Chapter 8: Zoning and Land Use

Richard G. Huber

Follow this and additional works at: http://lawdigitalcommons.bc.edu/asml

Part of the Land Use Planning Commons

Recommended Citation
CHAPTER 8

Zoning and Land Use†

RICHARD G. HUBER*

§ 8.1. Boston Linkage Payments: Authority. During the 1986 Survey year, Massachusetts courts reviewed Boston’s controversial linkage program. The linkage program, embodied in article 26 of the Boston Zoning Code, authorizes the City to exact fees from large-scale commercial developers seeking zoning relief. The fees are then dedicated to augmenting the pool of low and moderate income housing in the city.¹ The rationale behind the linkage concept is that because large-scale development attracts upper-income dwellers and displaces lower-income dwellers, commercial developers should therefore pay for the benefits they receive through such displacement. Nevertheless, without a rational nexus between the “wrong” committed by developers and the payment of a “penalty,” linkage exactions may run afoul of developers’ due process rights.²

In Bonan v. City of Boston,³ a group of abutters to the Massachusetts General Hospital filed suit against the hospital and the City.⁴ The plaintiffs challenged a zoning map amendment that the Boston Zoning Commission had granted to the hospital, contingent upon the payment of linkage fees. The abutters argued that the City did not have the authority to enact the

† Ed. Note: In order to keep the ANN. SURV. MASS. LAW current, the 1986 zoning and land use chapter surveys both 1986 and 1985 cases.

¹ RICHARD G. HUBER specializes in the areas of Property and Land Use Law in his teaching and is the former Dean of Boston College Law School. The author gratefully acknowledges the assistance of Tracey L. Davis, Joyce E. Rawlings, and Paul E. Salamanca in preparing this chapter.


⁴ The defendants included the Zoning Commission of Boston, the Boston Redevelopment Authority, and the hospital.
linkage program, and that the hospital would not have obtained zoning relief but for its pledge to pay linkage fees. The defendants challenged the abutters' standing to contest the linkage issue. The City also argued that it had at least implicit authority, under the enumerated purposes of Boston's zoning act, to enact the linkage program.  

In ruling for the plaintiffs, the superior court held that the abutters had standing to challenge article 26 and the zoning map amendment because they were persons aggrieved by the Zoning Commission's grant of relief to the hospital. The court examined Boston's zoning enabling act in detail, and held that the Zoning Commission lacked authority to enact article 26, and subsequently declared the article null and void.

The superior court reasoned that although the purposes of Boston's zoning act are broad, the powers it conveys are narrowly drawn, and do not explicitly or implicitly include the power to exact a fee in exchange for zoning relief. Additionally, the court noted that the linkage exaction in many ways resembled a tax, and as such, required specific statutory authorization. Finally, the superior court noted that in amending chapter 40A, which does not apply to Boston, the legislature explicitly authorized incentive zoning, which is analogous to the linkage concept. Therefore, had the legislature intended to grant Boston the authority to enact a linkage program, it would have stated so explicitly.

Upon direct review, the Supreme Judicial Court vacated the decision of the superior court, ruling that plaintiffs were not entitled to a ruling on the linkage issue. The Court noted that the plaintiffs were not liable for linkage fees themselves, and added that if the plaintiffs believed that the hospital's pledge to pay fees had improperly influenced the Zoning Commission, the plaintiffs' only course of action was to challenge the zoning map amendment in superior court. The Court thus failed to reach the issue of the City's authority to enact article 26, although it did state that the City might seek authority via legislation. Although it failed to reach the issue of linkage as it relates to the City of Boston, the Supreme Judicial Court remarked in a footnote, that chapter 40A, section 9, appears to authorize linkage programs in those communities to which

---

6 Id. at 14–19.
7 Id. at 19–20.
9 Bonan, No. 76438, slip op. at 21.
11 Id. at 323, 496 N.E.2d at 645.
12 Id. at 323, 496 N.E.2d at 645.
it applies. As a result, should the legislature extend to Boston the authority to implement linkage programs, the program will likely withstand subsequent judicial scrutiny.

§ 8.2. Nonconforming uses: Expansion of Residential Use. The Zoning Act, chapter 40A, has occasionally been criticized for its language, which often makes interpretation, or even comprehension, difficult. The first two sections of section 6,\(^1\) concerning the treatment of nonconforming uses, were criticized in Fitzsimonds v. Board of Appeals of Chatham.\(^2\)

In Fitzsimonds, the plaintiff appellants obtained a building permit to expand their one-story summer home by raising a dormer to create a liveable second story. Their house was one of ten units originally part of a cottage colony that was converted into condominium units in 1976. The Fitzsimonds obtained title to the house and the “footprint” of land on which it stood, plus a one-tenth undivided interest in the common areas and facilities. The colony as a whole comprised 80,000 square feet. The Fitzsimonds had a restriction in their deed that they would not occupy the premises year-round.

The Fitzsimonds’ summer home was a nonconforming use under a Chatham by-law enacted in 1978 requiring condominiums without public water or sewer access, such as the Fitzsimonds’, to have a minimum lot area of 15,000 square feet.\(^3\) Without regard to the area of their footprint,

\(^{'14}\) Id. at 319 n.9, 496 N.E.2d at 693 n.9.

§ 8.2. \(^1\) The language of G.L. c. 40A, § 6, (the first two sentences) is a particularly good example of the poor drafting of much of chapter 40A, and reads as follows:

> Except as hereinafter provided, a zoning ordinance or by-law shall not apply to structures or uses lawfully in existence or lawfully begun, or to a building or special permit issued before the first publication of notice of the public hearing on such ordinance or by-law required by section five, but shall apply to any change or substantial extension of such use, to a building or special permit issued after the first notice of said public hearing, to any reconstruction, extension or structural change of such structure and to any alteration of a structure begun after the first notice of said public hearing to provide for its use for a substantially different purpose or for the same purpose in a substantially different manner or to a substantially greater extent except where alteration, reconstruction, extension or structural change to a single or two-family residential structure does not increase the nonconforming nature of said structure. Preexisting nonconforming structures or uses may be extended or altered, provided, that no such extension or alteration shall be permitted unless there is a finding by the permit granting authority or by the special permit granting authority designated by ordinance or by-law that such change, extension or alteration shall not be substantially more detrimental than the existing nonconforming use to the neighborhood . . . .


\(^3\) Fitzsimonds, 21 Mass. App. Ct. at 54, 484 N.E.2d at 115 (citing SOUTH CHATHAM, MASS., BY-LAW 1.46 (1978)).
the Fitzsimonds’ one-tenth interest in the 80,000 square foot parcel could not conceivably meet this minimum.

When the Fitzsimonds were nearly finished raising their dormer, the building inspector issued a stop-work order, and informed the Fitzsimonds to apply for a special permit. After a public hearing, the Chatham Board of Appeals denied the permit, emphasizing that were the building permit granted, it would then be difficult to later deny a permit allowing year-round occupancy. Unhappy with the board’s decision, the Fitzsimonds filed a complaint in superior court under chapter 40A, section 17. Without a detailed discussion, the judge upheld the board’s action as not arbitrary or capricious and the plaintiffs appealed.\(^4\)

In remanding the plaintiff’s petition to the board for reconsideration, the Appeals Court noted that the board had improperly interpreted chapter 40A, section 6, which governs the treatment of nonconforming uses. The court held that under section 6, a zoning ordinance does not apply to the extension of a single-family residential structure,\(^5\) provided that the extension does not increase the nonconforming nature of the structure.\(^6\) If, however, the extension does increase the nonconforming nature of the structure, then, and only then, may the board consider whether the extension would be more detrimental than the existing nonconforming use.\(^7\) The court pointed out that the board had skipped the first step and addressed the second issue exclusively.

The court also ruled that the board erred by taking into account the anticipated difficulty in denying year-round occupancy permits, because this was a “putative problem to be found in the indefinite future upon now uncertain facts.”\(^8\) The court noted, however, that the board was empowered to consider the plaintiffs’ applications as a “bellwether” of other applications, because two other stop-work orders had been issued. The board was thus authorized, on remand for rehearing, to weigh other issues, such as parking, density, and sewage difficulties.\(^9\)

The court reached what seems the proper interpretation of the first sentence of chapter 40A, section 6. Statutory interpretation in accordance with the “plain meaning” rule has been subject to substantial criticisms for some decades. It does, however, seem unwarranted for legislatures to draft statutes so that the language, and the subsequent construction

\(^{5}\) For procedural economy, the court proceeded on the basis that the plaintiff’s cottage constituted a single-family residence within the meaning of section 6. Id. at 56, 484 N.E.2d at 116.
\(^{6}\) Id. at 55–56, 484 N.E.2d at 115–16.
\(^{7}\) Id. at 56, 484 N.E.2d at 116.
\(^{8}\) Id. at 57, 484 N.E.2d at 116.
\(^{9}\) Id. at 57–58, 484 N.E.2d at 116–17.
§ 8.3. Nonconforming use: Notice of Decision. In Cappuccio v. Zoning Board of Appeals of Spencer,¹ the Supreme Judicial Court shed light on certain procedural aspects of chapter 40A, the Zoning Act. In Cappuccio, the plaintiffs owned a parcel of land known as Sherwood Beach. In February 1985, an intervenor filed a petition with the Spencer Zoning Board of Appeals, alleging that the plaintiffs’ use of Sherwood Beach as a concert site was an extension of a nonconforming use. After a public hearing, at which the plaintiffs were present along with counsel, the board found that the plaintiffs’ use did constitute an extension of a nonconforming use. The board filed its decision with the town clerk on April 17, 1985, but failed to mail notice of the decision to the plaintiffs.

On May 8, 1985, twenty-one days after the board filed its decision, the plaintiffs filed a complaint in superior court challenging the board’s ruling. The superior court subsequently granted summary judgment in favor of the defendants, noting that chapter 40A, section 17, requires a person aggrieved by a decision of the board of appeals to bring an action within twenty days after the decision has been filed with the town clerk. The plaintiffs had failed to meet this deadline. The plaintiffs appealed this ruling, asserting that under section 17, a ninety-day appeal period rather than a twenty-day period applied. Therefore, the board’s failure to notify the plaintiffs violated the statute and denied the plaintiffs procedural due process.² The plaintiffs also appealed the superior court’s ruling denying them leave to file an amended complaint, which would have added two requests for declaratory judgment. One sought a declaration as to whether the board’s decision applied to the plaintiffs’ existing nonconforming use of part of Sherwood Beach as a concert site. The other sought a declaration that the board’s decision was a nullity, owing to the alleged pre-disposition of one of the board members against the plaintiffs.

The defendants challenged the failure of notice argument contending that under chapter 40A, section 15, notice of the board’s decision need

---

² Section 17 further provides that the appeal within twenty days shall be exclusive, notwithstanding any defect of procedure or of notice other than notice by publication, mailing or posting as required by this chapter, and the validity of any action shall not be questioned for matters relating to defects in procedure or of notice in any other proceedings except with respect to such publication, mailing or posting and then only by a proceeding commenced within ninety days after the decision has been filed . . . .

G.L. c. 40A, § 17.
only be mailed to the petitioner (the intervenor), abutters, and parties who request at the hearing that notice be mailed to them. The defendants argued that plaintiffs fit none of these categories. Defendants further contended that the defect in notice for which section 17 provides a ninety-day appeal period applies only to prior notice of a hearing.

Upon direct appellate review, the Supreme Judicial Court held that as owners of the property subject to the board’s decision, the plaintiffs were entitled to have notice of the board’s decision mailed to them. The Court reasoned that any other result would be absurd, and that the legislature surely intended “petitioners” to encompass the owner of the affected land. The Court held, however, that the failure of the board to notify the plaintiffs of its decision was not the type of defect for which section 17 provides a ninety-day appeal period. Agreeing with the defendants, the Court held that such defects are limited to defects of prior notice, as provided by chapter 40A, section 11. The Court added that the plaintiffs had not been denied procedural due process, because they were present at the hearing. The Court further noted that it was not unreasonable to require plaintiffs to inquire periodically of the town clerk regarding whether the board had filed its decision. Finally, the Court upheld the superior court’s denial of leave to file an amended complaint. They noted that the first claim for declaratory judgment, based on the applicability of the board’s ruling to an existing nonconforming use, was a claim on the merits and therefore barred by section 17. The second claim concerning predisposition of one of the board members was, according to the Court, insufficiently alleged.

The Court correctly found that despite the plain language of the statute, and although the landowner was entitled to notice of the decision, the ninety-day appeal period applies only to errors at the hearing itself and not to post-hearing errors such as failure to mail notice. In Cappuccio, 398 Mass. at 307-09, 496 N.E.2d at 648-49.

Section 15 provides that notice of the board’s decision “shall be mailed forthwith to the petitioner, applicant or appellant, to the parties in interest designated in section eleven, and to every person present at the hearing who requested that notice be sent to him and stated the address to which such notice was to be sent.” G.L. c. 40A, § 15.

Cappuccio v. Zoning Board of Appeals of Spencer, 398 Mass. at 307-09, 496 N.E.2d at 648-49. This is another example of the drafting problems of chapter 40A.

The Court also noted that before the legislature amended the Zoning Act by St. 1975, c. 808, the appeal period for defects of notice was unlimited. Thus the ninety-day period provided in section 17 was designated not to extend the period of appeals on the merits, but to limit the period of appeals caused by defects of notice. Cappuccio, 398 Mass. at 310, 496 N.E.2d at 649.

Id. at 312-13, 496 N.E.2d at 651.

Id. at 313-14, 496 N.E.2d at 652.
the plaintiffs were present at the hearing and had adequate time to prepare their case. Although the duty to inquire frequently of the clerk regarding the filing of the board’s decision may impose upon those who desire notice by mail, such inquiry hardly seems any real burden on a landowner whose property is seriously affected by the decision. Although the Court concluded in Cappuccio that the failure to notify by mail did not amount to a deprivation of procedural due process and that the ninety-day appeal period did not apply to this type of error, “notice reasonably calculated” of the pendency of an action remains a fundamental requirement of due process. Because notice by mail best meets this requirement in most cases, it is unlikely that town and city clerks will use Cappuccio as an excuse not to mail notices of decisions to affected parties.

§ 8.4. Dover Amendment and Licensing Power. Massachusetts is unique in having as a part of its zoning law the “Dover Amendment,” a provision forbidding communities from excluding land uses for religious and educational purposes in any section of a city or town. The extent of this provision was challenged in the 1985 Survey year in Newbury Junior College v. Town of Brookline. In this case, Newbury sought a lodging house license to use two buildings it owned for dormitory purposes. The buildings had been owned by Cardinal Cushing College, which had in the past used them for dormitories. Prior to 1965, no lodging house permits had been necessary, but a statutory amendment adopted that year made all dormitories subject to the local licensing authority for lodging houses. The selectmen of Brookline denied this permit, basing their denial on what appeared to be the very general standard of community interest. They failed to view their authority as limited by more precise standards or by the effect Newbury’s license would have under the Dover Amendment. The trial court reversed the decision of the selectmen and, instead of remanding the case for further consideration, ordered the town to issue the permits. The judge found the denial of the permits unreasonable and arbitrary. The town appealed.

The Appeals Court first noted that licensing authorities may exercise various levels of discretion in granting and denying licenses, depending upon the nature of the permit sought, the purpose of the relevant statute, and the language of the statute itself. As it noted, board discretion tends to be great in cases where moral depravity is at issue, whereas the board

§ 8.4. 1 G.L. c. 40A, § 3. The latest form of this provision, adopted in 1975, does permit a group of reasonable physical restrictions on use. The language relevant to this chapter prohibits zoning that may “prohibit, regulate or restrict the use of land or structures for . . . educational purposes on land owned . . . by a non-profit educational institution.”


3 G.L. c. 140, § 22.

Published by Digital Commons @ Boston College Law School, 1986
has no discretion to deny other licenses once prescribed conditions are met. Lodging house licenses were initially authorized because of a fear that if not licensed they could foster immoral conduct, and thus should be subject to local control. The inclusion of dormitories under these provisions occurred, the court suggested, at a time of increased radicalism and disruption on college campuses, and greater tolerance in the dormitory environment for conduct traditionally deemed immoral. The court thus found sufficient support for the lower court’s determination that the purpose of the lodging house laws, in general and as applied to dormitories, was to assure that the housing would be orderly, law-abiding operations, and responsibly managed by appropriate persons, in addition to being safe, sanitary and fit for human habitation. The court further sustained this reading of the limits on the power of the selectmen by noting that chapter 140, section 30, which governs revocation of a lodging house license, cites unfitness of the licensee as grounds for revocation. Section 30 authorizes suspension for any cause deemed satisfactory to the selectmen, which is a substantially less drastic penalty than revocation.

In Newbury, the selectmen’s argument that the court’s restrictive reading would give them no authority not already available to them under building law and public nuisance abatement powers, was summarily rejected. The court stated that the licensing power triggers notice to the local authorities that they should monitor the premises. The court subsequently noted that if the Brookline board “general interest” criterion were accepted, the town would be able to prevent the application of the Dover Amendment to this property.

It is clear that the zoning law provision prevents the use of any zoning by-laws or ordinances that result in forbidding valid educational and religious institutional uses, although reasonable regulation is permitted. The town, and the neighbor intervenors, in Newbury, stressed that the licensing provisions operate independently of zoning, and are thus a parallel regulatory system. As they noted, regulation of wetlands has been held to operate independently of zoning. The court itself noted that the rejection of a license for a bowling alley was sustained, when the use was permitted under the zoning by-law, and reached a similar result when the selectmen refused a permit to store explosive and inflammable materials, despite a board of appeals’ license to give the landowner a variance and a special permit for this purpose.

In Newbury, however, the denial of the licenses flatly contravened an

---

4 Under G.L. c. 131, § 40.
5 Marchesi v. Selectmen of Winchester, 312 Mass. 52, 42 N.E.2d 817 (1942).
express legislative purpose to permit educational uses on the locus. The town’s reason for denying the license was quite clearly that the neighbors did not want an educational institution at this particular location. It is difficult to find a more blatant refusal to be bound by state law, or any possible policy argument that would reconcile statutory language in a manner that might permit this attempted indirect refusal to comport with a clear legislative mandate.

The court also upheld the superior court’s order to the town to issue the permits, rather than remand the case. It noted the problems that Newbury and its predecessor had already had in using this locus for educational purposes. Such a consistent obstruction of lawful use gave neither the trial court nor the Appeals Court any confidence in the potential for fair adjudication by Brookline in handling this case on remand.

Certainly those interested in zoning, and in the Dover Amendment, owe Brookline gratitude for its persistent attacks on the Amendment, since the cases arising from these actions have done much to clarify the breadth and limits of the exception. It may be little consolation to the town that it has indirectly provided instructions to Massachusetts practitioners in its persistent efforts to repeal the Dover Amendment. Perhaps the Amendment itself may appropriately be limited by direct legislative action. No other states have such a broad exemption provision and this may suggest that some constriction might be feasible without any important negative effects on religious and educational institutions. Unfortunately, those who seek to attack this provision in the courts do not present themselves as unselfish proponents of the public weal, and thus create an environment that makes rational discussion of legislative alternatives difficult.

§ 8.5. Exemption for Educational Purposes: Breadth of Coverage. One issue continually facing local zoning boards and the courts is the extent of the exemption from zoning restrictions given to institutions with claimed educational purposes.\(^1\) The dispute arose again in *Whitinsville Retirement Society v. Town of Northbridge*,\(^2\) in a situation involving a mix of both educational and non-educational objectives.

The plaintiff, owner of a nine acre tract of land in the defendant town, was granted a special permit in 1975 to use premises on the tract for housing, shelter and care of retired persons. The permit allowed eventual construction of additional buildings for these uses. Although the State Department of Community Affairs eventually granted a building permit in 1980 to build an independent living facility on the premises, several

---

\(^1\) G.L. c. 40A, § 3.
attempts by the plaintiff to add to its facilities, both before and after
the 1980 permit was granted, were denied on the grounds that a variance or
special permit was required. The plaintiff’s appeals from various town
actions were denied for failure to exhaust administrative remedies and
for failure to comply with the statutory time for appeal. Plaintiff brought
this action in the land court under chapter 240, section 14A, and chapter
185, section 1(j 1/2).

The lower court found that the plaintiff’s plan included programs where
more able residents would assist less able residents; in addition to having
individuals, both from within and outside the complex, aid the elderly
residents by teaching them crafts. On this basis the land court found that
because the plaintiff was a non-profit institution performing an educa-
tional purpose it was exempt from the Northbridge zoning by-law. The
Town of Northbridge appealed the land court’s decision and the Supreme
Judicial Court reversed.

In its analysis, the Court noted that many activities of non-profit cor-
porations involve an element of education. Nevertheless when an excep-
tion is granted to an institution because of its educational purposes, these
purposes must be its primary or at least fundamental effort. The land
court in analyzing the work of the plaintiff, only found that there was
“an element of education.” Therefore, according to the Supreme Judicial
Court, the land court’s conclusion that the plaintiff was exempt was in
error. The Court reasoned that the educational function of the retirement
home was clearly secondary to the home’s primary function of caring
and providing for the elderly residents. ³

The Court also noted that according to the provisions of chapter 240,
section 14A and chapter 185, section (j 1/2), the land court lacked juris-
diction to determine the validity of plaintiff’s permit. According to the
Court, the land court’s jurisdiction is limited to determinations of the
validity of its application to the plaintiff’s land. ⁴ Because the land court
only examined the extent of the plaintiff’s 1975 permit and not the by-
law’s validity or its application to the plaintiff’s case, it had exceeded
its jurisdiction. ⁵

One can sympathize with the plaintiff’s frustration resulting from the
town’s denial of its plan for expanded operations. Nevertheless, the

³ For instances of facilities with mixed uses where educational purposes were found to
be primary, see Fitchburg Housing Authority v. Board of Zoning Appeals of Fitchburg,
396; Harbor Schools, Inc. v. Board of Appeals of Haverhill, 5 Mass. App. Ct. 600, 366
⁴ Whitinsville Retirement Society, Inc. v Town of Northbridge, 394 Mass. at 763, 477
N.E.2d at 411.
⁵ Id.
plaintiff had had a prior opportunity to contest the by-law’s validity, but failed to take timely action. Although the plaintiff’s belated claim questioning the extent of its permit evoked sympathy because of the residents it served, it did not comport with the precedents and statutes of the Commonwealth and therefore, the land court’s awarding of an exception was in error.

§ 8.6. Zoning Exemption for Religious Use: Extent. In *Southern New England Conference Association of Seventh-Day Adventists v. Town of Burlington*, the Seventh-Day Adventists Church Association, in 1978, purchased approximately two acres of land located in a residential district in the Town of Burlington. The land included a brook running through the middle of the property. The church planned to construct on the parcel a building with an adjoining parking lot. The church applied for a special construction permit, which was denied because the proposed use violated the town’s wetlands by-law. A substantial part of the tract had been classified as wetlands under the town’s amended zoning by-law, which superimposed a wetlands overlay district on the districts in the area. The town’s by-law defined wetlands as all lands within the boundaries designated as wetlands on certain topographic sheets prepared in 1977. These maps were made a part of the zoning by-law in 1979.

In 1982, the church hired the engineering company which had prepared the original topographical sheets to resurvey the parcel. The firm concluded that the original topographical sheets did not accurately depict the exact location and configuration of the “existing brook” on the face of the earth.” The firm recommended that the boundary line of the wetlands be relocated approximately 150 feet back from the front of the parcel toward the brook. A second plan was prepared and the church applied for placement of the wetlands boundary at the line established by the November, 1982 survey. The town refused to take any action on a town meeting article making this change, contrary to the recommendation of both the planning board and conservation commission. The church filed this action in the land court pursuant to chapter 240, section 14A and chapter 185, section 1 (j 1/2). The church first sought a determination that it was exempt from the town’s wetlands by-laws because it was a religious institution. It further sought to invalidate the classification of its land as wetlands. The land court held against the church on both issues and the church appealed.

---

§ 8.6. 1 The wetlands illustrated on the topographic sheets were in accord with the Wetlands Protection Act, G.L. c. 131, § 40.
3 *See* G.L. c. 40A, § 3.
On appeal the church contended that the town lacked the power to adopt a zoning by-law that regulated the use of the land merely by designating the tract as wetlands. The church conceded, however, that the town may regulate the church lands by lawful wetlands restrictions adopted in the form of a general by-law rather than a zoning by-law.\(^4\) In its analysis, the Appeals Court reviewed the purposes of chapter 40A, section 3, and the Wetlands Protection Act and stated that the two statutes address differing, non-competing interests. According to the court, the religious exemption insures that religious denominational preferences will not be established by a municipality\(^5\) and that religious uses can be placed at suitable sites in a municipality, subject only to reasonable dimensional regulations.

The Wetlands Protection Act,\(^6\) in turn, does not govern particular land uses, but is, as the Appeals Court described it, "use-neutral." The Act has the broader purpose of protecting wetlands from developmental intrusion. Thus, under this wetlands legislation, the Agency of Wetlands Conservation or other similar districts may bar or appropriately restrict uses so that they are fully compatible with the area's wetland environment. The location and boundaries of wetland districts, according to the Appeals Court, are determined by the wetlands themselves and not by the use to which the tracts within them are to be used. The court emphasized that a municipality may establish more stringent controls than those established by state law and in proper cases may even "prohibit outright any disturbance of covered lands."\(^7\) The court noted that a municipality has the authority to preserve its wetlands, either by means of the zoning power,\(^8\) or by means of its general legislative power.\(^9\) Thus, the Appeals Court held that as long as the dominant purpose of the local by-law is the proper protection of wetlands values, the form of regulation chosen does not matter. It also ruled that the legislature did not intend that section 3 of chapter 40A exempt a religious use from lawful wetlands control under a local zoning by-law, so long as the regulation has wetlands protection as its dominant purpose.

In general, a wetlands zoning by-law will be held valid if there is a substantial relationship between it and the furtherance of any of the objectives of wetlands protection.\(^10\) Thus the issue of whether the bound-

\(^6\) G.L. c. 131, § 40.
\(^7\) Lovequist, 379 Mass. at 15, 393 N.E.2d at 863.
\(^9\) See Lovequist, 379 Mass. at 12, 393 N.E.2d at 862.
ary established by the town’s by-law is valid, as applied to the church’s land, must be determined by examining whether the by-law has the required relationship with a reasonable purpose for wetlands protection. The court held that the facts and exhibits presented in *Southern New England* were insufficient to guide an informed decision regarding this question. Thus, attempting to decide whether the application of the wetlands boundary was lawful would require speculation resulting in prejudice to one party or the other. Nevertheless, according to the court, under chapter 240, section 14A and chapter 185, section 1 (j 1/2), the church has the right to seek a determination of the validity of the by-law as applied to its land. Thus, the Appeals Court affirmed the first paragraph of the amended judgment and held the church may move in the land court to secure a determination of the validity of the wetlands by-law as applied to its land.

The religious and educational exemption for local zoning regulation, except for certain dimensional limitations, applies only to zoning and not to other state, or state-authorized, legislation. *Southern New England* illustrates that certain policies may prevail over this exemption and can even be written into the zoning law of a community. Obviously the use of a state’s non-zoning municipal power cannot be used as a charade or pretense to avoid the zoning law limitation. Nevertheless, the present case indicates the limits of this zoning protection when another critical public policy requires consideration. One can assume, of course, that such a public policy must be one of great weight and not one of merely public convenience or preference. Such a limitation is thus seldom likely to be found.

§ 8.7. Subdivision Control: Changes Affecting Landowners. During the 1985 Survey year, the Appeals Court examined the validity of a planning board’s approval of a subdivision plan. In *Patelle v. Planning Board of Woburn*, the defendant planning board, acting under chapter 41, section 81W, approved modifications to a subdivision plan. The modifications transformed a cul-de-sac into a through street, created house lots in previously open space areas, and changed the location of a particular open space. The plaintiff residents of the subdivision sought review of the planning board’s approval of the plan, contending that the modification adversely “affected” them and that, within the meaning of the statute, subdivision lot owners’ and mortgagees’ consents were required prior to approval of the subdivision modifications.

---


Chapter 41, section 81W permits a planning board to modify, amend or rescind its approval of a plan of a subdivision. The issue thus was whether the planning board, exercising powers conferred under the statute, could approve the modifications as it did without the consent of the plaintiffs. The court held that it could, and affirmed the superior court’s judgment for the defendants.

In holding for the defendant planning board, the court reasoned that the word “affect” in the statute did not have the broad meaning that the plaintiffs ascribed to it. According to the court, the plaintiffs’ complaints about noise and traffic as well as an unwanted backyard neighbor were matters with which the statute was unconcerned. Analyzing the legislative history, the court found that the legislature sought to guard against plan modifications that impaired the marketability of titles, and not those changes which have an indirect qualitative effect on persons owning property in the subdivision.

The court properly pointed out that, even had the legislative history been less certain, the plaintiffs’ contentions in this case would possibly paralyze or seriously hamper planning boards’ powers to coordinate ways in a subdivision with other roads in the municipality, a duty the board has under chapter 41, section 81M. By construing “affect” to cover any type of impact, the statute would protect owners too broadly and severely limit the power of planning boards to regulate the local subdivision process. The cost of limiting planning boards’ power in exchange for unlimited owner veto power is too great a cost to bear when decisions concerning community planning are at stake.

§ 8.8. Constructive Grant: Statutory Uncertainty. In two cases decided in 1985, both the Supreme Judicial Court and the Appeals Court were faced with interpreting the semi-penetrable language of chapter 40A, section 15. In Zuckerman v. Board of Appeals of Greenfield, the plaintiff sought a permit to erect a playground at his McDonald’s franchise. The inspector denied the petition on the grounds that it would violate local zoning governing the placement of signs. On September 20, 1982, Zuckerman filed an appeal to the zoning board. A public hearing was held on
November 18, 1982, and on that same date, the board voted to overrule the inspector yet subjected the grant to substantial limitations. On December 3, 1982, fifteen days after the board had made its decision, the board filed written copies of the decision with the town clerk. The statute requires that the decision be filed within fourteen days, but does not state from which point in time the fourteen day period commences. Zuckerman argued that under section 15, the failure to file within fourteen days following the date of the actual decision resulted in the constructive grant of the permit. The Court, however, held that the fourteen day period was directory, not mandatory. According to the Court, as long as the time from the filing of the application to the formal filing of the written decision did not exceed the seventy-five day period set out in paragraph 5 of section 15, there was no constructive grant of the permit. In Zuckerman, the board filed its decision seventy-four days after the appeal was filed thereby, under the Court’s remedy of the statute, preventing a constructive grant of the permit. The Court found that, even though the language is imperative in form, the time of filing does not go to the essence of the thing to be done and is only a regulation for orderly conduct of public business. The Court distinguished Zuckerman from its decision in Capone v. Zoning Board of Appeals of Fitchburg, where it held that there was a constructive grant when the board acted within seventy-five days but did not file its formal opinion for 110 days following the filing of the application. The Court found, in Capone, that such a delay could create the prospect of a perpetual cloud on the rights of a landowner to use his or her land.

In O’Kane v. Board of Appeals of Hingham, the Appeals Court was similarly confronted with the task of interpreting section 15. In O’Kane, the plaintiff sought a variance which was orally denied at the public hearing forty-one days after the filing of the application. The written decision was, however, filed thirty-five days later, or seventy-six days after the filing of the application. The question thus was whether the failure of the board of appeals to file its written decision within 75 days of the application’s filing resulted in the constructive grant of the variance.

The Appeals Court noted that the Supreme Judicial Court had, after

---

5 Just as the Supreme Judicial Court had done in Zuckerman, the Appeals Court in O’Kane was forced to reconcile the seemingly conflicting provisions of chapter 40A, section 15, which provides that a decision must be made within seventy-five days after the filing of an appeal and the requirement that the board file its decision within fourteen days from making its decision.
the superior court had rendered its decision in this case, held that the fourteen day period for filing the opinion was directory, not mandatory.\textsuperscript{6} The Appeals Court relied on the Supreme Judicial Court's reasoning that as long as the filing was within seventy-five days of the application, there would be no constructive grant of the variance. Although the statute is not clear in its language, the Court read it to mean that the fourteen day filing requirement is not a factor in the analysis and should not shorten the seventy-five day period of the constructive grant.

Justice Kaplan refined the \textit{Zuckerman} analysis, finding that on the facts of \textit{O'Kane}, the actual period could be extended as long as seventy-five days plus the fourteen days for filing the written decision, with the obvious requirement that the decision itself be made within the seventy-five day period. As Justice Kaplan stated: "[w]e think this . . . position accommodates better to the text and scheme of section 15, such as they are."\textsuperscript{7}

It is probably, at this point, fruitless to admonish the drafters of the Zoning Act regarding its language. Nevertheless, it is inexcusable for statutory language to be so uncertain in its meaning that simple questions, such as those in the present cases, are not resolvable from the text. If ever the plain meaning rule of statutory interpretation should be meaningful, it should be in a statute which sets specific times within which certain actions must be taken.

\textbf{§ 8.9. Historic District: Certificate of Appropriateness.} In \textit{Anderson v. Old King's Highway Regional Historic District Commission},\textsuperscript{1} the Sandwich Historic District Commission (local committee) denied the plaintiffs a certificate of appropriateness for the installation of vinyl clapboards over the painted shingles of an ell added one hundred years ago to a house that had been built in 1703. The house, owned by the plaintiffs, was located within the Old King's Highway Regional Historic District.

The plaintiffs appealed the local committee's decision to the regional commission which similarly rejected the plaintiffs' claim and affirmed the local committee's decision. The plaintiffs then appealed to the district court which found facts and concluded that the committee should have issued a certificate of appropriateness. The Appellate Division of the district court reversed the trial judge's decision, and the plaintiffs then sought review by the Supreme Judicial Court.

The local committee denied the certificate of appropriateness based on the following contentions: the application involved a house of substantial

\textsuperscript{6} See \textit{Zuckerman}, 394 Mass. at 667, 477 N.E.2d at 135.
\textsuperscript{1} § 8.9. 397 Mass. 609, 493 N.E.2d 188 (1986).
§ 8.9

ZONING AND LAND USE

261

historic significance in an important part of the historic district; the plaintiffs applied vinyl siding to the rear of the house without the committee’s permission even though they had notice of the regional commission’s guidelines pointing to the problem of installing vinyl siding on old houses; there would be no hardship to the plaintiffs in denying the application because there were reasonable alternatives to vinyl clapboards; and a detrimental precedent would be set by allowing the plaintiffs to change the siding in the ell from shingles to clapboards. On appeal, the regional commission did not exercise its own independent judgment of the facts and reviewed the local committee’s decision only with an eye towards determining error. The commission concluded that the local committee’s decision had a reasonable, factual basis and thus, it acted appropriately. The district court judge, however, elaborated upon the local committee’s fact finding and further found that only a trained eye at close range could distinguish vinyl clapboards from wooden clapboards. Hence, the judge concluded on this ground that the architectural change undertaken by the plaintiffs was not inappropriate. To that conclusion, the Supreme Judicial Court disagreed and affirmed the decision of the Appellate Division.

The Court held that the district court’s conclusion that only the trained eye at close range could distinguish vinyl clapboards from wooden clapboards was not an appropriate standard because the facts involved replacing painted wooden shingles with vinyl clapboards. The Court noted that the district court judge’s standard of “obviousness to the ‘untrained eye’” was a suspect reading of the measure of appropriateness under the statute. According to the Court, even if the judge’s reliance on the “untrained eye” standard were correct, it is unhelpful because both the trained and the untrained eye can differentiate between vinyl siding and painted wooden clapboards.

The Court, in its decision, examined the standards of review used by the regional commission, district court, appellate division of the district court, and the Court itself. According to the Court, the authorizing statute identifies the appropriate standard with reasonable precision.

---

3 St. 1973, c. 40, § 10, as amended states: “The committee shall not make any recommendations or requirements except for the purpose of preventing changes in exterior architectural features obviously incongruous to the purposes set forth in the act.”
5 G.L. c. 40c, §§ 7, 10(a), (g); St. 1973, c. 470, §§ 6, 8, 10 as amended; St. 1975, c. 845, § 13. The Court noted, 397 Mass. at 611 n.4, 493 N.E.2d at 191 n.4, that the district court record made under St. 1976, c. 845, § 13 is unsatisfactory for a fully adequate review. According to the Court, the procedure requires a report of the evidence but not of the
local committee’s decision only was required to meet a standard that it was not in excess of its authority, was not an exercise of poor judgment, and was not arbitrary, capricious or erroneous.\footnote{Anderson, 397 Mass. at 611, 493 N.E.2d at 191 (citing Gumley v. Selectmen of Nantucket, 371 Mass. 718, 723-24, 358 N.E.2d 1011, 1015 (1977)).}

Although \textit{Anderson} arose under a special historic district statute rather than the Historic District Act,\footnote{G.L. c. 40C.} the Supreme Judicial Court’s opinion clarifies the standards that must be applied in reviewing local committee action. As the Court noted, the standard of review by the district court under the act is the same as that governing the granting or denial of special permits under local zoning regulations. The line of decisions cited by the Court in \textit{Anderson} provides extensive guidelines regarding the appropriate standard of review.

\section*{§ 8.10. Minimum Lot Size: Grandfathering.} At issue in \textit{Baldiga v. Board of Appeals of Uxbridge}\footnote{395 Mass. 829, 482 N.E.2d 809 (1985).} was the interpretation of another loosely drafted provision of the Zoning Act, in this case chapter 40A, section 6. Section 6 provides grandfather clause exemptions for minimum size increases to lots for single-family homes.\footnote{G.L. c. 40A, § 6, provides in relevant part:}

> 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.

On November 14, 1979, the plaintiff, as sole trustee of a realty trust, purchased a parcel of land comprising three lots in an area of Uxbridge zoned for agricultural use. Baldiga purchased these lots with the intention of erecting single-family homes upon them. Under the zoning by-law in findings of the district judge. Thus the Court left open whether errors of law not arising from denials of requests for rulings could be appealed.
effect at that time, single-family homes could be constructed in agricultural zones provided the lots had a minimum frontage of 200 feet and a minimum area of one acre. All three lots met both requirements.

On May 13, 1980, the town amended its zoning by-law to require a minimum frontage of 300 feet and a minimum lot size of 2 acres for the construction of single-family homes in an agricultural zone. This amendment became effective on May 20, 1980.

In October 1983, the plaintiff applied for building permits to build single-family residences on the lots, and the town building inspector denied the applications. The plaintiff then appealed the inspector’s decision to the town board of appeals, which denied the appeal on the grounds that the lots did not meet the requirements established by the 1980 amendment.

The plaintiff then brought an action in superior court, arguing that his application met all the requirements for a grandfather exemption set forth in the second sentence of section 6: to wit, that five years had not elapsed since the effective date of the zoning amendment, that each lot had been recorded or endorsed before the zoning amendment, that each lot was held in common ownership with adjoining land, and that the lots conformed to the existing zoning requirements as of January 1, 1976. Thus, Baldiga had to have recorded a plan, each lot had to be held in common ownership with an adjoining lot and the lots had to conform with zoning requirements existing as of January 1, 1976. The town argued that because Baldiga had recorded his plan after the 1976 Act, although before the zoning amendment of 1980, he was not entitled to an exemption.

Upon motions for summary judgment, the superior court held for the plaintiff and ordered the permit to issue, noting that the town’s interpretation of section 6 was inconsistent with principles of statutory construction and tended to undermine expressed legislative intent.

On direct appellate review, the Supreme Judicial Court upheld the superior court. Examining the statute closely, the Court noted that the town’s attempt to modify the entire second part of the second sentence of section 6 with the phrase “as of January 1, 1976” violated “the general rule of statutory as well as grammatical construction that a modifying clause is confined to the last antecedent unless there is something in the subject matter or dominant purpose which requires a different interpretation.” The Court further noted that the town’s interpretation of the statute would largely negate the provision which exempts a single-family

---

3 Baldiga v. Board of Appeals of Uxbridge, 395 Mass. at 832, 482 N.E.2d at 811.
4 Id.
5 Id. at 833–34, 482 N.E.2d at 812.
6 Id. at 833, 482 N.E.2d at 811 (quoting Moulton v. Brookline Rent Control Bd., 385 Mass. 228, 230–31, 431 N.E.2d 225, 227 (1982)).
lot for five years after January 1, 1976, whichever is later. The Supreme Judicial Court also agreed with the superior court’s observation that the legislature intended the statute to have “continuing applicability,” which it could only have under the plaintiff’s interpretation.

The town also argued on appeal that the plaintiff’s interpretation of section 6 would permit “checkerboarding” as a means of avoiding compliance with local zoning requirements. The Court described checkerboarding as a practice in which a landowner divides a large parcel of land among two or more straws so that no one holds two contiguous lots. The town argued that permitting this practice frustrated the purpose of chapter 40A, which is to facilitate exercise of the zoning power by municipalities. Although the Court did not controvert this assertion, it nevertheless rejected the argument, noting that the specific purpose of the second sentence of section 6, as enacted by St. 1979, c. 106, was “to grant grandfather rights to owners of certain lots of land.”

_Baldiga_ settles an issue that has been debated since Chapter 40A, section 6 was adopted. Clearly the result accords with the general purpose of this section since the town’s interpretation would destroy the concept of grandfathering in many situations to which it, at least under the prior law, would apply. Furthermore, if the legislature had intended such a major change, it would have likely stated so with some precision.

§ 8.11. Lot Size: Authorization of Special Permits for Existing Structures. In _Wizansky v. Board of Appeals of Brookline_, the Appeals Court reviewed the grant of a special permit for the construction of a narrow driveway adjacent to a property line. The plaintiff’s neighbors, the Williams, owned a home in a densely settled area of Brookline. They had no driveway, which required Mrs. Williams, a nurse, to park two blocks away from her home following her midnight shift so as to comply with Brookline’s overnight parking ban. Furthermore, the Williams’ lack of driveway space also required the Williams’ tenant, a handicapped individual, to park on the street at night.

The Williams’ sideyards were 8.00 to 8.65 feet on the left side of their house, and nine feet or slightly more on the right. The Williams could

---

7 _Id._ at 833, 482 N.E.2d at 812.
8 _Id._
9 _Id._
10 _Id._ at 834 n.4, 482 N.E.2d at 812 n.4.
11 _Id._ at 834, 482 N.E.2d at 812.

2 The tenant owned a car with handicapped driver plates thus exempting him from Brookline’s overnight parking ban. _Id._
§ 8.11

ZONING AND LAND USE

265

not therefore meet the requirements set forth in Brookline's zoning by-law for offstreet parking. The by-law, however, authorized special permits for the construction of new parking facilities for existing structures where offstreet parking would have been required for a new structure. Therefore, after a determination that the right side of the Williams' house, nearer the Wizanskys, was the preferable side for a driveway, owing to slightly greater width and less exposure to the street, the board granted a special permit to construct a two-car driveway on that side. The board also required the Williams' tenant to park his car in the driveway.

The Wizanskys thereupon brought an action in superior court challenging the board's decision. The judge upheld the board, and the Wizanskys appealed. Before the Appeals Court, the Wizanskys argued that the board had not made sufficient findings of fact to justify the grant of a special permit. While the court agreed that in particular cases more extensive findings were needed to justify zoning relief, it noted that this case did not rise to that level of complexity. In affirming the superior court, the Appeals Court also rejected a number of arguments that the Wizanskys raised within the context of Brookline's parking by-laws, remarking that none of the provisions cited were intended to apply to the Williams' situation. The Appeals Court concluded that based on the evidence presented to the board, the board's decision was rational and non-arbitrary.

Wizansky illustrates the important function of the interim appellate level existing in the Massachusetts judiciary. In an instance, such as this, where simple facts have given rise to an elaborate appeal process, it is necessary that there be a court that can efficiently resolve a dispute. By declining to remand the case back to the district court and simultaneously incorporating its own order, the Wizansky court provides a nice example of an intermediate appellate court effectively performing its essential "gate-keeping" function.

---

3 Wizansky v. Board of Appeals of Brookline, 21 Mass. App. Ct. at 916, 484 N.E.2d at 1027. The Appeals Court noted that although the superior court judge should have made his own findings of fact rather than incorporating those made by the board, no purpose could be served by remanding this case for express findings. Id. at 916, 484 N.E.2d at 1026.

4 Id. According to the court, the board's findings adequately met the general requirements for granting special permits. Id. Regarding the plaintiff's more specific contention, the court quickly dismissed the plaintiff's argument that under section 6.13(b)(6), the defendants were required to devote twenty-five percent of the space to compact car parking. According to the court, clearly this requirement applied to parking lots divided into marked spaces and not to the spaces in the present case. In contrast, the court agreed with the plaintiff's desire to be protected by section 6.13(1), requiring a fence or shrubbery to prevent trespass or headlamp glare. Accordingly, the court ordered a modification to the special permit. Id.
§ 8.12. Variance: Need to Show True “Hardship.” In *Martin v. Board of Appeals of Yarmouth*,¹ the Appeals Court considered an instance where a board acted outside its authority. The Martins and Patrick Marasco were owners of adjoining properties in Yarmouth. Between their parcels ran a private way, created as part of a subdivision in 1965, which provided frontage to Marasco’s lot, and to several new lots then created. At the time of the subdivision, Marasco’s garage encroached four feet on the private way, and it was a condition of subdivision approval that the garage be moved or removed.

In 1983, Marasco demolished his old garage and applied for zoning relief to build a new one within six and a half feet of the way. Although the zoning ordinance applicable when the action was brought and prior to the 1965 subdivision required offsets of thirty feet, the board granted Marasco a variance from the requirement because of the “desirability” of avoiding harm to ancient oak trees. The board granted Marasco both a special permit and a variance to build his garage, and the Martins sought review of this decision in superior court. The superior court found that the board had not exceeded its authority and the Martins appealed.

In reversing the superior court and annulling the decision of the board, the Appeals Court noted that the board lacked the authority to grant Marasco either a special permit or a variance. The court reasoned that because Marasco had voluntarily subdivided his property in 1965, he had created an unprotected, unlawful non-conforming use. Therefore, the by-law which authorized special permits for the extension or alteration of a non-conforming use was inapplicable to Marasco’s situation.² Moreover, the court noted that the board lacked the authority to grant a variance because Marasco had not shown a hardship. In this regard, the court disapproved of the board’s finding that it was desirable to locate the garage near the road because of “ancient oaks” elsewhere on the property. The court noted that mere desirability does not rise to the level of a hardship, and ruled that even without this consideration, it was apparent from the plan and photographs that the garage could be located elsewhere on Marasco’s property without disturbing major trees, and still comply with the thirty-foot setback provision in the by-laws.³

*Martin* demonstrates that the Massachusetts courts will show little tolerance for individuals who seek variances merely because of perceived inconvenience. The Appeals Court, in *Martin*, made it quite clear that true “hardship” must be demonstrated before a variance will be granted. As a policy matter, this rationale comports with general notions favoring effective and comprehensive subdivision planning.

---

² *Id.*
³ *Id.*
§ 8.13. Variance: Constructive Grant. In DiGiovanni v. Board of Appeals of Rockport, the Appeals Court cast stronger light on the proper procedures for appealing denials of zoning relief. In 1978, the plaintiff, as sole owner of a residential development company, sought and obtained from the defendant board of appeals a variance to construct a “cluster” development at Rowe’s Point in Rockport. The variance referred specifically to plans submitted to and on file with the board. In 1980, DiGiovanni modified these plans, and although he brought the modified plans with him to subsequent meetings with the board, he admitted that he never specifically highlighted the changes. The Rockport building inspector later issued foundation and building permits on the basis of the 1980 plans. After DiGiovanni’s project had commenced, the building inspector issued a stop-work order, noting that DiGiovanni’s construction was not in accordance with the 1978 plans. The order also indicated that DiGiovanni could request a modification of the 1978 variance or appeal the stop-work order to the board pursuant to chapter 40A, section 15.

On February 12, 1982, DiGiovanni filed an application with the town clerk requesting unspecified further relief from the board of appeals. DiGiovanni did not attach the stop-work order, a prerequisite for appeal thereof. Shortly afterward, on February 22, 1982, DiGiovanni met informally with the board and argued that he was in substantial compliance with the 1978 variance. The board disagreed, however, indicating that a public hearing and modification of the variance would be required. On March 5, 1982, DiGiovanni therefore filed a second application with the town clerk, this time specifying that he sought modification of the 1978 variance. The fate of the original application was unclear even at trial. Although the town clerk maintained that he returned the original application to DiGiovanni when DiGiovanni submitted the second application, DiGiovanni himself had no such recollection.

Pursuant to the second application, the board held a hearing on March 30, 1982, at which DiGiovanni’s attorney indicated that his client was seeking a modification of the 1978 variance. On May 12, 1982, the board filed its decision, granting some relief to the petitioner, but denying several of his other requests.

DiGiovanni then brought an action against the board in district court, pursuant to chapter 40A, section 17. The district court judge found that DiGiovanni’s application of February 12, 1982, was an appeal of the stop-work order, and that the appeal was constructively granted because the board had failed to act within the statutory period established by chapter 40A, section 15. The district court’s finding included a factual determination that DiGiovanni had not withdrawn his first application. The judge

also found that, had DiGiovanni sought modification of the 1978 variance in his original application, he would be entitled to modification as a matter of right. Nevertheless, in any case, according to the judge, DiGiovanni was not bound by the 1978 variance to follow the 1978 plans exactly. The judge further noted that the town was estopped to contest changes in setback resulting from the town conservation commission’s mandate. Finally, the district court found that the changes embodied in the 1980 plans were insubstantial, and available to the board for review, if not impliedly approved, in 1980. Accordingly, the district court vacated the stop-work order, declared DiGiovanni’s second application null and vacated the board’s ruling as “arbitrary and not supported by fact and law.” The board appealed.

In reversing the district court, the Appeals Court noted that because DiGiovanni had not appealed the stop-work order, neither the board of appeals nor the district court had the authority to violate the order. The Appeals Court reasoned that despite the patent ambiguity of DiGiovanni’s original application, all parties concerned, including DiGiovanni himself, understood the February 12 application to be a petition for modification of the 1978 variance. The Appeals Court also pointed out that had DiGiovanni sought review of the stop-work order, he had failed to follow the proper procedure set forth in chapter 40A, section 15, requiring the petitioner to specify the grounds for the appeal. Moreover, the court noted that this same lack of specificity prevented constructive relief from the stop-work order, because the application did not allege sufficient facts to enable the board to grant relief. Finally, the Appeals Court overturned the district court’s finding of fact concerning the fate of DiGiovanni’s original application, and found that the plaintiff had voluntarily withdrawn this document.

The Appeals Court similarly reversed the district court’s finding that the board’s decision of May 12, 1982, was arbitrary and not supported by fact and law. The court initially remarked that it is “axiomatic that when a variance is granted for a project ‘as shown by . . . plans’ that on their face give no indication that they are preliminary plans, the variance requires strict compliance with the plans, at least as far as the site location and the bulk of buildings are concerned.” Having determined, therefore,

---

3 Id. at 343, 474 N.E.2d at 202.
4 Id. at 343–44, 474 N.E.2d at 202–03.
5 Id. at 344, 474 N.E.2d at 203.
6 Id. at 345, 474 N.E.2d at 203.
7 Id. at 345–46 n.11, 474 N.E.2d at 204 n.11.
8 Id. at 346–47, 474 N.E.2d at 204.
that the board properly required DiGiovanni to seek modification to the 1978 variance, the court considered whether the board had appropriately denied relief.

In reversing the district court, the Appeals Court noted that neither the hardships that occasioned the 1978 variance nor those supposedly mandated by the town conservation commission compelled the board to modify DiGiovanni's variance. The court noted that the 1978 variance putatively extinguished the hardships that occasioned it, and that if the conservation commission had created new hardships, which fact the court did not wholly credit, it was nevertheless the board's province, and not DiGiovanni's, to grant a second variance. The court noted that DiGiovanni's real hardship was that he had built substantially before seeking zoning relief, and this was "not the type of hardship that justifies a variance."

The Appeals Court concluded that a trial judge may annul a decision of the board of appeals only upon a finding that the board acted in excess of its authority. This finding, however, can only occur when "the variance has been denied solely on a legally untenable ground, or when the decision is unreasonable, whimsical, capricious, or arbitrary." Barring such a finding, the Appeals Court remarked that a trial judge may not consider whether the board ought to have granted a variance. Because in this case the board found no hardship justifying modification of the 1978 variance, the district court erred in nullifying the board's decision as being in excess of its authority.

§ 8.14. Variance: Time of Exercise. In Hogan v. Hayes, the Appeals Court considered time limitations upon the exercise of zoning variances under the Zoning Act and its predecessor, the Zoning Enabling Act. The plaintiffs and defendants were owners of adjacent lots that had previously constituted a single lot. The two parcels had frontage on a private way. The plaintiffs' lot contained a house and a garage, and the defendant's lot was unimproved. In April 1974, the plaintiffs' and defendants' lots were both unimproved. In that month, the plaintiffs' and defendants' common predecessor in title, Margaret Stanton, a widow living in the house ultimately owned by the plaintiff, applied for a variance to subdivide her property and build a smaller house on the vacant half of her lot.

9 Id. at 349 n.17, 474 N.E.2d at 205 n.17.
10 Id. at 349, 474 N.E.2d at 205.
11 /d. at 349, 474 N.E.2d at 205–06.
12 Id. at 349, 474 N.E.2d at 206 (quoting Pendergast v. Board of Appeals of Barnstable, 331 Mass. 557, 559–60, 120 N.E.2d 916, 919 (1954)).
13 Id. at 349, 474 N.E.2d at 206.
Stanton sought the variance because neither lot resulting from this subdivision met minimum lot size, width, frontage, or offset requirements applicable under the city zoning ordinance. Citing the substantial hardship Stanton would suffer if denied relief, the board issued a variance. Stanton did not at the time request approval under or relief from the Subdivision Control Law.

In 1975, Stanton sold the lot with the house and garage to the plaintiff’s predecessor in title, leaving the other lot vacant. Subsequently, the defendants purchased the unimproved lot, and on December 14, 1982, shortly after they had obtained the property, applied for a building permit to build a single-family dwelling. The permit issued on January 14, 1983 and on April 7, 1983, the planning board gave the defendants an endorsement of “approval not required” under the Subdivision Control Law.

On January 24, 1983, the plaintiffs filed a written protest with the building inspector concerning the defendants’ permit, and one week later, they brought an action in superior court challenging the building permit, joining as defendants the Hayes, the building inspector, the board of appeals, and the planning board. Subsequently, and in the absence of a response by the building inspector to their January 24, 1983 protest, the plaintiffs took an administrative appeal of the defendants’ building permit to the board of appeals. On June 24, 1983, the board of appeals upheld the issuance of the permit, noting that the plaintiff’s action, already commenced in superior court, would resolve the issue. Plaintiffs thereupon filed a second action in superior court on July 12, 1983, reiterating arguments made in the original action, and also making specific reference to the board’s ruling of June 24, 1983. The two actions were consolidated. Upon motions for summary judgment, the superior court held for the defendants on all aspects of the claim, and the plaintiffs appealed.

The Appeals Court initially noted that under chapter 40A, sections 7 and 8, the plaintiffs could not technically seek administrative or judicial review of a building permit until after receiving a written response to their protest from the building inspector. Observing, however, that the defendants had not raised this issue, and that it was not necessary for the court to raise it *sua sponte*, the court proceeded to consider the case on the merits.²

The thrust of plaintiffs’ argument was that Stanton’s variance, permitting the construction of a dwelling on the vacant lot, had lapsed over the approximately nine years that separated the grant of the variance from the issuance of the defendants’ building permit. As authority, the plaintiffs cited the Zoning Act, chapter 40A, section 10, which, although not effective in Quincy at the time Stanton’s variance was granted, provides

that variances lapse unless exercised within one year. In finding for the defendants, however, the court emphasized that the Zoning Act has no set applicability to matters arising before its effective date. Nevertheless, because Stanton subdivided her property within a year of the grant, she sufficiently and irrevocably exercised her rights, thereby making it unnecessary for the court to reach this issue. The court additionally took notice of the fundamental inequity of the plaintiff’s argument that the defendants should not benefit from the same variance that permitted creation of the plaintiffs’ own lot.

Nevertheless, because the Quincy building inspector had issued the defendant’s building permit before the planning board had held that approval was not required under the Subdivision Control Law, the Appeals Court was unable to affirm the superior court’s ruling. The inspector’s premature action resulted in a procedural irregularity in violation of the Subdivision Control Law, chapter 41, section 81Y. Accordingly, the Appeals Court granted leave to the defendants to supplement their pleading and proof to show compliance with this provision.

§ 8.15. Variance: Tenant’s Standing to Challenge. In Quimby v. Zoning Bd. of Appeals of Arlington, the Appeals Court addressed whether a residential neighboring tenant, living approximately fifty feet from a restaurant that had obtained a parking variance, was a proper party to dispute such a grant. Quimby brought suit on her own behalf under chapter 40A, section 17 following the grant of a variance by the zoning board of appeals. Upon a motion by an individual defendant, the superior court dismissed the claim, noting that plaintiff lacked standing. Plaintiff thereupon moved to amend her complaint, adding as a co-plaintiff her parents, who owned the residence. The superior court summarily denied the motion to amend and plaintiff appealed.

In a rescript opinion reversing the superior court, the Appeals Court observed that the issue of whether a tenant has standing to challenge a zoning variance is a difficult one, and depends upon a number of considerations. In its analysis, the court enumerated the following factors as pertinent to the determination: “whether the applicant is in control of the

3 Id. at 403, 474 N.E.2d at 1160–61. G.L. c. 40A, § 10, as amended by St. 1977, c. 829, § 4B provides: “If the rights authorized by a variance are not exercised within one year of the date of grant of such variance they shall lapse, and may be reestablished only after notice and a new hearing pursuant to this section.” Hogan, 19 Mass. App. Ct. at 403 n.10, 474 N.E.2d at 1161 n.10.
4 Id. at 403, 474 N.E.2d at 1161.
5 Id. at 404, 474 N.E.2d at 1161.
6 Id. at 404, 474 N.E.2d at 1161–62.
7 Id. at 405, 474 N.E.2d at 1162.
property, whether she is in possession or has a present or future right to possession, whether the use applied for is consistent with the applicant’s interest in the same property, and the extent of the interest of other persons in the same property.” 2 Noting that “factual nuances” would determine the issue of plaintiff’s standing and thus, could only be resolved at trial, the court concluded that the motion to dismiss should not have been granted. 3

The Appeals Court was sharply critical of the superior court’s denial of plaintiff’s motion to amend. The court noted that, absent a demonstration of bad faith on the part of the plaintiff, such motions should be granted liberally. The court emphasized that the mere fact that the original plaintiff may have lacked standing did not justify denying a motion to amend the complaint and substitute parties who did have standing. 4

Tenants have not traditionally had standing to attack zoning and variations therein. The conventional view has been that the tenant’s interest is short-term and derivative, and thus the landowner should be the one to act, because her interest is presumed to be affected in a more permanent way. The Appeals Court opinion, requiring reconsideration on the denial of the plaintiff’s motion to amend, reflects a more intelligent view of the possible impact of zoning change on a tenant.

§ 8.16. Taking: Performance By Commonwealth of Private Landowner’s Duty to Abate Nuisance. In Nassr v. Commonwealth, 1 the Supreme Judicial Court distinguished an eminent domain taking from a temporary trespass for the purpose of eliminating a public nuisance. The plaintiff, Rena Nassr, owned a parcel of land in Freetown, which she leased to co-plaintiff San-Man Corp. 2 In 1978, San-Man rented a section of a warehouse it maintained on the premises to Harold Matthews, who did business as H.G.M. Drum Co., Inc. 3 In April 1979, employees or agents of Matthews were discovered dumping liquid on the ground a short distance from the building. Further investigation by Federal, state, and local officials revealed a “lagoon” of volatile organic materials at the site, along with approximately 750 barrels of liquid material in the warehouse, some of which were leaking. 4 This unlicensed hazardous waste operation

3 Id. at 1006, 476 N.E.2d at 242.
4 Id. at 1007, 476 N.E.2d at 242–43.
2 Nassr v. Commonwealth, 394 Mass. at 768, 477 N.E.2d at 989.
3 Id.
4 Id. at 769, 477 N.E.2d at 989.
posed a risk of ground-water contamination, accidental on-site ignition, and potentially serious bodily harm.\[^5\]

After the discovery of Matthews' operation, state officials padlocked his section of the warehouse, posted a security guard on the premises, and, with permission from the owners, began extensive cleanup operations.\[^6\] The state did not indicate any intent to charge for its services.\[^7\] The cleanup lasted until October 1980, during which time the plaintiffs were unable to rent Matthews' section of the warehouse.\[^8\]

The plaintiffs, Rena Nassr and San-Man Corp., brought an action in superior court seeking damages flowing from an alleged government trespass on their property.\[^9\] The Commonwealth thereupon countersued arguing under both statutory and common law lines that it ought to be reimbursed for the costs of the cleanup.\[^10\] In a non-jury trial, the superior court held that the state had not trespassed, because it had a "right and duty to abate the nuisance" on the land.\[^11\] The judge also found, however, that the Commonwealth was not entitled to restitution under any of several statutory and common law theories.\[^12\] All parties appealed, and the Supreme Judicial Court granted direct appellate review.

The plaintiffs re-argued their trespass claim as an uncompensated taking, contending that the Commonwealth had deprived them of rent for Matthews' section of the warehouse from April 1979 until October 1980.\[^13\] Observing that the plaintiffs had made no effort to clean up the site themselves, however, and that until cleaned up the property was unfit to

\[^5\] Id.

\[^6\] Id. at 769, 477 N.E.2d at 990.

\[^7\] Id. at 770, 477 N.E.2d at 990.

\[^8\] Id.

\[^9\] Id.

\[^10\] Id. at 768, 477 N.E.2d at 989. The Commonwealth also named as a third-party defendant Alfred Nassr, Rena Nassr's husband. Id.

\[^11\] Id. at 770, 477 N.E.2d at 990. See G.L. c. 21, § 27, as amended by St. 1979, c. 705, § 2, which provides in part: "[The division of water pollution control] shall:

\[
\ldots \text{(14) Undertake immediately whenever there is spillage, seepage or other discharge of oil or hazardous material into or proximate to any of the waters of the commonwealth or into any offshore waters which may result in damage to the waters, shores or natural resources utilized or enjoyed by citizens of the commonwealth to cause said spillage, seepage or discharge to be contained and removed by whatever method it considers best.}"
\]

In addition, G.L. c. 21, § 40, as amended by St. 1979, c. 705, § 3, authorizes the division of water pollution control to enter "upon any property, public or private" to carry out its duties under G.L. c. 21, § 27(14). Although the legislature struck out G.L. c. 21, § 27(14), and the provision of G.L. c. 21, § 40, quoted above by St. 1983, c. 7, §§ 2, 3, these were in effect when the case arose. See Nassr, 394 Mass. at 770-71 n.2, 477 N.E.2d at 990 n.2.

\[^12\] Id. at 772, 477 N.E.2d at 991.

\[^13\] Id. at 770, 477 N.E.2d at 990.
rent, the Court found no merit to this claim.\textsuperscript{14} The Court also implied that the temporary presence of state officials on private property, for the purposes of combatting a threat to public health, would under no circumstances rise to the level of a taking.\textsuperscript{15} Applying this premise to the instant case, the Court noted that chapter 27 confers explicit authority upon the state to enter the plaintiff’s land,\textsuperscript{16} and cited the state’s action as a “classic” example of the exercise of the police power.\textsuperscript{17}

On appeal, the Commonwealth did not raise its statutory claims for reimbursement, but did restate its claim for restitution.\textsuperscript{18} After reviewing the applicable statutes and concluding that the common law claims were not precluded,\textsuperscript{19} the Court considered the Commonwealth’s argument asserting its entitlement to restitution. The Court noted, initially, that the plaintiffs became responsible for the nuisance Matthews had created once they excluded him from the premises and resumed possession in April 1979. It thus became their duty to eliminate the hazard.\textsuperscript{20} Nevertheless, the Court reasoned that although the Commonwealth had acted upon the plaintiffs’ original duty, it was not entitled to restitution of benefit conferred unless it also “acted unofficiously and with an intent to charge . . . .”\textsuperscript{21} Noting that the trial court had found as a matter of fact that the Commonwealth had no intent to charge, the Court rejected the state’s claim.\textsuperscript{22}

\textbf{§ 8.17. Historic Districts: Scope of Review.} In \textit{Conservation Law Foundation v. Director of the Division of Water Pollution Control},\textsuperscript{1} the Appeals Court struggled with the language of the Massachusetts Historical Commission Act.\textsuperscript{2} The controversy involved the “so-called 500 Boylston Street development” in the Back Bay of Boston, in which the New England Mutual Life Insurance Company and Gerald D. Hines Interests, Inc., sought to construct a large office and retail complex.\textsuperscript{3} Part of the

\begin{itemize}
  \item \textsuperscript{14} \textit{Id.}
  \item \textsuperscript{15} \textit{Id.} at 770–71, 477 N.E.2d at 990–91.
  \item \textsuperscript{16} \textit{Id.} at 771, 477 N.E.2d at 990. See \textit{supra} note 11 for text of chapter 27, sections 21(14) and 40.
  \item \textsuperscript{17} \textit{Nassr}, 394 Mass. at 771, 477 N.E.2d at 990. The Court analogized the cleanup operations to the entry of firefighters on private property to extinguish a fire. See \textit{id.} (citing \textit{National Bd. of YMCA v. United States}, 395 U.S. 85, 93 (1969)).
  \item \textsuperscript{18} \textit{Nassr}, 394 at 772, 477 N.E.2d at 991.
  \item \textsuperscript{19} \textit{Id.} at 773, 477 N.E.2d at 991–92.
  \item \textsuperscript{20} \textit{Id.} at 776, 477 N.E.2d at 993.
  \item \textsuperscript{21} \textit{Id.} at 776–77, 477 N.E.2d at 993–94 (quoting the \textit{Restatement of Restitution \textsection 115 (1937))}.
  \item \textsuperscript{22} \textit{Nassr}, at 777, 477 N.E.2d at 994.
\end{itemize}
project site lay within the Back Bay historic district.\textsuperscript{4} The Appeals Court had to resolve whether the Act required a state permit-granting agency to seek historical review of an entire proposed project, or simply of that portion of the project in which the permit was sought.\textsuperscript{5}

Shortly after the developers applied to the Department of Environmental Quality Engineering (DEQE) for a sewer connection permit, the Massachusetts Historical Commission informed the DEQE that it was bound by statute to evaluate the entire project’s impact on “historic, and archaeological qualities of State register properties.”\textsuperscript{6} The DEQE, however, did not join in the Historical Commission’s interpretation of the statute, maintaining that the Historical Commission Act only required a permit-granting authority to assess the impact of the activity to which the permit applied. On May 7, 1985, the Attorney General issued an opinion in reference to another development that addressed this issue squarely, and sided with the DEQE.\textsuperscript{7} Adhering to the narrow interpretation of the Act, the DEQE found that the proposed sewer connection would have negligible impact on historically important property, notably an ancient underground indian fish trapping system that would lay at its nearest point, nine feet from the connection.\textsuperscript{8} The plaintiffs thereupon brought suit challenging this narrow interpretation. Upon motions for summary judgment, the superior court held for the defendants, and the plaintiffs appealed.\textsuperscript{9}

The Appeals Court began its review by examining the language of the

---

\textsuperscript{4} Id.

\textsuperscript{5} Id. at 545–46, 495 N.E.2d at 849–50.

\textsuperscript{6} Id. at 547. St. 1982, c. 152, § 5, added the following two paragraphs to G.L. c. 9, § 27C:

As early as possible in the planning process of any project undertaken by any agency, executive office, department, board, commission, bureau, division or authority of the commonwealth or of any authority established by the general court to serve a public purpose and prior to such state body funding, licensing or approving any private project, such state body shall determine if the project will affect any property listed on the state register of historic places. If the project affects a listed property, the state body shall so notify the [Massachusetts Historical] commission. Within thirty days of receiving notification, the commission shall determine if the project will adversely affect a listed property, and shall send an advisory report to the state body describing and documenting its findings. If the commission does not notify the state body within thirty days, the state body may proceed with the project.

If the commission finds that the project will adversely affect a listed property, the commission and the state body shall meet to discuss alternatives to the project and means of mitigating any adverse effect. The state body, in implementing its final plans, shall adopt all prudent and feasible measures that eliminate or mitigate the adverse effect.

G.L. c. 9, § 27C.


\textsuperscript{8} Id. at 548 n.7, 495 N.E.2d at 851 n.7.

\textsuperscript{9} Id. at 545–46, 495 N.E.2d at 849–50.
statute, in the hope that it would yield an unambiguous meaning. Finding none, the court then examined the statute’s legislative and early administrative history, therein finding support for the Attorney General’s narrow interpretation.

The court observed that in hearings before the House Committee on State Administration in 1982, the then executive director of the Massachusetts Historical Commission testified that the proposed changes in the Act, ultimately enacted as chapter 9, sections 26–27c, would not expand the power of the commission, but would simply provide a structure for its review. At that time, the court noted, the commission derived its review authority not from the Historical Commission Act, but from the Massachusetts Environmental Protection Act. That Act, moreover, at section 62A, provided that “[i]n the case of a permit application to an agency from a private person for a project for which [state] financial assistance is not sought the scope of [the environmental impact] report and alternatives considered therein shall be limited to that part of the project which is within the subject matter jurisdiction of the permit.” The Appeals Court also found support for its interpretation of the statute in regulations promulgated by the Historical Commission under the aegis of the act, shortly after its enactment. The court then noted that inasmuch as the action pursuant to the permit was simply a sewer connection, the DEQE was only required to review the impact of the connection on historically important property.

---

10 Id. at 548–51, 495 N.E.2d at 851–53.
11 Id. at 551–52, 495 N.E.2d at 852–53.
12 Id. at 551, 495 N.E.2d at 853.
13 G.L. c. 9, §§ 26–27D.
14 G.L. c. 30, §§ 61 et seq., as amended by St. 1977, c. 947, § 1.
16 Id. at 553, 495 N.E.2d at 854. MASS. ADMIN. CODE tit. 950, § 71.03 (1983) provides that “[p]rojects [under § 27c] include actions which are: . . . (c) carried out pursuant to a state . . . permit . . . .”
17 Conservation Law Foundation, 22 Mass. App. Ct. at 552–54, 495 N.E.2d at 853–54. The plaintiffs also urged that the court adopt the broader interpretation of chapter 21, section 27(14) because this was the interpretation currently in use by the Historical Commission. The court rejected this argument, however, noting in an appendix that it would not defer to an incorrect administrative interpretation. Id. at 555 app.(b), 495 N.E.2d at 855 app.(b).