use regulations has not made realistically possible ... the opportunity for low and moderate income housing ... a facial showing of [a] violation of substantive due process ... has been made out and the burden, and it is a heavy one, shifts to the municipality to establish a valid basis for its actions or nonactions.\textsuperscript{27} 439 Pa. 466, 268 A.2d 765 (1970).\textsuperscript{28} Id. at 474, 268 A.2d at 768.\textsuperscript{29} Id. at 476, 268 A.2d at 769; South Burlington County N.A.A.C.P. v. Township of Mt. Laurel, 67 N.J. 151, 174, 336 A.2d 713, 724 (1975).\textsuperscript{30} 416 U.S. 1 (1974).
The argument was premised on the notion that the classes discriminated against, minorities and the poor, were "suspect" and that the interest affected, housing, was "fundamental." Consequently, zoning restrictions should be measured by a compelling state interest test rather than a rationality standard. In Belle Terre, however, the Supreme Court, in upholding a zoning ordinance that restricted land use to one family dwellings occupied by no more than two unrelated people, stated that zoning is an area "where legislatures have historically drawn lines which we respect against the charge of violation of Equal Protection Clause if the law be 'reasonable, not arbitrary' and 'bears a rational relationship to a [permissible] state objective.'" Thus, after Belle Terre, the burden placed on a challenger to an exclusionary zoning practice seems no less onerous under the equal protection clause than it is under the due process clause.

In Wilson v. Town of Sherborn, the Massachusetts Appeals Court appears to have been faced with both a due process and an equal protection claim. The plaintiff owned 80 acres in Sherborn. A town by-law established a two acre minimum lot requirement for the area in which the plaintiff's property was located. The plaintiff claimed that the two acre minimum was invalid on two grounds: first, it was exclusionary; and second, it caused a diminution in the value of his property. While the court did not specify the basis for the plaintiff's claims, the first appears to be an equal protection argument, and the second seems to be a due process argument.

In rejecting the plaintiff's claim that the two acre minimum was exclusionary—the equal protection claim—the court seems to have combined the rational relationship standard of review suggested in Belle Terre, with a slight shift in the burden of proof. The court

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31 See Yale Note, supra note 22, at 67.
32 See id.; Sager, supra note 7, at 785-98.
33 416 U.S. at 2.
34 Id. at 8, quoting Reed v. Reed, 404 U.S. 71, 76 (1971).
35 In New Jersey, the state supreme court, although relying on the state rather than the federal constitution, has held that the same standards of review apply to both due process and equal protection claims. South Burlington County N.A.A.C.P. v. Township of Mt. Laurel, 67 N.J. 151, 181, 336 A.2d 713, 728 (1975). In New Jersey, however, this blurring of standards has not worked to the detriment of challengers because of that state's willingness to place the burden of justifying zoning restrictions on the municipality. See text at notes 26-29 supra.
37 Id. at 655, 652, 326 N.E.2d at 927, 926.
38 Id. at 643, 326 N.E.2d at 922.
39 Id. at 643-44 & n.2, 326 N.E.2d at 922-23 & n.2.
40 Id. at 652, 326 N.E.2d at 926.
41 Id. at 655, 326 N.E.2d at 927.
42 See text at notes 33-34 supra.
43 See text at note 26 supra.
acknowledged the warning given in *Simon v. Town of Needham* that "a zoning by-law cannot be adopted for the purpose of setting up a barrier against the influx of thrifty and respectable citizens ...." Therefore, the court required the town to bring forward some advantages that were "tangible" and not "nebulous." Thus, while the burden of persuasion was not entirely shifted to the town, Sherborn was required to present some showing of the by-law's necessity. All the court required, however, was a showing of a "reasonable basis" for the town's decision to impose a two acre minimum lot requirement. The town met this burden by showing that it lacked municipal sewage and water facilities. Consequently, two acre lots were needed so that on-site wells would not be contaminated by septic tanks. The court went on to suggest that it need not require the town to meet a more stringent burden because the equal protection rights of low and moderate income groups are protected by the Anti-Snob Zoning Law, in which the Legislature required that the local interests of the town "yield to the regional need for the construction of low and moderate income housing."

The court rejected the plaintiff's second claim—the due process claim—by stating that: "Since we thus hold that the two-acre zoning in this case is within the police power, the plaintiff's argument that the by-law is invalid because his property is diminished in value ... must fail." Thus, the court, in the wake of *Belle Terre*, seems to have adopted a similar standard of review for due process and equal protection claims. The court's reasoning seems to have been that since the two acre requirement had a reasonable basis, it was a valid exercise of the town's police power, and therefore, it did not violate either due process or equal protection.

Even though *Wilson* sustains the validity of a potentially exclusionary zoning device, the Massachusetts decision may not be as conservative as it first appears. The regional approach to housing needs has been legislatively implemented in Massachusetts, while judicially...

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45 Id. at 565, 42 N.E.2d at 519.
48 Id. at 647-52, 326 N.E.2d at 924-26.
49 G.L. c. 40B, §§ 20-23.
52 See text at note 35 supra.
53 See note 35 supra.
adopted in New Jersey and Pennsylvania. Indeed, the Anti-Snob Zoning Law may be a more effective solution to exclusionary zoning practices. The Law allows developers to avoid exclusionary zoning devices by obtaining comprehensive building permits from zoning boards of appeals, instead of obtaining all the local permits that would otherwise be necessary. In granting such comprehensive permits, the zoning boards of appeals have the authority to override any zoning requirement that is inconsistent with local needs. Thus, the Law assures that those developers successfully challenging restrictive zoning provisions will implement their victories to benefit the poor, and not merely to build more high priced housing in a smaller area. However, the Anti-Snob Zoning Law does not require affirmative action, and in many cases, the technicalities of the Law may preclude many people from acquiring decent suburban housing.

§ 19.2. Interim Zoning: Moratorium on Apartment Construction. While many courts are taking a critical look at exclusionary zoning practices, they are at the same time cognizant of the need for flexibility in contemporary zoning. Temporary restrictions on permissible land use pending revision of a comprehensive plan may have exclusionary effects. However, they may be necessary in order to implement an effective plan for long-range community development. In Collura v. Town of Arlington, the Supreme Judicial Court for the first time ruled on the validity of an interim zoning provision that placed a two year moratorium on the construction of apartment buildings in certain sections of the town. The Court held that the temporary freeze was permissible under section 2 of chapter 40A of the General Laws, and that it applied to the plaintiff's land.

In November, 1972, the plaintiff, a landowner in Arlington, applied for a building permit to construct a forty-unit, six-story apartment

54 See text at note 29 supra.

§ 19.2. 1 See § 19.1 supra.
2 See generally 1970 ANN. SURV. MASS. LAW § 17.1; Freilich, Development Timing, Moratoria, and Controlled Growth, in PROCEEDINGS OF THE INSTITUTE ON PLANNING, ZONING, & EMINENT DOMAIN (Sw. Legal Foundation 1974).
4 Id. at 1753-54, 329 N.E.2d at 734. In Tra-Jo Corp. v. Town Clerk of Methuen, 1974 Mass. Adv. Sh. 1481, 317 N.E.2d 822, the Court dismissed as moot a challenge to a moratorium on the construction of residential building units in new subdivisions pending revision of the town's comprehensive plan because the moratorium had expired prior to the Court's ruling.
6 Id. at 1763-64, 329 N.E.2d at 738.
building on his land. The structure was permissible under the existing zoning provisions. On December 14 and 21, 1972, published notices announced a public hearing, which was held on December 28, 1972, to consider an article to be proposed at the March, 1973 town meeting. The article would temporarily suspend construction of apartment buildings in certain areas of the town. The plaintiff attended the hearing. On January 15, 1973, a permit was issued to him with a notation that if the proposed “zoning amendment” were adopted, the permit would be affected under section 11 of chapter 40A of the General Laws, since no construction had been commenced under the permit.

At the town meeting on March 19, 1973, the proposed article was adopted, declaring a two year moratorium on the issuance of building permits for construction of apartment buildings larger than two-family dwellings in a designated “moratorium district” in order to “protect certain parts of the Town from ill-advised development pending final adoption of a revised Comprehensive Plan.”

The plaintiff-landowner sought declaratory relief upholding the validity of his building permit. The trial court granted the relief requested, holding that the article did not amend the town’s zoning by-law, and that, in any case, the article had prospective application only.

On appeal to the Supreme Judicial Court, plaintiff first argued that the temporary ordinance was not an “amendment” to the Arlington zoning by-law. The Court, however, noted that the town had adhered to the proper procedure for amending a zoning by-law and that the article was referred to as an amendment in the altered by-law. The Court held that the article had amended the zoning by-law even though it was designed to operate for a limited time. Quoting the Connecticut Supreme Court, the Court stated, “indeed, all zoning regulations are in a sense “interim” because they can be amended at any time, after proper notice and subject to certain limitations.”

The plaintiff further contended that the town lacked authority to enact an interim measure which suspended the operation of an existing by-law. In response to this contention, the Court first noted that the weight of authority does not require specific statutory authoriza-

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7 Id. at 1754, 329 N.E.2d at 734-35.
8 Id., 329 N.E.2d at 735. G.L. c. 40A, § 11 provides that where a permit is issued after notice of hearing of a proposed change in the zoning by-laws, the permit does not justify violation of the subsequently adopted amendment.
10 See id. at 1753, 1756, 329 N.E.2d at 734, 735.
11 Id. at 1757, 329 N.E.2d at 736.
12 Id. at 1756, 329 N.E.2d at 735.
tion for interim zoning ordinances. The Court then discussed whether the objectives of interim provisions are consistent with the purposes of zoning. The Court found that interim ordinances may protect affected areas from unwise exploitation while the town reviews its zoning regulations and formulates new zoning restrictions insofar as “[i]nterim zoning can be considered a salutary device in the process of plotting a comprehensive zoning plan to be employed to prevent disruption of the ultimate plan itself.” Procedurally, the Court emphasized that since the statutory amending procedure was followed, the landowner is no worse off than if the town had simply rezoned the area with the intent of later amending the by-law to reflect the new comprehensive plan. The town, by making explicit the temporary nature of the ordinance, promotes landowner participation in the debate over what the new plan should contain. The town’s authority to enact interim zoning measures may be inferred, the Court held, from the broad delegation of authority granted to localities by the Zoning Enabling Act.

The validity of Arlington’s provision was upheld by the Court because it was adopted during the process of the town’s revision of the Comprehensive Plan and the restriction—a moratorium on apartment construction—was both permissible and geared to a matter of “genuine planning significance.” Two years, the Court found, is not an unreasonable period during which to complete the planning process.

15 Id. at 1761, 329 N.E.2d at 737.
16 Id. at 1761-62, 329 N.E.2d at 737.
17 See id. at 1758, 1760, 1762, 329 N.E.2d at 736, 737, citing G.L. c. 40A, §§ 2 & 3. The Court pointed to a second possible source of local zoning power, § 6 of The Home Rule Amendment, Art. II of the Amendments to the Constitution of the Commonwealth. 1975 Mass. Adv. Sh. at 1759 n.3, 329 N.E.2d at 736-37 n.3. However, the Court expressly confined its ruling to the enabling act. Id.
18 Id. at 1762-63, 329 N.E.2d at 738.
20 1975 Mass. Adv. Sh. at 1762, 329 N.E.2d at 738. The New Jersey Supreme Court has also recognized that “stop-gap” zoning is “within the intent and purpose of the statutes relating to planning . . . .” Monmouth Lumber Co. v. Ocean Township, 9 N.J. 64, 75, 87 A.2d 9, 14 (1952). Moreover, it has indicated that an interim zoning ordinance, would be unconstitutional if it were not temporary, may be valid. Deal Gardens, Inc. v. Board of Trustees, 48 N.J. 492, 500, 226 A.2d 607, 611 (1967). Thus, in New Jersey, when the validity of an interim zoning ordinance is attacked, the court focuses primarily upon the reasonableness of the time span rather than upon the reasonableness of the effect upon the plaintiff’s land. See id. This approach appears to be in conflict with the analysis of the Supreme Judicial Court in Collura which apparently required both a reasonable time span and a restriction already permissible under Massachusetts law. See 1975 Mass. Adv. Sh. at 1762-63, 329 N.E.2d at 737-38.
The Court concluded by holding that the amendment did not have prospective operation only, but applied to the plaintiff's building permit.\(^\text{22}\)

The Supreme Judicial Court's decision in *Collura v. Town of Arlington* is representative of the predominant judicial attitude toward flexibility in zoning, particularly with respect to recent growth control measures.\(^\text{23}\) For example, the New York courts have upheld an interim zoning provision which placed a temporary freeze on the commencement of construction during consideration of zoning changes proposed in a master plan.\(^\text{24}\) Moreover, in *Golden v. Town of Ramapo*,\(^\text{25}\) the New York Court of Appeals sustained a town's zoning amendment which phased subdivision development with the scheduled expansion of municipal facilities and services (e.g. sanitation, drainage, parks, roads, firehouses) as provided for in the town's 18-year capital plan. Under the zoning amendment, the landowner was prohibited from developing a proposed subdivision plan until the municipal facilities and services were made available, unless he were to provide them himself.\(^\text{26}\) The court distinguished between a total prohibition of subdivision development and timed growth control measures. While the former may be invalidly exclusionary, the latter is a legitimate zoning tool.\(^\text{27}\)

The Connecticut Supreme Court has also sustained interim zoning ordinances despite the absence of specific statutory authorization.\(^\text{28}\) Moreover, in *Zelvin v. Board of Appeals*,\(^\text{29}\) a lower court held a temporary repeal of a zoning regulation permitting the construction of gar-

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\(^{21}\) 1975 Mass. Adv. Sh. at 1763, 329 N.E.2d at 738. In New Jersey, inquiry into the reasonableness of the duration of an interim ordinance may include such factors as "the progress of the study being made, its nearness to completion, . . . and the prospect for passage of a new (permanent) zoning ordinance . . . ." and the good faith with which the town proceeds to expedite the new master plan. Campana v. Clark Township, 82 N.J. Super. 392, 397, 197 A.2d 711, 714 (1964). The time span is unreasonable when the delay in completing and implementing the new master plan is caused solely by the town's inability to obtain federal funds for a planning and zoning survey. Deal Gardens, Inc. v. Board of Trustees, 48 N.J. 492, 500, 87 A.2d 607, 612 (1967).


\(^{26}\) Id. at 368, 371, 334 N.Y.S.2d at 143-44, 146, 285 N.E.2d at 295-96, 297.

\(^{27}\) Id. at 376, 334 N.Y.S.2d at 150, 285 N.E.2d at 300.


The fourteen month old ordinance was repealed so that the town could both assess the impact of the construction of the apartments, for which approval had already been granted, and develop a new comprehensive plan. The court found the temporary repeal to be a reasonable response to a community planning problem.

Delaware’s approach to interim zoning distinguishes between land which is in a highly developed area with established patterns of construction and development, and land which is newly annexed or underdeveloped. While no stop-gap zoning is apparently allowed in the former situation, it is permitted in the latter.

Interim zoning ordinances designed to control growth have been challenged as exclusionary in several cases before federal courts. In Steel Hill Development, Inc. v. Town of Sanbornton, the United States Court of Appeals for the First Circuit upheld the validity of three and six acre minimum zoning ordinances. Although the New Hampshire town in Steel Hill had apparently not adopted the ordinances on a temporary basis, the court allowed the six-acre minimum ordinance to stand as a legitimate stop-gap measure which would allow the town time "to plan with more precision for the future." The court emphasized that the developer in this case was not merely attempting to satisfy a demand for first-home expansion into towns in the path of population growth, but rather, was attempting to create a demand by urbanites for a second home in rural Sanbornton. Thus, the court decided, the town should be allowed the time to strike "the right balance between ecological and population pressures."

In Construction Industry Association v. Petaluma, the United States Court of Appeals for the Ninth Circuit rejected a challenge to the city's five-year plan, which plan limited the construction of residential units to a rate below that of the city's natural population growth. The court held that the exclusion bore a rational relationship to Petaluma's legitimate interests in preserving "its small town character, its open spaces and low density of population ..." at its deliberately paced growth. More successful was the challenge in Kennedy Park Homes As-

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30 Id. at 162, 306 A.2d at 157.
31 Id., 306 A.2d at 156-57.
32 Id., 306 A.2d at 157.
34 469 F.2d 956 (1st Cir. 1972).
35 Id. at 960, 962.
36 See id. at 959, 962.
37 Id. at 962.
38 Id. at 961.
39 Id. at 962.
40 522 F.2d 897 (9th Cir. 1975).
41 Id. at 902, 909.
42 Id. at 906, 908-09.
sociation v. Lackawanna to a moratorium on the approval of subdivision plans allegedly because of sewage problems. The United States Court of Appeals for the Second Circuit found that the measure had the effect, if not the purpose, of preventing the development by black families of a tract of land located in a white section of the city. Since the city had long neglected its sewer system, its interest was held to be not compelling.

§19.3. Spot Zoning:

General Welfare as Justification. In Raymond v. Building Inspector of Brimfield, the Appeals Court upheld a zoning amendment which permitted the town's only industry and largest employer to expand. The locus was a 4.7 acre parcel of land that was situated in a sparsely settled area and close to several main roads. The company operated in a one-story masonry structure with a floor area of 3000 square feet. Under the original zoning by-law, adopted in 1968, these operations constituted a nonconforming use in an agricultural-residential district. The company caused no environmental problems, nor did it demand more than minimal municipal services. In 1971, the company was refused a permit to expand its building. The company's owner then requested that the area be rezoned from agricultural-residential to industrial. After the planning board unanimously rejected the proposed amendment, the owner told the board of selectmen that if the company were allowed to expand, it would enlarge its work force, but if the proposed amendment were not approved, the company would move out of the community. The town meeting voted to accept the zoning change.

The court held that the amendment was not a form of spot zoning because the public welfare of the town was furthered by preserving the company's presence in the town. Moreover, the particular locus was an obviously appropriate area for an industrial zone.

The Raymond decision is another example of the court's willingness to sustain such ordinances by broadly construing the "promotion of the public welfare" objective of the Zoning Enabling Act. Although

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44 Id. at 109-10.
45 Id. at 114.

§19.3. The term "spot zoning" describes "an amendment which reclassifies a small parcel in a manner inconsistent with existing zoning patterns, for the benefit of the owner and to the detriment of the community, or without any substantial public purpose." R. ANDERSON, 1 AMERICAN LAW OF ZONING § 5.04, at 242 (1968).
3 Id. at 186, 322 N.E.2d at 200.
4 Id. at 182, 322 N.E.2d at 198.
5 Id. at 180, 322 N.E.2d at 198.
6 Id. at 182, 322 N.E.2d at 198.
7 Id. at 183-84, 322 N.E.2d at 198-99.
8 Id. at 185, 322 N.E.2d at 199.
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the facts suggest that the company exerted pressure on the town for the company's own benefit, the town's interest in retaining its only industry was deemed overriding and the spot zoning challenge failed.

§19.4. Zoning Amendment: Applicability to Building Permit Under Appeal. In Smith v. Building Commissioner of Brookline (Smith II), the Supreme Judicial Court was asked to determine the effect on a building permit of zoning amendments enacted while the issuance of the permit was being appealed. In an earlier case (Smith I), the town enacted amendments to the zoning by-laws after the building permit had been issued. The plaintiff, who was challenging the granting of the permit, appealed to the superior court seeking to annul the decision of Brookline's board of appeals which had denied his appeal from the building commissioner's granting of the permit. The superior court annulled the board of appeals' decision because construction had not been commenced within six months after issuance of the permit as required by section 11 of chapter 40A of the General Laws. The Supreme Judicial Court affirmed, and the case was remanded to the board of appeals. Meanwhile, Brookline had amended its by-laws, so that if the now completed building was subject to them, it would have to be destroyed and rebuilt. On remand, the board of appeals found that the building could shortly be brought into compliance with the requirements imposed in Smith I, and returned the case to the building commissioner for modification of the permit. The owner and the builder sought a declaration that the building would not be subject to the later amendments.

The Supreme Judicial Court recognized that, because the initial permit had been found defective in Smith I, the case did not clearly fall within the statutory exemption of section 11, which protects buildings lawfully under construction from new zoning requirements. The Court, reasoning that the effect of Smith I was to annul the board's decision denying the petition to revoke the permit, rather than to annul the permit itself, rejected the contention that the permit was rendered void ab initio by the decision in Smith I. The Court then held that the board of appeals had the power to modify the permit, and, since it did so, the permit had retroactive effect for purposes of protection from zoning amendments.

3 Id. at 1388, 316 N.E.2d at 502.
4 Id. at 1387, 316 N.E.2d at 502.
5 See id. at 1389-90, 316 N.E.2d at 502-03.
6 Id. at 1390-91, 316 N.E.2d at 503-04.
8 See id. at 1579 n.5, 328 N.E.2d at 869 n.5.
9 See id. at 1580 n.6, 1584-85, 328 N.E.2d at 869 n.6, 871.
10 Id. at 1577-78, 328 N.E.2d at 868.
11 Id. at 1581-82, 328 N.E.2d at 870.
12 Id. at 1582-83, 328 N.E.2d at 870.
13 Id. at 1584-85, 328 N.E.2d at 871.
The Court's decision in *Smith II* was significant for its interpretation of the appellate powers of the local boards of appeals. Section 15 of the Enabling Act empowers the boards to "hear and decide appeals"14 by persons aggrieved by the decisions of local zoning officials.15 Under section 19 of the Act, the board may "reverse or affirm in whole or in part, or may modify, any order or decision, and may make such order or decision as ought to be made, and to that end shall have all the powers of the officer from whom the appeal is taken ...."16 The Court in *Smith II* held that boards may exercise these powers "not only where the appeal is going up the scale, ... but also when the process is reversed and questions as to compliance with zoning requirements are necessarily before the board again on remand ...."17

As the Court noted, its decision permitting boards of appeals to modify permits on remand and thereby protect them from subsequent by-law amendments promotes the legislative intent of the "Saving Clause,"18 promotes remedial action to avoid destruction of buildings with remediable defects, and protects appellate right by ensuring that persons will not be prejudiced by the time required to adjudicate zoning controversies.19

§19.5. Special Permits: Standing to Challenge: Person Aggrieved; Waiver of Notice Requirement. During the 1975 Survey year the Appeals Court ruled on two cases challenging the issuance of special permits. In both cases, the court denied relief and restricted the scope of appeals permitted under section 21 of chapter 40A of the General Laws.

In *Waltham Motor Inn v. La Cava*,1 the plaintiffs challenged two separate decisions of the city council of Waltham granting special permits for the construction of a hotel and hotel/motel, respectively, in a limited commercial zoning district. The defendants contended that none of the plaintiffs was a "person aggrieved" within the meaning of section 21. The superior court agreed and dismissed the bills in equity.2

One plaintiff was an incorporated motor inn operating under a long-term lease on land abutting both parcels for which the special permits were issued.3 The corporation did not receive written notice

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14 G.L. c. 40A, § 15.
15 *Id.* § 13.
16 *Id.* § 19.
18 G.L. c. 40A, § 11.

2 *Id.* at 585, 326 N.E.2d at 349.
of the public hearings held in either case, but its counsel appeared at both hearings and opposed both applications. Owners of a second motel abutting one of the contested parcels were coplaintiffs in the first case. They received written notice of the public hearing and appeared in opposition to the special permit. Both motels were located within a limited commercial zoning district, where hotels, motels, and hotel/motels were allowed only under special permit. Additional plaintiffs in each case were individual owners of land situated in residential zoning districts at least one mile from the parcels in question.

The Appeals Court first noted that the plaintiff motel owners were entitled to an initial presumption that they were "persons aggrieved" within the meaning of the statute. Both motel owners enjoyed the presumption as "nearby owner(s) of property lying in the same or in a substantially similar type of zoning district ...." The second motel owner was also entitled to the presumption because it had received the statutorily mandated notice from the council as a "person affected" by the special permit. The court then ruled on the effect to be given the presumption, and concluded that if the issue is contested by the presentation of evidence, the presumption disappears and the issue is to be decided based on the evidence presented.

Since the only interest of the plaintiffs apparent in the record was the protection of their businesses from the anticipated competition—an interest not legally protected—the court found the motel owners not to be "persons aggrieved" by the issuance of the permit. The court also indicated that since both motels were themselves operating under a special permit, the owners could not have "any legitimate interest in preserving the integrity of the district from further like uses." The other plaintiffs offered no evidence of their interest in contesting the permit. Because their land was situated in a residential zoning district more than a mile from the parcels in question, the court found they were not entitled to a presumption of being a person aggrieved, and

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at 588 n.9, 326 N.E.2d at 351 n.9. In Kasper v. Board of Appeals of Watertown, 1975 Mass. App. Ct. Adv. Sh. 675. 326 N.E.2d 915, the plaintiff's son, a tenant in one of the affected buildings owned by his father, was also named as a plaintiff in the bill. The court dismissed the bill as to him on the ground he was not a "person aggrieved." Id. at 676 n.3, 326 N.E.2d at 916 n.3.


5 Id. at 590, 326 N.E.2d at 351.

6 Id. at 591-92, 326 N.E.2d at 352.

7 Id. at 92, 326 N.E.2d at 352.

8 See G.L. c. 40A, § 17.


10 Id. at 93, 326 N.E.2d at 352, citing Marotta v. Board of Appeals of Revere, 336 Mass. 199, 204, 143 N.E.2d 270, 274 (1957), noted in 1957 ANN. SURV. MASS. LAW §§ 11.2, at 68, 33.3 at 235-36.


dismissed their claim.\textsuperscript{13} A "general civic interest in the enforcement of the zoning ordinance," the court held, is not a sufficient interest under the statute to permit an appeal.\textsuperscript{14}

Although one abutting landowner in \textit{La Cava} did not receive written notice of the public hearing, required by section 17 of section 40A of the General Laws, that issue was neither argued nor considered in that case.\textsuperscript{15} The jurisdictional consequence of a board's failure to give such notice was settled in the subsequent decision in \textit{Kasper v. Board of Appeals of Watertown}.\textsuperscript{16}

In \textit{Kasper}, the Watertown board had granted a special permit for the operation of an auto body repair business. The plaintiff owned three contiguous multi-family dwellings which fronted on the same side of the street as the locus. Both the locus and the dwellings were in the same industrial zoning district.\textsuperscript{17} Following appropriate newspaper notices, a public hearing was held on the petition for the special permit. Notice had not been sent to the plaintiff, but he and his son learned of the hearing twelve days in advance thereof, on the date of the second newspaper publication. Both attended the hearing in opposition to the special permit. The plaintiff's son, an attorney, objected to the hearing because of failure of notice; he also presented evidence on the merits and argued against the permit.\textsuperscript{18} The superior court confirmed the decision of the board to grant the special permit.

The Appeals Court first rejected appellant's contention that the board's failure to give him written notice of the hearing deprived the board of jurisdiction to act on the permit application.\textsuperscript{20} The court compared the \textit{Kasper} situation with that presented in \textit{Co-Ray Realty Co. v. Board of Zoning Adjustment of Boston}.\textsuperscript{21} In \textit{Co-Ray}, the board after attempting to locate the plaintiff's correct address, mailed notice of the hearing to the affected vacant lot.\textsuperscript{22} The Supreme Judicial Court found the efforts to locate the correct address to be reasonable, and, therefore, refused to annul the board's decision.\textsuperscript{23} The court in \textit{Kasper} noted that the notice given in \textit{Co-Ray} was equivalent to no notice at all, and read that case as standing "for the proposition that not every decision of an administrative board need be invalidated for the board's failure to comply precisely with each of the notice provisions.

\begin{itemize}
  \item \textsuperscript{13} \textit{Id.} at 596, 326 N.E.2d at 353.
  \item \textsuperscript{14} \textit{Id.} at 596-97, 326 N.E.2d at 353.
  \item \textsuperscript{15} \textit{Id.} at 588 & n.9, 326 N.E.2d at 351 & n.9.
  \item \textsuperscript{17} \textit{Id.} at 675-76, 326 N.E.2d at 916.
  \item \textsuperscript{18} \textit{Id.} at 677, 326 N.E.2d at 917.
  \item \textsuperscript{19} \textit{Id.} at 675, 326 N.E.2d at 916.
  \item \textsuperscript{20} \textit{Id.} at 683, 326 N.E.2d at 918.
  \item \textsuperscript{21} 328 Mass. 103, 101 N.E.2d 888 (1951).
  \item \textsuperscript{22} \textit{Id.} at 107, 101 N.E.2d at 890-91.
  \item \textsuperscript{23} \textit{Id.} at 108, 101 N.E.2d at 891.
\end{itemize}
As the court noted, this interpretation avoids the possibility that successful petitions could remain subject indefinitely to attack through mandamus proceedings because of a technical failure in board procedure. The court then held that, because the plaintiff had actual notice of the hearing and had the opportunity to present his case to the board, he was not prejudiced by the nonreceipt of the prescribed notice. Moreover, by participating in the hearing without requesting a postponement, the plaintiff waived his objection to the failure of notice.

Both the Kasper and La Cava cases indicate the court’s reluctance to overturn decisions made by local appeals boards on narrow, noncritical procedural grounds. In both cases, a strict interpretation of the statutes could have led to contrary results. In La Cava, the plaintiff motel owners arguably met the statutory requirements as “persons aggrieved” by the issuance of the special permit. However, their positions as competitive enterprises in the same zoning district disqualified them from challenging the permit. In Kasper, the prescribed notice provisions of section 17 of chapter 40A of the General Laws, were not completely satisfied, yet the court found that the plaintiffs had sufficient notice. Thus, in each case, the court weighed the statutory requirement against the particular facts and concluded that neither permit should be reconsidered.

§19.6. Special Permit: Power in the Superior Court to Remand a Case to the Local Board; Power to Modify Defective Permit. The Supreme Judicial Court and the Appeals Court occasionally remand to local boards of appeals cases involving a grant or denial of a special permit or variance. During the 1975 Survey year, the Appeals Court, in Roberts-Haverhill Associates v. City Council of Haverhill, ruled that the superior court has the power to remand a variance case to a board of appeals “whenever circumstances are such that an appellate court could order such action to be taken.”

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25 Id. at 682-83, 326 N.E.2d at 918-19.
26 Id. at 684-85, 326 N.E.2d at 919.
27 Id. at 685-86, 326 N.E.2d at 919.

3 Id. at 2164, 319 N.E.2d at 919. The court found the power to remand in G.L. c. 40A, § 21, which provides in part:

The [superior] court shall hear all evidence pertinent to the authority of the board and determine the facts, and, upon the facts so determined, annul such decision if found to exceed the authority of such board, or make such other decree as justice and equity may require.

Since the § 21 provisions with regard to review by the district court are somewhat different, the extent of the district court’s power to remand may differ from that of the superior court. See Roberts-Haverhill, 1974 Mass. App. Ct. Adv. Sh. at 2165 n.10, 319 N.E.2d at 919 n.10.
In *Roberts-Haverhill*, the city council, acting pursuant to its powers to consider requests for permits, had denied the plaintiff's application for a special permit to construct garden apartments in a residential high-density zoning district. The council had enumerated eight reasons for its denial. The case had been referred to a master who found that as many as five of the reasons had no substantial basis in fact. The superior court judge ordered that the master's report be confirmed, noting that there were two possible valid reasons supporting the council's decision. Since these were not the only reasons given by the council, and the council's findings left it unclear whether the permit would have been denied if these had been the only reasons under consideration, the superior court: (1) annulled the decision of the council, and (2) ordered the council to make a new determination with respect to the application in light of the opinion. The plaintiffs appealed the "so called 'Final Decree'" entered pursuant to that order.

The Appeals Court approved the remand, reasoning that merely annulling a decision in such a case "often serve(s) not to terminate the underlying controversy but to prolong it in the form of further applications, hearings, decisions, and possible appeals." In many cases this duplication could be avoided by allowing the board to make further fact findings, by permitting it to elaborate the reasons for its decision, or by directing the board to reconsider an application in light of different legal principles. The court concluded that exercise of the power to remand "will be in the best interest of litigants and the courts.”

Although it was a case of first impression, the decision in *Roberts-Haverhill* appears merely to validate an existing practice of the superior court. See *id.* at 2165, 319 N.E.2d at 919. Indeed, the Appeals Court, prior to its decision in *Roberts-Haverhill*, affirmed a superior court remand of a variance case to the local board without reaching the issue of the superior court's power to do so. See *Waldron v. Board of Appeal of Malden*, 1974 Mass. App. Ct. Adv. Sh. 843, 316 N.E.2d 510.


*See id.* at 2159-60 n.2, 319 N.E.2d at 917 n.2. The reasons were: (1) saturation of the area with garden apartments; (2) overcrowding of the district's schools; (3) water and sewage problems; (4) increased traffic problems; (5) excessive costs for additional municipal services; (6) not in the best interests of the city; (7) excessive amount of subsidized housing in the city; and (8) excessive number of apartment permits pending. *Id.*

*See id.* at 2160, 319 N.E.2d at 917. The court noted that the practice of submitting such cases to a master has been strongly disapproved. *Id.* n.3. See *Garelick v. Board of Appeals of Franklin*, 350 Mass. 289, 290, 214 N.E.2d 60, 61 (1966).

*See 1974 Mass. App. Ct. Adv. Sh. at 2160 n.4, 319 N.E.2d at 917 n.4. See also reasons 1, 3, 5, 7, and perhaps 8 set forth in note 5 supra.*


*Id.* at 2161-62, 319 N.E.2d at 918.

*Id.* at 2162, 319 N.E.2d at 918.

*Id.*

*Id.* at 2165, 319 N.E.2d at 919.
After determining that the superior court had the authority to remand the case to the city council, the Appeals Court dismissed the appeal on the ground that it had been taken from an interlocutory decree.\textsuperscript{14} The court held that the superior court's remand of a variance case to the board of appeals is not a final order, and that an appeal may not be had until the board has reconsidered the application and an appeal, if any, from that decision has been taken to the superior court.\textsuperscript{15}

The Appeals Court's subsequent decision in \textit{Chira v. Planning Board of Tisbury}\textsuperscript{16} further extended the scope of the superior court's authority to efficiently manage the resolution of variance cases. In \textit{Chira}, the superior court ruled that the board of appeals had exceeded its authority by granting special permits which allowed attached, as well as detached, buildings on the locus. The court therefore entered decrees modifying the permits to exclude attached buildings. On appeal, appellant abutters claimed that by modifying the permits the superior court had usurped the statutory power of the board of appeals to issue special permits. They argued that the court was required by law to annul the decisions and remand the cases to the board for further proceedings.\textsuperscript{17} The Appeals Court held that the language "to make such other decree as justice and equity may require," of section 21 of chapter 40A of the General Laws provides the superior court with the power to modify special permits in some cases.\textsuperscript{18} The court appeared to limit the exercise of this power to cases in which "it is clear from the record that exactly the same ultimate result would occur from a remand as that effected by the decree ...."\textsuperscript{19} The Appeals Court's liberal construction of the superior court's power under section 21 is practical in terms of both judicial efficiency and fairness to the permit applicant.

\textbf{§19.7. Special Permits: Failure to Comply with Notice Provisions.} Under section 21 of chapter 40A of the General Laws, an appeal to the superior court from a board of appeals decision on a special permit application must be taken within twenty days after the board has filed its decision. The statute further requires that "[w]ritten notice of such appeal together with a copy of the bill in equity shall be given to such city or town clerk within said twenty day appeal period."\textsuperscript{20}

\begin{footnotes}
\item[14] Id. at 2168, 319 N.E.2d at 920.
\item[15] Id.
\item[17] See id. at 1043, 333 N.E.2d at 209. The board of appeals questioned the judge's underlying ruling, but supported his action in modifying its decision without remand. See id. at 1044 n.8, 333 N.E.2d at 209 n.8.
\item[18] Id. at 1044, 333 N.E.2d at 209.
\item[19] Id. at 1043-44, 333 N.E.2d at 209.
\item[19.7.1] G.L. c. 40A, § 21.
\end{footnotes}
Although the requirements are jurisdictional, the Supreme Judicial Court does not require strict compliance with the specifications of section 21. For example, the petitioner in *McLaughlin v. Rockland Zoning Board of Appeals* filed with the town clerk a copy of the bill in equity, but not the written notice, within the prescribed time limit; while the petitioner in *Carr v. Board of Appeals of Saugus* filed written notice, but not a copy of the bill, within the twenty-day period. In both cases, however, the court permitted the appeal to proceed despite the procedural defects. The Court concluded that the purpose of the section 21 time requirement "is to give interested third parties at least constructive notice of the appeal," and that this purpose is fulfilled by the timely filing of either the bill in equity or the notice of appeal.

The effect of noncompliance with the twenty-day time limit for filing was again placed in issue during the 1975 Survey year. In *Costello v. Board of Appeals of Lexington*, the petitioner mailed written notice of the appeal and a copy of the bill in equity to the town clerk on the twentieth day after the board's decision. The notice did not reach the clerk until the following day—the twenty-first day after the board's decision was filed. The board's plea in abatement was sustained by the superior court on the ground that notice had not been received by the twentieth day.

In affirming the decision of the superior court, the Appeals Court held that since the petitioner had not satisfied the notice requirements of section 21, his appeal to the superior court could not be maintained. The court noted that under *McLaughlin* and *Carr* compliance with all the details of the provision is not required. However, notice adequate to give interested third parties at least constructive notice of the appeal within the twenty-day period is necessary for the fulfillment of the purpose of section 21. The court dismissed the petitioner's contention that the mailing of notice within the time limit satisfied the statutory requirement, stating that, "[i]n the absence of an express provision to the contrary, a notice is not given until received".

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4 Id. at 679-80, 223 N.E.2d at 522.
5 361 Mass. 361, 280 N.E.2d 199 (1972). Both the *Carr* and the *McLaughlin* cases are surveyed in 1972 ANN. SURV. MASS. LAW § 22.8, at 629-30.
6 361 Mass. at 361, 280 N.E.2d at 199.
8 361 Mass. at 362, 280 N.E.2d at 200.
9 Id. at 362-63, 280 N.E.2d at 200.
11 Id. at 1046, 333 N.E.2d at 211.
12 Id. at 1046-47, 333 N.E.2d at 211.
13 Id. at 1047-48, 333 N.E.2d at 211-12.
14 Id. at 1048, 333 N.E.2d at 212.
by the person to be notified.”15 Thus, the court in Costello required that either the notice of appeal or a copy of the bill in equity be received by the town clerk within the twenty-day period.

In a companion case, filed after the superior court sustained the plea in abatement, the plaintiff sought a writ of mandamus ordering the building inspector to enforce the zoning by-law by prohibiting the specially permitted use of the premises. The Appeals Court affirmed the sustaining of the inspector’s answer in abatement.16 The court applied Saab v. Building Inspector of Lowell,17 which refused to permit a “second chance” at appeal through a mandamus action when a petitioner failed to properly utilize other available remedies.18 The court’s summary treatment of the issue in Costello indicates that any attempt to retrieve by mandamus action an otherwise forfeited appeal will be unsuccessful.

The Costello case illustrates the point beyond which the court will not go in overlooking instances of noncompliance with procedural time restrictions. The reasonable flexibility allowed in McLaughlin and Carr will not be carried to the point at which the twenty-day limit becomes meaningless. Under the circumstances of the Costello case, any other result would have been difficult to justify.

§ 19.8. Zoning: Access Roads. The use of residentially zoned land for access to property in a nonresidential district was contested in two cases during the 1975 Survey year. In Building Inspector of Dennis v. Harney,1 the Appeals Court emphasized the need for specific zoning authorization for such roadways. The property in question was a corner lot located primarily in an “unrestricted” zoning district.2 One side of the lot was zoned residential to a depth of 150 feet. The defendants operated a business on the unrestricted portion of the property. At issue was a roadway constructed by the defendants that ran through both the residential and unrestricted portions of the land, from one bordering street to another. This roadway was used as an

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15 Id. The court rejected the plaintiff’s argument that a 1969 amendment to § 21 eliminated the necessity of receipt of notice within twenty days. Prior to the amendment, the provision read: “Notice . . . shall be given to such city or town clerk so as to be received within such twenty days.” Acts of 1960, c. 365. The amendment deleted the phrase, “so as to be received within such twenty days.” Acts of 1969, c. 706. The Appeals Court held that the deletion merely eliminated a redundancy; the change was not the purpose of the amendment and the legislative history did not indicate an intent to make sending of notice sufficient. 1975 Mass. App. Ct. Adv. Sh. at 1050-51, 333 N.E.2d at 212-13.


2 In an “unrestricted” district, the zoning by-law permitted “any use . . . residential . . . business, or industrial, which is legal, proper, and not otherwise regulated or forbidden.” Id. at 923 n.2, 317 N.E.2d at 82 n.2.
additional means of access to the defendants' place of business.\textsuperscript{3}

The superior court found that such use of the residentially zoned portion of the defendants' land was illegal under the town's zoning by-law, and ordered the roadway barricaded.\textsuperscript{4} On appeal, the defendants sought to justify the roadway, because it was used by the public to gain access to other residential and commercial property in the town. The Appeals Court, however, held that this was not a qualifying use under the by-law, because it was neither residential in nature nor an accessory to a permitted use on the same lot.\textsuperscript{5} The court modified the decree to permit the barricade to be removable, so that the petitioners and the residents of an adjoining dwelling could use the roadway. Use of the roadway as access to the business was permanently enjoined.\textsuperscript{6}

As the Harney case indicates, courts will not permit nonconforming access roads through residential districts without the express approval of the local zoning authorities. The scope of this position has been demonstrated by a series of cases, the latest occurring during the 1975 Survey year, challenging a similar access road in Braintree.

In Harrison v. Building Inspector of Braintree (Harrison I),\textsuperscript{7} the town had enacted a zoning amendment which created an industrial district entirely surrounded by a 200 foot wide residentially zoned strip. The defendant corporation operated a factory in the industrial district. In order to provide access to its plant, the corporation purchased residentially zoned land on either side of the plaintiff's land and constructed access roadways. Demurrers to the plaintiff's petition for a writ of mandamus were sustained by the superior court.\textsuperscript{8} On appeal to the Supreme Judicial Court, defendants, the corporation and the town's building inspector, contended that means of access over the residential strip were necessarily implicit in the creation of an industrial zone completely surrounded by a residential zone.\textsuperscript{9} The Court recognized that the amendment may have effected an unreasonable classification with regard to the industrial district. It held, however, that "[t]here is no basis in the statute or in the nature of zoning for adding uses by implication to one zone to make reasonable the classification of another zone."\textsuperscript{10} The Court ordered that, on remand, any issuance of a writ of mandamus should be delayed so that the town could act to provide legal access to the industrial district.\textsuperscript{11}

\textsuperscript{3} Id. at 924, 317 N.E.2d at 82.
\textsuperscript{4} Id.
\textsuperscript{5} Id. at 924-25, 317 N.E.2d at 82-83.
\textsuperscript{6} Id. at 925-26, 317 N.E.2d at 83.
\textsuperscript{8} 350 Mass. at 561, 215 N.E.2d at 774.
\textsuperscript{9} Id. at 561-62, 215 N.E.2d at 775.
\textsuperscript{10} Id. at 562, 215 N.E.2d at 775.
\textsuperscript{11} Id. at 563, 215 N.E.2d at 776.
§ 19.8

ZONING AND LAND USE

After the decision in Harrison I, the town amended its by-laws to provide access to the industrial zone. The amendment authorized the board of appeals to grant special permits so that residential lots not then used for access could be so used. The amendment also changed the classification of residential parcels which had been used for access roads so as to permit that use.\[12\] The Land Court ruled that the amendment was invalid.\[13\] The Supreme Judicial Court in Harrison v. Town of Braintree (Harrison II)\[14\] held that the amendment provision authorizing the board of appeals to issue a special permit for access roads across residential land was valid since "[the] very limited non-residential use [was] not necessarily inconsistent with the dominant residential purpose."\[15\] The Court further held, however, that the rezoning of the parcels with existing access roadways was done not because that use was reasonable for each parcel, but rather, because the access use over them existed. Thus, the provision of the amendment authorizing such rezoning was invalid.\[16\] The Court suggested that the town lay out public ways, extend the industrial district to existing public ways, or allow access use of particular lots by special permit.\[17\]

Following the decision in Harrison II, the board of appeals granted a special permit for a proposed new access road near the plaintiff's land. While appeal from the grant of that permit was pending, the town voted to convert the proposed new access road into a town way, and before the orders of taking were recorded, the owner of the proposed new access road dedicated the road to the town as a public way.\[18\] In the 1975 Survey year decision in Harrison v. Textron, Inc. (Harrison III),\[19\] the Supreme Judicial Court first affirmed the superior court's ruling that the proposed road would not materially affect the use and enjoyment of plaintiff's property.\[20\] The Court then rejected plaintiff's contention that a public way may be used only for purposes which are permitted in the zoning district: "If the issue were before us squarely, we would rule that the use of a public way is not restricted by local zoning provisions."\[21\] Moreover, the zoning by-law authorized the issuance of special permits which allowed public or private ways in residential zones to be used as access routes to other zoning districts.

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13 Id. at 652, 247 N.E.2d at 357.
15 Id. at 655, 247 N.E.2d at 359.
16 Id. at 656, 247 N.E.2d at 360.
17 Id.
19 1975 Mass. Adv. Sh. 1239, 328 N.E.2d 838. This action also consolidated appeals from several nuisance actions.
20 Id. at 1245-46, 1265, 328 N.E.2d at 842, 848.
21 Id. at 1250-51, 328 N.E.2d at 843.
Harrison III should be read narrowly. As Harney and Harrison I and II indicate, the Court will not tolerate nonconforming access routes through residentially zoned land unless the locality expressly approves such routes. This approval may take the form of a special permit provision, requiring a determination of the suitability of each proposed road, or a zoning by-law amendment. Another option is the dedication of the privately owned property to the town or city for use as a public way. If the locality acknowledges a public need for a particular route, it may take the property by eminent domain. This last method may be particularly attractive to the owner of the site of the proposed road. He can acquire the desired access route, but avoid the costs of construction. Without some type of local approval, however, nonconforming access roads will not withstand a court challenge.

§ 19.9. Jurisdiction: Failure to File Decision Within Sixty Days. In Crosby v. Board of Appeals of Weston, the Appeals Court refused to invalidate a variance merely because the local board of appeals did not render its decision within the prescribed sixty-day time period. The decision conforms with previous cases that have held that such failures are not jurisdictional defects. In Cullen v. Building Inspector of North Attleborough, the board of appeals' decision with respect to an appeal from a building permit was five days late. The Supreme Judicial Court stated that the time requirement did "not go to the essence of" the validity of the variance and therefore was "directory and not mandatory." In Scott v. Board of Appeals of Wellesley, the plaintiffs had begun construction of a swimming pool with notice that their building permit was being appealed. The board of appeals subsequently revoked the permit, although not within the statutory ninety-day period. The Supreme Judicial Court held that this failure "was not a jurisdictional defect" invalidating the board's decision.

Shuman v. Board of Aldermen of Newton was the first case to raise this issue after a 1969 amendment shortened the time requirement from ninety to sixty days. There the Court sustained the board's decision.

Id. at 1251, 328 N.E.2d at 843.


2 Id. at 321-22, 323 N.E.2d at 773. G.L. c. 40A, § 18 provides in part: "The decision of the board shall be made within sixty days after the date of the filing of an appeal, application or petition."


5 353 Mass. at 680, 234 N.E.2d at 732.


7 Id. at 162, 248 N.E.2d at 283.


when it was filed "within a reasonable time" after the application for the special permit had been submitted. In addition, the Court noted that the late filing did not adversely affect the applicant's neighbors.\textsuperscript{10}

In \textit{Crosby}, the Court's liberal reading of section 18 of chapter 40A of the General Laws contains no expressed qualifications. Before waiving the sixty-day requirement, however, the court did acknowledge the strong evidence supporting the grant of the variance.\textsuperscript{11} As in prior cases, the court was reluctant to overturn on a technicality a well-grounded decision of the board of appeals.

\section{Remedies: Destruction of a Noncomplying Building}

Destruction of a building which violates existing zoning provisions is not a favored remedy. The resulting economic loss runs contrary to equitable principles and is usually avoided if an alternative remedy is available. However, even if an offending structure is modifiable, its removal will be ordered when there is evidence of bad faith by the building's owner. In \textit{Building Inspector of Falmouth v. Haddad},\textsuperscript{1} the Appeals Court demonstrated its willingness to impose this severe sanction where the zoning ordinance was knowingly violated.

The land in the \textit{Haddad} case consisted of four adjacent lots which originally comprised a single parcel. The parcel, which was located in a single-residence district, originally contained two structures: a garage converted into a two-room cottage and a ten-bedroom house which had been operated as a licensed boardinghouse for twenty years.\textsuperscript{2} After the main house was destroyed by fire, the parcel was divided into the four lots. Building permits were issued for the construction of single-family residences for lots 1 and 3, a single-family, two-story dwelling for lot 4. No application for a building permit was made for lot 2. Prior to the commencement of construction, the defendants (trustees) were informed by the building inspector that an inn could not be constructed without a special permit.\textsuperscript{3} Later, the trustees were issued an innholders license which contained the stipulation that "the structure and location shall be substantially the same as under the previous license." Construction on all four lots commenced in March 1972, but on April 18 the building inspector ordered an immediate stop to all work because of various zoning and sanitation violations. Because the building on lot 4 was already fully framed and boarded in, the trustees were allowed to close it in to protect it from the weather. They "closed in" the building by constructing two porches and by performing extensive exterior finishing work.\textsuperscript{4}

\begin{itemize}
  \item \textsuperscript{10} 361 Mass. at 764-65 n.9, 282 N.E.2d at 658-59 n.9.
  \item \textsuperscript{2} \textit{ld.} at 367-68, 324 N.E.2d at 387-89.
  \item \textsuperscript{3} \textit{ld.} at 368-69 & n.3, 324 N.E.2d at 389 & n.3.
  \item \textsuperscript{4} \textit{ld.} at 369-70, 324 N.E.2d at 389.
\end{itemize}
outstanding sewer and building permits for the lots were subsequently revoked.  

The superior court enjoined further construction on the four lots and ordered the removal of the structures. The Appeals Court first held that the injunction was overly broad because it prohibited even construction which conformed to the zoning by-law. It then found that "the intended use of the structures erected on lots 1, 2, and 3 [is] permissible under the zoning by-law, which allows the construction of single-family dwellings." The court therefore held that the orders directing the removal of those structures be modified to provide for a reasonable time period in which the trustees could bring the plans into conformity with the zoning and sanitation provisions. Finally, the court accepted the superior court's finding that the structure erected on lot 4 was "an inn or similar commercial establishment" rather than a single-family residence. The court affirmed the superior court's issuance of the mandatory injunction ordering the building's destruction because the structure could not be used, or modified to be used, as a single-family residence, and the trustees had been repeatedly warned and knew that a special permit was necessary for the construction of an inn. Because the trustees had proceeded with "fully demonstrated" bad faith, the court refused to stay the demolition order while they applied for the necessary special permit.

The Haddad case demonstrates that the court will not sanction flagrant disregard of zoning requirements. Complete removal of an entire building will be ordered if there appears to be a deliberate attempt to circumvent zoning provisions. Absent a showing of bad faith, however, unnecessarily severe remedies will be avoided. For example, in Building Inspector of Dennis v. Harney, the superior court had ordered the erection of a permanent barricade across a nonpermitted access road. This would have prevented even the landowners from using

5 Id. at 371-72, 324 N.E.2d at 389-90.
6 Id. at 366, 324 N.E.2d at 389.
7 Id. at 377, 324 N.E.2d at 391.
8 Id. at 375, 324 N.E.2d at 391.
9 Id. at 377, 324 N.E.2d at 391.
10 Id. at 373 & n.7, 324 N.E.2d at 390 & n.7.
The true inquiry in each case is whether the building or structure is legally usable (or modifiable and legally usable) and is intended to be used for a main or accessory use which is permitted by the applicable ordinance or by-law.

Id. at 903, 316 N.E.2d at 739.
13 Id.
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the blocked section of their property. The Appeals Court modified the order to provide a "less drastic" solution in the form of a removable chain or locked gate. While this approach is the more usual, the Haddad decision warns that severe measures will be ordered where warranted.

§ 19.11. Remedies: Invalid Variance for Federally Funded Housing. In Cass v. Board of Appeal of Fall River, the board of appeals had granted a variance for the construction of low and moderate income housing on a parcel zoned to permit no more than three-family residences. The federally funded proposed development was a turnkey project, i.e., the developer constructs the housing, then sells or leases it to the local housing authority. The Appeals Court applied the standards of section 15(3) of chapter 40A of the General Laws and ordered the variance annulled. The court found that there were no conditions peculiar to the parcel which did not affect the entire district. Moreover, a general community shortage for large families does not constitute a "hardship, financial or otherwise, to the appellant." Thus, the board had exceeded its authority in granting the variance.

Justices Goodman and Keville disagreed with the final disposition of the case because annulment of the variance could result in the city's losing considerable federal funds allocated to it for the construction of low-cost housing. Furthermore, a need existed for the housing. Since the project apparently could be considered under the Anti-Snob Zoning Law, the two justices recommended postponing the annulment of the variance pending an application to the board under the procedures of that statute. This, they said, would accord with the objective of the statute to "provide for the critical regional need for low and moderate income housing."

Although the suggestion of the two justices appears sound, the decision of the majority should serve to warn developers of low and mod-

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16 Id. at 925, 317 N.E.2d at 83.


2 Id. at 893-94, 317 N.E.2d at 78.

3 Id. at 894, 317 N.E.2d at 78, quoting G.L. c. 40A, § 15(3) (emphasis added).


5 Id.


erate income housing to carefully consider the appropriate procedural route before applying for building permits.

§ 19.12. Public Utilities: Extent of Local Authority. During the 1975 Survey year, the Supreme Judicial Court in *Save the Bay, Inc. v. Department of Public Utilities*¹ and *New England LNG Co. v. Fall River*² decided issues concerning the distribution between state and local authorities of control over the use of land by a public service corporation. The two related cases³ concerned a proposed natural gas processing plant and storage facility to be constructed on a 22.17-acre site contiguous to Mount Hope Bay in Fall River.⁴ In July 1971, New England LNG Co. (the company) applied to the Department of Public Utilities (DPU), under section 10 of chapter 40A of the General Laws⁵ for an exemption of its land and facility from the operation of the Fall River zoning ordinance.⁶ The company further requested approval of its methods for storing, transporting and distributing the propane and liquified natural gas.⁷ Both requests were granted in December of 1971.⁸

The DPU approvals were first challenged in *Pereira v. New England LNG Co.*⁹ In *Pereira*, the superior court declared that the facility could not be used for its intended purposes until licenses to store and process the gas were obtained from municipal authorities; an injunction to enforce the decree was also issued.¹⁰ Under one statute, such a municipal license was apparently required;¹¹ another statute, however, vested authority to regulate and control the storage, transportation

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⁵ G.L. c. 40A, § 10 provides:

A building, structure or land used or to be used by a public service corporation may be exempted from the operation of a zoning ordinance or by-law if, upon petition of the corporation, the department of public utilities shall, after public notice and hearing, decide that the present or proposed situation of the building, structure or land in question is reasonably necessary for the convenience or welfare of the public.

⁶ 1975 Mass. Adv. Sh. at 142, 322 N.E.2d at 747. Although the locus was within an industrial zone, the proposed facility was not a use permitted in the district. *Id.*

⁷ *Id.* at 140 n.3, 143, 322 N.E.2d at 746 n.3, 747. This request was filed pursuant to G.L. c. 164, § 105A.

¹⁰ *Id.* at 1207, 301 N.E.2d at 442.
¹¹ G.L. c. 148, § 13, which provides in part:

No building or other structure shall ... be used for the keeping, storage, manufacture or sale of [gunpowder, dynamite, crude petroleum or its products, or any other explosives] unless the local licensing authority shall have granted a license to use the land on which such building ... is to be situated for the aforementioned uses ...
and distribution of gas in the DPU.\textsuperscript{12} The Supreme Judicial Court held that a gas company which has obtained DPU approval of its methods for storing, transporting and distributing gas need not obtain a municipal license for the same operations.\textsuperscript{13} The Court found that the statute vesting authority in DPU was both more specific and more recently adopted than the statute requiring municipal licenses; thus, the former controlled.\textsuperscript{14} More importantly, the Court found a legislative intent to grant "paramount power" over the subject matter to DPU in order to ensure that the satisfaction of the energy needs of the entire Commonwealth could not be thwarted by the actions of local authorities.\textsuperscript{15}

After the decision in Pereira, a wide-ranging attack was made in \textit{Save the Bay, Inc. v. Department of Public Utilities}\textsuperscript{16} on the DPU's action in exempting the company from the local zoning ordinance pursuant to section 10 of chapter 40A of the General Laws. The company intervened and demurred to the petitions for appeal on the ground that petitioners lacked standing. Petitioners raised issues of (1) the adequacy of DPU's standards for providing notice; (2) the company's satisfaction of the exemption's "public service corporation" requirement; (3) the sufficiency of DPU's consideration of local interests and finding of reasonable necessity; and (4) the propriety of having the DPU hearing conducted by an employee rather than by the commissioners.

The company claimed that none of the petitioners were "aggrieved parties in interest," and they therefore lacked standing to bring an appeal. The petitioners included Save the Bay, Inc., a Rhode Island nonprofit corporation, Concerned Citizens of the South End, an unincorporated association, and several individual landowners, one of whom was Pereira, a member of the Concerned Citizens group.\textsuperscript{17} The Court reviewed the requirements for standing to challenge a decision made by the DPU. Under section 5 of chapter 25 of the General Laws, petitioners must be an aggrieved party in interest. Under the State Administrative Procedure Act,\textsuperscript{18} to be a "party" one must be: (1) a specifically named person whose legal rights or obligations are being determined in the proceeding; (2) a person entitled by law to participate in the proceeding who makes an appearance; or (3) a person

\textsuperscript{12}G.L. c. 164, § 105A, which provides in part: "Authority to regulate and control the storage, transportation and distribution of gas and the pressure under which these operations may respectively be carried on is hereby vested in the [Department of Public Utilities]."
\textsuperscript{14}Id. at 1216, 301 N.E.2d at 447.
\textsuperscript{15}Id. at 1218-19, 301 N.E.2d at 448.
\textsuperscript{17}Id. at 141, 149, 322 N.E.2d at 747, 750.
\textsuperscript{18}G.L. c. 30A.
permitted by the agency to intervene as a party.\textsuperscript{19} Neither of the organizations apparently could qualify for standing except as intervenors. Save the Bay, Inc. did not specifically allege that it had been permitted to intervene or was entitled to intervene; thus, the demurrer to its standing was sustained.\textsuperscript{20} Although the Concerned Citizens group had actively participated in the proceeding, it was an unincorporated association and, therefore, not a proper party to the litigation.\textsuperscript{21} Pereira, an abutter, apparently was entitled by law to intervene in the proceeding. Since Concerned Citizens acted in the proceeding for Pereira as well as for itself, its active participation satisfied the requirement that he make an appearance. Thus, the Court found Pereira to have standing to bring the appeal.\textsuperscript{22}

The Court next considered petitioner's allegation that the DPU standard for providing notice of a public hearing was inadequate. Since section 10 of chapter 40A of the General Laws does not specify the type of notice to be given, the Court held that notice must satisfy the requirements of section 11(1) of chapter 30A of the General Laws. Section 11(1) provides for reasonable notice to all parties of the time and place of the hearing and a statement of the issues involved.\textsuperscript{23} As required by its regulations, DPU gives abutters notice by registered mail; others are not formally notified but must rely on notice published in newspapers. The Court held the procedure not to be arbitrary on its face and found a presumption in favor of the reasonableness of notice given in compliance with an administrative regulation.\textsuperscript{24} However, the Court suggested that the DPU reconsider its notice regulations with regard to parties who are separated from the proposed facility only by a public way. "[C]onsiderations of fairness might call for broader notice to interested parties."\textsuperscript{25}

The third issue raised on appeal was the company's status as a public service corporation eligible for an exemption from local zoning requirements under section 10 of chapter 40A of the General Laws.\textsuperscript{26} The standard of review applicable to this issue limited the Court to deciding whether the DPU's determination of the company's status was erroneous as a matter of law.\textsuperscript{27} Petitioners argued that since the company was not organized under section 75B of chapter 164 of the General Laws, it did not qualify as a public service corporation.\textsuperscript{28} The

\textsuperscript{19} Id. § 1(3).
\textsuperscript{21} Id. at 149, 173, 322 N.E.2d at 750, 758.
\textsuperscript{22} Id. at 149-51, 322 N.E.2d at 750.
\textsuperscript{23} Id. at 151 n.7, 322 N.E.2d at 750 n.7.
\textsuperscript{24} Id. at 152, 322 N.E.2d at 751.
\textsuperscript{25} Id. at 153, 322 N.E.2d at 751.
\textsuperscript{26} Id. at 154-64, 322 N.E.2d at 751-55.
\textsuperscript{27} Id. at 155, 322 N.E.2d at 752.
\textsuperscript{28} Id. at 158, 322 N.E.2d at 753.
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Court, however, found the definition of public service corporation to be broader, and that some of the relevant considerations are:

whether the corporation is organized pursuant to an appropriate franchise from the State to provide for a necessity or convenience to the general public which could not be furnished through the ordinary channels of private business; whether the corporation is subject to the requisite degree of governmental control and regulation; and the nature of the public benefit to be derived from the service provided.\(^{29}\)

DPU had determined the existence of a state and regional need for an increased supply of natural gas, which need the company would help satisfy. Petitioners contended that the company might never serve any citizen of the Commonwealth. Although the Court found the DPU determination supported by the evidence, it suggested that distribution to the public in the Commonwealth and the region might be essential if the company was to preserve its status as a public service corporation.\(^{30}\) The Court further found that the required degree of governmental control was present because the company was subject to regulations of the Federal Power Commission and the DPU.\(^{31}\) Thus, the designation of the company as a public service corporation was not improper.

The petitioners next argued that DPU had incorrectly applied the reasonable necessity standard of section 10 of chapter 40A of the General Laws, particularly since it had not sufficiently considered local interests.\(^{32}\) The Court first held there was sufficient evidence to support the finding of reasonable necessity. Moreover, DPU had adequately considered local environmental and safety interests. Then the Court held that it was proper for DPU to consider the needs not only of Massachusetts but also those of the region. Although it recognized the special burden placed on Fall River by the proposed facility, the Court stated that "at some point local interests must be balanced against the general interests of the citizenry as a whole."\(^{33}\)

Finally, the Court held that it was not error for the DPU hearing to be conducted by an employee rather than by the commissioners. The procedure was authorized by statute and was similar to reference of a court case to a master.\(^{34}\)

The final challenge to construction of the facility in Fall River came in New England LNG Co. v. Fall River.\(^{35}\) Shortly after the Pereira

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\(^{29}\) Id. at 159, 322 N.E.2d at 753.

\(^{30}\) See id. at 159-60, 164, 322 N.E.2d at 754, 755.

\(^{31}\) Id. at 162-63, 322 N.E.2d at 754.

\(^{32}\) Id. at 164-72, 322 N.E.2d at 755-57.

\(^{33}\) Id. at 170, 322 N.E.2d at 757.

\(^{34}\) Id. at 172, 322 N.E.2d at 757.

decision, the city amended its general ordinances, as distinguished from its zoning by-laws, by adding new specifications for storage tank height, capacity and setback.\textsuperscript{36} The building inspector denied the company's application for a building permit on the ground that the plans for construction of the facility did not conform to the specifications required by the ordinance.\textsuperscript{37} The company sought a declaration that the ordinance was unenforceable as well as a writ of mandamus ordering the building inspector to issue the permit.\textsuperscript{38}

The city contended it had authority to enact the amended ordinance under either section 75 of chapter 164 of the General Laws, which permits towns to regulate the activities of gas companies that may in any manner affect the health, safety, convenience or property of the towns' inhabitants,\textsuperscript{39} or section 6 of the Home Rule Amendment to the Massachusetts Constitution,\textsuperscript{40} which permits towns to exercise any power conferable on them by the Legislature which is consistent with the state Constitution or with state statutes.\textsuperscript{41} In dealing with the city's first contention, the Supreme Judicial Court found the ordinance to be inconsistent with section 105A of chapter 164 of the General Laws, which vests in DPU the regulatory authority over storage, transportation and distribution of gas. The city's authority under section 75 had to give way to DPU's authority under section 105A because the latter section was both more specific and more recently adopted.\textsuperscript{42} In addition, this conflict with section 105A lead the Court to conclude that the city lacked authority under the Home Rule Amendment to enact the ordinance because the ordinance conflicted with a statute enacted by the Legislature "in conformity with the powers reserved to it . . ."\textsuperscript{43} The Court ordered the building inspector to issue the permit.\textsuperscript{44}

These cases are illustrative of situations in which localities are being required to yield to the state in controlling land use. By vesting in DPU the power to approve or disapprove proposed public utility facilities, the Legislature implicitly placed such facilities beyond the scope of local restrictions. The Court, acknowledging the supremacy

\textsuperscript{36} Id. at 2187-88, 331 N.E.2d at 538.
\textsuperscript{37} Id. at 2188-89, 331 N.E.2d at 538-39.
\textsuperscript{38} Id. at 2183, 331 N.E.2d at 537.
\textsuperscript{39} Id. at 2190-91, 331 N.E.2d at 539.
\textsuperscript{40} MASS. CONST. amend. art. II, § 6.
\textsuperscript{42} Id. at 2190-91, 331 N.E.2d at 539.
\textsuperscript{43} Id. at 2194, 331 N.E.2d at 540. The Court found it unnecessary to rule in the company's claims that the ordinance was invalid because it was an attempt to regulate land use without complying with the procedures for amending zoning ordinances, id. at 2191-92, 331 N.E.2d at 539-40, or because it constituted an unreasonable burden on interstate commerce, id. at 2194, 331 N.E.2d at 541.
\textsuperscript{44} Id. at 2195, 331 N.E.2d at 541.
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of the specific public utilities statute, affirmed the power of state control in this area. The result is a logical one, for if localities were allowed to countermand decisions made by DPU pursuant to its statutory authority, the Legislature’s purpose in granting the DPU such authority would be undermined.

The resolution of the issues in Save the Bay, Inc. v. Department of Public Utilities indicates the extent of the discretion exercised by DPU in granting exemptions from local zoning requirements to public service corporations. By giving a fairly narrow interpretation to the qualifications needed to challenge a DPU decision, the Court restricted the number of appeals which it will hear from DPU rulings. Nevertheless, the dicta concerning adequate notice and consideration of local interests indicates that the Court may intervene if DPU oversteps its authority.

§19.13. Pending Subdivision Plan: Applicability of Zoning Amendment. Preservation of the existing land use balance on the islands of Nantucket Sound has been the subject of proposals at both the federal and local levels. Influenced perhaps by the rapidly expanding population on neighboring Cape Cod and faced with the prospect of strict federal land use controls, the town of Tisbury, on Martha’s Vineyard, amended its zoning by-laws by doubling the minimum lot size requirement for subdivision developments. In Chira v. Planning Board of Tisbury, the Appeals Court considered the applicability of this change to a subdivision plan filed with the planning board prior to the adoption of the amendment.

In early 1973, the plaintiffs (applicants) filed with the planning board preliminary and revised plans for a conventional, grid-like subdivision on a 107-acre tract. Thereafter, a town meeting voted to amend the local zoning by-law to increase the minimum lot size from 25,000 square feet to 50,000 square feet; the applicants’ plans conformed to the former requirement but not to the latter. The amendment was then submitted to the Attorney General for his approval as required by section 32 of chapter 40 of the General Laws. In May, 1973, the applicants filed a second preliminary plan for the same locus; this time a “cluster development” subdivision was proposed. The Attorney General approved the zoning amendment on August 7, 1973, and it was last published on August 28. Both a definitive grid plan and a definitive cluster plan were filed. The planning board disapproved both definitive plans because they violated the minimum lot size requirements of the amended by-law.

The applicants challenged the decision of the planning board. The trial court found that both plans were governed by the zoning laws in

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2 Id. at 1034, 1037, 333 N.E.2d at 206, 207.
3 Id. at 1038, 333 N.E.2d at 207.
effect prior to the 1973 amendment, and the board, therefore, had improperly disapproved the plans. The Appeals Court agreed that the applicants' plans were entitled to approval. Under section 32 of chapter 40, a by-law amendment does not take effect until it has been approved by the Attorney General and published. Section 7A of chapter 40A of the General Laws provides that definitive subdivision plans are "governed by the applicable provisions of the zoning . . . by-law in effect at the time of the submission of [the preliminary plans] while such . . . plans are being processed . . . ." Since both preliminary plans had been submitted prior to the Attorney General's approval of the 1973 amendment, the amendment was not "in effect" with regard to the definitive plans. The court distinguished Doliner v. Planning Board of Millis because the decision in that case relied on a version of section 7A which required that a preliminary plan be approved before it was afforded protection. The court also rejected the planning board's contention that the grid plan was properly rejected because the applicants never had intended to implement it. Nothing in the Subdivision Control Law prevents "an owner from engaging in the fruitless exercise of filing subdivision plans which he never intends to utilize."

The court's decision in Chira effectuates the purpose of section 7A which is "to protect a developer from zoning changes during the planning stage." This purpose is perhaps even broad enough to protect the developer who files alternative plans before the effective date of a zoning change in order to both avoid the effects of new zoning and retain several development options. If the intended protection is not so broad, the remedy should be devised by the Legislature, not by the judiciary.

4 See id.
5 Id. at 1039, 333 N.E.2d at 207. Since the trial court had remanded the case to the Planning Board for further consideration, its decree was interlocutory and the appeal was dismissed. Id. at 1036, 333 N.E.2d at 206-07. See Roberts-Haverhill Associates v. City Council of Haverhill, 1974 Mass. App. Ct. Adv. Sh. 2159, 319 N.E.2d 916. The court, however, considered the issues because (1) the procedural error might have been induced by recent procedural changes, (2) the briefs on both sides argued the merits, and (3) resolution of the issues would expedite further proceedings. 1975 Mass. App. Ct. Adv. Sh. at 1036, 333 N.E.2d at 207.
7 Id. at 1039, 333 N.E.2d at 208.
§19.14. Pending Trailer Park Use: Effect of Zoning Amendment. Under section 7A of the Zoning Enabling Act, a land plan which does not require approval under the Subdivision Control Law enjoys a three-year exemption from any subsequent zoning amendment which would otherwise affect the proposed use of the land. In *Rayco Investment Corp. v. Board of Selectmen of Raynham*, the town attempted to prevent a landowner from claiming this statutory immunity by contending that a newly enacted by-law was not a zoning amendment, but rather an exercise of the town's general police power. In its examination of this claim, the Supreme Judicial Court clarified the scope of section 7A protection and delineated the sources of authority for regulating trailer parks.

The plaintiff owned a parcel of land which was zoned so that a trailer park would be a permitted use. His predecessor in title had submitted a plan for the parcel to the town's planning board. On October 14, 1971, the board endorsed the plan with the notation "approval under the subdivision control law not required." Four days later the town adopted a by-law limiting the number of licenses that could be issued for trailer parks to the number of licenses that had been issued as of October 1, 1971. In early November, 1972, the plaintiff applied to the town board of health for a license to operate a trailer park on the tract. The denial of his application was based on the existence of the 1971 by-law.

The plaintiff sought a declaration that section 7A of chapter 40A of the General Laws protected his property from the operation of the by-law. The superior court rejected the claim, ruling that the 1971 by-law was enacted under the town's police power and was "not to be construed as an amendment to the zoning by-law." The Supreme Judicial Court ordered direct appellate review.

The town's main contention was that the 1971 by-law was not a zoning amendment and thus was not subject to section 7A. However, since the record did not indicate the manner in which the law had been adopted, the Court examined the plaintiff's right to the license under two conditions: (1) if the by-law were a properly-enacted zoning amendment; and (2) if the procedural requirements for amending a zoning law were not fulfilled.

First, assuming that the by-law had been adopted as a zoning
amendment, it was clear that section 7A "[bore] on the applicability of the 1971 by-law to the plaintiff's property."\textsuperscript{10} The town, however, contended that the statute's protection against changes in the "use of the land" does not include the type of change made by the 1971 by-law. In \textit{Bellows Farms, Inc. v. Building Inspector of Acton},\textsuperscript{11} the Court held that zoning amendments that had the effect of reducing the intensity of apartment units but which did not prohibit use of the land for apartments were not changes in the "use of the land."\textsuperscript{12} Similarly, the town argued that the 1971 amendment did not preclude the use of the parcel as a trailer park, because the plaintiff might obtain a license if another license holder ceased operations.\textsuperscript{13} The Court, however, ruled that the by-law was a "'virtual prohibition' of the use of land for trailer park purposes . . . ."\textsuperscript{14} Thus, the Court held that if the 1971 amendment was a properly enacted zoning amendment, section 7A would protect plaintiff's land from the operation of the by-law, and the application for the trailer park license would be unaffected by the by-law.\textsuperscript{15}

The Court then considered the alternative possibility that the 1971 amendment did not comply with the procedural requirements of the Zoning Enabling Act. From this perspective, the town contended that the 1971 by-law was an exercise of its general police power rather than its zoning power, and thus was not subject to section 7A's provisions.\textsuperscript{16} The Court acknowledged that trailer parks may be subject to regulation by towns as an exercise of their police power.\textsuperscript{17} However, it held that the by-law involved in the instant case had the "nature and effect . . . of an exercise of the zoning power,"\textsuperscript{18} and therefore must be viewed as a zoning regulation. Three factors entered into the determination that the by-law was an exercise of the zoning power: (1) the by-law was within the scope of the town's zoning power;\textsuperscript{19} (2) prior to the adoption of the amendment, the town's zoning by-laws comprehensively regulated trailer parks, hence the 1971 amendment "necessarily modified the earlier by-law;"\textsuperscript{20} and (3) "similar by-laws have been adopted in the past by municipalities as zoning by-laws."\textsuperscript{21} Thus, if the amendment had not been adopted

\textsuperscript{10} Id. at 2380, 331 N.E.2d at 912.
\textsuperscript{12} 1973 Mass. Adv. Sh. at 1401-02, 303 N.E.2d at 733-34.
\textsuperscript{13} 1975 Mass. Adv. Sh. at 2380, 331 N.E.2d at 912.
\textsuperscript{14} Id. at 2382, 331 N.E.2d at 913.
\textsuperscript{15} Id.
\textsuperscript{16} Id.
\textsuperscript{17} Id. at 2384-85, 331 N.E.2d at 914.
\textsuperscript{18} Id. at 2385, 331 N.E.2d at 914.
\textsuperscript{21} Id. at 2385, 331 N.E.2d at 914.
pursuant to the procedures required by the Zoning Enabling Act, it was without effect and could not be relied on to defeat the application for the trailer park license. 22

The Court in Rayco examined the implications of a conclusion that the by-law was an exercise of the town's police power. If this conclusion were to be reached, "the assorted protections contained in the Zoning Enabling Act would in many instances be circumvented, thereby defeating the purposes of the statute." 23 For example, if the police power were used to limit the number of mobile homes in this case, another town might label an attempt to limit apartment buildings as a general health regulation, thereby ignoring the stricter requirements of the zoning power. Such an approach, the Court stated, "views the municipal power in a vacuum, whereas the law is clear that a municipality's 'independent police powers . . . cannot be exercised in a manner which frustrates the purpose or implementation of a . . . law enacted by the Legislature . . .'" 24

The Rayco decision is noteworthy in two respects. First, it guards against an interpretation of Bellows Farms which would deny section 7A protection wherever there was any possibility, however remote, of the availability of an intended use on a particular tract. Under the present approach, a plan would be protected if a subsequent zoning amendment "impedes the reasonable use of the land." 25 Second, the decision reinforced the scope of the Zoning Enabling Act. It serves to insure that a municipality cannot avoid the requirements of the enabling act merely by labeling a zoning by-law an exercise of the general police power.

B. SUBDIVISION CONTROL

§19.15. Subdivision Control: Dead-End Streets. In Sparks v. Planning Board of Westborough, 1 abutters sought to have annulled the planning board's approval of a definitive subdivision plan. The plan provided for two perpendicular roadways forming a T-shape; the sole access from a public way was provided at the base of the T. The roads were to each be slightly less than 600 feet in length; together, they were to provide access to thirteen lots. Planning board regulations required dead-end streets to be no longer than 600 feet and to provide access to no more than twelve lots. 2 Plaintiffs contended that the two

22 Id. at 2388, 331 N.E.2d at 915.
23 Id. at 2386-87, 331 N.E.2d at 915.
24 Id. at 2387, 331 N.E.2d at 915, quoting Board of Appeals of Hanover v. Housing Appeals Comm. in the Dept. of Community Affairs, 365 Mass. 339, 360, 294 N.E.2d 393, 409 (1973).
2 Id. at 2220, 321 N.E.2d at 668.
roadways would constitute a single dead-end street, and therefore, the roads would exceed the norms of the regulations.3

The Appeals Court rejected plaintiffs' contention. Neither state nor local authority had adequately defined "dead-end street." Thus, the board could not have applied plaintiffs' interpretation of the regulations without violating the requirement that board regulations be enforced "only to the extent that they are 'comprehensive, reasonably definite, and carefully drafted, so that owners may know in advance what is or may be required of them.'"4 Moreover, the court was disinclined to accept the proffered definition of "dead-end street." Treatment of combinations of subdivision roadways as a single dead-end street where there is only one means of access to them from a public way sweeps too broadly.5 By not insisting on an access route to an existing primary street, the court allowed each subdivision road to be considered as a separate way.

§19.16. Subdivision Control: Constructive Approval of Submitted Plan. Under section 81U of chapter 41 of the General Laws, the failure of a planning board to act on a proposed subdivision plan within the prescribed time is deemed to be an approval of the plan.1 In Pierce v. Town Clerk of Rochester,2 the Appeals Court considered the legal effect of a planning board's letter to the petitioner explaining why no action would be taken on a submitted plan.3 The court, rather than finding the letter a disapproval of the plan, held that it was "a refusal to consider the plan which could and did ripen into constructive approval thereof."4 The court recognized, however, that approval may not have been intended by the board.5 Therefore, judgment was not entered for sixty days, giving the board time to modify, amend, or rescind its constructive approval under section 81W of chapter 41 of the General Laws.6

3 Id.
4 Id. at 2221, 321 N.E.2d at 668 (emphasis in original).
5 Id. at 2223, 321 N.E.2d at 669.

§19.16. 1 G.L. c. 41, § 81U reads in part:
Failure of the planning board either to take final action or to file with the city or town clerk a certificate of such action regarding a plan submitted by an applicant within sixty days after such submission ... shall be deemed to be an approval thereof.
4 Id. at 461, 325 N.E.2d at 301.
§19.17. Subdivision Control: Applicability of Anti-Snob Zoning Law. Under the Anti-Snob Zoning Law, a qualified applicant, interested in building low and moderate income housing, may apply to the local zoning board of appeals (board of appeals) for a "comprehensive permit" instead of applying to the numerous local boards and officials having jurisdiction over the proposed construction. The board of appeals, in granting a comprehensive permit, may override local regulations, such as zoning ordinances or by-laws, which hamper the construction of low and moderate income housing when such regulations are not "consistent with local needs." In Mahoney v. Board of Appeals of Winchester, the Supreme Judicial Court held that the Anti-Snob Zoning Law authorizes the board of appeals to ignore or modify regulations adopted pursuant to the Subdivision Control Law which are not consistent with local need, and that such exemptions do not violate the equal protection rights of those community members forced to comply with the requirements of the Subdivision Control Law.

The plaintiffs, owners of property abutting land for which a comprehensive permit had been granted, claimed that the Anti-Snob Zoning Law did not authorize the board of appeals to override the requirements of the Subdivision Control Law. The Court pointed out that under section 21, the board of appeals has "the same power to

2 See generally Huber, Anti-Snob Zoning Law, 1969 ANN. SURV. MASS. LAW 360; Rodgers, Snob Zoning in Massachusetts, 1970 ANN. SURV. MASS. LAW 487.
5 G.L. c. 41, §§ 81K-81GG. Section 81N makes the Subdivision Control Law effective in those cities and towns that have approved it. Section 81Q provides that a local planning board may adopt rules and regulations designed to implement the law.
7 Id. at 1423-24, 316 N.E.2d at 609.
8 Id. at 1422, 316 N.E.2d at 609. The Court, relying on Board of Appeals of Hanover v. Housing Appeals Comm. in the Dept. of Community Affairs, 363 Mass. 339, 294 N.E.2d 393 (1973), summarily rejected the plaintiffs' additional claims that the Anti-Snob Zoning Law was an unconstitutional delegation of power, was unconstitutionally vague, and permitted unconstitutional spot zoning. 1974 Mass. Adv. Sh. at 1422, 316 N.E.2d at 608-09.

The plaintiffs also contended that the procedures for appealing the decisions of the appeals board, which require a denied applicant to appeal first to the Housing Appeals Committee, G.L. c. 40B, § 22, but which allow any other "aggrieved person" to appeal directly to the district or superior court, G.L. c. 40B, § 21, deny equal access to the courts. The Court rejected the claim by stating that "there are no substantial differences between the alternative methods of review." 1974 Mass. Adv. Sh. at 1422, 316 N.E.2d at 608, quoting Board of Appeals of Hanover v. Housing Appeals Comm. in the Dept. of Community Affairs, 363 Mass. 339, 361, 294 N.E.2d 393, 416 (1973).
issue permits or approvals as any local board or official who would otherwise act with respect to such application.' "10 Since the agencies charged with implementing the Subdivision Control Law, the local planning board and the board of subdivision control appeals,11 are such "local boards," the board of appeals may go beyond any provision of the Subdivision Control Law that is inconsistent with local needs.12

The plaintiffs' second major contention was that they were denied equal protection of the laws by the board of appeals' exempting the applicant from the subdivision control requirements, while the plaintiffs, as abutters, were held to those provisions.13 The Court indicated that the record did not show if the board of appeals had in fact modified or ignored the Subdivision Control Law.14 Even if the board of appeals had, however, the Court stated there would be no equal protection violation.15 Since the Legislature's authority to regulate zoning practices is "very broad,"16 the Court held that the appropriate standard of review was whether the Anti-Snob Zoning Law was "'a reasonable means to serve a legitimate public purpose.'"17 Without considering whether the particular aspect of the Anti-Snob Zoning Law in question—the board of appeals ability to override the Subdivision Control Law—was reasonable, the Court held, based on Board of Appeals of Hanover v. Housing Appeals Committee in the Department of Community Affairs,18 that the overall legislative scheme was reasonable.19

Mahoney reinforces the Court's support for the Anti-Snob Zoning Law as a legitimate remedy for exclusionary zoning practices. It should discourage further challenges to the law's substantive validity.

C. EMINENT DOMAIN

§19.18. Eminent Domain: Concurrent Remedies. In Raimondo v. Town of Burlington, the Supreme Judicial Court was asked to determine whether a landowner may challenge the validity of a taking of her property and at the same time file a petition for the assessment of damages under section 14 of chapter 79 of the General Laws. The

12 Id.
13 Id. at 1422-23, 316 N.E.2d at 609.
14 Id. at 1423, 316 N.E.2d at 609.
15 Id.
16 Id.
17 Id. at 1424, 316 N.E.2d at 609.

plaintiff filed a bill in equity contending that the town’s taking of her property was void because the premises taken were not identified with sufficient accuracy, and because the taking was not for a proper public purpose. Before the equity suit had been determined, the plaintiff filed a petition under section 14 seeking an assessment of damages based on the same taking. The town then filed a plea in abatement to the equity suit because of the plaintiff’s requested assessment of damages. The superior court sustained the plea and dismissed plaintiff’s bill, ruling that the plaintiff could not pursue both claims simultaneously.

On appeal, the Supreme Judicial Court reversed the superior court. The Court first noted that a party may follow inconsistent courses, successively or concurrently, in order to obtain complete relief. Thus, the plaintiff could maintain her bill in equity while seeking damages under section 14 in superior court.

The Court distinguished the cases of Preston v. City of Newton and Barnes v. City of Springfield on the ground that they merely assert the rule that “a petition for the assessment of damages on account of a taking admits, for the purpose of that proceeding, the . . . validity [of the taking].” The Court went on to indicate that the rule of Preston and Barnes, to the extent that it depends on the inability to join alternative claims and suits in equity with actions at law, has been overruled by Rule 18(a) of the Massachusetts Rules of Civil Procedure. Consequently, if no other justification exists for the rule of Preston and Barnes, a plaintiff may now be able to challenge the validity of a taking and seek an assessment of damages in the same action.

§19.19. Eminent Domain: Admissibility of Assessed Valuation. In Stewart v. Town of Burlington, the Appeals Court inter-

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2 Id. at 2236-37, 319 N.E.2d at 396.
3 G.L. c. 79, § 14.
5 Id.
6 Id. at 2236, 319 N.E.2d at 396.
7 Id. at 2237, 319 N.E.2d at 396-97.
8 Id. Accord, e.g., Radway v. Selectmen of Dennis, 266 Mass. 329, 336, 165 N.E. 410, 412 (1929); Moore v. Sanford, 151 Mass. 285, 287, 24 N.E. 323 (1890). In Raimondo, 1974 Mass. Adv. Sh. at 2238, 319 N.E.2d at 897, the Court also indicated that the plaintiff could bring her petition for an assessment of damages under the two year statute of limitations contained in G.L. c. 79, § 16, even though she would also have had six months from the termination of her equity suit within which to bring the petition under G.L. c. 79, § 18.
9 213 Mass. 483, 100 N.E. 641 (1913).
12 Id.


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interpreted the 1969 amendment\(^2\) to section 35 of chapter 79 of the General Laws.\(^3\) In an action for the determination of damages sustained because of a taking by eminent domain,\(^4\) section 35 allows as evidence of the value of the property taken, the tax assessment placed on the property for the three years preceding the taking.\(^5\) The 1969 amendment permits this evidence only if a "comprehensive revaluation" of the town's real estate has occurred within the "five years preceding" the three years preceding the taking.

In *Stewart*, the petitioner's property had been taken in 1971.\(^6\) The estimated fair market value of the property was $24,000.\(^7\) The town offered as evidence the assessed valuation of the property for the years 1968 to 1970, which valuation was $18,200.\(^8\) There had been a comprehensive revaluation of the town's real estate in 1968. The superior court excluded the evidence of the assessed valuation because the revaluation had not been "implemented within the five years (1963 through 1967) preceding the three years (1968 through 1970) next preceding the year of the taking (1971)."\(^9\)

The Appeals Court affirmed the ruling, insisting on strict compliance with the requirements of section 35. The court acknowledged the town's argument that "the purpose of the 1969 proviso was to insure a reasonably current relationship between the assessed valuation and the fair market value of the property taken . . . ."\(^10\) The court's ruling appears to defeat that purpose, however, because it excludes an assessment from evidence where the revaluation was made one to three years before the taking, but allows such evidence where the revaluation was made four to eight years before the taking. The court, however, insisted that the language and legislative history of section 35 are "'plain, and therefore, it is to be interpreted in accordance with the usual and natural meaning of . . . (its) words.'"\(^11\) The deci-

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\(^3\) G.L. c. 79, § 35, reads in part:

The valuation made by the assessors of a town for the purposes of taxation for the three years next preceding the date of the taking . . . may . . . be introduced as evidence of the fair market value of the real estate by any party to the suit; provided, however, that if the valuation for any one year is so introduced, the valuations for all three years shall be introduced in evidence; and provided further, that no such valuation shall be so introduced as evidence unless within the five years preceding said three years next preceding such taking . . . there has been a comprehensive revaluation of the real estate in the town.

(emphasized language added by the 1969 amendment).

\(^4\) Such suits are allowed by G.L. c. 79, § 14.


\(^7\) Id. at 2155 n.2, 319 N.E.2d at 922 n.2.

\(^8\) Id.

\(^9\) Id. at 2154-55, 319 N.E.2d at 922.

\(^10\) Id. at 2155, 319 N.E.2d at 922.

\(^11\) Id. at 2156, 319 N.E.2d at 922.
§19.20 Eminent Domain: Assessment of Damages. In Colonial Acres, Inc. v. North Reading,¹ the Appeals Court affirmed the traditional rule that the owner of land taken by eminent domain has a right to recover as damages its fair market value considered in light of the "highest and best use to which the land could reasonably be put."² The petitioner's land was situated in a residentially zoned district.³ Three years before the taking, the town's refuse disposal committee obtained a special permit to use the land as a sanitary landfill.⁴ In an action for assessment of damages under section 14 of chapter 79 of the General Laws, petitioner presented two arguments in support of his assertion that the value of the land should have been based on its suitability for a sanitary landfill, its highest and best use. First, he argued that the special permit granted to the refuse disposal committee ran with the land and consequently, the fair market value should reflect the ability of the petitioner or a purchaser to use the land as a sanitary landfill.⁵ Secondly, petitioner maintained that there was a reasonable probability that the town would remove the residential zoning restriction and consequently, the fair market value should reflect the probability that the petitioner or a purchaser could use the land as a sanitary landfill.⁶

In rejecting the first argument, the court held that the special permit granted to the refuse disposal committee did not run with the land, but rather ran only to the town.⁷ The circumstances surrounding the issuance of the special permit supported this view. The refuse disposal committee had petitioned for the permit. The permit was granted with the stipulation that a group containing at least three town officials be appointed to oversee the operation of the landfill process.⁸ In addition, the town had been considering taking the property by eminent domain, and the refuse disposal committee's special permit was merely a preliminary step in the complete conversion of the land to the town's use.⁹ Most significantly, the special permit was issued under a section of the town's zoning by-law allowing special

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⁴ Id. The court did not indicate what the petitioner received for allowing the refuse disposal committee to use his land as a sanitary landfill for three years.
⁵ Id.
⁶ Id. at 948-49, 331 N.E.2d at 551.
⁷ Id. at 946, 331 N.E.2d at 550.
⁸ Id. at 947, 331 N.E.2d at 550. The group had to contain at least one member from the town's Board of Selectmen, Board of Public Works, and Board of Health. Id.
⁹ Id.
permits for residential areas if the land is to be used for a "municipal use." Thus, the court concluded that, while the land was well-suited for a sanitary landfill, such use was available only to the refuse disposal committee, and the petitioner’s damages had to be based upon the property’s value as residential land.

In rejecting the second argument—that there was a reasonable probability the residential zoning restriction would be removed—the court indicated that the trial judge has a "margin of ultimate discretion" in determining whether there is sufficient evidence to warrant submitting the issue to the jury. The court found that the mere grant of a special permit to the town's refuse disposal committee was not highly probative of a probable zoning change. Since this was the only proof offered relating to the probability of such a zoning change, the trial judge did not abuse his discretion in prohibiting evidence of the land's value as a sanitary landfill.

§19.21. Government Land Bank. During the 1975 Survey year, the General Court, in chapter 212 of the Acts of 1975, created a "land bank" with the power to purchase, maintain, and dispose of lands formerly used for the Westover Air Force Base, the Chelsea Naval Hospital, and the Boston Naval Shipyard, including the South Boston Annex and the Boston Army Base. The land bank has two purposes: (1) to aid in the conversion of these lands to nonmilitary uses in order to prevent blight, economic dislocation, and unemployment; and (2) to aid in the construction of low and moderate income housing on these lands in order to alleviate the shortage of such housing.

Among the Land Bank Act’s many provisions, the most interesting deal with the Legislature’s attempt to insure some local control over the lands comprising these three military bases. Under section 3, three “advisory boards,” one for each base, are to be created. The chief executive officers of the municipalities in which the lands are located may appoint a specified number of board members. The boards’ function is to advise the bank’s board of directors in its decisions affecting the land. Section 5 provides that if a municipality in which an installation lies desires to acquire the land when vacated by

10 Id.
14 Id.
the military, the state land bank must wait one year before offering or bidding for it. Finally, under section 6, the bank cannot approve a redevelopment plan within two years after acquiring the land unless the plan is approved by the municipality in which the land lies. The statute expires on June 30, 1980.

D. Rent Control

When rent control is adopted by a city or town, a local board or administrator is charged with its implementation and enforcement. During the 1975 survey year, the Supreme Judicial Court clarified the extent of this local authority.

§19.22. Rent Control: Revocation of Acceptance. In Chisholm v. City Council of Lynn, the Supreme Judicial Court held that a city council could revoke a city’s acceptance of rent control, even where the city’s voters had previously approved rent control in a special referendum. Section 2 of the Rent Control Act provides that a city or town may accept rent control by a vote of the city council and that “a city or town ... may, in like manner, revoke its acceptance.” The Lynn City Council, while accepting rent control, petitioned the Legislature for permission to conduct a city-wide referendum on the “question of the further continuance of Rent Control in Lynn.” The General Court authorized the referendum, and in November, 1972, the

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6 The bank need not wait the full year, however, if it appears to the bank’s board of directors that the lands may be acquired by someone other than the appropriate municipality. Id.
7 Id. § 6.
8 The two-year period may be extended by the bank upon petition by the municipality. Id.
9 Id. § 19. Sections 16A-16E set forth the procedures to be followed upon the termination of the land bank.

2 Id. at 2266, 331 N.E.2d at 531.
4 Id. (emphasis added). Section 2 does not actually specify that the procedure for acceptance is by vote of the city council. G.L. c. 4, § 4, however, provides that where a statute requires the “acceptance” of a city or town to be effective, a vote by the city council is the proper means of acceptance. See Chisholm, 1975 Mass. Adv. Sh. at 2263-64 & n.4, 331 N.E.2d at 530 & n.4.
6 Acts of 1972, c. 625. The Act authorized the use of the following ballot:
   Notwithstanding the provisions of chapter eight hundred and forty-two of the acts of nineteen hundred and seventy, the following question shall be placed on the official ballot to be used at the state election to be held in the current year:--
   Shall rent control be continued in the city of Lynn? Yes No
   If a majority of the votes cast on said question is in the affirmative, rent control shall be continued in said city subject to the provisions of said chapter eight hundred and
Lynn residents voted 22,000 to 15,000 to continue rent control in the city. In June, 1974, a successor city council voted to abolish rent control. The mayor subsequently approved that decision. The plaintiffs, four low income tenants residing in Lynn, contended that the June decision of the city council did not terminate rent control in the city.

The Supreme Judicial Court reasoned that the city council's vote would be effective under section 2 unless the city-wide referendum "made a difference." The Court found that the referendum did not make a difference because it provided that rent control, if approved, would continue under the provisions of chapter 842 of the Acts of 1970. Since the section 2 revocation procedures are part of chapter 842, the Court reasoned that the referendum left the city council's authority unaltered.

The Court rejected the plaintiffs' three arguments for a finding that the referendum did in fact "make a difference." First, the plaintiffs argued that rent control had been accepted in Lynn through both a city council vote and a city-wide referendum. Consequently, a revocation of acceptance in like manner, as required by section 2, needed a city-wide referendum as well. The Court, however, found that the referendum concerned whether to continue rent control in Lynn, not whether to accept it. Second, the plaintiffs argued that the referendum altered the manner of revocation because if the voters had rejected rent control, it would have been revoked without the need for any action by the city council. The Court, while conceding that the argument might be true, found that it did not aid the plaintiffs because the voters had in fact approved rent control, including the section 2 revocation procedures. Third, the plaintiffs argued that "fairness" required a city-wide vote prior to revocation because the earlier vote indicated popular support for rent control. The Court, however, refused to go beyond the legislative revocation provisions. The Court concluded that the plaintiffs had "no remedy by litigation;" their only means of reestablishing rent control in Lynn was "political and legislative."

§19.22

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By insisting upon strict compliance with the Rent Control Act, *Chisholm* may appear to defeat the purpose of the special referendum authorized by the General Court for Lynn. The Legislature suspended the operation of chapter 842 in order for Lynn voters to indicate their acceptance or rejection of rent control. That vote was intended to be binding, whatever its results. The Court’s decision, however, was a proper one. If the Legislature intended that the Lynn voters should retain control over the continuation of rent control, such extended authority should have been explicitly granted. Instead, the referendum reinstated the administrative procedures outlined in chapter 842. The Court’s consideration was limited to that statute. The voters’ recourse was through the Legislature, not through the Court.

**§19.23. Rent Control: Applicability of Rollback Provision to Pre-Existing Leases.** Under section 6 of the Rent Control Act, the rollback provision, the maximum rent that may be charged for a controlled rental unit is “the rent charged the occupant for the month six months prior to the acceptance of [the] Act by a municipality.” In *Huard v. Forest Street Housing, Inc.*, the Supreme Judicial Court held that the rollback provision is applicable to a lease entered into before the effective date of rent control in a city, and that the rollback provision, as interpreted, does not violate the constitutional prohibition against the impairment of the obligation of a contract.

In July, 1970, the plaintiff-tenant signed a written lease for a Cambridge apartment owned by the defendant-landlord. The term of the lease was from August 1, 1970 to August 31, 1971. Subject to a tax escalation clause, the rent was $200 per month. The lease also provided for a $200 security deposit. On September 17, 1970, two months after the lease was signed, Cambridge adopted rent control. The rollback rent for the plaintiff’s apartment, which was a controlled rental unit, was $175 per month. The plaintiff’s November rent would have been the first controlled rental payment, but in October, 1970, the city ordered “that the rollback rent not be implemented ... until December 1, 1970.” In November, 1970, the plaintiff paid $200

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3 *Id.* at 1396, 316 N.E.2d at 507.
4 *Id.* at 1397, 316 N.E.2d at 508. See U.S. CONST. art. I, § 10, cl. 1.
5 The statement of facts contained in this paragraph comes from *id.* at 1393-95, 316 N.E.2d at 506-08.
6 This was the rent charged the occupant as of March, 1970, which was six months before the city’s acceptance of rent control in September, 1970.
7 Under Acts of 1970, c. 842, § 2, the Act takes effect “on the thirtieth day following acceptance of its provisions” by a locality. Since this day fell on October 17, 1970, November was the first month for which the rollback rent was applicable.
rent. From December, 1970 to April, 1971, inclusive, he paid the rollback rent of $175. The city then adjusted the maximum allowable rent for the plaintiff's apartment to $209 per month, effective May 1, 1971. The plaintiff, not seeking review of that ruling, paid $200 rent for the months of May through August, 1971. The plaintiff vacated the premises at the end of the leased term, leaving the apartment undamaged. In September, 1971, the defendant-landlord claimed $44 under the lease's tax escalation clause and suggested that an additional $466 might be owing if the Rent Control Act was found inapplicable to leases entered into before the effective date of the Act. The defendant-landlord offered to settle his potential claims for $360, with the security deposit applied against the plaintiff's obligation. In April, 1972, the plaintiff filed suit seeking, among other relief, the return of his security deposit and a refund of the rent paid in excess of the rollback rent ($175) for the months of November, 1970, and May through August, 1971. The district court denied his claims on the ground that the rent rollback provision of the Rent Control Act did not apply to a pre-existing lease. The superior court affirmed this ruling, and the plaintiff appealed to the Supreme Judicial Court.

The Supreme Judicial Court, in reversing the lower courts' rulings, found the rent rollback provision applicable to a pre-existing lease. The Court agreed with the defendant-landlord's proposition that statutes affecting substantive rights, such as the rollback provision of the Rent Control Act, are given prospective application in the absence of a contrary legislative intent. The Court discerned in the Rent Control Act, however, a legislative intent that all controlled rental units in a municipality "be subject to [the terms of the Rent Control Act] immediately on the effectiveness of the . . . Act in that municipality." Applying the rollback provision only to leases entered into after the adoption of the Act would be "inconsistent with the purposes of rent control" and would result in the inequity of some tenants having their rents rolled back and others not, depending entirely upon the

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9 The plaintiff's rent did not exceed $200 because that was the maximum amount called for in the lease.
10 As the Court noted, the $466 claimed by the landlord "inexplicably" exceeded the amount attributable to the difference between the rollback and agreed rentals. 1974 Mass. Adv. Sh. at 1395 n.5, 316 N.E.2d at 506 n.5.
11 The plaintiff's refund claim was based on the contentions that the city's attempted delay of the effective date of rent control from November to December, 1970 was ineffective, and that the city's adjustment of the maximum allowable rent in May, 1971 was invalid. See text at notes 26-37 infra.
15 Id.
effective date of their leases. Furthermore, since chapter 842 had been enacted as an emergency measure, its immediate implementation was essential.

The Court then found that this interpretation of the rent rollback provision did not violate the constitutional prohibition against the impairment of the obligation of a contract. The Court indicated that where a public emergency in housing exists, "any rights contained in a private contract must yield to rational legislative protection of the public interest." Therefore, since the defendant in *Huard* did not deny the existence of a housing emergency, the application of the rollback provision to pre-existing leases would be upheld if rationally related to the protection of the public interest. Noting that the Rent Control Act provided for the administrative adjustment of rents and for judicial review, the Court found that the legislative scheme did not unreasonably impair the obligations of pre-existing leases and, therefore, by implication, that the scheme was rationally related to the elimination of the housing emergency.

The Court then considered whether the plaintiff-tenant in the case before it was entitled to the return of his security deposit and the refund of excess rent. The Court remanded both issues to the superior court because the stipulation of facts omitted "significant information." However, the Court did make "observations" about both claims to guide the lower court.

In relation to the claim for the return of the security deposit, the Court noted that the plaintiff-tenant "appears to be entitled to recover the security deposit of $200." The plaintiff, however, was also seeking damages under section 11(a) of the Rent Control Act, which provides for treble damages where any rent demanded, accepted, or received exceeds the maximum lawful rent. Therefore, if the defendant-landlord treated the retained security deposit as "rent," he could be subject to the section 11(a) penalties.

In relation to the claim for a refund of rent paid in excess of $175 for the months of November, 1970 and May through August, 1971, the Court first rejected the defendant-landlord's contention that even

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16 *Id.*
19 *Id.* at 1397, 316 N.E.2d at 508.
22 *Id.* at 1398, 316 N.E.2d at 508.
23 *Id.* at 1401, 316 N.E.2d at 509-10.
24 *Acts of 1970, c. 842, § 11(a).*
if excess rent was received, the tenant could not recover because the amounts were paid voluntarily and without fraud. The Court held that section 11 provides a tenant with a "clear statutory remedy," regardless of any common law rights, for the recovery of excess rental payments. The Court then considered whether excessive rent was, in fact, received. The Court pointed out that there was an overpayment of $25 for November, 1970. The city's attempt to postpone the effective date of the Rent Control Act was ineffective. Once accepted by a city, the Rent Control Act does not allow local discretion with respect to its effective date. The plaintiff, however, could not recover the November, 1970 overpayment because he did not bring suit until April, 1972. Under section 11(c) of the Rent Control Act, recovery of liquidated damages is subject to a one-year statute of limitations, and refunds for rental overpayments are considered liquidated damages. The landlord's receipt of the $200 payments for May through August, 1971 could possibly be justified by the city's April, 1971 redetermination of maximum allowable rents. The plaintiff, however, argued that the Court, in Rent Control Board of Cambridge v. Gifford, invalidated rent adjustments made by the Cambridge rent control administrator and, therefore, the maximum allowable rent remained $175 a month. The Court pointed out, however, that even if the April 1971 increase was invalid under Gifford, the landlord would have been entitled to a redetermination of the requested increase pursuant to proper standards.

The Huard decision appears to be a well-considered reading of the Rent Control Act. The decision assures that all tenants occupying controlled premises are afforded the benefits of rent control once the measure is implemented. The decision also acknowledges the right of landlords in the proper circumstances to collect the maximum rents allowed by the local rent control board or administrator. This balanced interpretation of chapter 842 assures that neither landlords nor tenants can take unfair advantage of its provisions.

§19.24. Rent Control: Condominiums. Under section 9(b) of the

26 Id. at 1998, 316 N.E.2d at 508.
29 Id. at 1998-99, 316 N.E.2d at 508-09.
30 Id.
33 Id.
36 In Huard, the Court indicates that in Gifford no consideration was given to the effect of that decision on all rent increases previously approved by the Cambridge rent control administrator. Id.
37 Id.
Rent Control Act, a landlord must obtain a "certificate of eviction" from the local rent control board before recovering possession of a controlled rental unit. The grounds on which a local rent control board may issue such certificates are specified in section 9(a). In *Zussman v. Rent Control Board of Brookline*, the Supreme Judicial Court held that conversion of controlled rental units into condominiums may be "just cause" for the issuance of a certificate of eviction under section 9(a)(10), and that local rent control board regulations for the issuance of certificates of eviction are invalid if their "purpose and effect [is] preventing the conversion of controlled rental units into condominiums." The plaintiff in *Zussman*, a Brookline landlord, owned 56 apartments subject to rent control. With the intention of turning these units into condominiums, the plaintiff recorded master condominium deeds for the premises, made extensive improvements in the premises, and executed purchase and sale agreements with purchasers who were not tenants and who intended to occupy the units. Each tenant was extended a preferential offer to buy which included a price lower than that offered to the public, favorable financing, and a repurchase option if the tenant was dissatisfied. Any tenant not desiring to purchase was given a full year to vacate.
The plaintiff applied to the Brookline Rent Control Board for eviction certificates. On August 29, 1972, the board adopted "guidelines" for such cases. By September, 1972, the plaintiff had been granted two eviction certificates under these guidelines. In October, 1972, while the plaintiff had twenty-seven applications pending, the board delayed further consideration until after a public hearing on the subject in November. On January 30, 1973, the board issued an "Emergency Regulation" for eviction certificates when conversion into condominiums was planned. The plaintiff's pending applications were denied because they did not comply with the "Emergency Regulation." The plaintiff then brought suit in the Municipal Court of Brookline against the board and 26 tenants. The court ordered the issuance of the certificates. The ruling was affirmed by the superior court.

The Supreme Judicial Court first found that the conversion of controlled rental units into condominiums constitutes "just cause" for the issuance of certificates of eviction under section 9(a)(10). The Court reached this conclusion by discerning within various provisions of the Rent Control Act a policy of encouraging home ownership. For example, sections 3(b)(4) and 3(b)(6) exempt cooperatives and owner-occupied two and three-family houses from the provisions of the Rent Control Act. Section 9(a)(8) provides that eviction is possible where the landlord seeks to occupy the premises himself. Section 9(a)(6) appears aimed at encouraging personal ownership by allowing eviction where a tenant unreasonably refuses access to a unit that the landlord wishes to show to a prospective purchaser. After pointing to those sections of the Act supporting a policy of personal ownership, the Court suggested that condominiums promote the basic purposes of the Act because they "offer the city dweller significant advantages over rental housing" and they "may be well suited to the housing...

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11 Id.
12 Id.
13 Id. The "Emergency Regulation" was replaced by a Permanent Regulation on March 20, 1973. Id.
14 Id. at 1272, 326 N.E.2d at 877.
15 Id. at 1272-73, 326 N.E.2d at 877-78.
16 Id. at 1277-78, 326 N.E.2d at 879. For the text of Acts of 1970, c. 842, § 9(a)(10) see note 3 supra.
20 Acts of 1970, c. 842, § 9(a)(8). For the text of § 9(a)(8) see note 3 supra. As the Court pointed out, once a condominium purchaser has obtained a deed, he could obtain possession under § 9(a)(8). 1975 Mass. Adv. Sh. at 1277, 326 N.E.2d at 879. Few people would be willing to purchase a condominium, however, without being able to move in immediately. See id. at 1280, 326 N.E.2d at 880.
problems of low income families." Thus, the Court concluded that "home ownership in condominium form is not in conflict with [the Rent Control Act's] provisions or purposes."

Even though conversion to condominiums was held "just cause" for obtaining a certificate of eviction, the Court had to consider the effect of the Brookline Rent Control Board's Emergency and Permanent Regulations, the requirements of which were not met by the plaintiff's applications. Among other restrictions, these regulations prevented an owner of a controlled unit from obtaining a certificate of eviction in order to convert the unit into a condominium and prevented a condominium purchaser from obtaining a certificate of eviction unless he possessed a duly executed and recorded deed received for "full consideration paid." The Court found that in practice such regulations would prevent the conversion of rental units into condominiums. Since preventing such conversions did not further the purposes of the Act, the regulations were invalid.

Consequently, the Court affirmed the superior court decree which required the issuance of eviction certificates upon the owner's presentation of an executed purchase and sale agreement containing no repurchase clauses and the purchaser's representation that he, or members of his family, intend to occupy the premises.

The most significant, and most troubling, aspect of Zussman is the Court's enthusiastic support for the concept of condominium ownership. While condominiums allow more people to be their own landlords, many people cannot afford to take advantage of condominium living, or may, for valid personal reasons, not wish to do so. These people should not be forced to forgo the protections of rent control. The facts of Zussman indicated that the landlord attempted to accommodate the needs of his present tenants. However, another apartment building owner in the same situation may not be so solicitous. The is-

23 Id. at 1278, 326 N.E.2d at 879. In reaching this conclusion, the Court rejected the defendant's contention that Mayo v. Boston Rent Control Administrator, 1974 Mass. Adv. Sh. 1109, 314 N.E.2d 118, noted in 1974 ANN. SURV. MASS. LAW § 19.5, at 537, required a finding that the desire to create condominiums was not "just cause" under § 9(a)(10). In Mayo, the landlord sought evictions in order to renovate his apartments and re-rent them at substantially increased rents. The Court found that this purpose was contrary to the purposes of the Act because the apartments would be removed from the low and moderate income market. In Zussman, the Court found no indication that the proposed condominiums would be beyond the reach of the landlord's present tenants. 1975 Mass. Adv. Sh. at 1275-76, 326 N.E.2d at 878-79.
27 Id.
28 Id.
29 Id. at 1273 n.3, 326 N.E.2d at 877 n.3.
sues involved in such cases demonstrate the necessity for a careful balance between the rights of building owners to use their property and the rights of tenants as expressed in the Rent Control Act.

§19.25. Rent Control: Scope of Judicial Review. Under section 10(a) of the Rent Control Act,\(^1\) any person aggrieved by the decision of a local rent control board or administrator in a rent adjustment proceeding may obtain judicial review in the district court. The decision of the district court may be appealed to the superior court.\(^2\) The statute does not, however, specify the extent to which those courts may reexamine a local board or administrator's rent adjustment decision.\(^3\) In Sherman v. Rent Control Board of Brookline,\(^4\) the Supreme Judicial Court held that the scope of judicial review of a rent adjustment decision is limited to determining whether a "board's decision [is] supported by the facts before it and [is] legally justified."\(^5\)

The plaintiff in Sherman, a Brookline landlord, applied to the town rent control board for a rent increase.\(^6\) After a hearing, the board denied the increase without providing any reasons for its decisions.\(^7\) The plaintiff appealed the board's decision under section 10(a)\(^8\) by filing a complaint against the board in the Municipal Court of Brookline. While the case was pending, the board issued a second decision, this time assigning reasons. The board found that, if Sherman were to receive the same percentage of return in 1971 as he had received in 1970, his gross rental receipts should total $43,351. The board denied any increase, however, because of excessive deterioration of the housing units, the plaintiff's failure to make necessary repairs, and the plaintiff's noncompliance with the sanitary code, the building code, and the zoning by-law.\(^9\) On August 4, 1972, the municipal court awarded the plaintiff a rent increase to $39,120, $4,231 less than the board would have allowed absent the violations.\(^10\)

The plaintiff appealed this decision to the superior court. Examining the case de novo, the court held a hearing, heard witnesses, and

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\(^1\) Acts of 1970, c. 842, § 10(a).

\(^2\) Id.


\(^7\) Id. at 432, 323 N.E.2d at 731.

\(^8\) Acts of 1970, c. 842, § 10(a).

\(^9\) 1975 Mass. Adv. Sh. at 432-33, 323 N.E.2d at 731. A local board is instructed to consider these and other factors by Acts of 1970, c. 842, § 7(b) & (c) when making a rent adjustment determination.

made findings of fact. The court concluded that the board's denial of the plaintiff's requested increase was proper. The judge proceeded to infer, however, from the municipal court decision that the violations leading to the denial had been corrected. Once the violations had been remedied, the board should have established rents which would have yielded the plaintiff a "fair net operating income." Using the percentage of return that the plaintiff was receiving in 1970, the judge found that the plaintiff should have been allowed rentals at an annual rate of $43,351 after August 4, 1972.

In reversing the superior court, the Supreme Judicial Court found that district and superior courts may not provide de novo review of rent adjustment proceedings. The Court reached this conclusion by examining the procedural and substantive restrictions placed on local rent control boards in rent adjustment proceedings by the Rent Control Act. This examination revealed that:

[The court's proper role is not to take evidence afresh and decide for itself what rent is to be fixed, but is rather to decide whether the board's decision was supported by the facts before it and was legally justified.]

In relation to procedure, the Court discovered Rent Control Act provisions designed to safeguard the rights of parties in rent adjustment proceedings before local boards. Section 8(a) of the Act requires a board in rent adjustment proceedings, if requested by the tenant or landlord or if acting on its own initiative, to employ adversary procedures, including notice and a hearing. Section 8(d) directs a board to follow the procedures of sections 11(1)-(6) of the state Administrative Procedures Act when conducting rent adjustment hearings. Those procedures, while not requiring the observation of

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11 Id.
12 Id. at 434, 323 N.E.2d at 732. The superior court also found that the town of Brookline owed the plaintiff, as damages, the difference between the rent actually collected since August 4, 1972 and the rent he should have collected. Id. at 435, 323 N.E.2d at 732. The Supreme Judicial Court held that, regardless of the validity of the superior court's redetermination of the rent adjustment, its award of damages against the town was improper. Id. at 435-38, 323 N.E.2d at 732-33. The Court's holding was based on the following factors: (1) the municipal court, not the town, decided that the plaintiff was entitled only to $39,120; (2) the record did not indicate that all of the grounds for the board's decision had been remedied; (3) the town was not a party to the action; and (4) the town and the board members were immune from liability in these circumstances. Id.
13 Id. at 442, 323 N.E.2d at 735.
15 Id.
16 Id. § 8(a).
19 G.L. c. 30A, §§ 11(1)-(6).
formal rules of evidence, provide the parties with the right to examine witnesses and introduce evidence. The presence of these procedural protections at the board level, the Court suggested, made de novo review at the judicial level superfluous.

In relation to substance, the Court found that section 7 of the Rent Control Act allows local rent control boards considerable discretion in rent adjustment proceedings. Section 7(a) does establish the general principle that rents should be adjusted to allow landlords a "fair net operating income." In addition, section 7(b) stipulates several factors to be considered by local boards in making the determination. Nowhere, however, does the statute indicate the relative weight to be given to these factors. Also, section 7(d) gives local boards the discretion to deny a rent increase if it finds violations of sanitary or other codes and to deny a rent decrease if it finds the tenant is behind in his rent. Thus, the Court concluded that allowing de novo judicial review would be contrary to the Legislature's apparent intent to rely on the informed judgment of local boards in rent adjustment proceedings.

By limiting the scope of review in rent adjustment cases, Sherman reinforces the discretionary authority of local rent control boards. The local boards are close to the landlord-tenant relationship in the community and are well-suited to make fair, informed decisions. Moreover, both landlords and tenants are afforded procedural protections to assure that all arguments are heard. If judicial review is limited to a consideration of the propriety of the board's action, frivolous appeals will be discouraged, while good faith procedural objections are heard.

E. WETLANDS


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20 1975 Mass. Adv. Sh. at 438-39, 323 N.E.2d at 733-34. Although § 8(d) explicitly exempts rent adjustment proceedings from the G.L. c. 30A, § 11(8) statement of reasons requirement, the Court in Sherman indicated that boards should provide written statements of reasons in cases likely to reach the courts and that, in any case actually appealed, a court can require a board to supply a written statement of reasons. 1975 Mass. Adv. Sh. at 442-44, 323 N.E.2d at 735.
23 These factors include: changes in property taxes; unavoidable changes in operating and maintenance expenses; capital improvements; changes in space, services, or facilities provided; substantial deterioration not the result of ordinary wear and tear; and failure to perform ordinary repair and maintenance. Acts of 1970, c. 842, § 7(b).
25 Id.
26 Id. at 440, 442, 323 N.E.2d at 734, 735.

§19.26. 1 See generally 1974 ANN. SURV. MASS. LAW § 18.8, at 460-63.

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review\(^2\) and prospective regulation.\(^3\) During the Survey year, the General Court amended both programs.

The program of case-by-case review was amended by chapters 334 and 363 of the Acts of 1975. Chapter 334 amended the nineteenth paragraph of section 40 of chapter 131 of the General Laws\(^4\) by creating a three-year statute of limitations for civil or criminal actions against grantees who acquire real estate upon which wetlands violations have occurred. The statute of limitations begins to run on either the date the deed is recorded or the date of the death by which the grantee acquired the land.\(^5\) Chapter 363 of the Acts of 1975 made significant changes in the second, seventeenth, and eighteenth paragraphs of section 40.\(^6\)

The second paragraph of section 40 contains the procedure by which a person may obtain a written determination whether any land or project will be subject to the requirements of the section. The first change instituted by the 1975 amendment is to require a person seeking such a determination to make a written request to "a conservation commission"\(^7\) instead of to "the conservation commission."\(^8\) This amendment changes the focus from a centralized state conservation commission to the municipal conservation commissions. Chapter 363 of the Acts of 1975 also lengthened, from 10 to 21 days, the period within which a conservation commission must make the requested written determination. The 21-day period will be measured from the time a conservation commission receives a written request for a determination. The amendment also requires that a person send his written request for a determination by certified mail.\(^9\)

The seventeenth paragraph of section 40 provides that certain work will be exempted from the requirements of the section.\(^10\) Prior to the 1975 amendment, one such exemption was for "maintenance or improvement of lands for agricultural use."\(^11\) Chapter 363 modifies this exemption to "lands in agricultural use."\(^12\) This change eliminates possible claims of exemptions by people seeking to transform land to an agricultural use. Under the present law, the exemption applies only to maintaining or improving land already in agricultural use.

The eighteenth paragraph of section 40 provides that the state or local governments need not comply with the section's notice provisions

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\(^2\) G.L. c. 131, § 40 (covers both inland and coastal wetlands).
\(^3\) G.L. c. 130, § 105 (coastal wetlands); G.L. c. 131, § 40A (inland wetlands).
\(^4\) G.L. c. 131, § 40.
\(^5\) Id., as amended by Acts of 1975, c. 334.
\(^6\) G.L. c. 131, § 40.
\(^7\) Id., as amended by Acts of 1975, c. 363, § 1 (emphasis added).
\(^8\) Acts of 1974, c. 818 (emphasis added).
\(^10\) G.L. c. 131, § 40.
\(^12\) G.L. c. 131, § 40, as amended by Acts of 1975, c. 363, § 2 (emphasis added).
when performing an emergency project necessary for the protection of the health or safety of the Commonwealth.\(^\text{13}\) Prior to the 1975 amendment, the existence of such an emergency had to be certified by the local conservation commission and the commissioner of natural resources.\(^\text{14}\) The amendment provides that this certification may now be made by the local conservation commission alone.\(^\text{15}\) Although this seems to mark a return to local control, the amendment goes on to require the local officials to act favorably within 24 hours. Otherwise, the power to make the determination reverts back to the commissioner of natural resources.

The program of prospective regulation of wetlands was amended by chapter 351 of the Acts of 1975. Under section 105 of chapter 130 of the General Laws, the commissioner of environmental management may promulgate orders governing the use of coastal wetlands.\(^\text{16}\) The 1975 amendment prohibits the issuance of such an order permitting the construction, in coastal wetlands, of driveways except in a manner that allows the flow of the tide.\(^\text{17}\)

\(^{13}\) G.L. c. 131, § 40.
\(^{14}\) Acts of 1974, c. 818.
\(^{15}\) G.L. c. 131, § 40, as amended by Acts of 1975, c. 363, § 3. If the municipality does not have a conservation commission, the mayor or selectmen may certify the existence of the emergency.
\(^{16}\) G.L. c. 130, § 105, as amended by Acts of 1975, c. 351.
\(^{17}\) Id. Also during the Survey year, the general responsibility for implementing G.L. c. 131, § 40 and G.L. c. 130, § 105 was placed with the Department of Environmental Affairs. See Acts of 1975, c. 706, §§ 220, 237-43.