Chapter 14: Zoning and Land Use

Richard G. Huber

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CHAPTER 14

Zoning and Land Use

RICHARD G. HUBER*

§ 14.1. Eminent Domain — Rent Control. During the Survey year, in a case on appeal from the Massachusetts Supreme Judicial Court, *Fresh Pond Shopping Center, Inc. v. Callahan,* the United States Supreme Court determined the applicability of the taking clauses in the fifth and fourteenth amendments to a city ordinance forbidding the demolition of an apartment building until all tenants have voluntarily vacated the premises. The appellant, Fresh Pond Shopping Center, Inc. ("Fresh Pond"), wanted to raze an apartment building that came under the jurisdiction of the Cambridge Rent Control Act. Fresh Pond could not do so, however, without the Cambridge Rent Control Board's permission to remove the property from the rental housing market due to the limitations imposed by Cambridge City Ordinance 926. The Massachusetts Supreme Judicial Court found the ordinance constitutional. On appeal, the United States Supreme Court dismissed the suit for lack of a federal question. Justice Rehnquist, in a memorandum decision, dissented.

According to Justice Rehnquist, Ordinance 926 gave the Rent Control Board unlimited discretion in deciding when to grant a removal permit. He found the ordinance flawed because it failed to balance the benefit afforded to tenants and the housing market by denying a removal permit

* RICHARD G. HUBER is Dean and Professor of Law at Boston College Law School. The author thanks Francis K. Chowdry and Irwin B. Schwartz for their major contributions in the preparation of this chapter.

2 Id. at 219.
3 Id. at 218.
5 Id. In Fresh Pond Shopping Center, Inc. v. Rent Control Board of Cambridge, 388 Mass. 1051, 446 N.E.2d 1060 (1983), the Supreme Judicial Court affirmed a superior court decision. The superior court, relying on Flynn v. City of Cambridge, 383 Mass. 152, 418 N.E.2d (1981), had found the restrictions against removing rental units from the market embodied in Cambridge, Mass., Ordinance 926 constitutional. 104 S. Ct. at 218.
6 104 S. Ct. at 218.
7 Id. Justice Rehnquist noted that because the case was on appeal, not on certiorari, the Court acted on the merits of the case. Id.
8 Id.
against the landlord’s right to put his property to other use. In Rehnquist’s view, Ordinance 926 effected a physical occupation of property which amounted to a taking. He distinguished the Supreme Court’s finding in Block v. Hirsh because in that case the rent control statute found constitutional was a temporary measure to cope with a wartime emergency housing crisis, and not a permanent scheme such as Cambridge Ordinance 926.

The reasoning in the Rehnquist dissent may be valid in situations where, for example, one recalcitrant tenant refuses to vacate in the face of a building owner’s desire to renovate. Yet, if it had been adopted, the precedent Rehnquist’s reasoning could have provided to the unscrupulous is disturbing. A court, for example, might have applied it to the very different situation where many tenants are to be removed from a rent-controlled building at one time. In using Fresh Pond this way, a federal court might incorrectly preempt legislation enacted to deal with a local emergency, such as a housing shortage, of which it has little knowledge.

§ 14.2. Eminent Domain — Public Utilities — Relocation Act. In Norfolk Redevelopment and Housing Authority v. Chesapeake and Potomac Telephone Company of Virginia the United States Supreme Court considered whether public utilities are entitled to the same compensation under the Uniform Relocation Act as are natural persons, corporations and farm operations. The Chesapeake and Potomac Telephone Co. (“C&P”) was forced to relocate, and in some instances abandon, a number of its underground transmission facilities because of federally funded urban renewal projects undertaken by the Norfolk Redevelopment and Housing Authority (“NRHA”). These facilities included manholes, conduits, cables and accessory fittings which C&P had placed in the

9 Id. at 218-19.
10 458 U.S. 419 (1982).
11 Id. at 421.
12 104 S. Ct. at 219.
13 256 U.S. 135 (1921).
14 104 S. Ct. at 219-20. Justice Rehnquist concluded that there was no foreseeable end to the housing shortage in Cambridge. Id. at 219. In addition, Justice Rehnquist found that “the Massachusetts statute ensuring a fair net operating income to a landlord” did not alter the fact that the owner was deprived of the basic property right to exclude. Id. at 220. Justice Rehnquist noted that the Board is not required to compensate the owner for the loss of control over the use of his property. Id.

2 Id. at 306-07. The Uniform Relocation Act is found in 42 U.S.C. §§ 4621-38 (1982).
3 104 S. Ct. at 306.
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...public rights-of-way of certain streets altered by the urban renewal project.4

The Court held that, as a matter of common law, public utilities such as C&P are not "displaced persons" to be compensated for any act of eminent domain.5 Reviewing the legislative history of the Relocation Act, the Court found that Congress never intended for public utilities to be recompensed.6

The Court noted that if C&P were forced to relocate part of its business, such as a branch office, then the government would have to compensate it.7 In the present situation, however, the Court found that C&P sought compensation for relocating aspects of its business, utility conduits, which are unique to utilities and are denied compensation under federal law.8 In matters of eminent domain, the Court noted, federal principles derive from the common law of the states.9 For the most part, the Court stated, traditional common law has maintained that permits which allow utilities to use public ways are subservient and utilities must pay for the relocation for utility facilities.10 Citing New Orleans Gas Co. v. Drainage Commission,11 the Court observed that it had long adhered to the rule that a power company has no compensable property right in its transmission facilities.12 Referring to the principle of statutory construction that common law should not be deemed repealed absent clear language to that effect, the Court discussed the testimony of Senator Edmund Muskie, principal sponsor of the Relocation Act. Muskie's testimony pointed out the lack of uniformity in dealing with persons affected by a taking of land by federally assisted programs.13 The Court then noted the similarities between the Relocation Act and the relocation provisions in the Federal-Aid Highway Act of 1968 ("Highway Act of 1968").14 The language of the relocation provisions and the formula for calculating relocation benefits found in the Relocation Act, according to the Court, were taken from the Highway Act of 1968.15 Based on the comparison, the

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4 Id.
5 Id. at 307. Justice Rehnquist wrote the opinion for the Court.
6 Id.
7 Id.
8 Id.
9 Id.
10 Id. (citing 12 E. McQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS, § 34.74a (3d ed. 1970); 4A P. NICHOLS, THE LAW OF EMINENT DOMAIN, § 15.22 (J. Sackman rev. 3d ed. 1970)).
11 197 U.S. 453 (1905).
12 104 S. Ct. at 307, 311.
13 Id. at 308 (citing 115 Cong. Rec. 31353 (1969)).
15 Id.
Court then concluded that the claims made by C&P in *Norfolk* could not be sustained because the claims would have been denied by the relocation provisions of the Highway Act of 1968. The Court noted that utility relocation expenses had been specifically addressed by Congress in section 153 of the Highway Act of 1968. According to the Court, this provision showed that Congress considered the utility relocation problem as "separate and distinct from the plight of 'displaced' persons." The Court then turned to the report of the Senate Committee on Public Works. As a result of the recommendations found in this report, the Court noted, the Highway Act of 1968 was adopted with a provision mandating reimbursement by the federal government to states who, in accordance with state law, paid a utility relocation charge necessitated by a federally-funded highway project. The Court stated, however, that "no federal right to reimbursement was ever granted to utilities," although such reimbursement was available to the states.

In *Norfolk*, therefore, utility companies were held not entitled to relocation compensation. Of more significance, however, is the Court's finding that the rules of eminent domain are a product of state law. In terms of precedent, *Norfolk* directs future federal courts deciding eminent domain cases to undergo a federalism analysis that would recognize the limits on federal power in matters of eminent domain. In this regard it is important to note that, in *Norfolk*, the state of Virginia was an active participant in the urban renewal project. Consequently, *Norfolk* does not speak to the issue of what law governs — either state or federal — in projects exclusively funded by federal money.

§ 14.3. Zoning — Constitutional Law — Coin-Operated Amusement Devices. The issue presented to the Massachusetts Supreme Judicial Court in *Marshfield Family Skateland, Inc. v. Town of Marshfield*, was whether Marshfield may prohibit the operation of commercial coin-activated amusement devices pursuant to the town's police power. The Court answered this question in the affirmative.

In June, 1982, the voters of Marshfield adopted an amendment to a town zoning by-law ("‘By-Law 48’) which prohibited the operation of ‘any mechanical or electronic automatic device, whether coin-operated

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16 Id. at 309.
17 Id.
18 Id. The Court cited § 111 of the Federal-Aid Highway Act of 1968.
19 104 S. Ct. at 309.
20 Id. at 310 (emphasis in original).
2 Id. at 436, 450 N.E.2d at 606.
3 Id. at 440, 450 N.E.2d at 607-08. The amendment was General By-Law No. 48 (art. 57 of the town meeting warrant). Id. at 438, 450 N.E.2d at 606-07.
or not’ . . . except private in-house use, coin-operated boxes, pool, billiard and athletic training devices.’" Prior to approval of the by-law by the attorney general, the town’s building inspector ordered the plaintiff merchants to cease operating their amusement devices. When the plaintiffs refused, the building inspector commenced legal action against them.

The attorney general approved the by-law on September 30, 1982. The plaintiffs then sought a declaration in the superior court that By-Law 48 was invalid. When the superior court judge refused to invalidate the by-law, the plaintiffs applied for direct appellate review.

On appeal, the plaintiffs contended that By-Law 48 denied both equal protection and due process of law. The plaintiffs also contested the interpretation of a zoning by-law enacted in 1972 which prohibited “the commercial operation of coin-activated amusement devices in every zoning district of the town.” The 1972 zoning by-law, the plaintiffs asserted, did not prohibit the commercial use of coin-activated devices, and, if it did, the 1972 by-law would be invalid for the same reasons that invalidate By-Law 48. The Court held that By-Law 48 was a proper exercise of the town’s police power. The Court then found it unnecessary to consider the zoning by-law of 1972, reasoning that its provisions were more general and thus included in By-Law 48.

In its opinion, the Court first addressed the plaintiffs’ argument that the by-law was inconsistent with state law. The Supreme Judicial Court looked to Shell Oil v. Revere and to John Donnelly & Sons v. Outdoor Advertising Board to support its view that “every presumption should be made in favor of the validity of a by-law.” In applying this standard, the Court examined the provisions of chapter 43B, section 13, which authorizes a municipality to enact legislation for the common good where the legislation is consistent with the state constitution. To determine...
whether, in fact, local legislation is consistent with state law, the Court noted, the same analysis used in federal preemption cases applies.\(^\text{19}\)

The plaintiffs in *Marshfield* contended that the prohibition against coin-activated devices in By-Law 48 conflicted with chapter 140, section 177A of the General Laws, which allows municipalities to license such devices.\(^\text{20}\) The Court did not find this argument compelling. Instead, the Court found that one purpose of section 177A was to remove coin-activated amusement devices from gambling law restrictions and to permit municipalities to license these devices.\(^\text{21}\) According to the Court, By-Law 48 did not hinder this purpose. The Court also found the plaintiffs' reliance on *Turnpike Amusement Park, Inc. v. Licensing Commission of Cambridge*\(^\text{22}\) misplaced. In *Turnpike Amusement*, the Court held that a statute permitting a municipality to suspend all machine operations does not confer authority to place a total ban upon all such activities.\(^\text{23}\) The *Marshfield* Court found that, although municipalities may not go beyond a statutory grant and ban all activity, they may supplement the statute with by-laws which are not inconsistent with state law.\(^\text{24}\)

Turning to the plaintiffs' second argument, the Court rejected the contention that By-Law 48 was unconstitutional because it violated the first and fourteenth amendments to the United States Constitution.\(^\text{25}\) The Court noted that, in *Caswell v. Licensing Commission for Brockton*,\(^\text{26}\) it had ruled that "to gain protective status . . . entertainment must be designed to communicate or express some idea or some information."\(^\text{27}\) The *Marshfield* Court found video games unprotected expression because of a failure to demonstrate that "video games impart sufficient communicative . . . elements to constitute protected expression."\(^\text{28}\)

The Court also found unpersuasive the plaintiffs' claim that the ordinance should be declared facially void under the overbreadth doctrine. The United States Supreme Court in *Young v. American Mini Theatre, Inc.*\(^\text{29}\) held that if a statute does not hinder the expression of free speech to "both [a] real [and a] substantial" degree and if the statute is amenable to

\(^{19}\) 389 Mass. at 440-41, 450 N.E.2d at 408 (citing Bloom v. Worcester, 363 Mass. 136, 293 N.E.2d 268 (1973)).

\(^{20}\) 389 Mass. at 441, 450 N.E.2d at 608.


\(^{23}\) Id. at 438, 179 N.E.2d at 324.

\(^{24}\) 389 Mass. at 442, 450 N.E.2d at 609.

\(^{25}\) Id.


\(^{27}\) Id. at 868, 444 N.E.2d at 925.

\(^{28}\) 389 Mass. at 443, 450 N.E.2d at 609.

\(^{29}\) 427 U.S. 50 (1976).
a "narrowing construction," the overbreadth doctrine may not be used. Following this reasoning, the Marshfield Court ruled that the prohibition of one form of entertainment is not substantial overbreadth.

The plaintiffs next contended that the town statute violated due process and equal protection as guaranteed by the state and federal constitutions. The Court found that because the right to work or to pursue one's business was not a fundamental right, triggering strict judicial scrutiny, the by-law needed only be rationally related to and serve a legitimate purpose to survive a constitutional challenge. In terms of due process, the Court concluded that By-Law 48 bore a "reasonable relation to a permissible objective of the police power." The Court noted that the town in Marshfield had shown that the automatic amusement devices contributed to the noise, traffic and congestion problems of Marshfield.

The Court also rejected the plaintiffs' equal protection argument. According to the Court, equal protection analysis required a determination of whether Marshfield's classification furthered a legitimate state interest under the minimum rationality test. The Court found that if the town of Marshfield determined that coin-operated devices posed a greater threat to public welfare than do other forms of recreation, then the town could ban such activity.

The Marshfield case demonstrates the Court's unwillingness to interfere in local matters. A municipality's exercise of its police power is usually deferred to by courts when such problems as traffic congestion and noise are involved. The Marshfield Court followed the prevailing judicial tendency to pursue the least obtrusive course in matters of local concern. A town's use of the police power, of course, is not restricted to matters of land use and zoning. Consequently, the Marshfield decision may provide precedent for those arguing against judicial activism in cases involving the exercise of local police powers.

§ 14.4. Eminent Domain — Calculation of Compensation. In Young Men's Christian Association of Quincy v. Sandwich Water District, the Appeals Court of Massachusetts considered how much a municipality

30 Id. at 60.
31 389 Mass. at 445, 450 N.E.2d at 610.
32 Id.
33 Id. at 445, 450 N.E.2d at 611.
34 Id. (quoting John Donnelly & Sons v. Outdoor Advertising Bd., 369 Mass. 206, 216, 339 N.E.2d 709, 716 (1975)).
35 389 Mass. at 446-47, 450 N.E.2d at 611.
36 Id. at 447-48, 450 N.E.2d at 612.
37 Id. at 448, 450 N.E.2d at 612.
exercising its eminent domain power should compensate a private entity.\(^2\) The defendant, Sandwich Water District (the "District"), took by eminent domain land located in South Sandwich belonging to the plaintiff, the Y.M.C.A.\(^3\) The land was situated over the Mashpee Pitted Outwash Plain, a geographical formation rich in potable water.\(^4\) At the time of the taking, the land was undeveloped, part of a campsite.\(^5\) The Y.M.C.A. brought suit in the superior court for damages.\(^6\) A jury found for the plaintiff in the amount of $1,500,000.\(^7\) The defendant appealed.\(^8\)

According to the Appeals Court, three different sources of information on the value of the land were considered by the superior court.\(^9\) First, three real estate appraisers gave opinions based on comparable sales data.\(^10\) The second source was the finding of a judge in a previous bench trial.\(^11\) The third opinion came from a real estate appraiser named Coleman who had calculated the value based on capitalization of the income from the land if used as a water resource and determined that the land was worth $1,200,000.\(^12\) The Appeals Court concluded that the trial court jury's $1,500,000 award could only have been based upon the Coleman opinion.\(^13\)

The District argued that the trial judge erred in allowing into evidence expert opinion analyzing the capitalization of income approach without first finding that it was impossible to determine the value of the land by reference to comparable sales.\(^14\) The Appeals Court rejected this contention, stating that, since the sales market approach and income approach are both based upon a property's income producing potential, both methods "should produce roughly comparable results with respect to certain kinds of commercial property."\(^15\) The court distinguished cases requiring a preliminary showing of comparable sales data, finding that they were concerned with the proposed use of depreciated-cost evidence, an analysis that departs from the impartiality of the market data basis.\(^16\) The court

\(^2\) Id. at 667, 454 N.E.2d at 516.
\(^3\) Id.
\(^4\) Id. at 675, 454 N.E.2d at 520.
\(^5\) Id. at 667, 454 N.E.2d at 516.
\(^6\) Id. G.L. c. 79, § 14 provides that a "person entitled to an award of . . . damages . . . may petition for the assessment of such damages to the superior court . . . ."
\(^7\) 16 Mass. App. Ct. at 667, 454 N.E.2d at 516.
\(^8\) Id.
\(^9\) Id.
\(^10\) Id.
\(^11\) Id. at 668, 454 N.E.2d at 516.
\(^12\) Id.
\(^13\) Id.
\(^14\) Id. at 668, 454 N.E.2d at 517.
\(^15\) Id.
\(^16\) Id. In Newton Girl Scout Council v. Massachusetts Turnpike Authority, 335 Mass. 189,
therefore held that it was within the trial court’s discretion to admit
evidence of value based on income capitalization even though comparable
sales data was available.\textsuperscript{17}

The defendant next argued that the Coleman approach should have
been excluded from evidence because, under town of Sandwich zoning,
the land could not be used as a commercial water resource.\textsuperscript{18} The Col-
eman approach, the defendant contended, determined income on the
basis of a potential commercial venture.\textsuperscript{19} The defendant cited \textit{Roach v. 
Newton Redevelopment Authority},\textsuperscript{20} for the proposition that “care must
be taken to distinguish between availability which is peculiar to the
government . . . and availability for public use.”\textsuperscript{21} The court found this
argument without merit.\textsuperscript{22} A Sandwich zoning by-law, the court observed,
states that special permits shall normally be granted to allow for the
extraction of water on a commercial basis unless a nuisance would result
to surrounding landholders.\textsuperscript{23} According to the court, no evidence was
presented that the extraction of water would cause a nuisance.\textsuperscript{24} In fact,
the court noted, other neighboring landlords had been permitted to oper-
ate their land as a commercial water resource.\textsuperscript{25}

Although the Appeals Court held Coleman’s testimony admissible, the
court found that the figures were inaccurate because they were computa-
tions of gross income and not net income.\textsuperscript{26} According to the court, gross
income cannot be used for capitalization purposes absent assurances that
no expenses are required to produce sales.\textsuperscript{27} Costs such as well drilling,
pumping equipment and housing, pipes, water storage, salaries and

\begin{footnotes}
\item \textsuperscript{17} 16 Mass. at 668, 454 N.E.2d at 517.
\item \textsuperscript{18} Id.
\item \textsuperscript{19} Id.
\item \textsuperscript{20} 381 Mass. 135, 407 N.E.2d 1251 (1980).
\item \textsuperscript{21} 16 Mass. App. Ct. at 669, 454 N.E.2d at 517 (quoting Roach v. Newton Development
Authority, 381 Mass. 135, 139, 407 N.E.2d 1251, 1254).
\item \textsuperscript{22} 16 Mass. App. Ct. at 669-70, 454 N.E.2d at 517.
\item \textsuperscript{23} Id. at 670, 454 N.E.2d at 517. See The Town of Sandwich Zoning By-Law, Art. I, § 1330
(1973).
\item \textsuperscript{24} 16 Mass. App. Ct. at 670, 454 N.E.2d at 517.
\item \textsuperscript{25} Id.
\item \textsuperscript{26} Id. at 672, 454 N.E.2d at 518.
\item \textsuperscript{27} Id.
\end{footnotes}
supplies for maintenance personnel, and power to run the pumps were not considered when Coleman computed his figure.\(^{28}\) The court therefore found that the trial judge had erred in allowing an appraisal based on capitalization of gross income "to go to the jury without showing that gross income would be substantially identical to net income."\(^{29}\)

In conclusion, the court found Coleman’s valuation inaccurate because it valued the water that could be produced rather than the land taken.\(^{30}\) The whole southern area of Sandwich, the court noted, sits on top of an outwash plain, rich in water resources. Because of the large size of the plain, the jury’s consideration of the plaintiff’s land as the only access point to the water supply was in error.\(^{31}\) On the basis of the Coleman opinion, the court noted, the jury had valued the land at $36,135.87 per acre, a figure computed on the basis of the District’s selection of the land as the location for its wells.\(^{32}\) According to the court, if the District chose another parcel, the value of the plaintiff’s land would be only $3,000 per acre.\(^{33}\) Consequently, the court found the jury award inconsistent with the principle "that the owner of the land which is taken is not to receive any enhancement in value based on the contemplated improvement."\(^{34}\)

In sum, the Appeals Court in \textit{YMCA} examined the rather complicated economic capitalization formulae used by the lower courts. The court upheld the use of evidence which values land based on the capitalization of net income even when valid comparable sales data is available.\(^{35}\) In the end, however, the court decided the case on a well-established principle which has governed decisions in similar eminent domain cases. This principle is that the value of land taken by eminent domain must be computed without considering its enhanced value due to the contemplated improvement or use.

\section*{§ 14.5. Restrictions on Wetlands — Taking.} The issue before the Appeals Court of Massachusetts in \textit{England v. Department of Environmental Management},\(^1\) was whether restrictions imposed by a municipality on the filling, draining or dredging of private property located in a wetland area were so extreme as to constitute a taking without compensation.\(^2\) The land in question, twenty-five acres located in the town of Westwood,

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was part of a larger, forty-seven acre tract straddling the Norwood-Westwood boundary line. The land in Norwood had been developed into a 250 unit apartment building. The plaintiff was prevented from developing the Westwood land by an order issued by the Commissioner of Natural Resources prohibiting the filling, draining or dredging of about half of the Westwood land, and stating that no building could be placed on that parcel, even though it was zoned for single family use. The plaintiff petitioned to the superior court for a finding that these restrictions constituted a taking.

At trial, the testimony indicated that the plaintiff wanted to erect apartment buildings on the Westwood land similar to those located in Norwood, that the topography of the Westwood land was similar to that in Norwood, and that the Westwood parcel could be reached only through the Norwood land. The trial judge held that the defendant's order was tantamount to a taking, and that, by prohibiting the plaintiff from developing the land, the order "reduced the value of the land to that of recreational limited use."

On appeal, the Appeals Court reversed, finding that Moskow v. Commissioner of the Department of Environmental Management, decided by the Supreme Judicial Court subsequent to the trial court's decision, controlled. According to the Englander court, the Supreme Judicial Court had found that a comparable order was not a taking in Moskow. The

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3 Id. at 943, 450 N.E.2d at 1120-21.
4 Id. at 943, 450 N.E.2d at 1120.
5 Id. at 943, 450 N.E.2d at 1121. The Department of Natural Resources is now the Department of Environmental Management. This order was promulgated pursuant to G.L. c. 131, § 40A, which in relevant part states: "The commission of environmental management . . . shall from time to time, for the purposes of preserving and promoting the public safety, private property, wildlife, fisheries, water resources, flood areas and agriculture, adopt . . . orders . . . prohibiting dredging, filling, removing . . . inland wetlands."
8 Id. at 944, 450 N.E.2d at 1121.
9 384 Mass. 530, 427 N.E.2d 750 (1981). In Moskow, the plaintiff owned an undeveloped tract of land in Newton. Id. at 531, 427 N.E.2d at 751. On April 7, 1977, the commissioner issued a restrictive order preventing Moskow from dredging, filling or altering his property since it was determined that the area was part of a wetland. Id. at 531, 427 N.E.2d at 752. The superior court held that the defendant can restrict the plaintiff's use of the land for the purposes of environmental protection. Id. at 532, 427 N.E.2d at 752. The Massachusetts Supreme Judicial Court agreed and further held that, since the Commission's act was reasonably related to the goals of flood protection and pollution control, no unconstitutional taking occurred. 384 Mass. at 535, 427 N.E.2d at 753-54. The Moskow case referred to Pennsylvania Central Transportation Co. v. New York City, 438 U.S. 104 (1978). In Penn. Central, the extent of interference was an important factor. Id. at 130-31.
11 Id.
Appeals Court therefore held that, viewing the Englander tract as a whole, the restrictions on the Westwood portion are not substantial enough to create an undue burden on the entire tract.\textsuperscript{12} To support its finding, the court noted that "there remained about twelve and one-half acres of land, susceptible to development for single-family house lots worth, as the trial judge found, $5,000 each."\textsuperscript{13} The court in Englander apparently used a "balancing test" and found that the public interest in pollution control and in prevention of soil erosion and flooding, outweighed Englander's property right to develop his land as he so pleased. Yet, it is significant to note that in both Englander and Moskow, the respective plaintiffs had developed their land to some degree. The decisions do not establish that in the future the Massachusetts courts will prohibit all reasonable economic development of privately-owned land in deference to pollution or flood control acts of the Legislature. The Englander court was careful to note that the restrictions being challenged did not forbid all development of the land in question, although, in reality, the limited access to the Westwood parcel might make its use for single-family homes impractical.

\section*{§ 14.6. Special Permits — Public Hearings — Board Member’s Attendance Prerequisite to Voting.} During the Survey year, in Mullin v. Planning Board of Brewster,\textsuperscript{1} the Appeals Court addressed the issue of whether four members of the Brewster planning board ("Board") properly voted to issue a special permit to Bay Colony Property, Inc. ("Bay Colony").\textsuperscript{2} In May, 1981, Bay Colony requested a special permit to construct a Planned Unit Development (PUD).\textsuperscript{3} According to chapter 40A, section 9, a PUD "means a mixed use development on a plot of land . . . in which a mixture of residential, open space, commercial, industrial or other uses and a variety of building types are determined to be sufficiently advantageous to render it appropriate to grant special permission to depart from the normal requirements of the district."\textsuperscript{4} In July, 1981, a public hearing attended by only four members of the seven-member Board was held.\textsuperscript{5} Many neighbors of the proposed PUD attended the meeting.\textsuperscript{6} On September 1, 1981 six members of the Board met to vote on the Bay Colony application, but, on the advice of legal counsel, the

\begin{thebibliography}{9}
\bibitem{12} Id.
\bibitem{13} Id.
\bibitem{1} Id. at 140, 456 N.E.2d at 781.
\bibitem{2} Id.
\bibitem{3} G.L. c. 40A, § 9.
\bibitem{4} 17 Mass. App. Ct. at 140, 456 N.E.2d at 781.
\bibitem{5} Id.
\end{thebibliography}
two members not present at the July meeting were asked to abstain from voting.\textsuperscript{7} The four members unanimously voted to allow Bay Colony’s project to proceed.\textsuperscript{8} On September 10, 1981 the Board filed its decision with the town clerk’s office pursuant to chapter 40A, section 9.\textsuperscript{9} Twenty days later, the plaintiffs filed a complaint in the superior court pursuant to chapter 40A, section 17, alleging that, because of the Board’s failure to comply with the voting requirements of chapter 40A, section 9, the vote to issue a special permit to Bay Colony was null and void.\textsuperscript{10}

The superior court granted the Board’s motion for summary judgment, but subsequently vacated that judgment on the ground that only four members of the Board had voted, violating the statutory requirement of a two-thirds majority.\textsuperscript{11} The court then remanded the case to the Board for further consideration.\textsuperscript{12} On remand, the six members present at the September 1 meeting convened on May 4, 1982, and again voted unanimously to accept the Bay Colony proposal.\textsuperscript{13} The Board’s motion for summary judgment was subsequently granted by the superior court.\textsuperscript{14} The plaintiff appealed.\textsuperscript{15}

The Massachusetts Appeals Court agreed with the plaintiffs’ contention that, because two members of the Board were not present for the public hearings regarding the Bay Colony project, they were not eligible to participate in either the May 4 or the September 1 voting.\textsuperscript{16} Consequently, according to the court, only four of the seven Board members could cast votes, an insufficient number under chapter 40A, section 9.\textsuperscript{17} Section 9 provides that: “Special permits issued by a special voting authority shall require a two-thirds vote of boards with more than five members . . . .”\textsuperscript{18}

In reaching its decision, the Mullin court discussed whether the Board was acting in a quasi-judicial or quasi-legislative capacity when granting the permit.\textsuperscript{19} The court noted that when a board makes a judicial or quasi-judicial decision, all members who vote must have been present at a public hearing on the issue.\textsuperscript{20} The court rejected the defendants’ argument

\textsuperscript{7} Id.
\textsuperscript{8} Id.
\textsuperscript{9} Id. at 140, 456 N.E.2d at 781.
\textsuperscript{10} Id. at 140-41, 456 N.E.2d at 781.
\textsuperscript{11} Id. at 141, 456 N.E.2d at 782.
\textsuperscript{12} Id.
\textsuperscript{13} Id.
\textsuperscript{14} Id.
\textsuperscript{15} Id.
\textsuperscript{16} Id.
\textsuperscript{17} Id.
\textsuperscript{18} G.L. c. 40A, § 9.
\textsuperscript{19} 17 Mass. App. Ct. at 141, 456 N.E.2d at 782.
\textsuperscript{20} Id. In Sesnovich v. Board of Appeals of Boston, 313 Mass. 393, 47 N.E.2d 943 (1958), the Court held that although one of the members of the zoning board was ill and although he
that the Board was functioning as a quasi-legislative rather than as a quasi-judicial body, and that therefore it was not subject to the requirement that all board members be present at the public hearings as a prerequisite to vote.\textsuperscript{21} According to the court, the Board had acted in a quasi-judicial fashion when granting the permit to Bay Colony.\textsuperscript{22} To support this finding, the court referred by analogy to the definition of an adjudicatory proceeding in the State Administration Procedures Act.\textsuperscript{23} In that act, an adjudicatory proceeding is defined as a "proceeding before an agency in which legal rights, duties or privileges of specifically named persons are required by constitutional right or by any provision of the General Laws to be determined after opportunity of an agency hearing."\textsuperscript{24}

In addition, the court cited \textit{Cast Iron Soil Pipe Institute v. State Examiners of Plumbing and Gas Fitters}\textsuperscript{25} for the proposition that a proceeding involving particular people, their business or property, and their relation to a particular transaction, as opposed to a more general question of governmental policy, is adjudicatory in nature.\textsuperscript{26} The \textit{Mullin} court found that the application for a special permit affected the rights of Bay Colony specifically and that "given the quantum of procedural requirements involved in the issuance of a special permit" the proceedings before the Board were adjudicatory in nature.\textsuperscript{27} As a result, the court held that only those members of the Board who were present at the July, 1981 public meeting could vote on Bay Colony's request for a special permit.\textsuperscript{28}

\begin{itemize}
\item read the testimony, visited the premises and participated in the decision, his absence was fatal to the action of the board. \textit{Id.} at 396, 47 N.E.2d at 946. The statute, the Court found, required the "entire membership of the board," and, thus, in the member's absence, the board was without authority to act. \textit{Id.}
\item \textsuperscript{21} 17 Mass. App. Ct. at 142, 456 N.E.2d at 783.
\item \textsuperscript{22} \textit{Id.}
\item \textsuperscript{23} \textit{Id.} at 142, 456 N.E.2d at 782. The State Administrative Procedure Act is found in G.L. c. 30A.
\item \textsuperscript{24} G.L. c. 30A, § 1(1).
\item \textsuperscript{26} 17 Mass. App. Ct. at 142, 456 N.E.2d at 782. The defendant relied on Hayeck v. Metropolitan Dist. Comm'n, 335 Mass. 372, 140 N.E.2d 210 (1957) (need for appropriating property for public use legislative, not judicial, action); on McHugh v. Board of Zoning Adjustment of Boston, 336 Mass. 685, 147 N.E.2d 761 (1958) (decision of zoning board not invalid on basis that hearing on matter attended by nine of twelve members and subsequent decision signed by ten members — two of whom not at hearing); and on 1958 ANN. SURV. MASS. LAw. § 14.7, at 148 (not all commissioners who vote on zoning regulation need attend public hearing on regulation for vote to be valid).
\item \textsuperscript{27} 17 Mass. App. Ct. at 142-43, 456 N.E.2d at 782-83. In \textit{Cast Iron}, the court held that a provision in a statute which governed the enactment of a plumbing code promoting public safety is political in nature. 8 Mass. App. Ct. at 586, 396 N.E.2d at 464. According to the \textit{Cast Iron} court, a political question at the public hearing stage, which requires legislative rather than adjudicatory deliberation, is a legislative act. \textit{Id.}
\item \textsuperscript{28} 17 Mass. App. Ct. at 143, 456 N.E.2d at 783.
\end{itemize}
The defendants further argued that they were not obligated to comply with chapter 40A, section 9, which requires two-thirds vote of an authority having five or more members. Instead, according to the Board, the town of Brewster’s Zoning By-Law, requiring “a concurring vote of four or more members,” controlled. The court rejected this argument, finding that by-laws which conflict with an enabling act will not be upheld. The defendant’s argument that it was authorized to reduce the number of board members to four in this particular instance was also found to be without merit. The Mullin court noted that in Gamache v. Acushner it had held that a zoning board could not transform itself into a board with fewer members unless given specific authority to do so in the governing statute. Consequently, finding no language in chapter 40A, section 9, permitting such a “metamorphosis,” the court held that the Board could grant a special permit only if at least five members voted for the Bay Colony proposal.

§ 14.7. Evidence — Admissibility of Zoning Board Minutes. During the Survey year, in Building Inspector of Chatham v. Kendrick, the Appeals Court held that the minutes of a zoning board meeting are not admissible to prove the truth of the evidence presented to the board and recorded in the minutes.

The case arose in 1980 when the building inspector brought suit in the superior court to enjoin the defendant, Kendrick, from conducting a business for repairing heavy machinery on his property. In 1974, Chatham’s Zoning Board of Appeals (“Zoning Board”) had granted a special permit to Kendrick. That permit specified that a building addition constructed by Kendrick could be used as a blacksmith shop, but could not be used as a repair shop for large equipment or machinery. In August, 1978, the town’s building inspector ordered Kendrick to cease repairing large trucks on his premises in violation of the 1974 permit. Kendrick was notified that to conduct such an activity in a general business zone, he needed a special permit allowing him to use the property as a garage for

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29 Id.
30 Id. The defendants referred to § XI(J)(3) of the Brewster zoning law (1979) which requires only a concurring vote of four or more members. Id.
32 Id.
35 Id.
37 Id. at 928, 456 N.E.2d at 1151-52.
38 Id. at 928, 456 N.E.2d at 1152.
39 Id.
40 Id.
41 Id. at 928-29, 456 N.E.2d at 1152.
the repair of trucks and related machinery. Kendrick's subsequent application for this permit was denied by the Zoning Board. He did not appeal this decision. On three occasions in 1980, the building inspector again ordered Kendrick to cease using the property in violation of the 1974 permit. Finally, in June 1980, a suit was instituted in the superior court to force Kendrick to desist from further work in violation of his permit.

At trial, Kendrick asserted that his business constituted a nonconforming use established prior to the existence of any zoning by-law forbidding such activity in Chatham. As a result, Kendrick maintained, he never used the land in violation of the 1974 permit. Kendrick further contended that his use of the land was presumptively allowed in Chatham regardless of any finding by the Zoning Board to the contrary.

The trial judge allowed into evidence the Zoning Board's minutes of the January 9, 1974 and November 29, 1978 meetings. These minutes contained language indicating that Kendrick had begun the repair business in 1965, after the enactment of the 1954 zoning by-law forbidding Kendrick's particular use of the land. The record also showed that at no time during these meetings did Kendrick claim that the repair business was a pre-1954 nonconforming use. The trial judge made specific reference to a statement in the 1978 minutes which said that Kendrick had operated his shop as a repair facility for light machinery at that location on a part-time basis since 1964. Although it was unclear from the minutes who made this statement, the trial judge concluded that the repair business had been operating, on at least a part-time basis, since 1965.

On appeal, the issue before the Massachusetts Appeals Court was whether the recorded minutes of the two Zoning Board meetings were admissible under the public records exception to hearsay. The court held that although the burden was upon Kendrick to prove his defense that a non-conforming use existed, the trial judge's use of the minutes was unacceptable.

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6 Id. at 929, 456 N.E.2d at 1152.
7 Id.
8 Id.
9 Id.
10 Id.
11 Id.
12 Id.
13 Id.
14 Id. at 930, 456 N.E.2d at 1152-53.
15 Id.
16 Id. at 930, 456 N.E.2d at 1153. The court noted that under the Proposed Massachusetts Rules of Evidence 803(8), a wide range of public records would be admissible absent information or circumstances suggesting their untrustworthiness. Id. This rule, however, has not been adopted.
In deciding *Kendrick*, the court discussed two parts of the Massachusetts General Laws. First, the Appeals Court noted that chapter 39, section 23B provides that “a governmental body shall maintain accurate records of its meetings, setting forth the date, time, place, members present . . . and action taken at each meeting . . . The records of each meeting shall become a public record and be available to the public . . .” 18 The court then referred to chapter 66, which provides that the record does not have to be a verbatim record of discussions. 19 Based on these provisions, the court determined that public records are admissible to prove matters which the statutes require to be recorded: the date of meetings, members, votes, members of the board absent and the reasons stated for each discussion. 20 The actual findings made by a zoning board, according to the court, have “no evidentiary weight.” 21 Consequently, the court decided that in *Kendrick* the minutes of the 1974 and 1978 Zoning Board meetings could not be admitted “to prove the truth of the evidence before the board recorded in the minutes.” 22 The court specifically stated, however, that it was not deciding whether zoning board minutes could be used for other purposes if supplemented by testimony from persons at the meeting in question or if the testimony were from someone who had prepared the minutes, particularly if done from a verbatim transcript or tape recording. 23

In sum, the *Kendrick* case shows that minutes from a hearing before a zoning board are admissible into evidence only for the limited purpose of proving specific matters required to be recorded by statute. The statements within the minutes, however, may not be used to prove the truth of the matter asserted. The court did suggest, however, that testimony establishing the accuracy of the minutes might allow them to be used for other purposes.

§ 14.8. Review of Board Decisions — Findings of Fact. The issue reviewed by the Massachusetts Appeals Court in *Lomelis v. Board of Appeals of Marblehead* 1 was whether a structure had accidentally collapsed, entitling the owner of the premises to a building permit as a matter

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18 Id. at 930, 456 N.E.2d at 1153 (quoting G.L. c. 39 § 23B).
19 Id. (citing G.L. c. 66 § 5A).
20 Id.
21 Id. (citing Lawrence v. Zoning Board of Appeals, 336 Mass. 87, 142 N.E.2d 378 (1957) (judge may consider only evidence heard in court, not finding of board of appeals); Devine v. Zoning Board of Appeals of Lynn, 332 Mass. 319, 125 N.E.2d 131 (1955) (judge hearing appeal of grant of variance may not consider findings of zoning board of appeals.))
23 Id. at 931, 456 N.E.2d at 1153.
of law.\textsuperscript{2} In \textit{Lomelis}, the plaintiff Lomelis owned a seasonal home in the town of Marblehead which he desired to upgrade to a year-round house.\textsuperscript{3} To accomplish this, Lomelis applied for, and was granted, a building permit in September 1978.\textsuperscript{4} The building inspector, aware of the problems presented by a coastal storm such as the blizzard of 1978, granted the permit contingent upon Lomelis erecting all living and utility areas thirteen feet above mean high tide.\textsuperscript{5} This necessitated a building "five to ten feet higher than the original structure and with a slight variation from the preexisting perimeter."\textsuperscript{6}

Reconstruction of the premises commenced in October, 1978.\textsuperscript{7} During January of 1979, with most of the foundation finished, workers decided to lift a wall and remove an old window sill.\textsuperscript{8} As the wall was lifted, wind speed in the area suddenly increased, causing the workmen to lose control of the wall, which crashed into and destroyed the remainder of the house.\textsuperscript{9}

The Careys, neighbors of the plaintiffs, complained to the town building inspector that the construction workers, and not the wind, had torn down the structure.\textsuperscript{10} The inspector then rescinded the permit without notice or a hearing.\textsuperscript{11} Lomelis contacted the inspector and presented proof that the collapse of the building was accidental.\textsuperscript{12} Convinced by the evidence, the inspector issued a second permit.\textsuperscript{13} The Careys appealed to the Marblehead Board of Appeals ("Board of Appeals") which ordered the second permit revoked, finding it unsupported by a building plan.\textsuperscript{14}

Lomelis promptly filed a new application for a building permit together with plans showing the variation required as a result of the 1978 blizzard.\textsuperscript{15} He also requested permission to make certain extensions to the porch and chimney.\textsuperscript{16} The building inspector then granted a third permit and the Careys again appealed to the Board of Appeals.\textsuperscript{17} The Board of Appeals decided that the collapse was not accidental, and that, consequently,
Lomelis retained no right to reconstruct the building. On appeal, the superior court held that the third permit was legitimate and that Lomelis could proceed with his plans.

The Appeals Court upheld the decision of the superior court. The court first noted that, "although a judge of a statewide judicial system is no substitute for a local tribunal familiar with the local requirements of a particular zoning scheme, the trial court has a duty to receive evidence and make findings of fact independent of the decisions of a board of appeal." On appeal, the court stated, the trial judge's findings of fact are accepted unless clearly erroneous. The Appeals Court then accepted the trial judge's finding that the Lomelis house fell down accidentally. The court also agreed with the trial judge's finding that the second and third permits were reinstatements of the original permit, which the superior court found was unlawfully revoked.

The Lomelis case reaffirms the traditional rule regarding chapter 40A, section 17. The findings of local administrative bodies in Massachusetts do not constitute evidence useable at trial. In matters of fact and law, the judicial body is the final arbiter.

§ 14.9. Notice Requirements — Appeal of Zoning Board Decision. County of Norfolk v. Zoning Board of Appeals of Walpole involved an interpretation of the notice requirements in chapter 40A, section 17. The plaintiff county had telephoned the defendant zoning board regarding its intention to appeal one of the board's decisions but had not given any written notice. That telephone call, the plaintiff asserted, satisfied the notice requirements of chapter 40A.

To support its contention, the plaintiff relied upon Pierce v. Board of Appeals of Carver. In Pierce, the Massachusetts Appeals Court held that
dismissal of an action was not required solely because the complaint and summons, which were mailed first class by the plaintiff but which were erroneously treated as second class, did not arrive in time to satisfy the notice requirements of chapter 40A.5 The Pierce court noted that, with respect to defective notice, a judge should use his discretionary power to determine whether the defect was fatal to the action.6 According to the court, mechanical application of hard fast rules would inevitably lead to injustice in some cases.7 Relying upon the reasoning in Pierce, the plaintiff in Norfolk County argued that telephone notice was not a serious defect deserving dismissal of the action on appeal.8

The Appeals Court in Norfolk County held that telephone notice is inadequate because it leaves nothing in the town records to warn interested third parties that the zoning status of a particular parcel of land is still in question.9 The court rejected the plaintiff’s reliance on Pierce, pointing out that Pierce analyzes notice requirements solely in terms of prejudice, whereas the issue before the court in Norfolk County concerned the sufficiency of telephone notice, not prejudice.10 The court also rejected the plaintiff’s second argument that, because the county was not the original party seeking appeal, it need not comply with service requirements.11 In support of its decision, the court cited Twomey v. Board of Appeals of Medford,12 and Massachusetts Bread Co. v. Brice,13 for the proposition that notice requirements must be fulfilled regardless of the identity of the appealing party.

The primary concern of the Norfolk County court was adequacy of notice to third parties whose rights might be abridged by the lack of accessible information regarding zoning appeal. Telephone calls, per se, 

5 Pierce, 369 Mass. at 809, 343 N.E.2d at 415.
6 Id. at 808-09, 343 N.E.2d at 415.
7 Id. at 809, 343 N.E.2d at 415.
9 Id. at 930, 450 N.E.2d at 629. The court, in holding “telephone notice” inadequate, relied upon Carr v. Board of Appeals of Saugus, 361 Mass. 361, 280 N.E.2d 199 (1972). In that case, the court found that if written notice was filed within the requisite twenty day appeal period, but that a copy of supplementary material, such as a bill of equity was not, “interested third parties would be forewarned that the zoning status of the land [was] still in question.” Id. at 363, 280 N.E.2d at 200.
without recording or transcription, do not constitute readily available memoranda warning "interested third parties" that the zoning status of a piece of land is in question. Because of this desire to protect the rights of innocent third parties, it is unlikely that the Massachusetts courts will lower the chapter 40A standard requiring written and recorded notice of appeal in the future.

§ 14.10. Variances — Standing — Tenants. A person does not have standing to contest a variance granted pursuant to chapter 40A, section 17 unless "aggrieved by a decision of the board of appeals." In Reeves v. Board of Zoning Appeal of Cambridge, the plaintiff, Reeves, was a tenant in an eight-unit apartment building which the owner, Sherwood, wanted to subdivide into four two-story townhouses. Sherwood discovered that, prior to subdividing, he had to correct certain deficiencies to comply with a Cambridge zoning ordinance. Instead of making the changes, he sold the building to defendant Clark, who requested, and was granted, a variance from the Cambridge Zoning Board of Appeal.

Alleging reliance on chapter 40A, section 17, Reeves filed a complaint in superior court contesting the variance grant. His main contention was that the subdivision and subsequent sale of the building would result in four owner-occupied dwellings which would probably not be subject to the restrictions of the Cambridge Rent Control Ordinance. Each defendant filed a motion to dismiss the complaint. The Appeals Court held that since Reeves was not a "person aggrieved" by the granting of a variance, he did not have standing to object to the townhouse conversion.

Reeves had argued that, although there is a presumption that landowners are "persons aggrieved" because they are entitled to a mailed...
notice of a hearing from the local zoning board, the landowner does not attain standing solely by receiving such notice. Consequently, Reeves contended, a tenant's right to standing should not be decided on the fact that, because of their non-landowning status, tenants do not receive notice by mail. The only conceivable reason to deny a tenant standing, according to Reeves, was because tenants are only residents who lack the long-term neighborhood interest of landowners. Reeves argued that this reason had little application in a rent control jurisdiction such as Cambridge. The Cambridge Rent Control Act, according to Reeves, gives a tenant at will under rent control the right to stay in an apartment indefinitely, absent a violation of the terms of his tenancy as set out by the Act. The Act’s guarantee of tenure and moderate rents in rent-control jurisdictions, Reeves contended, assures tenants a long-term interest in their neighborhood.

In addition, Reeves argued that the purpose of the Rent Control Act is to protect in part moderate income persons such as himself from eviction due to building conversion. The ordinance prohibits the removal of any controlled rental unit from the rental market unless the Rent Control Board issues a permit. According to Reeves, in deciding whether to grant a permit, the board considers "any aggravation of the shortage of decent rental housing accommodation, especially for families of low and moderate income ... which may result from their removal." The variance as it affects him, Reeves argued, may therefore undermine one of the ordinance’s purposes by making housing unavailable for him, a moderate-income tenant. The ordinance, according to Reeves, should be read as giving standing to a person who may lose his statutory protection by the issuance of a variance.

In response, the defendant Cambridge relied primarily on precedent to support its decision to grant the variance. Citing CHR General, Inc. v. Newton, the defendant stated that because a building composed of

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12 Brief for Plaintiff at 7.
13 Id.
14 Id.
15 Id.
16 Id.
17 Id. at 9.
18 Id.
19 Id.
20 Id.
21 Id. at 12.
22 387 Mass. 351, 439 N.E.2d 788 (1982) (zoning ordinances deal with use of land and conversion of building from rental units to condominiums results in no change in use of land on which building located).
townhouse units does not involve a different use of land from the building’s use as rental units, no change in use was anticipated that would create a grievance giving rise to a remedy under chapter 40A, section 17.\(^{23}\)

In addition, the defendant cited cases from other jurisdictions in which a tenant without a lease was afforded less judicial protection than a tenant with a signed lease when seeking standing.\(^{24}\)

The Appeals Court did not find Reeves’ equity arguments compelling. Instead, relying upon the common law of Massachusetts and other jurisdictions, the court found the complaint properly dismissed.\(^{25}\) According to the court, Reeves was not a “person aggrieved” under the statute, and lacked standing to bring the suit.\(^{26}\)

The Reeves decision is significant particularly because of the court’s refusal to extend the principles of Flynn v. City of Cambridge.\(^{27}\) In Flynn, the Supreme Judicial Court noted that a serious housing emergency existed in Cambridge, causing the removal from the housing market of low to moderately priced rental units.\(^{28}\) The Court concluded that Cambridge was therefore authorized to enact an ordinance restricting the

\(^{23}\) 16 Mass. App. Ct. at 1012, 455 N.E.2d at 449.

\(^{24}\) Brief for Defendant at 12. Nicholson v. Zoning Bd. of Adjustment, 392 Pa. 278, 140 A.2d 609 (1958) (lessee has standing to contest a variance); Ralston Purina Co. v. Zoning Bd. of Westerly, 64 R.I. 197, 12 A.2d 219 (1940) (lessee has standing to contest issuance of building permit); Richman v. Philadelphia Zoning Bd., 391 Pa. 254, 137 A.2d 219 (1940) (commercial tenant under five year lease has standing to apply for variance). See also Gallagher v. Zoning Bd. of Pawtucket, 95 R.I. 225, 186 A.2d 325 (1952) (tenant at sufferance without sufficient property interest to apply for variance); City of Little Rock v. Goodman, 222 Ark. 350, 260 S.W.2d 450 (1953) (tenant at will not considered real party in interest).


\(^{26}\) Id. In support of its decision, the court cited several cases. In Redstone v. Bd. of Appeals of Chelmsford, 11 Mass. App. Ct. 383, 416 N.E.2d 543 (1981), the plaintiff bank objected to a variance allowing a competitor bank to use a side yard as a parking lot. Id. at 351, 416 N.E.2d at 543. The plaintiff’s sole objection was that he could see the parking lot from the northern corner of his building. Id. at 352, 416 N.E.2d at 543. The court found this insufficient to establish the plaintiff as a “person aggrieved under the statute.” Id. at 353, 416 N.E.2d at 544. In the second case, Owens v. Bd. of Appeals of Belmont, 11 Mass. App. Ct. 994, 418 N.E.2d 635 (1981), the Appeals Court held that owners of property far removed from the site of a proposed condominium conversion had no standing under G.L. c. 40A, § 17 to challenge the town of Belmont’s variance grant. Id. at 994-95, 418 N.E.2d at 637. The third case relied upon by the court was Circle Lounge and Grille, Inc. v. Bd. of Appeals of Boston, 324 Mass. 427, 86 N.E.2d 920 (1949). In Circle Lounge, the plaintiff objected to a variance which allowed establishment of a Howard Johnson’s restaurant near his own restaurant. Id. at 429, 86 N.E.2d at 922. The Court held that where a person’s sole interest is to prevent business competition, he is not a “person aggrieved.” Id. at 429, 86 N.E.2d at 922. See Huber, Zoning and Land Use, 1981 ANN. SURV. MASS. LAW § 11.3, at 249 for a discussion of these cases and standing as a person aggrieved.


\(^{28}\) 383 Mass. at 157, 418 N.E.2d at 337.
removal of rental units from the market under the enabling act.\textsuperscript{29} The Flynn Court also noted that rent control was specifically enacted to protect low and moderate income tenants.\textsuperscript{30} The Appeals Court in Reeves distinguished Flynn, stating that the ordinance in Flynn concerned rent control and not zoning.\textsuperscript{31} According to the Reeves court, zoning ordinances deal with use, and a variance granted to permit townhouse conversion does not change the use of the land upon which the townhouse rests.\textsuperscript{32}

In Reeves, the court applied the general rules of standing and concluded that tenants at will have an insufficient property interest to contest a landowner’s desire to convert a building from apartments to townhouses.\textsuperscript{33} The court’s reasoning suggests that the Massachusetts courts may be more willing to confer standing upon a tenant with a signed lease than upon a mere tenant at will or at sufferance. Even though tenants at will in housing under rent control have no standing to contest a variance which effectively takes the property out of the housing market, municipalities may still restrict the property right of a landlord to convert an apartment building into other types of housing.

§ 14.11. Statutory Construction — Filing of Decisions — Appeals — Timeliness. In Capone v. Zoning Board of Appeals of Fitchburg,\textsuperscript{1} the Supreme Judicial Court addressed two appeals involving the interpretation of chapter 40A, sections 15 and 17.\textsuperscript{2} The first case concerned section 15, which addresses the circumstances under which a petition for zoning relief may be considered constructively granted due to the inaction of a zoning board of appeals.\textsuperscript{3} On July 16, 1980, the Fitchburg superintendent of buildings informed Capone that he was wrongfully operating a commercial landscaping business at his home, located within a residential zoning district.\textsuperscript{4} Capone filed a petition on September 10 with the Fitchburg Board of Zoning Appeals (the “Board”) seeking a determination that

\textsuperscript{29} Id. at 157, 418 N.E.2d at 338.
\textsuperscript{30} 383 Mass. at 153, 418 N.E.2d at 337.
\textsuperscript{31} 16 Mass. App. Ct. at 1012, 455 N.E.2d at 449.
\textsuperscript{32} Id. at 1012, 455 N.E.2d at 449 (citing CHR General, Inc. v. Newton, 387 Mass. 351, 356-57, 439 N.E.2d 788, 791 (1982)).
\textsuperscript{33} 16 Mass. App. Ct. at 1012, 455 N.E.2d at 448.
\textsuperscript{34} § 14.11. 389 Mass. 617, 451 N.E.2d at 1141.
\textsuperscript{2} Id. at 618, 451 N.E.2d at 1141-42. The Court decided the cases together upon finding that they involved the same parties and arose from the same facts. Id. at 619, 451 N.E.2d at 1142.
\textsuperscript{3} Id. at 618, 451 N.E.2d at 1142. G.L. c. 40A, § 15 provides that “The decision of the board shall be made within seventy-five days after the date of the filing of an appeal . . . . Failure by the board to act within said seventy-five days shall be deemed to be the grant of the relief, application or petition sought . . . .”
\textsuperscript{4} Id. at 619, 451 N.E.2d at 1142.
his home was not being used in violation of town zoning ordinances. On October 20, a public hearing was held at which the Board voted to deny Capone’s petition. A written decision was filed by the Board on November 6, which was 110 days after the Board had publicly made its oral decision.

On January 16, 1981 Capone filed a complaint in the district court of Fitchburg, maintaining that, because the Board had not formally filed its decision with the city clerk within seventy-five days of rendering it, as required by law, Capone’s original request was constructively granted. Capone moved for summary judgment. Dennis and Joan Syriopoulos, who owned land adjacent to Capone, filed, and were granted, a motion to intervene. The district court granted Capone summary judgment on June 4, 1981, and both the Syriopouloses and the Board appealed. The appellate division of the district court affirmed summary judgment. Subsequently, the Syriopouloses appealed the decision to the Supreme Judicial Court.

In addition to that action, the Syriopouloses filed a separate complaint on June 25, 1981 in the district court, intending to appeal under chapter 40A, section 17. In response, Capone filed a motion for summary judgment and a motion to dismiss, alleging that the Syriopouloses so-called “appeal” was not timely because it had not been filed within twenty days after the Board had constructively granted Capone’s petition. Section 17 requires that appeals to the district or superior courts be made within “twenty days after the decision has been filed in the office of the city or town clerk.” The superior court denied Capone’s motions and entered judgment for the Syriopouloses, ruling that Capone’s use of his land violated the Fitchburg zoning ordinances.

The first issue addressed by the Supreme Judicial Court was whether the Board’s failure to file its written decision in a timely manner as mandated by section 15 resulted in a constructive grant of the relief.
sought.\textsuperscript{18} In relevant part, section 15 states: "The decision of the board shall be made within seventy-five days after the date of the filing of a petition . . . . Failure by the board to act within said seventy-five days shall be deemed to be the grant of the relief . . . ."\textsuperscript{19} The Court refused to apply the reasoning in \textit{Cullen v. Building Inspector of North Attleborough},\textsuperscript{20} which held that filing time-tables establish only a directory procedure and not a mandatory one.\textsuperscript{21} Instead, the Court noted that in \textit{Casasanta v. Zoning Board of Appeal of Milford},\textsuperscript{22} it had determined that the statutory period for filing had been extended since \textit{Cullen} and that therefore "the softening influence of the \textit{Cullen} case was removed."\textsuperscript{23} Moreover, the \textit{Capone} Court noted, \textit{Rinaudo v. Zoning Board of Appeals of Plymouth}\textsuperscript{24} subsequently held that the language of chapter 40A, section 15, requires a board to decide within the statutory period, and if it exceeds this time limit, the petitioner prevails by default.\textsuperscript{25} The Court then found that a constructive grant of a petition also results when a board makes a decision within the seventy-five day limit, but fails to comply with the statutory requirement of filing the decision within fourteen days.\textsuperscript{26} According to the Court, this interpretation was supported by the mechanics of judicial review found in chapter 40A, section 17 which, in part, states that a person aggrieved by a board's decision must bring an action "within twenty days after the decision has been filed in the office of the . . . town clerk."\textsuperscript{27} The Court concluded that the time for appeals must be limited to a definite period, even when a board does not file its decision with the town clerk within the statutory time period, in order to avoid a potentially unlimited appeal period and a possible cloud on a landowner's

\textsuperscript{18} Id. at 621, 451 N.E.2d at 1143.
\textsuperscript{19} G.L. c. 40A, § 15. \textit{See supra} note 3.
\textsuperscript{21} 353 Mass. at 679, 234 N.E.2d at 731.
\textsuperscript{22} 377 Mass. 67, 384 N.E.2d 1218 (1979).
\textsuperscript{23} \textit{Id.} at 70, 384 N.E.2d at 1220.
\textsuperscript{25} \textit{Id.} at 885, 421 N.E.2d at 440.
\textsuperscript{26} 389 Mass. at 622, 451 N.E.2d at 1144. The Court noted that it was not deciding whether the fourteen day time limit began immediately following the rendering of a decision by a board or on the last day of the seventy-five day period within which board action is permitted. \textit{Id.} at 622 n.7, 451 N.E.2d at 1144 n.7.
\textsuperscript{27} \textit{Id.} at 23, 451 N.E.2d at 1144 (quoting G.L. c. 40A § 17) (emphasis supplied). \textit{See Building Inspector of Attleborough v. Attleborough Landfill, Inc.}, 384 Mass. 109, 423 N.E.2d 1009 (1981). The \textit{Attleborough Landfill} Court addressed the applicability of G.L. c. 40A, § 9 to a zoning ordinance forbidding the operation of a landfill in a residential area. \textit{Id.} at 109-10, 423 N.E.2d at 1010. The Court found that the filing of a board's decision on a petition with the city clerk is the final action on an application for a special permit and is required to limit the time within which appeals may be made. \textit{Id.} at 112-13, 423 N.E.2d at 1011. \textit{See also}, Huber, \textit{Zoning and Land Use}, 1981 ANN. SURV. MASS. LAW § 11.6, at 256.
right to use his property. Consequently, the Court affirmed the district court’s decision that Capone’s petition had been constructively granted.

In the second case, the issue was “what event begins the twenty-day period during which a person aggrieved by a decision of the board of appeals may seek judicial review under chapter 40A, section 17.” The Court decided the question on procedural grounds and failed to reach the merits of the issue. Section 17, the Court noted, states that an aggrieved party may appeal “by bringing an action within twenty days after the decision has been filed in the office of the city or town clerk.” The Syriopouloses had argued that they were not “persons aggrieved” as required by section 17 at the time the board filed its decision, but only became aggrieved when Capone was constructively granted zoning relief. The Court found this argument inapposite, noting that section 17 provides for appeal of “a decision of the board of appeals,” not from a decision of the court. The Court then concluded that the superior court had no jurisdiction to hear the Syriopouloses’ “appeal” and that the complaint should have been dismissed.

The Capone decision demonstrates the Court’s view that the statutory limits established by the Legislature should be strictly followed. As the Court noted, the purpose of chapter 40A, section 15 was to force zoning boards of appeals to act promptly on petitions for relief. Because action on a petition is not final until all steps are completed, including the filing of a decision with the city clerk, the Court found that boards who fail to file within the mandatory seventy-five days must pay the penalty of having the petition constructively granted. This decision avoids the possibility that a petitioner may have a “cloud” on its property rights due to a board’s negligent failure to file its decision and the subsequent delay in the commencement of the appeals period. The Court’s interpretation of chapter 40A, section 15 is thus consistent with the Legislature’s purpose in enacting the provision — to assure prompt action on all zoning petitions.

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28 389 Mass. at 624, 451 N.E.2d at 1145.
29 Id.
30 Id.
31 Id.
32 Id. (citing G.L. c. 40A, § 17).
33 Id. at 625, 451 N.E.2d at 1145.
34 Id.
35 Id.
36 Id. at 623, 451 N.E.2d at 1144.
37 See id.
§ 14.12. Land Court — Jurisdiction. In Banquer Realty Co. v. Acting Building Commissioner of Boston,¹ the Supreme Judicial Court considered whether the land court had jurisdiction to hear a suit that involved the revocation of various construction permits.² On March 27, 1981, the plaintiffs were granted various permits for the construction of a concrete batching plant in Dorchester.³ Subsequently, the defendant, the acting building commissioner of Boston, informed the plaintiff that the permits had been issued in error and, as a result, all construction must cease.⁴ The alleged error concerned the proper category of the permits under “Use Items” in the Boston Zoning Code.⁵ The original permits were granted under Use Item 68, which allows a use as a matter of right. Use Item 70, the category the acting commissioner later determined applied to the plaintiffs, requires a special permit, and is therefore conditional in nature.⁶

On April 22, 1981, the plaintiffs brought suit in the land court pursuant to chapter 240, section 14A and chapter 185, section 1(j 1/2).⁷ Section 14A of chapter 240 states that “the owner of a freehold estate in possession in land may bring a petition in the Land Court against a city or town wherein such land is situated . . . .”⁸ Chapter 185, section 1(j 1/2) provides that the “land court department shall have exclusive original jurisdiction of . . . complaints under section 14A of chapter 240 to determine the validity and extent of municipal zoning ordinances, by-laws and regulations.”⁹ The plaintiffs sought an injunction to prevent the defendant from interfering with the construction of the batching plant and an order forcing the issuance of the necessary permits.¹⁰ The trial judge determined that the permits were correctly issued and that the subsequent revocation of these permits was erroneous.¹¹ The judge found that the site of the proposed batching plant was located in the middle of an industrial area.¹² This area, the judge noted, was accustomed to a heavy traffic flow. Furthermore, another company operated a batching plant adjacent to the plaintiffs’ property.¹³

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² Id. at 567, 451 N.E.2d at 424.
³ Id. at 566, 451 N.E.2d at 423.
⁴ Id.
⁵ Id.
⁶ Id.
⁷ Id.
⁸ G.L. c. 240, § 14A.
⁹ G.L. c. 185, § 1 (j 1/2).
¹⁰ 389 Mass. at 567, 451 N.E.2d at 423.
¹¹ Id. at 567, 451 N.E.2d at 424.
¹² Id. at 569, 451 N.E.2d at 425.
¹³ Id.
The Supreme Judicial Court affirmed, disagreeing with the defendant’s argument that the land court lacked jurisdiction over the claim. According to the Court, the statutory grant of section 14A allows the land court to determine the validity and the extent of zoning ordinances, by-laws and regulations which affect a landowner’s proposed use of his property. The defendant argued that the land court may only hear cases where a litigant seeks to declare a regulation invalid on its face and not cases where an interpretation of a zoning code is involved. In support of this view, the defendant asserted that in “virtually all of the reported cases under chapter 240, section 14A, validity challenges have been made.” The Court rejected this approach, however, noting the many cases in which both validity and interpretation have been considered by the land court. According to the Court, the lack of pure interpretation cases resulted from chance, and not from a judicial or legislative decision denying the land court jurisdiction over such matters.

The defendant next maintained that even if the land court had proper jurisdiction, the plaintiffs’ claim should have been dismissed because they had not first exhausted all administrative remedies. The defendant contended that before initiating suit in the land court, the plaintiffs should have appealed to the Boston Zoning Board of Appeal. The Court disagreed, stating that although the general rule requires complete exhaustion of all administrative remedies prior to an appeal to the courts, Banquer involved a statute which explicitly does not require exhaustion of administrative remedies. Observing that the issue in Banquer was not a question of primary jurisdiction, the Court determined that in chapter 240, section 14A, the Legislature provided that exhaustion of all administra-

14 *Id.* at 569-70, 451 N.E.2d at 425.
15 *Id.* at 570, 451 N.E.2d at 425.
16 *Id.*
20 389 Mass. at 571, 451 N.E.2d at 426.
21 *Id.*
22 *Id.* at 572, 451 N.E.2d at 26-27 (citing G.L. c. 240, § 14A).
trative remedies through local zoning procedures was not a necessary antecedent to obtaining judicial relief. The Court found no reason why the same judicial relief should not be available to a plaintiff who had applied for, but been denied, a permit.

Finally, the defendant claimed that the findings of the land court were clearly erroneous. The Court noted that the issue before the land court was whether the proposed use was a use as a matter of right. According to the Court, Use Item 70, which requires a permit, includes "any use which is objectionable or offensive because of special danger or hazard because of cinders, dust, smoke, refuse matter, flashing, fumes, gases, vapor or odor not effectively confined to the lot . . . [or] if a residential district is within two hundred and fifty feet of the lot, at any point inside such residential district." On the other hand, Use Items 68 and 69, available as a matter of right, include "an industrial use other than a use described in Use Item No. 70 which does not result in noise or vibration perceptible without instruments more than fifty feet outside the perimeter of the lot." The Court determined that the trial judge properly considered such factors as the industrial nature of the area and the fact that a batching plant had previously operated in the area when deciding that the plaintiff could construct a batching plan as a matter of right.

§ 14.13. Frontage — Yard Space Requirements. In Sieber v. Zoning Board of Appeals of Wellfleet, the Appeals Court decided a simple case of statutory interpretation. The plaintiffs brought an action in superior court seeking judicial review of a decision by the defendant zoning board which, the plaintiffs claimed, was contrary to chapter 40A, section 6. The parties made cross-motions for summary judgment. The trial judge granted the defendant’s motion, finding that the board had acted within its authority when granting the challenged building permit.

The defendants, the Sullivans, owned a parcel of land in a residential section of Wellfleet. A zoning by-law mandated a minimum frontage of 125 feet and an area of 20,000 square feet for construction on a residential

25 Id. at 575, 451 N.E.2d at 427.
26 Id. at 575, 451 N.E.2d at 428.
27 Id. (quoting Use Item 70 of the Boston Zoning Code).
29 Id. at 576, 451 N.E.2d at 429.
2 Id. at 986, 454 N.E.2d at 108. See infra text accompanying note 10 for G.L. c. 40A, § 6 quoted in pertinent part.
4 Id.
5 Id.
lot. The Sullivans' lot was only 5,600 square feet in area and had eighty feet of frontage. Nevertheless, the Sullivans were granted a building permit authorizing the construction of a single family house. The plaintiffs, abutting landowners, sought review before the zoning board. The board upheld the validity of the permit. The superior court agreed with the board, finding its decision valid on the basis of the grandfather provision in chapter 40A, section 6, which provides that:

Any increase in area, frontage, width, yard, or depth requirements of a zoning ordinance or by-law shall not apply to a lot for single and two-family residential use which at the time of recording or endorsement, whichever occurs sooner was not held in common ownership with any adjoining land, conformed to then existing requirements and had less than the proposed requirement but at least five thousand square feet of area and fifty feet of frontage.

The Appeals Court affirmed. The court found that since the land in question had been in separate ownership from all abutting land since 1891, the board had been authorized to grant the building permit.