Chapter 6: Property

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CHAPTER 6

Property

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§ 6.1. A Strict Necessity Standard for the Implication of Municipal Authority from Legislative Enabling Acts.* In the past two decades, the Massachusetts legislature has passed various enabling acts granting the power to regulate rents and evictions to the cities of Boston and Cambridge and the Town of Brookline.† The Massachusetts Supreme Judicial

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The Constitution of Massachusetts provides, in part, that “[a]ny city or town may, by the adoption, amendment, or repeal of local ordinances or by-laws, exercise any power or function which the general court has the power to confer upon it . . . .” MA. CONST. amend. art. II, § 6 (1966). This power is limited by the next section, however, which states in relevant part, “[n]othing in this article shall be deemed to grant to any city or town the power . . . . (5) to enact private or civil law governing civil relationships except as an incident to an exercise of an independent municipal power . . . .” Id. at § 7.

The legislature has explicitly granted the City of Boston power to regulate rents and evictions. 1969 Mass. Acts, c. 797 as amended by 1970 Mass. Acts, c. 863. The legislature has also authorized the creation of a Boston city housing court. G.L. c. 185A. The preamble of the original enabling act stated, in part, “[t]he general court finds and declares that a serious public emergency exists with respect to the housing of a substantial number of the citizens in the City of Boston, which emergency has resulted in a substantial shortage of rental housing accommodations . . . .” 1969 Mass. Acts, c. 797. The legislature then conferred the authority on the city “when public exigency, emergency or distress exists in the city of Boston, the city council of said city, with the approval of the mayor, may by ordinance control the rent . . . . of [certain] housing accommodations . . . .” by creating a rent board empowered to establish a maximum rent for housing accommodations within the Act’s coverage. 1969 Mass. Acts, c. 797. The following year, the legislature, finding that a public housing emergency continued to exist, expanded the coverage of the Act to include all housing accommodations having three or more dwelling units (excluding motels, hotels, inns, and owner-occupied three dwelling units). 1970 Mass. Acts, c. 863 § 2. The legislature also granted the city authority to regulate evictions from such housing, specifying ten permissible grounds for such an action. 1970 Mass. Acts, c. 863 § 3(a). The Act further provided that “[a] landlord seeking to recover possession of a housing accommodation shall apply to the [rent] board for a certificate of eviction.” 1970 Mass. Acts, c. 863 § 3(b). If a landlord attempted to recover possession of a housing accommodation within the Act’s coverage without an eviction certificate, he or she could be subject to criminal prosecution.
Court, in *Grace v. Brookline*² and *Flynn v. Cambridge*,³ interpreted these enabling acts as grants of power to these municipalities to regulate certain aspects of the conversion of rental housing to condominium or cooperative units.⁴ In *Grace* and *Flynn* the Court held that both Brookline and Cambridge could regulate condominium conversion⁵ through the enactment of ordinances or by-laws prohibiting or restricting the eviction of rental tenants in favor of condominium owners in addition to limiting removals of controlled housing from the rental market.

In *Grace*, the Court upheld a Brookline town by-law that made certificates of eviction unavailable to condominium developers.⁶ The by-law


The Cambridge rent and eviction regulation enabling act is similar to Boston's enabling legislation. That Act declares that a public housing emergency exists (1976 Mass. Acts, c. 36 § 1) and establishes a rent control board (id. at § 5) with the power to set and adjust maximum rents for controlled rental housing (id. at §§ 6, 7). “Controlled rental housing” is defined similarly to Boston’s regulated housing: all rental units except those in hotels, motels and inns (1976 Mass. Acts, c. 36 § 3(b)(1)) and owner-occupied two or three-family dwellings (id. at (b)(6)); but the Act also exempts units constructed after January 1, 1969 (id. at (b)(2)), government owned, operated, regulated, financed, or subsidized units (id. at (b)(3)), cooperatives (id. at (b)(4)), units in hospitals, schools and other charitable institutions (id. at (b)(5)), and any other units exempted by the City of Cambridge, as long as no more than twenty-five percent of rental units are exempted from the rental board’s control. Id. at (b)(7). The Act further provides that no tenant may be evicted without a certificate of eviction granted by the board. Id. at § 9(b). The Act enumerates ten grounds for eviction similar to the ten enumerated in the Boston enabling act. Id. at § 9(a). Although the Cambridge enabling act is somewhat more detailed than Boston’s enabling acts, the housing covered, the way in which the legislature directs that housing be regulated, and the allowable grounds for which an eviction certificate may be issued, are very similar. *Compare* 1969 Mass. Acts, c. 797 as amended by 1970 Mass. Acts, c. 863 with 1976 Mass. Acts, c. 36.

The Act enabling Brookline to regulate rental housing is more inclusive than the acts enabling Boston and Cambridge to regulate rental housing. The Act states that a serious public emergency exists in the Town of Brookline with respect to housing and subjects rents and evictions to regulation and control. 1970 Mass. Acts, c. 843 §§ 1, 2. The Act specifically authorizes the town to establish a rent board to regulate rents, minimum standards for rental units and evictions. Id. at § 2. The Act, unlike the Boston and Cambridge enabling acts, does not exempt any rental units from its provisions. See 1970 Mass. Acts, c. 843.

⁵ In this chapter, the term condominium will also include cooperative units.
⁶ 379 Mass. at 47, 59, 399 N.E.2d at 1040, 1047.
did provide that prospective owner-occupants of condominiums could obtain such a permit, but it also provided that even such owner-occupants could be forced to wait for up to one year for an eviction certificate.\textsuperscript{7} The \textit{Grace} Court characterized Brookline’s authority to enact its by-law regulating eviction of tenants from converted housing units as explicitly granted by the legislature.\textsuperscript{8} The Brookline town council relied on the authority of a specific act of the legislature to enact this by-law.\textsuperscript{9} That enabling act provided that because of the existing housing emergency in the Town of Brookline, the town council was authorized to control rents and evictions from rental housing.\textsuperscript{10} The Court, stating that every presumption should generally be made in favor of a municipal ordinance,\textsuperscript{11} recognized that Brookline’s enabling legislation granted the town broad power to regulate the town’s unique housing problems.\textsuperscript{12} The Court concluded in \textit{Grace} that the legislature, and municipalities when granted the requisite authority, have wide latitude to regulate rents and evictions when a housing emergency exists.\textsuperscript{13} It was in the context of the Town of Brookline’s explicitly granted authority to regulate rents and evictions that the Court articulated a standard of broad deference to municipal ordinances or by-laws.\textsuperscript{14}

In \textit{Flynn}, the Court found that the legislature’s express grant of authority to the City of Cambridge to regulate rents and evictions implied the authority to regulate removals of housing from the rental market.\textsuperscript{15} The Cambridge ordinance flatly prohibited the removal of controlled rental housing from the rental market without a permit.\textsuperscript{16} The ordinance

\textsuperscript{7} See \textit{id.} at 47, 399 N.E.2d at 1040.
\textsuperscript{8} See \textit{id.} at 51, 399 N.E.2d at 1042.
\textsuperscript{10} See 1970 Mass. Acts, c. 843 §§ 1, 2; see also \textit{supra} note 1.
\textsuperscript{11} 379 Mass. at 50, 399 N.E.2d at 1042 (quoting Crall v. Leominster, 362 Mass. 95, 102, 284 N.E.2d 610, 615 (1972)). The Court accorded substantial deference to the Town of Brookline, stating that “in the judicial review of municipal by-laws and ordinances ‘every presumption is to be made in favor of their validity, and that their enforcement will not be refused unless it is shown beyond reasonable doubt that they conflict with the applicable enabling act or the Constitution.’” \textit{Id.}
\textsuperscript{12} \textit{Id.} at 51, 399 N.E.2d at 1042–43. Furthermore, the Court relied on the broad powers granted by the enabling statute passed expressly for the town. \textit{Id.} at 50–51, 399 N.E.2d at 1042–43 (citing 1970 Mass. Acts, c. 843).
\textsuperscript{13} \textit{Id.} at 56, 399 N.E.2d at 1045–46.
\textsuperscript{14} \textit{Id.} at 50, 399 N.E.2d at 1042.
\textsuperscript{15} 383 Mass. at 159, 418 N.E.2d at 339.
\textsuperscript{16} \textit{Cambridge, MA., Code} ch. 23 (1979) [hereinafter Chapter 23] § 1(c) provides in relevant part: “No owner or any other person shall remove from the market any controlled rental unit, unless the board after a hearing grants a permit.” \textit{Id.}
essentially required that all units of controlled rental housing as of August 10, 1979, remain part of the City’s rental housing stock.\textsuperscript{17} While the ordinance did not prevent condominium conversion, it mandated that those controlled rental units that were converted remain as rental housing.\textsuperscript{18} Although the legislature’s enabling statute expressly granted to Cambridge only the power to regulate rents and evictions,\textsuperscript{19} the Court stated that an express grant of power also carries with it “‘all unexpressed, incidental powers necessary to carry it into effect.’”\textsuperscript{20} Citing statistics that demonstrated an alarming increase in the number of units of rental housing converted to condominiums in the preceding 18 months,\textsuperscript{21} the Court found that if the power to control rents and evictions was to have any meaning, it must include by implication the power to make reasonable regulations regarding the removal of units from the rental housing market,\textsuperscript{22} and that these regulations must be essential to the operation of the control of rentals and evictions.\textsuperscript{23} One commentator found the Flynn Court’s willingness to find implied authority for Cambridge to regulate removals from rental housing signified that the Court might be willing to extend a wide range of powers to municipalities on similar grounds.\textsuperscript{24}

During the Survey year, the Supreme Judicial Court addressed the issue of the allowable scope of the authority that may be implied from an enabling act in Greater Boston Real Estate Bd. v. City of Boston.\textsuperscript{25} In Greater Boston, the Court held that although the Massachusetts legislature had granted the City of Boston power to regulate rents and evictions similar to the power that Cambridge and Brookline enjoyed, that power did not encompass the regulation of condominium conversions through an ordinance which discourages investors from speculating in the burgeoning Boston condominium market.\textsuperscript{26} The Greater Boston decision thus narrowed the scope of permissible municipal regulation of condominium-

\textsuperscript{17} See 383 Mass. at 156, 418 N.E.2d at 337 (citing Chapter 23).
\textsuperscript{18} Chapter 23; see also 383 Mass. at 156, 418 N.E.2d at 337.
\textsuperscript{19} 1976 Mass. Acts, c. 36; see also 383 Mass. at 157, 418 N.E.2d at 338.
\textsuperscript{20} 383 Mass. at 158, 418 N.E.2d at 338 (quoting 3 C. Sands, Sutherland Statutory Construction § 64.02 (4th ed. 1974)).
\textsuperscript{21} 383 Mass. at 159, 418 N.E.2d at 339.
\textsuperscript{22} Id. at 158, 418 N.E.2d at 338–39. The Court stated, “[i]f the power to control rents is to be anything more than an interim measure effective for only the short period needed to convert the entire rental housing stock, it must include by implication the power to make reasonable regulations governing removals from the rental housing market.” Id.
\textsuperscript{23} Id. at 159, 418 N.E.2d at 339. The Court concluded that “the power to control removals from the rental housing market is essential to the operation of [1976 Mass. Acts c. 36], and is therefore conferred by implication in the rent control statute.” Id.
\textsuperscript{24} See Schlein, supra note 4 § 4.3, at 108.
\textsuperscript{25} 397 Mass. 870, 494 N.E.2d 1301 (1986).
\textsuperscript{26} See id. at 878, 494 N.E.2d at 1306.
related activity under the legislative grant of power to regulate rents and evictions.

It was in light of Flynn and Grace that in December 1985, the Boston City Council passed, and Mayor Flynn approved, an ordinance that was aimed at alleviating at least part of the city’s chronic housing problem. This ordinance, section 10A, required that a removal permit be obtained before any housing unit could be removed from rental housing use. Under the ordinance, “removal” included any activity resulting in the sale or transfer of legal title of housing accommodations as condominiums to any person. Therefore, a permit was required even if the transaction would not displace a rental tenant. The ordinance provided that certain factors must be considered when deciding whether to grant or deny a permit. The ordinance also established guidelines for the mandatory

27 Boston, MA., Code c. 34 §10A (hereinafter Section 10A) stated that: “a serious public emergency ... continues to exist in the City of Boston; and WHEREAS, the rate of conversion of rental housing units to condominiums ... has continued to increase, resulting in fewer affordable rental accommodations; and ... WHEREAS, the majority of recent condominium and cooperative conversions have not resulted in affordable homeownership opportunities for existing Boston residents, but have been primarily investment opportunities for absentee owner-investors ... therefore ... be it declared by the City Council and the City of Boston that a substantial and critical shortage of safe, decent, and reasonably priced rental housing exists in the City of Boston ... due, further, to the conversion of rental housing units to other uses or forms of ownership, particularly conversion to condominiums or cooperatives ... Preamble to Section 10A.

28 Section 10A(C) provides: “It shall be unlawful for any person to remove a housing accommodation from rental housing use without having first obtained a removal permit from the Board subject to the provisions contained in this Ordinance.” Id.

29 Section 10A(B) provides, in relevant part;

When used in this Ordinance the term 'removal of housing accommodations from rental housing use' shall include the following activities:

(1) Any activity ... which would result ... in the sale and transfer of legal title of any housing accommodation as a condominium or cooperative unit(s) ....

(2) The change in occupancy of any rental unit so as to no longer be a rental unit ....

Id.

30 See id. See also Greater Boston, 397 Mass. at 872, 494 N.E.2d at 1303.

31 Section 10A(D)(1) enumerates the following factors:

(a) The benefits and detriments to the persons whom this Ordinance and this Section seek to protect;

(b) The hardships imposed on the tenant(s) residing in the housing accommodation proposed to be removed;

(c) Circumstances demonstrating hardship and inequity to the applicant seeking a removal permit;

(d) The rate of vacancy in the City of Boston at the time the applicant applies for a removal permit.

The Board, in its discretion, may also review other relevant factors in making its decision.

Id.
granting\textsuperscript{32} or denial\textsuperscript{33} of such permits; these guidelines made the issuance of such a permit improbable. In effect, the ordinance was aimed at stopping investors from speculating in the condominium market.\textsuperscript{34} The City Council, relying on \textit{Flynn}, found the authority to enact section 10A implied in the powers granted by the Massachusetts legislature to regulate rents and evictions.\textsuperscript{35}

On December 31, 1985, the Greater Boston Real Estate Board (GBREB) brought suit in the Supreme Judicial Court against the City of Boston seeking declaratory and injunctive relief alleging that the City lacked the authority to enact section 10A.\textsuperscript{36} On February 10, 1986, a single justice of the Supreme Judicial Court reserved and reported the case to the full Court for a decision.\textsuperscript{37}

On July 9, 1986, the Supreme Judicial Court held section 10A invalid because the Massachusetts legislature had neither explicitly nor implicitly granted the City of Boston the authority to enact the ordinance.\textsuperscript{38} In assessing the validity of section 10A, the Court first examined the terms of section 10A. Section 10A, the Court observed, required that a removal permit be obtained both when housing was to be removed from the rental housing market and when title to rental housing was sold or transferred, regardless of whether the unit was to be removed from the rental market.\textsuperscript{39} The Court noted that the permits, however, were to be granted when the owner was to occupy the condominium or when at least 50\% of the units in a building were to be purchased by the present tenants.\textsuperscript{40}

\textsuperscript{32} Section 10A(D)(2) provides that a removal permit must be granted when a permit is sought for one of the following reasons:
(a) The owner or purchaser of a condominium . . . intends to occupy the housing unit as a principal residence.
(b) A majority of the tenants in a building . . . have unequivocally agreed to purchase such building and convert it to a limited equity cooperative . . . .
(c) A majority of the tenants in the building . . . will be purchasing their rental unit when it is converted to a condominium . . . and occupy such unit as their principal and permanent residence provided that the tenants have resided in the building for at least one (1) year prior to the filing of the removal permit application . . . . \textit{Id.}

\textsuperscript{33} Section 10A(D)(3) provides that a removal permit must be denied unless the applicant has satisfied the requirements of either section 10A(D)(1) or (D)(2). \textit{Id.} If the purpose of obtaining the permit is to sell the unit(s) to an investor, the Board is required to deny the permit. Section 10A(D)(3).

\textsuperscript{34} See, e.g., supra notes 27 & 33. See also \textit{Greater Boston}, 397 Mass. at 874, 494 N.E.2d at 1304.

\textsuperscript{35} See supra note 7 for Preamble to Section 10A.

\textsuperscript{36} \textit{Greater Boston}, 397 Mass. at 870–71, 494 N.E.2d at 1302.

\textsuperscript{37} \textit{Id.} at 871, 494 N.E.2d at 1302.

\textsuperscript{38} \textit{Id.}

\textsuperscript{39} \textit{Id.} at 872, 494 N.E.2d at 1303.

\textsuperscript{40} \textit{Id.} at 874, 494 N.E.2d at 1303–04.
The Court concluded that the ordinance acted as an almost absolute bar only to sales of housing units to investors.\footnote{Id. at 874, 494 N.E.2d at 1304. "Because a removal permit is required for the lawful sale of a rental dwelling unit as a condominium or cooperative unit, and nevertheless in almost all instances is not obtainable, nearly all sales to investors of such units are absolutely prohibited." Id.}

The Court framed the issue as whether the Massachusetts legislature had granted the City of Boston authority to bar such sales to investors.\footnote{Id.} The City contended that the statutory grant of authority, although not expressly granting the City the power to regulate condominium conversions in such a manner, implied a grant of the necessary power because such regulations are reasonably related to the legislative purpose of the enabling legislation.\footnote{See id. at 874–75, 494 N.E.2d at 1304 (citing 1969 Mass. Acts, c. 797, as amended by 1970 Mass. Acts, c. 863 and G.L. c. 185A). See also supra note 1 for a discussion of Boston’s rent control enabling acts.} The City relied on the Court’s previous decisions in Flynn and Grace, where the Court had upheld ordinances enacted under the authority of similar statutes.\footnote{Id. at 876–77, 494 N.E.2d at 1304–05.}

The Court first looked to the legislation in question, which delegated authority to the City of Boston to regulate both rents and evictions from rental housing.\footnote{Id. at 875, 494 N.E.2d at 1304 (citing 1969 Mass. Acts, c. 797 as amended by 1970 Mass. Acts, c. 863). See also supra note 1 for a discussion of Boston’s rent control enabling acts.} Because there was no express grant of power to regulate condominium conversions, the Court stated that for section 10A to be validly enacted, that power must be implied from the legislature’s intent when it enacted these two statutes.\footnote{Id.} The Court stated that the standard by which the ordinance should be judged was not, as the City of Boston contended, whether the ordinance was reasonably related to the enabling statute.\footnote{Id. at 876, 494 N.E.2d at 1305–06.} The Court stated that the proper standard was that articulated in Flynn which requires that the ordinance or by-law be essential to the implementation of the express powers granted by the statute.\footnote{Id. at 878, 494 N.E.2d at 1306.}

In examining section 10A in light of this necessity standard, the Court stated that there was a “minimal, if any, logical nexus between the operation of [section] 10A and the preservation of Boston’s rental housing stock.”\footnote{Id.} Indeed, the Court stated that because investors are likely to offer their units for rent, the very persons who would be offering rental housing were foreclosed from purchasing it.\footnote{Id.} Thus, the Court distinguished Grace and Flynn on the grounds that the Boston ordinance was
self-defeating. The *Grace* Court had upheld Brookline’s by-law which made certificates of eviction unavailable to condominium developers. The *Flynn* Court had provided only that no rental unit that was a part of Cambridge’s rent-controlled housing on August 10, 1979, could be removed from the rental market. In neither case, stated the *Greater Boston* Court, was condominium conversion or ownership precluded altogether.

Thus, the Supreme Judicial Court held that section 10A, Boston’s ordinance regulating condominium conversion, was invalidly enacted. Finding that section 10A was not necessary to effectuate the provisions of the statutory grant of authority to regulate the rental housing market in Boston, the Court found that the City of Boston did not have the requisite authority to enact such an ordinance. In so holding, the Supreme Judicial Court not only sharply limited Boston’s authority to regulate condominium conversions, but perhaps more importantly, articulated a strict test for judging the validity of municipal ordinances.

The *Greater Boston* Court’s decision relied on the language of *Flynn*, but it is open to question whether the Court’s decision also encompassed *Flynn*’s spirit. Although the *Flynn* Court articulated a strict standard for determining whether a municipality may find the requisite authority to enact an ordinance or by-law implied within an enabling act’s provisions — the ordinance or by-law must be *necessary* to give effect to the express power granted by the enabling act — the *Flynn* Court’s decision appeared to give great deference to the Cambridge ordinance. The legislature expressly authorized the Cambridge city council to regulate only rents and evictions from controlled rental housing. The Cambridge city council, however, enacted an ordinance which prohibited removals

51 Id. at 877–78, 494 N.E.2d at 1306. See *supra* notes 2–24 and accompanying text for a discussion of *Grace* and *Flynn*.
52 379 Mass. at 43, 399 N.E.2d at 1038.
53 383 Mass. at 152, 418 N.E.2d at 335.
54 397 Mass. at 877–78, 494 N.E.2d at 1306.
55 *Id.* at 871, 494 N.E.2d at 1302.
56 *Id.* at 878, 494 N.E.2d at 1306.
57 *See id.* at 877, 494 N.E.2d at 1306. The Court stated, “powers provided by necessary implication must be essential and not merely convenient to the implementation of express powers conferred by statute.” *Id*.
59 *Flynn* was generally perceived as an *expansion* of the municipal powers authorized under enabling acts. See Schlein *supra* note 4 § 4.3, at 108.
of units from controlled rental housing stocks because, the council stated, the ordinance was needed in order to carry out the purposes of the legislature’s grant of authority. The Supreme Judicial Court upheld the Cambridge ordinance in Flynn and essentially stated that unless the authority to control removals from rental housing was implied from the enabling act, the power to control rents and evictions would be nullified by the wholesale conversion of the city’s rental housing stock to condominiums. Yet, when the City of Boston enacted section 10A to prevent condominium conversions, finding the requisite authority implied by an enabling act similar to Cambridge’s, the Supreme Judicial Court found that Boston’s ordinance was invalid because the city lacked the express or implied authority to enact it. Either Boston’s ordinance was distinguishable from the Cambridge removal ordinance, or the Court had retreated from its previous posture of deference to municipalities. It appears that both factors played a role in the Greater Boston Court’s decision.

Section 10A broadly defined “removal” to include not only removal of housing units from the rental market, as had the Cambridge ordinance, but also any transfer of title. The ordinance subjected most rental units

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63 Chapter 23 § 1(a) provides in relevant part: “No owner or other person shall remove from the market any controlled rental unit, unless the board after a hearing grants a permit.”

64 Chapter 23 § 1(a) states that a serious public emergency exists in the City of Cambridge with respect to housing, as declared in 1976 Mass. Acts, c. 36 (the enabling act). The ordinance further states that this emergency “has worsened since 1976 because of the removal of a substantial number of rental housing units from the market, by condominium conversion . . . . In order to carry out the purposes of [1976 Mass. Acts, c. 36] . . . it is necessary for the Cambridge City Council, in the exercise of its powers under . . . [the enabling act], to regulate the removal of controlled rental housing units from the market.”


67 Greater Boston, 397 Mass. at 871, 494 N.E.2d at 1302.

68 See Garrity, The Flynn condo loss — did Court have motive? BOSTON BUS. J., July 28, 1986, at 8B, col. 1 [hereinafter Garrity]. The author stated:

In my opinion, [the Court’s statements finding no rational relationship between section 10A and the enabling legislation or even a logical nexus between the ordinance and the preservation of Boston’s rental housing stock] reflect value judgments which appear to be inconsistent with the value judgments the Court made in its Grace and Flynn decisions.

What the Court seemed to say is that as far as municipal rent control is concerned, enough is enough.

Until its decision on July 9th, the SJC appeared to be willing to go along with just about any rent control provision. Now, that seems to have changed.

69 See supra note 29 for the relevant text of section 10A.

70 See supra note 16 for the relevant text of chapter 23.
whose title was sold or transferred to its provisions, whether or not those units would actually be removed from the rental housing market. 71 It is this aspect which appears to have distinguished section 10A from the Flynn ordinance. 72 The Court found that because the people who are most likely to offer housing units for rent, investors, were essentially precluded from purchasing these units by the ordinance, section 10A could be distinguished from the ordinance at issue in Flynn. 73 In Flynn, the Court stated that Cambridge’s ordinance did not prevent persons from buying housing units or converting them into condominiums. 74 Instead, the Court found that the ordinance simply required that controlled rental housing units remain on the rental market. 75 Thus it appears that the Court found that Boston had overstepped the bounds of its implied authority to regulate rental housing by essentially prohibiting investors from purchasing rental housing units.

In addition to being overinclusive, Boston’s ordinance mistakenly relied on the Court’s statements in Grace that every presumption should be made in favor of the validity of a municipal ordinance or by-law. 76 That standard was applied to an ordinance enacted under the express authority of an enabling act. 77 Although Boston was mistaken as to the correct standard for determining the extent of the authority conferred on a municipality by implication, 78 the Court’s decision in Flynn appeared to continue the Grace Court’s deference to municipal ordinances or by-laws enacted under implied authority even though the Court articulated the stricter “necessity” standard. 79 The Flynn Court’s statement that the power to regulate rents and evictions must include, by implication, the power to regulate removals from the rental housing market 80 left the impression that if a municipality had been authorized by the legislature

71 See supra note 29.
72 See Greater Boston, 397 Mass. at 877–78, 494 N.E.2d at 1306.
73 Id. at 878, 494 N.E.2d at 1306.
74 Flynn, 383 Mass. at 156, 418 N.E.2d at 337.
75 Id.
76 See Greater Boston, 397 Mass. at 876, 494 N.E.2d at 1305.
77 See Grace, 379 Mass. at 49–50, 399 N.E.2d at 1042. The Court stated in Grace: "Chapter 843 explicitly grants 'to Brookline the option to regulate the eviction of tenants by by-law . . . . We have consistently stated that in judicial review of municipal by-laws and ordinances "every presumption is to be made in favor of their validity, and that their enforcement will not be refused unless it is shown beyond reasonable doubt that they conflict with the applicable enabling act or the Constitution."

Id. (quoting Crall v. Leominster, 362 Mass. 95, 102, 284 N.E.2d 610, 615 (1972)).
78 See Greater Boston, 397 Mass. at 876, 494 N.E.2d at 1305.
79 See Flynn, 383 Mass. at 158, 418 N.E.2d at 338. See also Schlein supra note 4 § 4.3, at 108.
to regulate rents and evictions, that municipality also had broad powers by implication to regulate condominiums through regulation of removals from the rental housing market. The Court found, however, that section 10A had little or no logical relation to the preservation of Boston's rental housing stock. Recent statistics show, on the other hand, that nearly 3,000 apartments have been removed from the rental housing market in Boston since the Court's decision in Greater Boston, nearly doubling the rate of conversions in the six months preceding the Court's decision. It is clear that condominium conversion is putting a severe strain on an already limited Boston housing market, where in many areas over 25% of private housing units are already condominiums.

The Greater Boston Court's decision has two major impacts; perhaps the most important is the Court's strict adherence to the necessity standard articulated in Flynn; the other, invalidating section 10A, has been overruled by the legislature. After the Flynn decision, many persons felt that the Supreme Judicial Court would continue to expand municipalities' authority to enact ordinances or by-laws by finding that the requisite power was necessarily implied from enabling statutes. Although the Flynn Court's decision required that the ordinance be necessary to give effect to the express powers granted to a municipality by the legislature, the Court's actual decision appeared to be deferential to the Cambridge city council.

The Court's strict characterization of "necessity" in Greater Boston makes it clear that the Court will not broadly defer to a municipality's ordinances or by-laws enacted pursuant to implied legislative authority. As a result, municipalities wishing to enact an ordinance or by-law based

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81 See supra note 57.
82 See supra note 29 for the definition of "removal" in section 10A. See also Preamble to section 10A.
83 Id. at 878, 494 N.E.2d at 1306.
85 See id. See also J. Creed Section 10A: A Taxing Problem? (Dec. 5, 1986) (unpublished manuscript). This manuscript addresses various means that have been proposed to alleviate Boston's housing crisis and concludes that private development is the best solution and should thus be encouraged by favorable tax legislation. (The author is a Boston College law student; copies of the manuscript are available upon request).
87 See Garrity supra note 68; Schlein supra note 4 § 4.3, at 108.
88 See Flynn, 383 Mass. at 158, 418 N.E.2d at 338.
89 See id. at 157-59, 418 N.E.2d at 338-39.
90 See Greater Boston, 397 Mass. at 877, 494 N.E.2d at 1306.
on implied authority will have to draft such an enactment carefully to conform to the Court’s necessity standard. Under that standard a reasonable relationship between the ordinance or by-law and the enabling legislation will not be sufficient to uphold the ordinance or by-law’s validity.\textsuperscript{91} Instead, each element of the ordinance or by-law must be necessary to effectuate the purposes of the enabling legislation.\textsuperscript{92} An additional result of the Court’s construction of its \textit{Flynn} necessity standard in \textit{Greater Boston} will be that in order to conduct their affairs, municipalities will require either extremely broad grants of authority from the legislature or numerous specific grants. The Supreme Judicial Court has thus increased the state’s municipalities’ dependence on the legislature for grants of authority to enact ordinances or by-laws.

As far as the specific authority required for Boston to regulate the conversion and sale of condominiums, the legislature has already acted to alleviate the onus of the Court’s decision.\textsuperscript{93} Chapter 45 of the Acts of 1987 explicitly authorizes the City of Boston to regulate condominium conversions as well as consolidations or removals from the housing market, powers that many members of the legislature believed were implied in the earlier statutes.\textsuperscript{94} Thus, the legislature has resolved the specific issue of Boston’s authority to regulate condominium conversion.

The Supreme Judicial Court’s decision in \textit{Greater Boston Real Estate Bd. v. City of Boston} invalidated the city’s ordinance regulating condominium conversion on the grounds that the city lacked the authority to enact the ordinance.\textsuperscript{95} In so ruling, the Court articulated a strict standard for determining when municipal by-laws and ordinances will be upheld when based on authority implied from legislative enactments.\textsuperscript{96} The Court stated that the municipality’s enactment must be more than reasonably related to the enabling legislation; it must be necessary to carry out the explicit terms of the legislative grant.\textsuperscript{97} Although the legislature has over-

\textsuperscript{91} Id. at 877, 494 N.E.2d at 1305.
\textsuperscript{92} Id. at 877, 494 N.E.2d at 1306.
\textsuperscript{94} 1987 Mass. Acts 45 § 2 provides, in relevant part:

Chapter 797 of the Acts of 1969, as most recently amended by section 26 of chapter 843 of the acts of 1971, is hereby further amended by adding the following five paragraphs:

(a) Notwithstanding the provisions of any general or special law to the contrary . . . the City of Boston may, by ordinance, further regulate and control the removal of housing accommodations from rental housing use, the reduction in the total number of units in a housing accommodation, or the change in form of ownership of housing accommodations used for rental housing.


\textsuperscript{95} 397 Mass. at 871, 494 N.E.2d at 1302.
\textsuperscript{96} Id. at 877, 494 N.E.2d at 1306.
\textsuperscript{97} Id. at 877, 494 N.E.2d at 1305.
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ruled the Court’s decision regarding Boston’s authority to regulate condominium conversion,98 the Court’s strict standard for determining if a municipality has implicit authority to enact a by-law or ordinance has made municipalities more dependent on the legislature for express grants of authority to regulate municipal affairs than before the Greater Boston decision.

§ 6.2. Probate Court May Not Intervene in Land Registration Decrees.*
The Massachusetts legislature historically limited the jurisdiction of the probate courts to resolving legal and equitable disputes in specified circumstances, such as wills, guardianships, divorce and adoption.1 In 1963, the legislature added to the probate courts’ specific equity jurisdiction the same general equity jurisdiction as the superior courts and the Supreme Judicial Court.2 The legislature’s intent, according to the Supreme Judicial Court, was to make the requirements for equity actions as similar as possible in each court.3

While the Supreme Judicial Court described the expanded equity jurisdiction of the probate courts as broad,4 it has stressed that they remain courts of limited jurisdiction.5 Plaintiffs have tested the scope of the probate courts’ general equity jurisdiction several times and found that the courts construe that jurisdiction narrowly.6 For example, in Konstan-

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98 See supra notes 93–94 and accompanying text.
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§ 6.2. 1 NOLAN, CIVIL PRACTICE, 9 MASS. PRACTICE SERIES § 95 (1975). G.L. c. 215, § 3 (1984 ed.) provides in pertinent part:
Probate courts shall have jurisdiction of probate of wills, of granting administration on the estates of persons who at the time of their decease were inhabitants of or residents in their respective counties and of persons who die out of the Commonwealth leaving estate to be administered within their respective counties; of the appointment of guardians and conservators; of all matters relative to the estates of such deceased persons and wards; of petitions for the adoption of children, and for change of names; of actions for divorce or for affirming or annulling marriage brought in the probate court . . . .

Id.
2 Acts of 1963, c. 820, § 1. The current version of the statute provides in pertinent part:
The probate and family court department shall have original and concurrent jurisdiction with the supreme judicial court and the superior court department of all cases and matters of equity cognizable under the general principles of equity jurisprudence

G.L. c. 215, § 6 (1984 ed.)
3 NOLAN, 9 MASS. PRACTICE SERIES at § 95.
topoulos v. Whately, the Court ruled that a probate court lacked equity jurisdiction to enjoin the Town of Whately’s Board of Selectmen from revoking an entertainment license, because the probate court first would have to consider whether the revocation was arbitrary and capricious. The Court reasoned that review of administrative action traditionally is an action at law, and thus outside the probate courts’ general equity jurisdiction.

During the Survey year, the Supreme Judicial Court again narrowly construed the scope of the general equity jurisdiction of the probate courts in Tetrault v. Bruscoe. The Court held that while a probate court’s general equity jurisdiction allowed it to hear a request to enjoin trespass on land held by registered title, its jurisdiction did not extend to granting affirmative relief by modifying the substance of a land court registration decree.

In Tetrault, the plaintiffs, Richard and Barbara Tetrault, brought suit in the probate court seeking a permanent injunction against defendants Michael and Dorothy Bruscoe from entering their land, and damages for the defendants’ trespass. The Bruscoes contended that they had a prescriptive roadway easement across the plaintiffs’ land, and raised equitable defenses as well. The plaintiffs argued that because the title to the land was registered and the defendants did not raise the easement issue at the time of the registration of title, the easement was extinguished by the registration decree.

Henry and Cloma Donnis, who owned the property before the Tetraults, filed a petition in 1968 in the land court to register title to their lot in Hatfield, Massachusetts. The purpose of registering title through a land court action is to record all matters affecting title on one document for conversion is not within equity jurisdiction of the probate court); Smola v. Camara, 16 Mass. App. 908, 449 N.E.2d 678 (1983) (power to appoint receiver within general equity jurisdiction of probate court); Homstead v. Whately, 11 Mass. App. 985, 418 N.E.2d 356 (1981) (declaratory judgment involving action by zoning board of appeals is not within equity jurisdiction of the probate court).

\[\text{Id. at 128, 424 N.E.2d at 215.}\]

\[\text{Id. at 455, 497 N.E.2d at 276. The plaintiff’s lot measured 6.84 acres and contained a roadway that abutters, including the Bruscoes, had made use of since the 1930s. Id. and n.3.}\]

\[\text{Tetrault, 398 Mass. at 456, 460, n.7, 497 N.E.2d at 276, 279, n.7. The defendants raised laches and the doctrine of de minimus as equitable defenses. The judge, however, did not reach these issues. Id. at 460, 497 N.E.2d at 279.}\]

\[\text{Id. at 455, 497 N.E.2d at 276.}\]
so that the current and future title holders can have certainty in their title. The defendants, who were abutting property owners, were notified by registered mail that the Donnises intended to register the title to their land. The Bruscoes raised no objections nor requested that a roadway across the Donnis property be recognized formally as an easement on the registered title.

In July, 1970, the land court confirmed and registered the Donnises' title, with no roadway easement across the property. One month later, the Tetraults purchased the registered land from the Donnis family and received a transfer certificate of title. A dispute arose between the Tetraults and the Bruscoes when the Bruscoes began using large trucks and bulldozers to haul material over the Tetraults' property.

The probate judge agreed that the Bruscoes had a prescriptive easement over the property which predated the title registration and ruled that the plaintiffs had bought the land subject to the defendants' pre-existing unregistered and unrecorded easement. This holding conflicted with Supreme Judicial Court precedents interpreting the finality of title registration decrees.

Upon learning of the probate court's decision, the Attorney General attempted to intervene after the probate court had entered judgment. After the probate court denied the intervention motion, the Attorney General filed a motion for declaratory judgment in the land court. The Attorney General sought an order enjoining any registration of the roadway easement. The Attorney General also asked for a declaratory judgment that a probate court is without jurisdiction to encumber a registered title and that the land court has exclusive jurisdiction over any document or encumbrance later affecting a registered parcel.

Before the land court acted on the Attorney General's complaint, the Tetraults filed a suit with

16 See E. Mendler, DAVID'S MASSACHUSETTS CONVEYANCERS' HANDBOOK, § 8.1 (1984); R. Powell, REAL PROPERTY ¶ 908[2] (1986). One benefit of registering title is that a subsequent bona fide purchaser will hold the title free of any unrecorded interests, unless the purchaser had actual notice of them.
17 Tetrault, 398 Mass. at 455, 497 N.E.2d at 276.
18 Id. at 455-56, n.3, 497 N.E.2d at 276, n.3.
19 Id. at 455-56, 497 N.E.2d at 276.
20 Id. at 455, 497 N.E.2d at 276.
21 See id. at 455-56, n.3, 497 N.E.2d at 276, n.3.
22 Id. at 456, 497 N.E.2d at 276.
23 Id. at 461, 497 N.E. 2d at 279 (citing Goldstein v. Beal, 317 Mass. 750, 757, 59 N.E.2d 712, 716 (1945); Dubinsky v. Cama, 261 Mass. 47, 56-57, 158 N.E. 321, 324 (1927)).
24 Tetrault, 398 Mass. at 456, 497 N.E.2d at 276.
25 Id.
26 Id.
27 Id.
the Supreme Judicial Court seeking substantially the same relief. The Court ordered the Attorney General’s complaint transferred from the land court and joined the two actions.

In this merged action, the Supreme Judicial Court addressed two issues: (1) whether a probate court has jurisdiction to hear an action to enjoin a trespass onto registered land, and (2) whether the probate court has jurisdiction to encumber a registered parcel of land by finding that a prescriptive easement takes precedence over a registered title. The Supreme Judicial Court first addressed whether the probate court had jurisdiction over the Tetraults’ initial complaint to enjoin a trespass over registered land. Analyzing the jurisdictional statute governing the land court, the Supreme Judicial Court concluded that although the land court has exclusive jurisdiction to confirm or register title, it does not have exclusive jurisdiction over actions to enjoin trespass onto registered land. Such actions fall under general equity jurisdiction, the Court noted, and thus could be brought to any court having general equity jurisdiction, including a probate court.

Having determined that the plaintiffs’ suit properly was before the probate court, the Supreme Judicial Court then considered whether the probate court had exercised its jurisdiction validly. The Court held that the general equity jurisdiction of the probate court was restricted by the statutory language in chapter 185, section 45. Section 45, the Court

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28 Id.
29 Id. at 456–57, 497 N.E.2d at 276–77.
30 Id. at 457, 497 N.E.2d at 277.
31 See id. at 457–61, 497 N.E.2d at 277–79.
32 See id. at 457, 497 N.E.2d at 277. G.L. c. 185, § 1(a) (1984 ed.) provides that the land court shall have exclusive original jurisdiction of:

(a) Complaints for the confirmation and registration and complaints for the confirmation without registration of title to land and easements or rights in land held and possessed in fee simple within the [C]ommonwealth, with power to hear and determine all questions arising upon such complaints . . . .

Id.
33 Tetrault, 398 Mass. at 457, 497 N.E.2d at 277.
34 Id. at 458, 497 N.E.2d at 277.
35 Id. at 458–59, 497 N.E.2d at 278. G.L. c. 185, § 45 (1984 ed.) provides:

If the court, after hearing, finds that the plaintiff has title proper for registration, a judgment of confirmation and registration shall be entered, which shall bind the land and quiet the title thereto, subject only to the exceptions stated in the following section. It shall be conclusive upon and against all persons, including the [C]ommonwealth, whether mentioned by name in the complaint, notice or citation, or included in the general description “to all whom it may concern.” Such judgment shall not be opened by reason of the absence, infancy or other disability of any person affected hereby, not by any proceeding at law or in equity for reversing judgments or decrees; subject, however, to the right of any person deprived of land, or of any estate or interest therein, by a judgment of registration obtained by fraud.
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stated, establishes the general inviolability of registered land titles.\textsuperscript{36} The Court quoted the provision of section 45 that such judgments shall not be opened unless a person deprived of a property interest by a fraudulently obtained registration decree files a complaint within one year of the judgment and no innocent purchaser for value has acquired an interest in the land.\textsuperscript{37} The land court has exclusive jurisdiction to hear complaints under section 45, the Court noted.\textsuperscript{38}

The Court reasoned that by giving legal effect to the Bruscoes’ alleged prescriptive easement, the probate judge was attacking the conclusiveness of the plaintiffs’ title registration decree,\textsuperscript{39} something only the land court is allowed to do and only in limited circumstances.\textsuperscript{40} The Court thus concluded that the probate judge had exceeded the general equity jurisdiction of the probate court.\textsuperscript{41} It interpreted the power of the probate courts to extend only to enforcing the land court’s judgment of registration.\textsuperscript{42}

The Court explained that the probate court had based its decision, in part, on a misinterpretation of chapter 185, section 46.\textsuperscript{43} As the Court explained, section 46 sets out a limited list of encumbrances that do not have to be listed on the certificate of title to be valid.\textsuperscript{44} The probate judge to file a complaint for review within one year after the entry of the judgment, provided no innocent purchaser for value has acquired an interest. If there is any such purchaser, the judgment of registration shall not be opened but shall remain in full force and effect forever, subject only to the right of appeal as provided by law from time to time. But any person aggrieved by such judgment in any case may pursue his remedy in tort against the plaintiff or against any other person for fraud in procuring the judgment.

\textit{Id.}

\textsuperscript{36} \textit{Tetrault}, 398 Mass. at 459, 497 N.E.2d at 278; G.L. c. 185, § 45 (1984 ed.). For the pertinent text of § 45, see \textit{supra} note 35.

\textsuperscript{37} \textit{Tetrault}, 398 Mass. at 454, 497 N.E.2d at 278.


\textsuperscript{39} \textit{Tetrault}, 398 Mass. at 460, 497 N.E.2d at 279.

\textsuperscript{40} See text of § 45, \textit{supra} note 35.

\textsuperscript{41} \textit{Tetrault}, 398 Mass. at 460, 497 N.E.2d at 279. In discussing the limited power of the probate courts in actions involving registered land titles, the Court stated, “[t]he power to enforce is not the power to modify.” \textit{Id.} at 459, 497 N.E.2d at 278.

\textsuperscript{42} \textit{Id.}

\textsuperscript{43} \textit{Id.} at 460–61, 497 N.E.2d at 279.

\textsuperscript{44} See \textit{id.} at 461, n.9, 497 N.E.2d at 279, n.9. G.L. c. 185, § 46 (1984 ed.) provides in relevant part:

Every petitioner receiving a certificate of title in pursuance of a decree of registration, and every subsequent purchaser of registered land taking a certificate of title for value and in good faith, shall hold the same free from all encumbrances except those noted on the certificate, and any of the following encumbrances which may be existing:

First, Liens, claims or rights arising or existing under the laws or constitution of
apparently reasoned, the Court stated, that a prescriptive easement came under that list of exceptions, but the Supreme Judicial Court rejected that conclusion. The Court reiterated prior holdings that an easement must appear on the certificate of title in order to affect registered land.

Finally, the Supreme Judicial Court examined the probate judge’s finding that the Tetraults had actual notice of the roadway easement prior to purchasing the land. Citing precedent, the Court noted that a purchaser’s actual notice of an unregistered encumbrance could attack the conclusiveness of the registration decree. The Court concluded that the plaintiffs’ mere awareness that the roadway existed, without proof they knew of the defendants’ use of it, did not constitute actual notice.

The Supreme Judicial Court’s decision in Tetrault correctly affirmed the general inviolability of registered titles by confirming the land court’s exclusive jurisdiction and narrowly construing the probate courts’ general equitable jurisdiction. Massachusetts is one of a minority of states with extensive title registration, and the effectiveness of registration depends on the conclusiveness of the registration decree. In California and Oregon, judicially created exceptions eroded the finality of title registration decrees to the point that the registration statutes were subsequently repealed. While Massachusetts law does allow registration decrees to be attacked in limited circumstances, the Court in Tetrault has restricted such challenges to the land court.

The decision in Tetrault reflects the view that general equity jurisdiction should be construed narrowly so that courts of limited jurisdiction such as the probate courts do not resolve cases that are outside their expertise and within the statutory jurisdiction of another court. In reaction to a 1977 governor’s commission report recommending reorganization and consolidation of the state court system, Chief Justice Hennessey endorsed the court merger, but stated that permanent divisions should

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the United States or the statutes of this [C]ommonwealth which are not by law required to appear of record in the registry of deeds in order to be valid against subsequent purchasers or encumbrances of record . . . .

Id.

45 Tetrault, 398 Mass. at 460-61, 497 N.E.2d at 279.
46 Id. at 460-61, 497 N.E.2d at 279.
48 See Tetrault, 398 Mass. at 461, 497 N.E.2d at 279.
49 See id. at 462, 497 N.E.2d at 278-80 (citing Killam v. March, 316 Mass. 646, 55 N.E.2d 945 (1944)).
51 R. Powell, REAL PROPERTY ¶ 908[4], 83-10 (1986).
52 Id. at ¶ 908[3], 83-8.
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be established to preserve the former areas of judicial specialization. The Court has balanced the desire to retain the specialized nature of the courts, however, with its recognition that the legislature intended to encourage a broader availability of court personnel to hear cases in equity. The Court has stressed that when a probate court receives a case that presents issues outside its jurisdiction, it should not dismiss the case and force the plaintiff to find a new forum, but should remove the case as a matter of right to an appropriate court.

In sum, the Tetrault decision ensured that decisions regarding the finality of a registration decree will continue to be made exclusively by the court having the expertise and the statutory jurisdiction, the land court. The line of cases examining the equity jurisdiction of the probate courts, including the Tetrault decision, demonstrate that practitioners should evaluate the underlying issues their complaint will present before filing it in a court of limited jurisdiction such as a probate court. The plaintiffs in Tetrault were correct in bringing to a probate court an action in equity to enjoin their neighbors' trespass. Once the defendant raised the issue of the finality of the plaintiffs' registered title, however, the probate court should have transferred the case to land court. Unless the matter falls within specific probate jurisdiction, or is purely an equitable dispute, a complaint brought to probate court may be removed or a decision set aside for lack of jurisdiction.

§ 6.3. Termination Clauses in Purchase and Sale Agreements.* Contracts to purchase and sell real property frequently contain a clause which provides that if a seller is unable to convey the title specified in the agreement, the contractual obligations cease and the agreement is void. The termination clause enables land owners who are ignorant of a title defect at the time of the agreement to retain the property rather than incur the expense of perfecting title. To allow the seller to escape liability

55 See Konstantopoulos, 384 Mass. at 129, 424 N.E.2d at 216.
56 Tetrault, 398 Mass. at 460, n.8, 497 N.E.2d at 279, n.8.

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§ 6.3. 1 PARK, REAL ESTATE LAW, 28 MASS. PRACTICE SERIES § 954 (2d ed. 1981) [hereinafter PARK]. Generally, the standard termination clause in purchase and sale agreements reads as follows: "If the [SELLER] shall be unable to give title or to make conveyance as above stipulated, any payment made under this agreement shall be refunded and all other obligations of either party hereto shall cease and this agreement shall be void without recourse to either party." Id.

in such a situation is fair because the obligations of both parties terminate when the seller is unable to convey marketable title.³

Since 1913, when the Supreme Judicial Court first interpreted the termination clause in Old Colony Trust Co. v. Chauncey, Massachusetts courts have construed the termination clause to mean that the obligations of the parties to a purchase and sale agreement cease, and the agreement is void, if through no fault of the seller, it is discovered subsequent to the execution of the contract that he or she has defective title.⁴ When this defect is discovered the seller must return the buyer's payments.⁵ Moreover, absent fault of the seller, or contractual provisions requiring removal of defects in title, the seller is under no obligation to remove the defects.⁶ Massachusetts courts reason that where the buyer and seller specifically have agreed upon their rights in the event a given contingency occurs, the agreement should be enforced.⁷ The seller remains excused of performance under the contract even though the buyer expresses willingness to take the property with defective title.⁸

Where the seller is at fault, however, he or she must remove the title defect that his or her wrongful action caused.⁹ Massachusetts courts have construed "fault" to include any affirmative acts subsequent to the purchase and sale agreement which clouds the seller's title.¹⁰ Additionally, courts have found that fault exists where the seller fails to clear title defects which the seller knew about when he or she agreed to convey marketable title.¹¹ Courts generally have held that fault does not exist, however, where the seller refuses to clear a title defect of which the seller was ignorant when he or she agreed to convey marketable title.¹²

³ Chauncey, 214 Mass. at 273, 101 N.E. at 424 (seller's performance excused where he was ignorant of an outstanding one-sixth undivided interest in the property arising out of a power under a will).
⁴ Id.
⁵ Id.
⁶ Barrett v. Carney, 337 Mass. 466, 468, 150 N.E.2d 276, 277 (1958) (seller not required to remove a street betterment assessment lien, even though the seller could have easily done so).
⁷ PARK supra note 1, at § 954.
⁸ Barrett, 337 Mass. at 468, 150 N.E.2d at 277.
⁹ Oberg v. Burke, 345 Mass. 596, 599, 188 N.E.2d 566, 569 (1963) (seller's refusal to convey property was wrongful where finance company placed lien caused "entirely [by seller's] own fault" after execution of purchase and sale agreement).
¹⁰ Sawl, 349 Mass. at 715, 212 N.E.2d at 230.
¹¹ See Rousseau v. Mesite, 355 Mass. 567, 571, 246 N.E.2d 441, 443 (1969) (because seller knew of mortgages and liens when he signed agreement to convey marketable title he was not excused from performance). See also Annotation, Application of Provision in Land Purchase Agreement that it Shall be Null Unless Marketable Title is Delivered, Where Defect in Title is Created or Permitted by Vendors Subsequent to Execution of Agreement, 13 A.L.R. 4th 927, 935 (1982).
¹² Sawl, 349 Mass. at 715, 212 N.E.2d at 230. In Sawl, the Supreme Judicial Court held
Thus, where the seller acts to cloud title subsequent to the contract or fails to act to remove title defects the seller knew about when he or she agreed to sell, he or she must act to cure title defects. 13

The termination clause does not protect a seller who does not act in good faith in the performance of the contract and does not intend to carry out the agreement. 14 Bad faith may be found, for example, where the seller refuses to remove a lien unless the buyer pays additional amounts. 15 But a seller who has the power to remove an encumbrance does not act in bad faith where he or she refuses to remove the encumbrance unless the seller bears some other contractual duty to do so. 16 Thus, a seller who acts in bad faith by using the existence of a known encumbrance to force the buyer to pay additional amounts may not invoke the protection of the termination clause to excuse performance under the contract. 17

During the Survey year, the Massachusetts Appeals Court in Durkin v. Ferreira held that a seller of real estate could not invoke a termination clause in his purchase and sale agreement in an attempt to excuse performance because the seller knew of the encumbrance when he agreed to sell the property and used its existence to attempt to obtain a higher purchase price from the buyer. 18 In Durkin the court found that the seller's refusal to remove tax liens which he knew about when he contracted to sell the property was in bad faith. 19

The defendant, Ferreira, was the beneficial owner of two lots in West Falmouth, Massachusetts. 20 William Bonito, Ferreira's brother-in-law, and co-defendant in this action, held legal title in the lots. 21 In August

that the seller's failure to file inheritance tax returns and discharge the lien did not constitute "fault" because the failure was not "deliberate, but resulted from lack of knowledge." Id. at 714, 212 N.E.2d at 229.

13 Oberg, 345 Mass. at 599, 188 N.E.2d at 568–69.


15 See Hall v. Selig, 346 Mass. 761, 768, 193 N.E.2d 678, 679 (1963) (demand by seller for additional compensation before removing liens was "in the nature a holdup" and thus in bad faith).


17 See Hall, 346 Mass. at 768, 193 N.E.2d at 679.

18 21 Mass. App. Ct. 771, 776, 490 N.E.2d 498, 501 (1986). Additionally, the court considered whether the parties mutually rescinded the contract, because Durkin returned Ferreira's deed which Durkin held in escrow. Id. at 773, 490 N.E.2d at 501. The court concluded that Durkin did not waive his right to sue, because he had expressly reserved his right to litigate at the time he returned the deeds. Id. at 775, 490 N.E.2d at 501.

19 Id.

20 Id. at 771, 490 N.E.2d at 499.

21 Id.
1983, Ferreira agreed to sell the two lots to plaintiff Durkin for $70,000.\textsuperscript{22} The contract provided that on September 7, 1983 Ferreira would convey marketable title to the two lots, free from encumbrances.\textsuperscript{23} The agreement also contained a termination clause which provided that if the seller was unable to convey title as stipulated in the agreement, the obligation of both parties would cease and the agreement would be void.\textsuperscript{24}

Before the date set for the conveyance, Durkin’s attorney learned that seven months prior to the agreement, in February 1983, the Massachusetts Department of Revenue filed three tax liens on Ferreira’s lots in the amount of $4,867.33.\textsuperscript{25} At the time of the agreement,\textsuperscript{26} Ferreira knew of the existence of the tax liens and made no attempt afterwards to discharge the liens.\textsuperscript{27} Instead, Ferreira later offered to sell the two lots to Durkin for $95,000, $25,000 more than Durkin originally agreed to pay.\textsuperscript{28} Durkin rejected the offer.\textsuperscript{29}

Durkin brought suit against Ferreira in superior court seeking specific performance of the original agreement.\textsuperscript{30} The court examined whether the existence of the liens rendered the title defective thus excusing Ferreira’s performance under the termination clause.\textsuperscript{31} The superior court found that Ferreira acted in bad faith and thus denied him the protection of the termination clause.\textsuperscript{32} The superior court specifically enforced the agreement.\textsuperscript{33}

The Massachusetts Appeals Court affirmed the superior court’s holding relying heavily on the Massachusetts Supreme Judicial Court decision, \textit{Old Colony Trust Co. v. Chauncey}.\textsuperscript{34} The \textit{Durkin} court reaffirmed that the termination clause does not protect a seller who is at fault for failing

\textsuperscript{22} \textit{Id.}
\textsuperscript{23} \textit{Id.}
\textsuperscript{24} \textit{Id.} at 771–72 n.2, 490 N.E.2d at 499 n.2. The court noted that the agreement was on the Greater Boston Real Estate Board 1978 standard form purchase and sale agreement articles 10 and 11. \textit{Id.}
\textsuperscript{25} \textit{Id.} at 772, 490 N.E.2d at 499. There was some question whether the liens assessed against the property on taxes owed by Ferreira were placed properly because Ferreira did not hold legal title to the property. \textit{Id.} at 772 n.3, 490 N.E.2d at 499 n.3. The court avoided having to reach this issue by determining that in any case Durkin knew of Ferreira’s beneficial interest in the lots and thus had constructive knowledge of the liens. \textit{Id.}
\textsuperscript{26} \textit{Id.} at 772, 490 N.E.2d at 499.
\textsuperscript{27} \textit{Id.} at 772–73, 490 N.E.2d at 499.
\textsuperscript{28} \textit{Id.} at 773, 490 N.E.2d at 500.
\textsuperscript{29} \textit{Id.} at 772, 490 N.E.2d at 500.
\textsuperscript{30} \textit{Id.} at 773, 490 N.E.2d at 500.
\textsuperscript{31} \textit{Id.}
\textsuperscript{32} \textit{Id.} at 775, 490 N.E.2d at 500.
\textsuperscript{33} \textit{Id.} at 773, 490 N.E.2d at 500.
\textsuperscript{34} 214 Mass. 271, 101 N.E. 423 (1913).
to remove known title defects or acts in bad faith.\textsuperscript{35} Although the termination clause language seemed unambiguous, the court stated that the termination clause must be given its reasonable meaning.\textsuperscript{36} Because the termination clause protects a seller who is ignorant of title defects, a seller's performance is not excused where the seller knew of the defect when he or she agreed to sell the property, or caused the defect after the agreement.\textsuperscript{37} Additionally, the \textit{Durkin} court reviewed the interpretation of termination clauses in subsequent Massachusetts cases and found that courts continue to apply the principles set forth in \textit{Chauncey}.\textsuperscript{38}

The \textit{Durkin} court discussed in depth two cases, \textit{Lafond v. Frame}\textsuperscript{39} and \textit{Berry v. Nardozzi},\textsuperscript{40} both of which presented issues of bad faith similar to \textit{Durkin}. In reviewing \textit{Lafond}, the \textit{Durkin} court noted that the good faith requirement precluded a seller, who placed a mortgage on her property and then refused to discharge it before conveyance, from relying on the existence of the encumbrance to excuse performance under the termination clause.\textsuperscript{41} The \textit{Durkin} court also noted that in \textit{Berry} the Supreme Judicial Court precluded the seller's reliance on the termination clause where he misrepresented the availability of a cure for the defect.\textsuperscript{42} Thus, the Court has stated that a seller cannot use the existence of a known encumbrance to create, in effect, an option contract for him or herself.\textsuperscript{43}

In determining that Ferreira acted in bad faith, the \textit{Durkin} court noted that Ferreira felt free at all times to avoid the conveyance because of the tax liens.\textsuperscript{44} In particular, the \textit{Durkin} court mentioned that Ferreira's lack of good faith was shown by his second offer to sell the property to Durkin for $25,000 more than the original agreement.\textsuperscript{45} The Appeals Court thus concluded that Ferreira's attempted use of the termination clause to create an option for himself could be regarded as a lack of good faith and absence of an intent to carry out the agreement.\textsuperscript{46}

The Durkin court correctly refused to allow Ferreira to excuse performance under the termination clause. The court's reasoning, however,
went unnecessarily far in reaching the issue of Ferreira's bad faith. Rather, the court needed only to state that because Ferreira knew of the liens at the time he entered into the contract, he was at "fault" and so was unable to excuse performance under the termination clause. Thus, even if Ferreira had not acted in bad faith, the court, based on Ferreira's knowledge of the liens, still should have found that Ferreira's performance was not excused under the contract.

The Durkin court's preoccupation with the manipulative aspect of the case suggests a trend in Massachusetts law toward expanding the circumstances under which termination clauses will be set aside, and a seller compelled to complete land sales. The next step in that trend would be to require a seller who acts in bad faith to complete the contract, whether or not he or she was unaware of the encumbrance when he or she agreed to sell the property. For example, a seller who attempts to use the lien to obtain a higher price may be required to complete the contract, whether or not he or she was aware of the encumbrance when he or she agreed to convey the property. Thus, a seller would be excused from performance only if he or she were unaware of the encumbrance when he or she agreed to convey the property and, in addition, has not acted in bad faith.

The current trend toward imposing liability on a seller who acts in bad faith, even if he or she was originally unaware of the encumbrance, is desirable. Otherwise, a seller who knows of or discovers a title defect would be able to use it as new leverage to obtain a greater price than that originally bargained. This is precisely the sort of overreaching which historically courts have condemned in equitable actions.47

In sum, the Massachusetts courts preclude a seller from excusing performance under a termination clause where the seller knows of an encumbrance on the property when he or she agreed to sell, but fails to remove it. The Massachusetts Appeals Court held in Durkin v. Ferreira that a seller who knew of a lien on his property when he agreed to sell and deliberately failed to remove it was not excused from performance under the termination clause. The Durkin court reasoned that a seller who knows of a title defect, acts in bad faith and does not intend to carry out the agreement is not entitled to the protection of the termination clause because the clause is meant to protect sellers who are ignorant of the title defect at the time they enter into the agreement.

The Durkin court's extensive consideration of the seller's bad faith actions as a basis for its decision, however, reveals a trend in Massachu-

setts law toward imposing liability on a seller who, though originally ignorant of a title defect, uses its existence to manipulate the buyer. This trend toward limiting the use of a termination clause to excuse performance where a seller acts in bad faith is desirable because it discourages sellers from attempting to use the termination clause to create an option contract to be exercised by him or herself.

§ 6.4. Limited Common Areas and the Massachusetts Condominium Statute.* The Massachusetts condominium statute, chapter 183A, establishes certain minimum requirements for creating condominiums. In addition, chapter 183A extensively covers the subjects of common areas and common expenses for condominium owners, although it does not deal with limited common areas. The Massachusetts courts have not addressed, until recently, the issues of "limited" common areas and

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§ 6.4. 1 G.L. c. 183A, §§ 1–22. Tosney v. Chelmsford Village Condominium Association, 397 Mass. 683, 686, 493 N.E.2d 488, 490 (1986). For example, a master deed which creates a condominium must first be recorded. G.L. c. 183A, §§ 2, 8. Chapter 183A, section 8(i) states that the master deed must contain the name of the corporation, trust or association through which the unit owners will manage and regulate the condominium, together with a statement that the new condominium has enacted by-laws pursuant to chapter 183A. G.L. c. 183A, § 8(i). Section 5(a) provides that each unit owner is entitled to an undivided interest in the common areas and facilities according to a percentage stated in the master deed. G.L. c. 183A, § 5(a). Section 5(b) adds that the percentage shall not be changed without the consent of all unit owners, expressed in an amended and recorded master deed. G.L. c. 183A, § 5(b). Furthermore, section 6(a) establishes that common expenses shall be charged to unit owners according to their respective percentages of the undivided interest in the common areas and facilities. G.L. c. 183A, § 6(a).

2 Tosney, 397 Mass. at 687, 493 N.E.2d at 490. Common areas are defined as:

1. The foundations, columns, girders, beams, supports, party walls, common walls, main walls, roofs, halls, corridors, lobbies, public stairs and stairways, fire escapes and entrances and exits of the building;
2. Installations of central services such as power, light, gas, hot and cold water, heating, refrigeration, air conditioning and incinerator;
3. The elevators, tanks, pumps, motors, fans, compressors, ducts, and in general all apparatus and installations existing for common use;
4. The land on which the building is located;
5. The basements, yards, lawns, gardens, recreational facilities, parking areas and storage spaces;
6. The premises for the lodging of custodian or persons in charge of the condominium;
7. Such community and commercial facilities as may be provided for in the master deed as being owned in common.
8. All other parts of the condominium necessary or convenient to its existence, maintenance and safety, or normally in common use.

G.L. c. 183A, § 1. Common expenses are defined as "the expenses of administration, maintenance, repair or replacement of the common areas and facilities, and expenses declared common expenses by this chapter." G.L. c. 183A, § 1.
expenses. Limited common areas and facilities are areas available for the use and enjoyment of one or more, but less than all of the unit owners.\(^3\) Approximately thirty-six jurisdictions have provisions in their condominium statutes expressly allowing for limited common areas.\(^4\) Furthermore, most states require that limited common areas must be designated in the master deed.\(^5\) During the Survey year, in *Tosney v. Chelmsford Village Condominium Association*,\(^6\) the Supreme Judicial Court ruled that chapter 183A permits the establishment of “limited” common area charges to fewer than all the unit owners and that the limited common area charges can be assessed pursuant to a recorded agreement between the condominium developer and the condominium association without amendment to the master deed.\(^7\)

In *Tosney*, the original developer of Chelmsford Village Condominiums executed and recorded a master deed in which the right to build additional units was reserved.\(^8\) According to the master deed, each unit owner was liable for a proportionate share of the common expenses.\(^9\) The master deed also provided that amendments to the master deed could be effectuated by a vote of three-quarters of the record owners and mortgagees.\(^10\) Also, such amendments had to be recorded in order to be effective.\(^11\)

The original developer experienced financial difficulties,\(^12\) and a second developer continued the construction of additional townhouse units and four “garden-style” buildings.\(^13\) The four “garden-style” buildings contained limited common areas such as elevators, underground parking,

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\(^4\) Id. n.24. See, e.g., *Conn. Gen. Laws Stat. Ann.*, § 47–68a(g) (West 1986) (“‘Limited common elements’ means and includes those common elements designated in the declaration as reserved for use of a certain unit or units to the exclusion of other units”).

\(^5\) *Condominium Law* at § 6.01 [5]. See, e.g., *Colo. Rev. Stat.* § 103(5) (1982) (“‘Limited common elements’ means those common elements designated in the declaration [master deed] as reserved for use by fewer than all the owners of the individual air space units’). See also, Norris v. Edwin W. Peck, Inc., 381 So.2d 353, 355 (Fla. Dist. Ct. App. 1980) (“Section 718.103(14), Florida Statutes (1979) defines ‘limited common elements’ as ‘those common elements which are reserved for the use of a certain condominium unit or units, to the exclusion of other units as specified in the declaration of the condominium’”).


\(^7\) Id. at 688, 493 N.E.2d at 491.

\(^8\) Id. at 684, 493 N.E.2d at 489.

\(^9\) Id.

\(^10\) Id.

\(^11\) Id.

\(^12\) Id. at 685, 493 N.E.2d at 489.

\(^13\) Id. “The original developer either was declared bankrupt or was terminated as a result of a foreclosure proceeding, and another developer continued the construction of the additional townhouse units and of four ‘garden-style’ buildings.” Id.
central heating and air-conditioning, which the townhouse units did not have.14 Shortly thereafter, the condominium association,15 through its board of directors, entered into an agreement with the second developer.16 The agreement, which was binding on successors and assigns, provided that a fee for the limited common areas be assessed to the owners of “garden-style” units in proportion to their respective percentages of beneficial interest.17 This agreement was later recorded in the appropriate Registry of Deeds.18

The plaintiffs bought a “garden-style” unit from the developer approximately one year after the developer and the condominium association entered into the agreement.19 At this time, the developer gave the plaintiffs a copy of the agreement in a condominium documentation booklet and several documents which referred to limited common areas.20 During the first month in which the plaintiffs lived in their new unit, the condominium association charged the plaintiffs a common area maintenance fee plus a limited common area fee.21

In August, 1983, the plaintiffs filed a consumer protection claim against the condominium association pursuant to chapter 93A, section 9, demanding a refund and refusing to pay future special or limited condominium fees.22 The plaintiffs then filed a complaint for equitable and monetary relief, claiming that the association had no authority under chapter 183A to assess a special common area fee to fewer than all unit owners

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14 Id.
15 A condominium association is an organization of unit owners, defined under chapter 183A, section 1 as a corporation, trust or association owned by the unit owners and used by them to manage and regulate the condominium. G.L. c. 183A, § 1.
16 Id.
17 Id.
18 Id.
19 Id.
20 Id.
21 Id. The master deed provided:

Common Areas and Facilities

Common Areas and Facilities shall consist of the entire property, including all parts of the building other than the Units, and including, without limitation, swimming pool(s) and cabana(s), driveways, walkways, bridge, lawns, tennis court(s), gate house, recreation building, exterior walls, roofs, structural components, sewage treatment plant, parking garage (except Townhouses), and common funds, as well as all other items stated in The Condominium Act . . .

Common Expenses

Common Expenses include expenses of administration, maintenance, operation, repair or replacement of the common areas, and expenses declared common expenses by provisions of this Declaration, the By-Laws or the Condominium Act.

Id. at 684 n.3, 493 N.E.2d at 489 n.3.
22 Id.
in the absence of a formal amendment to the master deed.\textsuperscript{23} The association then moved for and was granted summary judgment.\textsuperscript{24}

The Supreme Judicial Court began its analysis by stating that chapter 183A is essentially an enabling statute.\textsuperscript{25} Although the statute intended to establish certain minimum requirements for creating condominiums, the Court stressed that the statute also provides flexibility to developers and unit owners.\textsuperscript{26} Consequently, the Court stated that the parties are free to contract concerning issues not specifically addressed by chapter 183A.\textsuperscript{27} In addition, the Court looked to other, more modern jurisdictions which allow for limited common areas by statute, but also require these areas to be designated in the master deed.\textsuperscript{28}

The Court, however, agreed with the lower court that a treatment of special common areas can be derived from the statute’s discussion of common areas.\textsuperscript{29} The condominium statute, the Court concluded, permits special common expenses because special common expenses are extensions of the theory behind general common expenses.\textsuperscript{30} As an example, the Court noted that chapter 183A, section 1 defines common areas and facilities to include elevators, parking areas, and the installation of air-conditioning and heating systems.\textsuperscript{31} These facilities comprise the special or limited areas that were in question, and these areas were used solely by the plaintiffs and others who owned or occupied the “garden-style” units.\textsuperscript{32} Accordingly, the Court stated that it would be inequitable and illogical to force townhouse unit owners to pay a portion of the expenses for facilities from which they do not benefit.\textsuperscript{33} Thus, the Court concluded that the association had the right to assess the respective owners for their use of limited common areas.\textsuperscript{34}

The Court stated that the failure of the association to amend the master deed did not preclude the association from assessing owners of “garden-style” apartments for their use of limited common areas, although it

\textsuperscript{23} Id. at 685–86, 493 N.E.2d at 489–90.

\textsuperscript{24} Id. at 685–86, 493 N.E.2d at 489.

\textsuperscript{25} Id. at 686, 493 N.E.2d at 490 (citing Barclay v. DeVeau, 384 Mass. 676, 682, 429 N.E.2d 323, 326 (1981) ("Statutes like c. 183A which imprint the condominium with legislative authorization are essentially enabling statutes.")).

\textsuperscript{26} Tosney, 397 Mass. at 686–87, 493 N.E.2d at 490; See Barclay, 384 Mass. at 682, 429 N.E.2d at 326.

\textsuperscript{27} Tosney, 397 Mass. at 687, 493 N.E.2d at 490.

\textsuperscript{28} Id.

\textsuperscript{29} Id.

\textsuperscript{30} Id.

\textsuperscript{31} Id. (citing G.L. c. 183A, § 1).

\textsuperscript{32} Tosney, 397 Mass. at 687, 493 N.E.2d at 490.

\textsuperscript{33} Id.

\textsuperscript{34} Id. at 687, 493 N.E.2d at 490–91.
would have been "better practice" to amend the master deed. In this case, however, due to the notice the plaintiffs received as to the charges for the limited common areas, the Court stated that it was not necessary to formally amend the master deed. The Court observed that the plaintiffs received a copy of the agreement that had been entered into between the developer and the association. The agreement was properly recorded with the master deed. Moreover, an amendment to the master deed referred to the enforceability of "all other documents." Therefore, the Court stated that the recording requirements as set forth in the condominium statute ensured that the plaintiffs took title to their unit with sufficient notice that they could be assessed fees for special common areas used only by the "garden-style" condominium owners. Thus, the plaintiffs had the informed choice of whether to buy a "garden-style" condominium unit with its restrictions and fees, and the Court therefore agreed with the lower court’s ruling that the association had the legal authority to levy special common expense charges and increase the assessments according to the by-laws.

The Supreme Judicial Court, in Tosney v. Chelmsford Village Condominium Association, correctly decided in favor of the defendant association for several reasons. As the Court in Barclay v. DeVeau stated, the Massachusetts condominium statute does not prohibit unit owners from entering into valid agreements for management and control of the condominium. By analogy, a condominium association and its developer should also be able to enter into a valid agreement whereby management

35 Id. at 687–88, 493 N.E.2d at 490–91.
36 Id. at 687–88, 493 N.E.2d at 491.
37 Id.
38 Id. at 688, 493 N.E.2d at 491.
39 Id.
40 Id. (citing Johnson v. Keith, 368 Mass. 316, 331 N.E.2d 879, 882 (1975) (the plaintiff "had knowledge of all of the terms of the master deed and the by-laws when she received her unit deed, which subjected her property to the provisions of the master deed and the by-laws").
41 Id.
42 Id. The Court also found no merit to the plaintiffs’ contention that an increase of the limited common area fees in 1984 violated the terms of the master deed. Id. The plaintiffs relied on a provision of the master deed which stated that "no amendment shall . . . increase the Owner’s share in the common expenses, unless all the record owners of the units concerned, and all the record owners of mortgages thereon shall join in the execution of the amendment." Id. at 688 n.4, 493 N.E.2d at 491 n.4.

The Court held that the section relied on by the plaintiffs refers to an increase in the proportionate share of the unit owners and not an overall increase in the amount assessed. Id. at 688, 493 N.E.2d at 491. The by-laws gave the association the discretion to charge additional fees as needed. Id.
43 Barclay, 384 Mass. at 679, 429 N.E.2d at 325.
can reasonably control and maintain the limited common areas through raising maintenance funds from those who enjoy benefits from the limited common areas.

The condominium statute in Massachusetts does not contain provisions dealing with limited common areas. The Court followed precedent, however, stating that the condominium statute provides unit owners with flexibility. The condominium statute establishes a unit owner's obligation to comply with by-laws, rules and regulations and the lawful covenants, conditions and restrictions of the master deed and unit deed. Because restrictions in the master deed and in the by-laws may be amended by the unit owners, they resemble municipal by-laws more than private deed restrictions. Accordingly, an agreement such as that between the condominium association and the developer should be valid if the agreement serves a legitimate purpose, and if the means adopted are rationally related to the achievement of that purpose.

Finally, the Court properly held the plaintiffs to the laws of the condominium association because unit owners are subject to the terms of the condominium's master deed and to its by-laws. Since the plaintiffs' decision to purchase the "garden-style" unit within the condominium was apparently voluntary, any restrictions imposed on the plaintiffs, for this reason, were essentially self-imposed. With this type of restriction, an individual can choose at the time of purchase whether to buy the unit or to look elsewhere. Thus, the plaintiffs' situation was freely bargained for, and the plaintiffs should therefore be held to the same requirements as other owners of "garden-style" units at Chelmsford Village Condominiums.

The Supreme Judicial Court in Tosney v. Chelmsford Village Condominium Association, ruled that chapter 183A permits the establishment of limited common area charges to fewer than all the unit owners and that the limited common area charges can be assessed pursuant to a recorded agreement between the condominium association and its developer. While the Court strongly advised that condominium associations should

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44 See supra note 26 and accompanying text.
45 See G.L. c. 183A, § 4(3).
47 Franklin, 388 Mass. at 774, 447 N.E.2d at 1250. This test is applied when assessing the constitutional validity of municipal by-laws affecting economic relations between the parties. Id.
48 G.L. c. 183A, § 4(3).
49 See Franklin, 388 Mass. at 773, 447 N.E.2d at 1250.
50 See id.
amend their master deeds in these situations, the effect of this ruling is that unit owners who have actual notice of any restrictions which are attached to master deeds and are duly recorded, will be subject to those restrictions regardless of whether such restrictions are created or adopted by traditional methods within chapter 183A, section 11(b) or the individual condominium's by-laws.