

## Zoning and Land Use

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**§ 10.1. Rate of Development and Youth Lot Exemption By-Laws Upheld.** Concern with implementing controls on community growth has risen significantly over the past two decades.<sup>1</sup> During the 1980 *Survey* year, in *Sturges v. Town of Chilmark*,<sup>2</sup> the Supreme Judicial Court ruled that a municipality has the authority, within limitations, to enact a rate of development by-law and that such a by-law is constitutional.<sup>3</sup> The *Sturges* Court also denied a challenge to another by-law, the “youth exception by-law” which creates an exception to the town’s minimum lot size requirements for younger residents of the town.<sup>4</sup> Finally, the Court determined whether the subdivision control law applied to the plaintiffs’ unregistered land<sup>5</sup> and how the term “adjoining” in G.L. c. 40A, § 6<sup>6</sup> should be applied to two of the plaintiffs’ lots.<sup>7</sup>

The plaintiffs in *Sturges* were joint owners of several parcels of land in the small, rural town of Chilmark on Martha’s Vineyard.<sup>8</sup> They initiated an action in the land court in 1977, seeking determinations regarding several by-laws and regulatory provisions that could have been applied to restrict

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§ 10.1. <sup>1</sup> R. ANDERSON, AMERICAN LAW OF ZONING, § 10.01; 3 N. WILLIAMS, AMERICAN LAND PLANNING LAW, § 73.01.

<sup>2</sup> 1980 Mass. Adv. Sh. 815, 402 N.E.2d 1346.

<sup>3</sup> *Id.* at 821, 402 N.E.2d at 1350.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 818, 402 N.E.2d at 1349.

<sup>6</sup> *Id.* at 829, 402 N.E.2d at 1355. This section provides, in part, that:

“[a]ny 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.”

G.L. c. 40A, § 6.

<sup>7</sup> 1980 Mass. Adv. Sh. at 829-30, 402 N.E.2d at 1355.

<sup>8</sup> 1980 Mass. Adv. Sh. at 815, 402 N.E.2d at 1347.

the plaintiffs' right to use their land.<sup>9</sup> On cross-appeals to the Supreme Judicial Court, the plaintiffs and the town challenged various rulings of the land court. The plaintiffs challenged the land court's determination that the plaintiffs had no standing to challenge the youth lot exception by-law and the land court's resultant refusal to determine the by-law's validity. The plaintiffs also challenged the court's ruling that their land was subject to the town's subdivision control law, despite subdivision of the land on recorded plans predating the subdivision control law.<sup>10</sup> The town appealed from the court's ruling that the rate of development by-law was unconstitutional and from the court's interpretation of the word "adjoining" in chapter 40A section 6 of the General Laws to exclude the plaintiffs' lots joined only at one point.<sup>11</sup> Because each of the challenged rulings presents a distinct issue, they will be discussed separately.

**Rate of development by-law.** The rate of development amendment to the town's zoning by-laws was enacted at a special town meeting in 1976.<sup>12</sup> The amendment restricted the number of building permits that could be issued for residential construction in any year. In the year of the subdivision, the amendment permitted construction permits to be issued for one-tenth of the subdivision. In each of the following nine years, an additional one-tenth could be issued.<sup>13</sup> The plaintiffs challenged authority of the town to adopt the by-law and claimed that the by-law was unconstitutional.<sup>14</sup>

The Court noted that, although time-based controls on local development have been a frequent source of litigation and a subject of controversy in other jurisdictions, the issue has not often been raised in Massachusetts.<sup>15</sup> The Court did find precedent in a previous Massachusetts case, *Collura v. Arlington*,<sup>16</sup> in which a two-year moratorium on the construction of apartment houses in certain areas was held to be an authorized form of interim zoning to prevent uncontrolled growth.<sup>17</sup> The *Collura* case was very limited in its scope because the by-law had a two-year time limit and applied only to apartment houses.<sup>18</sup> Because of this limited scope and because *Collura* did not raise of constitutional issue, the *Sturges* Court found *Collura* to be of little precedential value.<sup>19</sup>

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<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 816, 402 N.E.2d at 1347.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 818, 402 N.E.2d at 1349.

<sup>13</sup> *Id.* at 819, 402 N.E.2d at 1349.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 820-21, 402 N.E.2d at 1350.

<sup>16</sup> 367 Mass. 881, 329 N.E.2d 733 (1975). See Huber, *Zoning and Land Use*, 1975 ANN. SURV. MASS. LAW, § 19.2, at 519-24.

<sup>17</sup> 376 Mass. at 887, 329 N.E.2d at 737.

<sup>18</sup> 1980 Mass. Adv. Sh. at 821, 402 N.E.2d at 1350.

<sup>19</sup> *Id.*

Finding no precedent in its previous decisions, the Court announced that a Massachusetts city or town has the authority to adopt zoning measures which control orderly growth.<sup>20</sup> The Court further specified that such measures could include “reasonable time limitations on development, at least where these restrictions are temporary and adopted to provide controlled development while the municipality engages in comprehensive planning studies.”<sup>21</sup> The Court found support for this ruling in the general purposes of the Zoning Act.<sup>22</sup> The purpose of the Zoning Act, according to the Court, was to permit municipalities to enact any constitutionally permissible zoning provisions, within limitations stated expressly in the Act.<sup>23</sup>

After holding that the town had the authority to enact the by-law, the Court turned to an examination of the by-law’s constitutionality. Because the issue was one of first impression in Massachusetts, the Court noted cases from other jurisdictions in which time-based controls have been upheld against constitutional challenges.<sup>24</sup> The prominent cases upholding these controls were *Construction Industry Association of Sonoma County v. Petaluma*<sup>25</sup> and *Golden v. Planning Board of Ramapo*.<sup>26</sup> The *Sturges* Court observed that these cases dealing with time restraints on residential development generally have involved suburban communities affected by the expansion of a metropolitan area, in marked contrast to the town of Chilmark. Chilmark, as a town of 400 residents, is isolated on the island of Martha’s Vineyard.<sup>27</sup> While acknowledging that the constitutional principles remain constant, the Court determined that some differences in ap-

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<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> St. 1975, c. 808, § 2A.

<sup>23</sup> 1980 Mass. Adv. Sh. at 821, 402 N.E.2d at 1350-51. Municipalities are permitted specifically to use zoning by-laws to control population density, the water supply, the conservation of natural resources, and pollution. *Id.*

<sup>24</sup> *Id.* at 822, 402 N.E.2d at 1351.

<sup>25</sup> 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976). In response to the rapid growth in the San Francisco Bay in the early 1960’s, which showed a projected 1985 population of 77,000 for the suburb of Petaluma, Petaluma adopted a plan to limit its overall growth. This plan included a five-year quota on the number of residential units that could be constructed in subdivisions above a certain size in any year. 522 F.2d at 900-01. The plan was upheld by the Court of Appeals for the Ninth Circuit against a challenge that the plan was arbitrary and unreasonable and, therefore, in violation of the due process clause of the fourteenth amendment. *Id.* at 905-09.

<sup>26</sup> 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138, *appeal dismissed*, 409 U.S. 1003 (1972). In *Golden*, the town of Ramapo, a suburb of New York City, adopted a zoning amendment which keyed subdivision development to the scheduled expansion of municipal facilities and services. The developer could accelerate the rate at which subdivisions could be developed by installing some of the municipal services himself. *Id.* at 366-69, 285 N.E.2d at 294-96, 334 N.Y.S.2d at 142-44. In upholding the scheme, the New York Court of Appeals distinguished between a total prohibition of development, and timed growth control measures, which are legitimate zoning devices. *Id.* at 373, 285 N.E.2d at 298-99, 334 N.Y.S.2d at 147-48.

<sup>27</sup> 1980 Mass. Adv. Sh. at 823, 402 N.E.2d at 1351.

proach were warranted because of the nature of the municipality.<sup>28</sup> For example, considerations regarding regional housing requirements and the potential exclusionary impact of a municipality's action are significantly lessened in a rural area.<sup>29</sup> When the demand is only for vacation homes for wealthy nonresidents rather than for primary housing to meet regional needs,<sup>30</sup> the Court observed that local concern with preserving the environment and a way of life should be given greater weight.<sup>31</sup> Support for this distinction was found in *Steel Hill Development, Inc. v. Sanbornton*,<sup>32</sup> in which a six acre minimum lot provision was upheld in a rural New Hampshire town.<sup>33</sup> The *Sturges* Court pointed out, however, that the Sanbornton court upheld the restrictive provision for only a limited time period.<sup>34</sup> The Court also looked to the "unique and perishable qualities" of Martha's Vineyard, which were already the subject of special protection by a statute enforced by the Martha's Vineyard Commission.<sup>35</sup> The Court concluded that the town's by-law was responding not merely to local considerations but also to the regional concerns expressed by statute.<sup>36</sup>

The Court also emphasized the limitation of its own role in reviewing the validity of zoning acts.<sup>37</sup> The Court quoted the test established by the United States Supreme Court in *Euclid v. Ambler Realty Co.*,<sup>38</sup> that a by-law is unconstitutional only if it is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."<sup>39</sup> Furthermore, the *Sturges* Court emphasized that "any possible permissible legislative goal which may rationally be furthered by the regulation" will support its constitutionality against a due process challenge.<sup>40</sup> The Court observed, however, that the town must "bring forward some indication that the zoning provision has some reasonable prospect of a tangible benefit to the community" and make a showing "on the record" of a reasonable basis for the by-law.<sup>41</sup>

The Court found such justification for the by-law in the record, noting that the town had conferred with the Martha's Vineyard Commission and

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<sup>28</sup> *Id.*, 402 N.E.2d at 1351-52.

<sup>29</sup> *Id.*, 402 N.E.2d at 1352.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> 469 F.2d 956 (1st Cir. 1972).

<sup>33</sup> *Id.* at 961.

<sup>34</sup> 1980 Mass. Adv. Sh. at 824, 402 N.E.2d at 1352 (citing *Steel Hill Dev., Inc. v. Sanbornton*, 469 F.2d at 962).

<sup>35</sup> 1980 Mass. Adv. Sh. at 824, 402 N.E.2d at 1352.

<sup>36</sup> *Id.* at 824-25, 402 N.E.2d at 1352.

<sup>37</sup> *Id.* at 825, 402 N.E.2d at 1352.

<sup>38</sup> 272 U.S. 365 (1926).

<sup>39</sup> 1980 Mass. Adv. Sh. at 825, 402 N.E.2d at 1352, (quoting *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926)).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 826, 402 N.E.2d at 1353.

had produced a number of studies, including development guidelines established by the Commission and federal maps of the area showing soil limitations for septic tank sewage disposal.<sup>42</sup> The Court determined that these studies provided a reasonable basis for the town's action, even though the studies were not admitted in evidence.<sup>43</sup> Testimony had shown, however, that, based on the studies, "reasonable people" had become concerned about Chilmark's subsoil conditions.<sup>44</sup>

The Supreme Judicial Court rejected the land court judge's conclusion that he needed expert testimony regarding actual subsoil conditions in order to uphold the by-law.<sup>45</sup> The Supreme Judicial Court stated that this would have improperly placed on the town the burden of proof or the burden of coming forward with evidence. The town's proper burden was only to make a *prima facie* showing of a rational basis for its action.<sup>46</sup>

The Court concluded that the "need for time for study" provided such a basis, particularly since Chilmark was a town with a limited population, restricted annual budget and land area, and only five paved public ways.<sup>47</sup> Furthermore, the Court noted that the by-law itself placed only a "partial and annually relaxing restriction on the construction of what will for the most part be second, or vacation, homes."<sup>48</sup> The Court expressly avoided stating any opinion as to the by-law's application beyond the years immediately following its adoption, and especially beyond the first ten-year period, preferring to assume that ten years was a reasonably necessary time for study and that the town would proceed in good faith in carrying out these measures.<sup>49</sup>

In its holding on this issue, the Court seems to emphasize the goal of preserving the status quo while consideration of an overall plan is undertaken, a purpose often attributed to "interim" or "stop-gap" zoning.<sup>50</sup> While the variety of types of cases dealing with time-based restrictions are frequently cited together, perhaps because they all have potential exclusionary impact, it seems that this type of zoning to produce a temporary "holding pattern" for study differs substantially from the zoning schemes in *Construction Industry Association of Sonoma County v. Petaluma*<sup>51</sup> and *Golden v. Planning Board of Ramapo*.<sup>52</sup> In those cases, time-related restric-

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<sup>42</sup> *Id.* at 827, 402 N.E.2d at 1353.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*, 402 N.E.2d at 1354.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 828, 402 N.E.2d at 1354.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 828-29, 402 N.E.2d at 1354-55.

<sup>50</sup> 2 E. YOKLEY, ZONING LAW AND PRACTICE (4th ed. 1979), § 10-1.

<sup>51</sup> 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976). See note 25 *supra*.

<sup>52</sup> 30 N.Y.2d 359, 285 N.E.2d 251, 334 N.Y.S.2d 138, *appeal dismissed*, 409 U.S. 1003 (1972). See note 26 *supra*.

tions were an integral part of the comprehensive plan, implemented as a result of considered study. It is difficult to predict, therefore, how receptive the courts would be to a plan that was comprehensive and long-range and could not be interpreted as primarily providing "time for study," as was the case in *Sturges* and in the decision in *Collura v. Arlington*.<sup>53</sup>

In addition, although the Court has clearly given its approval to restrictions on rate of development as a means of promoting orderly growth, the application of this principle in the instant case was strongly influenced by and limited to the unique circumstances of the town of Chilmark. Since the Court indicated that the exclusionary impact was to be more heavily weighted in a suburban area where regional primary housing needs were likely to be affected,<sup>54</sup> a time-based scheme in such an area is likely to receive closer scrutiny. Indeed, the Massachusetts legislature has already mandated such special consideration in the case of low and moderate income housing with the adoption of the Anti-Snob Zoning Law.<sup>55</sup>

**Youth lot by-law.** The plaintiffs in *Sturges* also challenged a second amendment enacted at the special town meeting in 1976.<sup>56</sup> Termed the "youth lot by-law," it created an exception to the town's three-acre minimum lot size requirement by authorizing the board of appeals to grant special permits to build single-family dwellings, primarily for owner-occupancy, to applicants under 30 years of age who have been residents of Chilmark for eight consecutive years.<sup>57</sup> The town's express reason for adopting the measure was "[f]or the purpose of helping young people who have grown up in Chilmark and lived here for a substantial portion of their lives and who, because of the rising land prices, have been unable to obtain suitable homes at a reasonable price, and who desire to continue to live in Chilmark."<sup>58</sup> The trial judge had concluded that the plaintiffs lacked standing to challenge the by-law, since they were benefited rather than harmed by it, and therefore declined to pass on its validity.<sup>59</sup> The plaintiffs in turn argued that they should be entitled to sell all their undersized lots affected by the by-law "without regard to the age, residence or economic condition of the purchaser."<sup>60</sup>

The Supreme Judicial Court determined that because the plaintiffs asserted a right to sell their undersized lots without regard to age and residency and objected to these requirements as a restriction on that right,

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<sup>53</sup> 367 Mass. 881, 329 N.E.2d 733 (1975). See text and notes at notes 16-17, *supra*.

<sup>54</sup> 1980 Mass. Adv. Sh. at 823, 402 N.E.2d 1352.

<sup>55</sup> G.L. c. 40B, §§ 20-23. See Huber, *Zoning and Land Use*, 1969 ANN. SURV. MASS. LAW, § 14.1.

<sup>56</sup> 1980 Mass. Adv. Sh. at 816, 402 N.E.2d at 1348.

<sup>57</sup> *Id.* at 816-17, 402 N.E.2d at 1348.

<sup>58</sup> *Id.* at 816, 402 N.E.2d at 1348.

<sup>59</sup> *Id.* at 817, 402 N.E.2d at 1348.

<sup>60</sup> *Id.*

they had standing to challenge the by-law.<sup>61</sup> The Court determined that, as landowners, the plaintiffs had a statutory right “to petition for a decision concerning the validity or invalidity of any zoning restriction applicable to his land.”<sup>62</sup>

Having established the plaintiffs’ standing, the Court addressed the validity of the by-law. The Court construed the plaintiffs’ challenge to be based upon their erroneous assumption that, if the supposedly invalid age and residency requirements were stricken, the remainder of the by-law would stand, thereby making special permits generally obtainable for undersized lots.<sup>63</sup> The Court concluded that the town would never have enacted the by-law without these provisions, given its express purpose.<sup>64</sup> The plaintiffs could not, therefore, affirmatively rely on the by-law with these allegedly invalid conditions taken out.<sup>65</sup> The Court declared that the plaintiffs were bound by the terms of the youth lot by-law in selling any of their undersized lots for residential purposes.<sup>66</sup> The Court left it to the trial judge’s discretion, however, to allow the plaintiffs to amend their complaint to seek declaratory relief concerning the youth lot by-law in other respects.<sup>67</sup>

Although the challenge to the youth lot by-law was unsuccessful, the Court disposed of it on very narrow grounds. This by-law creates an interesting and unusual classification that could be subject to other attacks. Rather than imposing an additional restriction on the use of the land, as is the case with most zoning legislation, this by-law selectively relaxes restrictions that are part of the overall zoning scheme of the town. Furthermore, it does so only for a specifically defined population, placing emphasis on ownership rather than use, which is a generally impermissible classification in zoning regulations.

While in the instant case, the classification was challenged by landowners who sought to extend this relaxation of restrictions to all their undersized land to increase its market potential, the by-law might also be challenged, on something akin to equal protection grounds, by other potential beneficiaries who do not fit into the by-law’s defined exception. For example, a 31-year-old who just misses the age restriction would be a more likely buyer of a first home than 21-year-old. The use of the zoning law to promote this social purpose and the rationale behind the particular classification used might well be held up to scrutiny. The Court did, in fact, leave the door open to further challenge by the plaintiffs.<sup>68</sup>

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<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 818, 402 N.E.2d at 1348. See G.L. c. 240, § 14A.

<sup>63</sup> *Id.* at 818, 402 N.E.2d at 1349.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

**§ 10.2. Educational Purpose Exemption—Application to “Halfway Houses.”** During the *Survey* year, in *Fitchburg Housing Authority v. Board of Zoning Appeals of Fitchburg*,<sup>1</sup> the Supreme Judicial Court broadened the interpretation of what will be considered an “educational purpose” entitled to exemption from local ordinances and by-laws pursuant to section 2 of the former Zoning Enabling Act.<sup>2</sup> The Court ruled that a residential facility for formerly institutionalized but educable adults with histories of mental difficulties, that provided them with training in such skills for independent living as self care, cooking, job seeking, budgeting and using community resources, was a use for a public educational purpose that could not be prohibited by the Fitchburg zoning ordinance. In so doing, the Court has provided proponents of “deinstitutionalization” with an additional weapon against local resistance to “halfway houses,” a growing area of controversy.<sup>3</sup>

The *Fitchburg Housing Authority* case extends the ruling of the Appeals Court in *Harbor Schools, Inc. v. Board of Appeals of Haverhill*,<sup>4</sup> the first statement on this issue. In *Harbor Schools*, the Appeals Court held that a residential facility for the education of emotionally disturbed children is an educational use, but emphasized the fact that the facility’s educational program included traditional academic subjects and fulfilled the public policy expressed in chapter 766 of the Acts of 1972 concerning the education of children with special needs.<sup>5</sup>

In *Fitchburg Housing Authority*, the Fitchburg Housing Authority applied for a permit to convert a single-family house for use as a community residence.<sup>6</sup> The facility’s basic purpose would be “to train people to rid

§ 10.2. <sup>1</sup> 1980 Mass. Adv. Sh. 1465, 406 N.E.2d 1006.

<sup>2</sup> G.L. c. 40A, § 2. Although the case was decided under the former Zoning Enabling Act, its application will likely extend to the counterpart provision in the new Zoning Act, G.L. c. 40A, § 3, added by Acts of 1975, c. 808, § 3, which provides in part:

“No zoning ordinance or by-law shall . . . prohibit, regulate or restrict the use of land or structures for religious purposes or for educational purposes on land owned or leased by the commonwealth or any of its agencies, subdivisions or bodies politic or by a religious sect or denomination, or by a nonprofit educational corporation; provided, however, that such land or structures may be subject to reasonable regulations concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements.”

*Id.*

<sup>3</sup> See *Annot.*, Halfway Houses: Housing Facilities for Former Patients of Mental Hospital as Violating Zoning Restrictions, 100 A.L.R.3d 876 (1980); Comments: Exclusionary Zoning of Community Facilities, 12 N.C. CENTRAL L.J. 167 (1980); Schmedemann, *Zoning for the Mentally Ill: A Legislative Mandate*, 16 HARV. J. LEGIS. 853 (1979); Boyd, *Strategies in Zoning and Community Living Arrangements for Retarded Citizens: Parens Patriae Meets Police Power*, 25 VILL. L. REV. 273 (1979-1980); Witkin, *But Not in My Neighborhood*, PLANNING 23 (May 1981).

<sup>4</sup> 5 Mass. App. 600, 366 N.E.2d 764 (1977).

<sup>5</sup> See Huber, *Zoning and Land Use*, 1978 ANN. SURV. MASS. LAW, § 11.1.

<sup>6</sup> 1980 Mass. Adv. Sh. at 1466, 406 N.E.2d at 1007.



themselves of bad habits and teach them habits so that they would be qualified to live independently by themselves in a community.”<sup>7</sup> It would have full-time house managers with bachelor’s degrees in human services, and personnel would be selected on the basis of social and psychological training and abilities, rather than teaching qualifications.<sup>8</sup> None of the teachers would be certified.<sup>9</sup> The Association did not intend to accept individuals with a primary diagnosis of alcoholism, criminality, drug abuse, organic brain disorder, violent behavior, antisocial sexual behavior, or mental retardation.<sup>10</sup> Most of the residents would be taking prescription medicine under their own control. There would be no medical personnel or facilities on the premises, although a psychiatrist would make periodic visits, and a psychologist would be available.<sup>11</sup>

The superintendent of buildings denied the permit on the basis that such a residence was not allowed in the zoning district in which the building was located.<sup>12</sup> The Housing Authority and the North Central Massachusetts Mental Health Association, Inc., which was to operate the facility, appealed to the board of zoning appeals, seeking “authorization to operate a residential educational and rehabilitational facility for adults with histories of psychiatric difficulties” on the grounds that the use was permitted as a matter of law.<sup>13</sup> They based this claim on the language in the city’s ordinance that permitted “Private and Public Schools” in the district in question and on the provisions of section 2 of the Zoning Enabling Act.<sup>14</sup>

After hearing the matter on June 5, 1978, the board of zoning appeals denied the application on August 2, having concluded that the use was not a school without addressing the question whether section 2 of the Zoning Enabling Act applied to the proposed use.<sup>15</sup> The Association and Housing Authority appealed this decision to the superior court, relying upon the provisions of section 2 and also claiming that, because the board had not acted within seventy-five days of the filing of the appeal on May 10, the application must be considered granted under the provisions of section 15 of the new Zoning Act.<sup>16</sup>

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<sup>7</sup> 1980 Mass. Adv. Sh. at 1468, 406 N.E.2d at 1008.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 1468, 406 N.E.2d at 1008.

<sup>11</sup> *Id.* at 1467 n.5, 406 N.E.2d at 1008 n.5.

<sup>12</sup> *Id.* at 1466, 406 N.E.2d at 1007.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 1466-67, 406 N.E.2d at 1007.

<sup>16</sup> *Id.* at 1467, 406 N.E.2d at 1007. G.L. c. 40A, § 15, added by St. 1975, c. 808, § 3, provides, in part, that “[t]he decision of the board shall be made within seventy-five days after the date of the . . . application . . . [with an exception not relevant here]. Failure by the board to act within said seventy-five days shall be deemed to be the grant of the . . . application . . . sought.” *Id.* Because the Supreme Judicial Court decided the case on the basis of § 2 of the Zoning Enabling Act, it did not address the issue whether this automatic approval provision of

The trial judge concluded that the proposed use was a "medical facility," not a school, although the claim that it was a school and thus a permissible use under the Fitchburg ordinance had been abandoned before the superior court.<sup>17</sup> The judge acknowledged the claim that the facility was an exempt educational use but did not discuss the issue in making his determination.<sup>18</sup> He entered a judgment that no modification of the board's decision was necessary.<sup>19</sup>

The Supreme Judicial Court rejected as erroneous the trial judge's characterization of the facility as a "medical facility" and the concomitant conclusion that the use would not be "educational."<sup>20</sup> The Court noted that the fact that many residents had been institutionalized and would be taking prescription drugs did not render the facility's primary purpose medical or negate its educational purpose.<sup>21</sup> The Court also noted that the facts that the population was comprised of adults, that what was to be taught was not within traditional areas of instruction, that the teachers would not be certified by the state, and that the facility was residential did not preclude the proposed use of the facility from being educational.<sup>22</sup> The Court then addressed the question whether the facility's primary activity would be educational.

Although the Court acknowledged that this case differed from *Harbor Schools* and similar out-of-state authority regarding residential facilities for the education of emotionally disturbed children, in that the proposed facility was not as concerned with fulfilling traditional educational goals,<sup>23</sup> the Court noted that it has long held "education" to be "a broad and comprehensive term."<sup>24</sup> Its definition includes "the process of developing and training the powers and capabilities of human beings" and preparing individuals "for activity and usefulness in life."<sup>25</sup>

The Court found that the facility would fulfill an important educational goal in preparing its residents to live independently, emphasizing that "[i]nstruction in the activities of daily living is neither trivial nor unnecessary to these persons," but an important step in developing their

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the new Zoning Act, which has no counterpart in the former act, could apply to an appeal submitted to and heard by the board of zoning appeals prior to July 1, 1978, when the new Zoning Act became effective in Fitchburg.

<sup>17</sup> 1980 Mass. Adv. Sh. at 1468, 406 N.E.2d at 1008.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 1469, 406 N.E.2d at 1008.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 1469-70, 406 N.E.2d at 1008-09.

<sup>23</sup> *Id.* at 1470, 406 N.E.2d at 1009.

<sup>24</sup> *Id.* (quoting *Mount Hermon Boys' School v. Gill*, 145 Mass. 139, 146, 13 N.E. 354, 357 (1887)).

<sup>25</sup> *Id.* at 1471, 406 N.E.2d at 1009, quoting *Mount Hermon*, note 25, *supra*, 145 Mass. at 146, 13 N.E. at 357.

potential.<sup>26</sup> "Inculcating a basic understanding of how to cope with everyday problems and to maintain oneself in society is incontestably an educational process," the Court summarized.<sup>27</sup> It found this to be the dominant purpose of the proposed facility.<sup>28</sup>

The movement toward "deinstitutionalization" or "normalization" of disabled individuals in group residences such as the Fitchburg facility and away from large and impersonal institutions is a growing one, particularly in the case of the mentally ill and retarded. Yet local opposition in the very communities that are most appropriate for these facilities has often defeated this goal, frequently through the use of the zoning power.<sup>29</sup> One of the most common means of excluding such facilities is through an ordinance's restrictive definition of "family" for the purposes of "single family housing" as limited to blood-related groups or a very small number of unrelated individuals. This exclusionary method was given support by the United States Supreme Court's decision in *Village of Belle Terre v. Boraas*,<sup>30</sup> which upheld a local ordinance that defined a family as no more than two unrelated individuals. Nevertheless, in *State v. Baker*,<sup>31</sup> the New Jersey Supreme Court avoided the ruling of *Belle Terre* by construing its own state constitution more strictly in determining that an ordinance prohibiting more than four unrelated individuals from sharing a single housing unit violated the constitutional right of privacy and due process. Likewise, in the recent decision of *City of Santa Barbara v. Adamson*,<sup>32</sup> the Supreme Court of California relied upon its constitution to find that an ordinance defining "family" as related persons in a household unit or a group not to exceed five persons, excluding servants, living together violated the right to privacy.

State legislation governing the establishment of "halfway houses" has been advocated as the most effective means of countering exclusionary efforts.<sup>33</sup> In *Region 10 Client Management, Inc. v. Town of Hampstead*,<sup>34</sup> the Supreme Court of New Hampshire ruled that the state's statutory scheme for placing developmentally impaired individuals in various locations throughout the state furthered an important state policy that could not be frustrated by local zoning regulations, which would restrict such a residence from meeting the requirements of a "single family dwelling." The Ohio

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<sup>26</sup> 1980 Mass. Adv. Sh. at 1471, 406 N.E.2d at 1009.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> See articles cited at note 3, *supra*.

<sup>30</sup> 416 U.S. 1, 94 S.Ct. 1536, 39 L.Ed.2d 797 (1974).

<sup>31</sup> 81 N.J. 99, 405 A.2d 368 (1979).

<sup>32</sup> 27 Cal.3d 123, 164 Cal. Rptr. 539, 610 P.2d 436 (1980).

<sup>33</sup> See Schmedemann, *Zoning for the Mentally Ill: A Legislative Mandate*, 16 HARV. J. LEGIS. 853 (1979).

<sup>34</sup> 120 N.H. 885, 424 A.2d 207 (1980).

court, however, has been notably unsympathetic to such efforts. In *Garcia v. Siffrin Residential Association*,<sup>35</sup> the Ohio Supreme Court struck down a similar statute on the grounds that, under the Home Rule Amendment, such a provision could not override the local ordinance defining "family," which had been passed for a legitimate public purpose. In *Brownfield v. State*,<sup>36</sup> the same court determined that the establishment by the state of a halfway house for patients discharged from psychiatric institutions was not automatically exempt from local zoning provisions under the principle of governmental immunity.

Approaches to the problem of group homes vary widely and are clearly still in flux. By interpreting existing provisions of the Zoning Enabling Act specifically to exempt such an institution as meeting its broad definition of "educational purpose," the Massachusetts Court has established an approach that may avoid the state-local conflict. While it is yet unclear how far the Court will go in viewing "halfway houses" as fulfilling an educational purpose—for example, whether the homes for the mentally retarded or other groups specifically excluded from the Fitchburg facility will qualify or whether eventual re-entry into society by residents will be a prerequisite—advocates of deinstitutionalization are certain to regard this case as a major victory.

As the Massachusetts Court takes this admirable step in expanding the language of the "educational purpose" exemption to include such uses, it is also important that the needs of the local communities be kept in mind. Steps should be taken, perhaps by the Legislature, to grant to local communities some reasonable regulatory powers to ensure that these important, but not mainstream, educational uses will be "good neighbors."

**§ 10.3. Flood Plain Zoning—Turnpike Realty Standard Controlling.** In 1972, in *Turnpike Realty Co. v. Town of Dedham*<sup>1</sup> the Supreme Judicial Court established a strong policy in support of flood plain zoning. In *Turnpike Realty*, the Court ruled that provided that there was a reasonable basis for including land in a flood plain district and that not all use of the land was prohibited, very stringent restrictions on the permitted uses did not amount to an unconstitutional deprivation.<sup>2</sup> Noting that the restrictions

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<sup>35</sup> 63 Ohio St.2d 259, 407 N.E.2d 1369 (1980).

<sup>36</sup> 63 Ohio St.2d 282, 407 N.E.2d 1365 (1980).

§ 10.3 <sup>1</sup> 362 Mass. 221, 284 N.E.2d 891 (1972), *cert. denied*, 409 U.S. 1108, 93 S.Ct. 908, 34 L.Ed. 689 (1973). See Huber, *Zoning and Land Use*, 1972 ANN. SURV. MASS. LAW, § 22.5.

<sup>2</sup> The by-law upheld in *Turnpike Realty* provided that: "[w]ithin a Flood Plain District no structure or building shall be erected, altered or used, and no premises shall be used except for one or more of the following uses: Any woodland, grassland, wetland, agricultural, horticultural or recreational use of land or water not requiring filling. Buildings and sheds accessory to any of the Flood Plain uses are permitted on approval of the Board of Appeals." 362 Mass. at 224, 284 N.E.2d at 894.

placed on an individual's land must be balanced against the potential harm to the community from uncontrolled development of flood plain land, the Court listed the following as important public policy objectives of flood plain zoning:

- (1) the protection of individuals who might choose, despite the flood dangers, to develop or occupy land on a flood plain;
- (2) the protection of other landowners from damages resulting from development of a flood plain and the consequent obstruction of the flood flow;
- (3) the protection of the entire community from individual choices of land use which require subsequent public expenditures for public works and disaster relief.<sup>3</sup>

Citing the Connecticut decision of *Vartelas v. Water Resources Commission*,<sup>4</sup> the Court emphasized the distinction between this type of protective regulation and eminent domain: "The police power regulates use of property because uncontrolled use would be harmful to the public interest. Eminent domain, on the other hand, takes private property because it is useful to the public."<sup>5</sup>

Two 1980 cases reaffirmed the continued vitality of *Turnpike Realty* with regard to flood plain zoning. In *S. Kemble Fischer Realty Trust v. Board of Appeals of Concord*,<sup>6</sup> the Appeals Court, relying on *Turnpike Realty* upheld the local board's denial of a special permit to fill a canal on land within the town's flood plain zone.<sup>7</sup> In *Turner v. Town of Walpole*,<sup>8</sup> the Appeals Court again found *Turnpike Realty* to be controlling. The court upheld the land court's decision that the town's flood plain district was not confiscatory, barring evidence showing that the plaintiff's land was not subject to flooding and so long as the plaintiff was not deprived of all use.<sup>9</sup>

In *S. Kemble Fischer*, the Appeals Court found that the trial judge's findings of fact amply supported his determination that the board had been correct in denying the permit.<sup>10</sup> These facts showed that the land in question

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<sup>3</sup> *Id.* at 228, 284 N.E.2d at 896.

<sup>4</sup> 146 Conn. 650, 153 A.2d 822 (1959).

<sup>5</sup> 362 Mass. at 235, 284 N.E.2d at 899, (quoting *Vartelas*, 146 Conn. at 654, 153 A.2d at 824).

<sup>6</sup> 1980 Mass. App. Ct. Adv. Sh. 637, 402 N.E.2d 100.

<sup>7</sup> *Id.* at 641, 402 N.E.2d at 103.01. Initially, the court addressed a threshold procedural issue. The plaintiff claimed that the findings of the trial court were inconsistent with facts contained in responses of the board to requests for admissions made pursuant to MASS. R. CIV. P. 36(a). *Id.* at 637, 402 N.E.2d at 100. The court rejected this claim, pointing out that, as with all forms of discovery, facts must be introduced into the record in order for a party to rely on them. *Id.* at 638, 402 N.E.2d at 102. The court compared the plaintiff's attempt to argue the importance of facts not before the court to trying to argue on appeal a point of law that was not before the trial judge. *Id.* at 639, 402 N.E.2d at 102.

<sup>8</sup> 1980 Mass. App. Ct. Adv. Sh. 1745, 409 N.E.2d 807.

<sup>9</sup> *Id.* at 1745-46, 409 N.E.2d at 808.

<sup>10</sup> 1980 Mass. App. Ct. Adv. Sh. at 639-40, 402 N.E.2d at 102.

was subject to flooding and that filling it would defeat the canal's drainage function.<sup>11</sup> Filling the land would increase the velocity of water flow over a dam, possibly eroding the dam, washing out fill, and changing the course of a river.<sup>12</sup> Filling would also reduce the water storage in the land, affect other properties, and cause stagnation and pollution in the unfilled end of the canal.<sup>13</sup>

The applicable provision of the Concord by-law provided that no land fill was permitted "in any part of the Flood Plain Conservancy District" without a special permit, which could be issued only if it were "proven to the satisfaction of the Board of Appeals, after the question has been referred to and reported on by the Planning Board and the Board of Health, as being in fact not subject to flooding or not unsuitable because of drainage conditions . . . and that the use . . . will not be detrimental to the public health, safety or welfare."<sup>14</sup> The planning board determined that the fill would interfere with the purpose of the Flood Plain Conservation District and the board of health reported that it would be detrimental to the public health by increasing pollution and stagnation in a section of water.<sup>15</sup> The court concluded that these reports precluded any claim that the board of appeals had acted in an unreasonable, capricious, or arbitrary manner or on a legally untenable ground—the only bases for overturning a board's decision to deny a permit.<sup>16</sup>

The plaintiff also attacked the by-law as unconstitutional, claiming that because the by-law left him without any practical use of the property, it effected a taking without just compensation.<sup>17</sup> The court found that this claim was untenable following *Turnpike Realty*, despite the plaintiff's attempt to sidestep that decision by relying on the trial judge's finding that he could not use the land "as it is now for access, general recreation or other uses permitted within the Flood Plain Conservancy District."<sup>18</sup> The court pointed out that the judge also had found that the plaintiff's land was not worthless and had noted that the record did not show that he could not use his land for some purpose not requiring filling, such as to enhance his land outside the flood plain.<sup>19</sup>

Finally, the court rejected the plaintiff's attempt to use section 1.B of the zoning by-law, which permits an owner whose lot straddles zoning districts to extend the less restrictive use into the more restrictive area for thirty feet,

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<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 640, 402 N.E.2d at 103.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*, at 640-41, 402 N.E.2d at 103.

<sup>17</sup> *Id.* at 641, 402 N.E.2d at 103.

<sup>18</sup> *Id.*, 402 N.E.2d at 104.

<sup>19</sup> *Id.*

to exempt a thirty-foot strip of his land from the flood plain zoning.<sup>20</sup> The court noted that the flood plain district is an overlay zone imposed over any underlying use district.<sup>21</sup> Because the subjecting of land to flood plain restrictions is a function of the grade of the land, as specified in another section of the by-law, these controls override the controls of the underlying zone.<sup>22</sup>

In *Turner v. Town of Walpole*, the plaintiff similarly tried to avoid the rule of *Turnpike Realty* by distinguishing the facts. The plaintiff asserted that Walpole's by-law did not provide any special permit procedure allowing the building of residential and business buildings in the flood plain district, whereas it did authorize such permits for industrial and manufacturing uses.<sup>23</sup> The court deferred to the judgment of the town meeting in establishing the by-law, noting that it reasonably could have determined that the latter uses were more able to provide flood protection devices or to cope with flooding than the former.<sup>24</sup> The court also found that the town meeting's action reflected the policy concerns of flood plain zoning outlined in *Turnpike Realty*<sup>25</sup> and were consistent with the requirements of the National Flood Insurance Act.<sup>26</sup>

The strong policy in support of flood plain zoning in Massachusetts established by *Turnpike Realty* has clearly not been eroded. Unless a municipality has no basis for including the land in such a district or prohibits all use of the land, the validity of flood plain zoning will be upheld. This may appear to be a harsh limitation, particularly in view of the natural tendency of landowners to assume that they can "improve" any land they own to suit their purposes. However, it is arguable that certain land with inherent restrictions, such as land subject to flooding, is taken by a landowner subject to present, not speculative uses. If land has always been a swamp and, over several centuries, no "improvements" have been made, it is difficult for the landowner to argue economic loss or to claim entitlement to make significant changes, especially when those changes could have an adverse impact on others. The present, valid use of such land, however limited, may be all that a landowner is entitled to enjoy and sufficient to avoid the taking issue.

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<sup>20</sup> *Id.* at 642, 402 N.E.2d at 104.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 1746, 409 N.E.2d at 808.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*, see text and note at note 3 *supra*.

<sup>26</sup> The federal government attempted to control flood losses through a massive system of public works, such as dams and levees, but this system failed to reduce losses, and it was determined that the only way to ensure control of damages was to restrict the development of land that is subject to flooding. Through the Flood Insurance Act of 1956 and the National Flood Insurance Program passed in 1968, states and municipalities have been required to adopt flood plain regulations. 5 N. WILLIAMS, AMERICAN LAND PLANNING LAW, §§ 158.17-158.19; 2 R. ANDERSON, AMERICAN LAW OF ZONING, § 9.45.

§ 10.4. **Open Meeting Law—Applicability to Zoning Board of Appeals.** During the *Survey* year, the Appeals Court ruled that a meeting of a zoning board of appeals considering an application for a special permit falls within the purview of the Massachusetts open meeting law.<sup>1</sup> In *Yaro v. Board of Appeals of Newburyport*,<sup>2</sup> the zoning board of appeals of Newburyport, following proper notice, held a public hearing on July 10, 1979, to consider a petition for a special permit to build residential condominiums. Following two hours of public discussion of the issue at the hearing,<sup>3</sup> the board adjourned.<sup>4</sup> Its members then moved to another room in the city hall where they deliberated and voted in favor of the petition.<sup>5</sup> Neither minutes nor a roll call vote were taken during the twenty-minute meeting, which took place in the absence of the public, as was the board's practice.<sup>6</sup> On July 19, the board members signed their written decision, and on July 23, it was filed with the city clerk and copies were mailed to the interested parties.<sup>7</sup>

The plaintiffs, four registered voters of the city, brought an action in the superior court seeking invalidation of the decision alleging that, in holding the private meeting, the board had not complied with the open meeting requirement of chapter 39 of the General Laws. The plaintiffs claimed that the board was a "governmental body" as defined in section 23A<sup>8</sup> and was, therefore, subject to the provisions of section 23B, which require that "[a]ll meetings of a governmental body shall be open to the public."

The court first noted that the board would not be required to adhere to the open meeting requirements if to do so would be inconsistent with the board's obligations under other statutes.<sup>10</sup> The board argued that the open-meeting requirement conflicted with sections 11 and 15 of chapter 40, the zoning statute.<sup>11</sup> These sections concern notice, public hearings, and procedures for taking appeals to permit-granting authorities.<sup>12</sup> The court found

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§ 10.4. <sup>1</sup> G.L. c. 39, §§ 23A-23C.

<sup>2</sup> 1980 Mass. App. Ct. Adv. Sh. 1839, 410 N.E.2d 725.

<sup>3</sup> *Id.* at 1840, 410 N.E.2d at 727.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> Section 23A defines a "governmental body" as "every board, commission, committee or subcommittee of any district, city, region or town, however elected, appointed or otherwise constituted, and the governing body of a local housing, redevelopment or similar authority." G.L. c. 39, § 23A.

<sup>9</sup> *Id.*, § 23B.

<sup>10</sup> 1980 Mass. App. Ct. Adv. Sh. at 1841, 410 N.E.2d at 727. G.L. c. 39, § 24 provides that "[t]he provisions of this chapter shall be in force only so far as they are not inconsistent with the express provisions of any provisions of any general or special law; and so far as apt, shall apply to districts as defined in section A of chapter 40." *Id.*

<sup>11</sup> 1980 Mass. App. Ct. Adv. Sh. at 1841, 410 N.E.2d at 727.

<sup>12</sup> G.L. c. 40A, §§ 11, 15.



that the purpose of these sections was to stabilize property uses in the interest of the public, by preventing alterations in zoning laws without full notice and opportunity for public protest.<sup>13</sup>

The court rejected the board's claim that the zoning statutes are inconsistent with the open meeting requirement. The board argued that the legislature did not intend that a zoning board of appeals "deliberate and write their decision in the public arena."<sup>14</sup> The court found this to be an exaggerated characterization of the impact of the open meeting law upon the functioning of a zoning board.<sup>15</sup> The court noted that section 15 of the zoning statute itself requires a public hearing,<sup>16</sup> and that the open meeting law simply mandates that the board "deliberate and arrive at its decision under public observation."<sup>17</sup> The court also noted that the open meeting law does not require verbal public participation during board deliberations or public scrutiny of the actual writing of a decision, once it has been reached at an open meeting at which accurate records have been kept.<sup>18</sup> Thus, the court concluded that the open meeting requirement was not inconsistent with the board's obligation under sections 11 and 15 of chapter 40A of the General Laws.

The board also relied upon section 9 of chapter 40A to support its claim of inconsistency with the open meeting law.<sup>19</sup> Section 9 of chapter 40A provides that if a board does not decide upon an application for a special permit within ninety days after the public hearing, the application shall be considered approved.<sup>20</sup> The board contended that, since it could "act through inaction," section 23B does not apply to it.<sup>21</sup> The court responded to this contention by simply stating that when the board does choose to act by meeting and deliberating, as it had in this case, the requirements of section 23B must be met.<sup>22</sup> The court averred that no responsible body would attempt to avoid the provisions of the open meeting law by approving all requests through habitual inaction.<sup>23</sup>

Thus, the court rejected the board's contention that the open meeting statute did not apply to zoning boards of appeals. Since the superior court judge found the statutory provisions to be inconsistent, he had neither

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<sup>13</sup> 1980 Mass. App. Ct. Adv. Sh. at 1842, 410 N.E.2d at 727-28.

<sup>14</sup> *Id.*, 410 N.E.2d at 728.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 1842-43, 410 N.E.2d at 728. G.L. c. 40A, § 15 provides, in relevant part, that: "[a]ll hearings of the board of appeals shall be open to the public." *Id.*

<sup>17</sup> 1980 Mass. App. Ct. Adv. Sh. at 1842-43, 410 N.E.2d at 728.

<sup>18</sup> *Id.* at 1843, 410 N.E.2d at 728.

<sup>19</sup> *Id.*

<sup>20</sup> G.L. c. 40A, § 9.

<sup>21</sup> 1980 Mass. App. Ct. Adv. Sh. at 1843-44, 410 N.E.2d at 728-29.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

issued an order to the board not to violate section 23B in future meetings nor considered whether to use his discretionary power to invalidate the board's decision.<sup>24</sup> Therefore, the appeals court remanded the case for further proceedings.<sup>25</sup>

After the *Yaro* decision, local boards are on notice that they must comply with the provisions of the open meeting law. This does not mean that all deliberations must take place in a public forum, but simply that notice of all meetings be given and that they be open to observation by members of the public who choose to attend. Furthermore, the actual writing of decisions need not be performed at open sessions, provided that this step is merely the recording of previously made decisions and does not affect the substance of those decisions.

This type of quasi-judicial decision-making differs from true judicial deliberations and can, therefore, more reasonably be undertaken in public. In the case of judicial decisions, where precedent is being developed or cases are being fitted into existing precedent, issues beneath the surface must often be raised. However, in the case of a special permit, in which issues and evidence are well-defined and the standards are clearly set forth by the ordinance, there is less need for privacy in deliberations. This decision does not demand that board members make their decision immediately following a public meeting. They can take time to digest and think over matters before meeting again to vote. Because closed sessions always carry the potential for abuse, it is best that meetings of the board of appeals be open to the public, particularly when there is no inconsistency between the goals of the open meeting law and those of the enabling act that created the decision-making body.

**§ 10.5. Subdivision Control Law—Endorsement of Plans Not Requiring Approval.** Section 81P of the Massachusetts Subdivision Control Law<sup>1</sup> provides that a municipal planning board shall endorse plans that do not require the board's approval under the law.<sup>2</sup> Before this section was added to the subdivision control law, the register of deeds had to endorse

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

§ 10.5. <sup>1</sup> G.L. c. 41, §§ 81K-GG.

<sup>2</sup> Section 81P provides, in part:

"Any person wishing to cause to be recorded a plan of land situated in a city or town in which the subdivision control law is in effect, who believes that his plan does not require approval under the subdivision control law, may submit his plan to the planning board of such city or town and, if the board finds that the plan does not require such approval, it shall forthwith, without a public hearing, endorse thereon . . . the words 'approval under the subdivision control law not required' or words of similar import with appropriate name or names signed thereto, and such endorsement shall be conclusive on all persons."

*Id.*

plans that did not require the board's approval. The endorsement required a determination by the register as to whether the submitted plan, in fact, showed a subdivision—a quasi-judicial function that was neither traditionally nor appropriately a part of the register's role. The addition of section 81P was designed to relieve the register of that burden by requiring the planning board to make this initial determination and providing that the register cannot record a plan unless it is endorsed by the planning board as either approved or not requiring approval.<sup>3</sup> Three cases decided during the 1980 *Survey* year, which involved a board's denial of an endorsement of plans as "not requiring approval," provide guidance as to the appropriate role of the board in making this determination.

In *Gallitano v. Board of Survey and Planning of Waltham*,<sup>4</sup> the Appeals Court upheld a superior court determination that the planning board had improperly withheld an endorsement of a plan.<sup>5</sup> The plaintiff's proposed plan would have divided a parcel, which had access to a public way at two separate points along different sides of the lot, into four separate lots.<sup>6</sup> Each of the lots had at least twenty feet of frontage on a public way, as required by section 81L.<sup>7</sup> One large lot used all the access along one side, while the three smaller lots had access along the other side.<sup>8</sup> Two of these lots were dogleg in shape, narrowing as they angled to the road to provide access to wider sections that complied with the city's width and side yard requirements.<sup>9</sup> The lots all met the city's other requirements for a buildable lot, which did not include a minimum frontage requirement,<sup>10</sup> as well as the twenty-foot frontage minimum required by section 81L of the Subdivision Control Law.<sup>11</sup>

The planning board alleged that despite the literal compliance with the public access requirements, the proposed plan would leave some of the lots without clear access to utility and municipal services and would create a traffic hazard.<sup>12</sup> On this basis, the planning board offered affidavits of city fire, police, traffic, and public works officials in support of its motion for summary judgment.<sup>13</sup> The officials' chief concern was with two dogleg lots one with a forty foot access and one with a twenty foot access.<sup>14</sup> They claimed that because the houses would likely be invisible from the road, fire

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<sup>3</sup> *Id.*, Johnson, "Conveyancing," 1954 ANN. SURV. MASS. LAW, § 2.7.

<sup>4</sup> 1980 Mass. App. Ct. Adv. Sh. 1397, 407 N.E.2d 359.

<sup>5</sup> *Id.* at 1402, 407 N.E.2d at 362.

<sup>6</sup> *Id.* at 1397-98, 407 N.E.2d at 359-60.

<sup>7</sup> *Id.* at 1398, 407 N.E.2d at 360.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 1398-99, 407 N.E.2d at 360.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 1399, 407 N.E.2d at 360.

and police response to emergencies would be jeopardized and the cost of running utility lines would be heightened.<sup>15</sup> The board claimed, in sum, that the lots had "too narrow a frontage, too long a neck and enter . . . Beaver Street at too acute an angle."<sup>16</sup>

The board relied on *Gifford v. Planning Board of Nantucket*,<sup>17</sup> where the court held that the plan was "an attempted evasion" of the subdivision control law. In *Gifford*, a proposed plan showed a division of a parcel into forty-six lots, each of which met the zoning frontage and area requirements only by means of connector strips, some over a thousand feet long and narrowing to as little as seven feet.<sup>18</sup> The Court noted that the plan was "a quite exceptional case" in which some of the lots "are practically inaccessible from their respective borders on a public way."<sup>19</sup>

In denying the board's appeal, the Appeals Court distinguished *Gifford*, pointing out that in the present case, access would not be difficult, and that the twenty foot access strip never narrowed further.<sup>20</sup> The court noted that any difficulties that might exist in the plan are inherent in a zoning ordinance that does not require minimum frontage, regulate the widths or angles of driveways, or require that dwellings be visible from the street.<sup>21</sup> The court also stated that the development of back lots is foreseeable in a zoning scheme requiring a 100-foot lot width minimum but less frontage. The court emphasized that it is beyond the power of the planning board to rectify such a scheme whether or not it be a conscious choice on the part of the town to allow such development.<sup>22</sup> In sum, the court stated that the board is limited to acting principally through its regulations and has no power to pass regulations governing "the size, shape, width, [or] frontage . . . of lots."<sup>23</sup>

In *Smalley v. Planning Board of Harwich*,<sup>24</sup> the Appeals Court also upheld a superior court determination that a planning board had erroneously refused an endorsement of a plan and further delineated the appropriate role of the board in reviewing plans under section 81P. In *Smalley*, the plaintiff had submitted a plan subdividing a parcel of 34,925 square feet into two lots—one with an area of 14,897 containing the residence from the original parcel and one with an area of 20,028 containing a barn.<sup>25</sup> Each lot had frontage on a public way greater than the 100-foot minimum required

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<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 1400, 407 N.E.2d at 361.

<sup>17</sup> 376 Mass. 801, 383 N.E.2d 1123 (1978).

<sup>18</sup> *Id.* at 808-09, 383 N.E.2d at 1126-67.

<sup>19</sup> *Id.*

<sup>20</sup> 1980 Mass. App. Ct. Adv. Sh. at 1401, 407 N.E.2d at 362.

<sup>21</sup> *Id.* at 1400, 407 N.E.2d at 361-62.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 1400-01, 407 N.E.2d at 362 (quoting G.L. c. 41, § 81L).

<sup>24</sup> 1980 Mass. App. Ct. Adv. Sh. 1867, 410 N.E.2d 1219.

<sup>25</sup> *Id.* at 1868, 410 N.E.2d at 1220.

by the zoning ordinance.<sup>26</sup> The smaller lot did not conform to the by-law's 20,000 square foot minimum, however, and the plan also contained some violations of the side-line requirements.<sup>27</sup>

The board grounded its refusal to grant the endorsement on the basis of these violations of the zoning law, relying on section 81M of chapter 41 of the General Laws.<sup>28</sup> This section sets out the general purposes of the subdivision control law stating in part that "[t]he powers of a planning board . . . under the subdivision control law shall be exercised with due regard . . . for insuring compliance with the applicable zoning ordinances or by-laws."<sup>29</sup>

The court concluded that section 81P did not place on the board the same responsibilities and duties the board holds when considering approval of a subdivision.<sup>30</sup> The court stated that the legislative history of the provision supported the conclusion that the section's purpose was to alleviate the "difficulty . . . encountered by registers of deeds in deciding whether a plan showing ways and lots could lawfully be recorded,"<sup>31</sup> and not to enlarge the substantive powers of the board.<sup>32</sup> The court stated further that section 81P simply provides a simple method of informing the register that the board is not concerned with a plan "because the vital access is reasonably guaranteed."<sup>33</sup>

The court described the endorsement procedure as routine in nature, noting that an endorsement is to be made "forthwith, without a public hearing" and pointing to the 1961 amendment to the section which provides that "[s]uch endorsement shall not be withheld unless such plan shows a subdivision."<sup>34</sup> Further, the court rejected the board's reliance upon the general provisions of section 81M.<sup>35</sup> In doing so, the court noted that if the planning board were considered responsible "for insuring compliance with the applicable zoning [laws]" for the purposes of a section 81P endorsement, it would also logically be responsible for such other provisions of section 81M as "securing adequate provisions for water, sewerage, drainage, [and] underground utility services."<sup>36</sup> The court emphasized that a section 81P endorsement is not a statement that these matters are satisfactory to the board, but merely a determination as to whether a plan shows a subdivision.<sup>37</sup>

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<sup>26</sup> *Id.* at 1869, 410 N.E.2d at 1221.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 1870, 410 N.E.2d at 1221.

<sup>31</sup> *Id.* (citing 1953 House Docket No. 2249, at 55).

<sup>32</sup> *Id.* at 1871, 410 N.E.2d at 1222.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 1871-72, 410 N.E.2d at 1222.

<sup>35</sup> *Id.* at 1872, 410 N.E.2d at 1222.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

The court also denied the board's argument that the recording of a plan showing a zoning violation serves no legitimate purpose, pointing out that recording could be a preliminary step to applying for a variance or buying from or selling to an abutter in order to bring the lot into compliance.<sup>38</sup> Finally, the court rejected the board's argument that the phrase "used, or available for use" in the definition of "lot" in section 81L means a lot that meets the zoning requirements, thereby excluding the plaintiff's land from qualifying as an exception to the definition of subdivision in that section.<sup>39</sup> The court characterized the board's reasoning as "self-defeating," stating that such reasoning would also take the plan out of the definition of a subdivision, as subdivision is defined as "the division of a tract of land into two or more lots."<sup>40</sup> Thus, the court held that if the plan did not create a subdivision, the board would be required to endorse it.<sup>41</sup>

In *Richard v. Planning Board of Achushnet*,<sup>42</sup> the Appeals Court affirmed the superior court determination that the planning board had acted within its authority in refusing to endorse the plaintiff's plan as "approval under the subdivision control law not required."<sup>43</sup> Following the planning board's failure to endorse his plan, the plaintiff appealed to the superior court claiming entitlement to a section 81P endorsement.<sup>44</sup> The plaintiff claimed that he was merely altering the boundaries of lots on an already approved subdivision plan.<sup>45</sup> He claimed further that he had to make the charges in order to comply with changes made in the minimum lot area requirements of the zoning law since approval of his original plan.<sup>46</sup> He contended that the new plan did not show a subdivision because the lots drawn all had the required frontage on "a way shown on a plan theretofore approved and endorsed in accordance with the subdivision control law," pursuant to exception (b) of the definition of the word "subdivision" in the General Laws.<sup>47</sup> The prior endorsement on which the plaintiff relied had been granted 18 years earlier, in 1960, by the town's board of selectmen, who were acting in a temporary capacity as a planning board.<sup>48</sup> The plan showed a subdivision of 26 lots and a layout of three proposed streets.<sup>49</sup> At the time of the plaintiff's request for endorsement of its revised plan in 1978, none of the streets had been built, and no houses had been con-

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<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 1872, 410 N.E.2d at 1223.

<sup>40</sup> *Id.* at 1872-73, 410 N.E.2d at 1223.

<sup>41</sup> *Id.* at 1873, 410 N.E.2d at 1223.

<sup>42</sup> 1980 Mass. App. Ct. Adv. Sh. 1331, 406 N.E.2d 728.

<sup>43</sup> *Id.* at 1331, 406 N.E.2d at 729.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 1331-32, 406 N.E.2d at 729.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

structed on lots that were material to the present action.<sup>50</sup> In addition, the locus had been the site of gravel excavation and was now twenty-five feet below the grade of the surrounding land.<sup>51</sup>

The parties framed the question before the court as whether a plan previously approved as complying with the then applicable zoning requirements is exempt from further control, where the ways in the plan are only "paper streets."<sup>52</sup> According to this characterization of the question, the court would have to determine whether the plan would technically involve a subdivision, or whether the earlier approval removed the plan from the subdivision category.<sup>53</sup> The court rejected this characterization of the issues benefited. Such a statement, the court pointed out, ignored many significant variables. For example, if an earlier approved plan contained conditions that had not been met, then a new plan would not be exempt from subdivision control.<sup>54</sup> On the other hand, if the landowner has filed a bond, deposited money or negotiated securities, or entered into a covenant to secure the construction of ways and the installation of municipal services, a new plan that merely alters the number, shape, and size of lots would be entitled to endorsement as not requiring approval under section 81P.<sup>55</sup>

The court noted that the provisions in section 81U, regarding the completion of the ways and municipal services of a subdivision plan, are mandatory.<sup>56</sup> The court also noted that in endorsing the plaintiff's original plan in 1960, the town selectmen had not set forth the manner in which the ways were to be built, the principal services which were to be provided, or the standards which the work must meet.<sup>57</sup> The court concluded that exception (b) of the definition of subdivision in section 81L, upon which the plaintiff relied, requires that the approved ways have been built or that there be assurance as set forth in section 81U that they will be constructed.<sup>58</sup> Any

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<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 1332-33, 406 N.E.2d at 730.

<sup>54</sup> *Id.* at 1333, 406 N.E.2d at 730.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*, G.L. c. 41, § 81U provides, in part:

"Before endorsement of its approval of a plan, a planning board shall require that construction of ways and the installation of municipal services be secured by one, or in part by one and in part by the other, of the methods described in the following clauses (1) [providing for a proper bond or a deposit of money or negotiable securities "to secure performance of the construction of ways and the installation of municipal services required for lots in the subdivision shown on the plan . . ."] and (2) [providing for a covenant "whereby such ways and services shall be provided to serve any lot before such lot may be built upon or conveyed, other than by mortgage deed . . ."], which method may be selected and from time to time by the applicant."

*Id.*

<sup>57</sup> 1980 Mass. App. Ct. Adv. Sh. at 1333-34, 406 N.E.2d at 730.

<sup>58</sup> *Id.*, 406 N.E.2d at 731.

other conclusion would controvert the essential role of the subdivision control law in ensuring that ways and services will be constructed according to municipal standards.<sup>59</sup> The court noted that this was especially true in a case such as *Richard* in which the locus was 25 feet below the surrounding land, warranting municipal concern about the safety of the grades of access roads and the adequacy of drainage facilities.<sup>60</sup>

In sum, the Appeals Court in 1980 made clear that the role of the planning board in passing on a request for a section 81P endorsed is a limited one. The board simply must make a determination as to whether, according to the definition of "subdivision" in section 81L, a plan shows a subdivision, in which case it requires approval by the board, or does not show a subdivision, in which case it must receive an endorsement as not requiring approval by the board. The planning board cannot use this provision to force a landowner to comply with the municipality's zoning by-laws or to conform with its own view of desirable traffic and safety standards. On the other hand, an application for such endorsement cannot circumvent the goals of the subdivision control law where the very access to public ways that exempts a plan from the law does not exist in any bona fide, meaningful form.

**§ 10.6. Governmental Immunity From Local Zoning By-Laws.** Absent a statutory provision to the contrary, a state and its agencies are not subject to the zoning regulations of municipalities.<sup>1</sup> During the *Survey* year, in *County Commissioners of Bristol v. Conservation Commission of Dartmouth*,<sup>2</sup> the Supreme Judicial Court rejected a town's attempt to invoke the provisions of the Zoning Act<sup>3</sup> and the Home Rule Amendment<sup>4</sup> to subject the construction of a county jail to the requirements of the town's zoning ordinance.

In 1973, the Legislature authorized the County Commissioners of Bristol County to construct a new jail and to acquire the necessary land by purchase or eminent domain.<sup>5</sup> After appropriate study, the County Commissioners decided to build the facility in the town of Dartmouth in an area zoned for limited industrial use.<sup>6</sup> In compliance with the requirements of chapter 131, section 40,<sup>7</sup> the commissioners applied to the Conservation

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<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

§ 10.6. <sup>1</sup> 2 R. ANDERSON, AMERICAN LAW OF ZONING (2d ed. 1977), § 12.06.

<sup>2</sup> 1980 Mass. Adv. Sh. 1289, 405 N.E.2d 637.

<sup>3</sup> G.L. c. 40A.

<sup>4</sup> Art. 2 of the Amendments to the Massachusetts Constitution, as amended by art. 89 of the Amendments.

<sup>5</sup> 1980 Mass. Adv. Sh. at 1289, 405 N.E.2d at 637.

<sup>6</sup> *Id.* at 1289-90, 405 N.E.2d at 637-38.

<sup>7</sup> Chapter 131, section 7 requires, in part, that:

"[n]o person shall remove, fill, dredge or alter any bank, fresh water wetland, coastal



Commission of Dartmouth for a determination as to what controls, if any, were to be applied to the construction of the proposed jail to meet the environmental considerations covered by that statute.<sup>8</sup> Following a determination by the Conservation Commission that the site fell within the scope of the statute, the County Commissioners filed with the Conservation Commission the required notice of intent to engage in construction activity on the land.<sup>9</sup>

The Conservation Commission, relying on chapter 31, section 40,<sup>10</sup> notified the County Commissioners that it could not accept their notice until they had applied for a zoning variance.<sup>11</sup>

The County Commissioners obtained a declaratory judgment from the superior court that the planned county use gave the land immunity from the local by-law.<sup>12</sup> The Conservation Commission filed a motion to alter or amend judgment, claiming that the presumption of immunity from municipal zoning contravened the Home Rule Amendment.<sup>13</sup> The superior court denied the motion, and the Supreme Judicial Court affirmed the judgment of the superior court, holding that the land upon which the county jail was to be built was exempt from Dartmouth's zoning by-laws.<sup>14</sup>

The Court examined the origins and use of the immunity rule in Massachusetts by looking at three earlier cases. In *Teasdale v. Newell & Snowling Construction Co.*,<sup>15</sup> the Court held that a contractor hired by the metropolitan park commissioners for work on land taken for park purposes was exempted from the community's health laws, which prohibited stables needed by the contractor for workhorses.<sup>16</sup> In *City of Medford v. Marinucci*

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wetland, beach, dune, flat, marsh, meadow or swamp bordering on the ocean or on any estuary, creek, river, stream, pond, or lake, or any land under said waters or any land subject to tidal action, coastal storm flowage, or flooding, other than in the course of maintaining, repairing or replacing, but not substantially changing or enlarging, an existing and lawfully located structure or facility used in the service of the public and used to provide electric, gas, water, telephone, telegraph and other telecommunication services, without filing written notice of his intention to so remove, fill, dredge or alter, including such plans as may be necessary to describe such proposed activity and its effect on the environment. . . . Said notice shall be sent by certified mail to the conservation commissioner or, if none to the board of selectmen in a town or the mayor of a city in which the land upon which such activity is proposed is located. . . . Upon written request of any person, the conservation commission shall within ten days make a written determination as to whether this section is applicable to any land or work thereon."

*Id.*

<sup>8</sup> 1980 Mass. Adv. Sh. at 1290, 405 N.E.2d at 638.

<sup>9</sup> *Id.*

<sup>10</sup> G.L. c. 31, § 40.

<sup>11</sup> *Id.* at 1290-91, 405 N.E.2d at 638.

<sup>12</sup> *Id.* at 1291, 405 N.E.2d at 638.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> 192 Mass. 440, 78 N.E. 504 (1906).

<sup>16</sup> *Id.* at 443, 78 N.E. at 504.

*Bros. & Co.*,<sup>17</sup> a contractor hired by the Department of Public Works to build a section of interstate highway was allowed to build a railroad loading area in a location zoned for single residence housing.<sup>18</sup> In *Village on the Hill v. Massachusetts Turnpike Authority*,<sup>19</sup> the Turnpike Authority, after taking land by eminent domain from a corporation, contracted to sell to the corporation another lot on which to rebuild its plant.<sup>20</sup> The plaintiff petitioned for a writ of mandamus to compel the building commissioner to enforce the Boston zoning law, which placed part of his new lot in a residential district.<sup>21</sup> At the time of the action, title to the lot and the building being constructed upon it remained in the Turnpike Authority.<sup>22</sup> The Court found that the property was not subject to the zoning regulation stating that the Turnpike Authority was a body politic . . . performing an essentially governmental function.<sup>23</sup> The reasoning in all these cases is well summarized by language from *Medford v. Marinucci Bros. & Co.*: “[W]e cannot conclude that by enacting the Zoning Enabling Act the Legislature intended to authorize a municipality to thwart the Commonwealth in carrying out the functions of government.”<sup>24</sup>

The Court in *County Commissioners of Bristol* then reconfirmed the immunity rule, stating that “an entity or agency created by the Massachusetts Legislature is immune from municipal zoning regulations at least insofar as that entity or agency is performing an essential governmental function absent statutory provision to the contrary.”<sup>25</sup> The Court concluded that a county was such an entity.<sup>26</sup> The Court found clear support that the county was performing “an essential governmental function” in the specific language of chapter 34, section 3, which provides, in part, that “[e]ach county shall provide suitable jails, houses of correction, fireproof offices and other public buildings necessary for its use.”<sup>27</sup>

The Conservation Commission argued that section 3 of the Zoning Act itself expressly limits immunity from local by-laws to land used for religious or educational purposes.<sup>28</sup> The Court rejected the commission’s reading of

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<sup>17</sup> 344 Mass. 50, 181 N.E.2d 584 (1962); see Huber, *Zoning and Land Use*, 1962 ANN. SURV. MASS. LAW, § 13.5.

<sup>18</sup> 344 Mass. at 53, 181 N.E.2d at 586.

<sup>19</sup> 348 Mass. 107, 202 N.E.2d 602 (1964); see Huber, *Zoning and Land Use*, 1964 ANN. SURV. MASS. LAW, § 14.24.

<sup>20</sup> 348 Mass. at 117, 202 N.E.2d at 610.

<sup>21</sup> *Id.* at 109, 202 N.E.2d at 604-05.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 119, 202 N.E.2d at 611.

<sup>24</sup> 344 Mass. at 57, 181 N.E.2d at 588.

<sup>25</sup> 1980 Mass. Adv. Sh. at 1293, 405 N.E.2d at 640.

<sup>26</sup> *Id.* at 1293-94, 405 N.E.2d at 640.

<sup>27</sup> *Id.* at 1294, 405 N.E.2d at 640.

<sup>28</sup> *Id.* at 1295, 405 N.E.2d at 641. The section 3 of the Zoning Act provides that: [n]o zoning ordinance or by-law shall . . . prohibit, regulate or restrict the use of land or structures for religious purposes or for educational purposes on land owned or leased by

this provision, stating that it had failed to read the statute as a whole and to interpret the section in light of the statutory purposes of the Zoning Act.<sup>29</sup> The Court found that the commission's interpretation would defeat the act's purpose of facilitating public requirements and would effectively allow municipalities to preempt the construction of all facilities at the state or the county level.<sup>30</sup> The Court also found that the commission had misconstrued the purpose of section 3. The Court stated that the specific mention of religious and educational facilities did not exclude all other uses from immunity to local by-laws. Rather, the provision made these formerly totally exempt institutions subject to reasonable local dimensional requirements without making them subject to local zoning requirements.<sup>31</sup> In addition, the Court noted that in the past the Legislature had been specific when it granted a veto power to a municipality over any legislative action.<sup>32</sup>

The Conservation Commission's final argument was that the superior court's decision was contrary to both the "spirit and letter" of the Home Rule Amendment, which provides a direct constitutional grant of power to municipalities.<sup>33</sup> The Court cited *Bloom v. Worcester*<sup>34</sup> as the source of the standard for determining whether a local by-law is "not consistent" with

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the commonwealth or any of its agencies, subdivisions or bodies politic or by a religious sect or denomination, or by a nonprofit educational corporation; provided, however, that such land or structures may be subject to reasonable regulations concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements.

G.L. c. 40A § 3.

<sup>29</sup> 1980 Mass. Adv. Sh. at 1295, 405 N.E.2d at 641. G.L. c. 40A, § 2A states, in part, that This act is designed to provide standardized procedures for the administration and promulgation of municipal laws. This section is designed to suggest objectives for which zoning might be established which include, but are not limited to, the following: . . . to facilitate the adequate provision of transportation, water, water supply, drainage, sewerage, schools, parks, open space and other public requirements.

*Id.*

<sup>30</sup> 1980 Mass. Adv. Sh. at 1296, 405 N.E.2d at 641.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* The court cited the provisions of G.L. c. 34, § 25, as exemplifying this practice. This section authorizes county commissioners to acquire "such real property within their respective counties as may be necessary to maintain, improve, protect, limit the future use of or otherwise conserve and properly utilize open spaces, and may control and manage the same; *provided that such acquisition has been approved* by the department of environmental management and the conservation committee of the city or town within which the land lies, or if such city or town has no conservation committee, by a two thirds vote of the city council in the case of a city and by a two thirds vote of the board of selectmen in the case of a town . . ." *Id.* (emphasis supplied by the Court).

<sup>33</sup> 1980 Mass. Adv. Sh. at 1297, 405 N.E.2d at 641.

<sup>34</sup> Art. 2 of the Amendments to the Massachusetts Constitution, as amended by art. 89 of the Amendments, § 2. The Amendment reads, in part: "Any city or town may, by the adoption, amendment, or repeal of the local ordinances or by-laws, exercise any power or function which the general court has power to confer upon it, which is not inconsistent with the constitution or laws enacted by the general court in conformity with powers reserved to the general court by section eight." *Id.*

the laws enacted by the Legislature in conformity with its reserved powers.<sup>35</sup> The *Bloom* decision likened the process to that used in federal preemption cases and other cases involving "inconsistent" local ordinances, noting that even if the Legislature has not expressly indicated its intent in this regard, an intention to bar local by-laws that exercise control over the same subject as the legislation may still be inferred.<sup>36</sup> The *Bloom* Court also stated that if the state legislative purpose can be achieved in the face of a local by-law on the same subject, the local by-law would not be considered inconsistent with that legislation.<sup>37</sup>

The Court in the *County Commissioners of Bristol* case found that the purpose of the statute in question unequivocally empowered the commissioners to construct the jail and related facilities within the county and to "acquire *any land and buildings that may be necessary* for this construction."<sup>38</sup> Because the municipal ordinance impeded the commissioners' ability to carry out these tasks, the Court found the ordinance to be inconsistent with the statute and, therefore, not authorized by the Home Rule Amendment.<sup>39</sup>

The final issue before the Court was whether the statute conformed with the requirements of section 8 of the Home Rule Amendment, which provides that "[t]he general court shall have the power to act in relation to cities and towns, but only by general laws which apply alike to all cities, or to all towns, or to all cities and towns, or to a class of not fewer than two."<sup>40</sup> The Court concluded that the statute met the requirements of section 8 because it applied to a facility for a county, which represents a class of two or more towns and cities.<sup>41</sup> The Court stated also that the special legislation was valid because the statute provides that the county commissioners may take or purchase "any land and buildings that may be necessary for said purposes," without specifying the land of any particular city or town.<sup>42</sup>

The Court stressed that the issue in this case was one of legislative intent, and not of town or county rights.<sup>43</sup> In addition to concluding that the Legislature did not intend the Zoning Act to subject state buildings to local zoning regulations, the Court also expressed concern with maintaining consistency within the legislative framework stating that a requirement of express legislative intent would cause undue confusion in other situations in

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<sup>35</sup> 363 Mass. 136, 293 N.E.2d 268 (1973). *Id.* at 155-56, 293 N.E.2d at 280.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> 1980 Mass. Adv. Sh. at 1290, 405 N.E.2d at 642 (emphasis supplied by the Court).

<sup>39</sup> *Id.*

<sup>40</sup> Art. 2 of the Amendments to the Massachusetts Constitution, as amended by art. 89 of the Amendments, § 8.

<sup>41</sup> 1980 Mass. Adv. Sh. at 1300, 405 N.E.2d at 643.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

which the Legislature did not intend to yield to local regulations but did not specifically refer to them in the statute.<sup>44</sup>

In a vigorous dissent, Justice Wilkins argued that the Home Rule Amendment should have changed this presumption about silence on the part of the Legislature. He claimed that the Court did a disservice to the spirit and provisions of this amendment by relying on decisions made prior to its passage in attributing to the legislature an intention to override local ordinances when a statute is silent on the issue.<sup>45</sup> While agreeing that the Legislature clearly could have authorized the County Commissioners to proceed in disregard of local regulations and acknowledging that the proposed use would not be incompatible with other uses authorized by the town's by-law, he strongly disagreed with "the principle established by the court's decision . . . that every grant of the power of eminent domain to a State entity or agency [at least if enacted after the Home Rule Amendment] contains an implied right to disregard explicit, lawful, local restrictions."<sup>46</sup> He contended that, in light of the Home Rule Amendment, it would be better to require that the Legislature be specific on the issue of overriding local legislation.<sup>47</sup>

Although the Bristol County Commissioners decision produced a satisfactory result, the approaches of both the majority and minority to the issue are, it seems, overly automatic. Ideally, the Legislature should try to avoid this type of conflict by providing specific statements of its intent. Barring this, however, a balancing test that would examine whether the governmental entity's need serves a greater or more important purpose than that of the local regulation might achieve consistently fairer results. For example, one might have asked whether the horses in *Teasdale v. Newell & Snowling Construction Co.*<sup>48</sup> really needed to be stabled in Quincy in contravention of the local health laws or, in the present case, whether the jail actually conflicts with local zoning regulations in any meaningful way. With such a balancing test, an outcome would be determined by the importance of the objective, and not simply according to which is the dominant level of government.

**§ 10.7. Special Permits—Board Denial Overturned.** In the 1962 case of *Mahoney v. Board of Appeals of Winchester*,<sup>1</sup> the Supreme Judicial Court extended the doctrine of *Pendergast v. Board of Appeals of Barnstable*,<sup>2</sup> which grants deference to the discretion of a local board in denying a

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<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 1301, 405 N.E.2d at 643 (Wilkins, J., dissenting).

<sup>46</sup> *Id.*, 405 N.E.2d at 644 (Wilkins, J., dissenting).

<sup>47</sup> *Id.* (Wilkins, J., dissenting).

<sup>48</sup> See text at note 15 *supra*.

§ 10.7. <sup>1</sup> 344 Mass. 598, 183 N.E.2d 850 (1962).

<sup>2</sup> 331 Mass. 555, 120 N.E.2d 916 (1954); see Sacks and Curran, *Administrative Law*, 1954 ANN. SURV. MASS. LAW, § 14.25.

variance or special permit.<sup>3</sup> According to this doctrine, the judge may overrule the board's decision only when the variance or permit was denied on a legally untenable ground, except for which the variance or permit would have been granted, or when the denial was "unreasonable, whimsical, capricious, or arbitrary and so illegal."<sup>4</sup> While this policy that the reviewing court may not substitute its own judgment for that of the local board remains strong,<sup>5</sup> the rule's stated exceptions will be applied, as illustrated by a 1980 case in which the board's denial of a special permit was overturned.

In *McDonald's Corporation v. Board of Selectmen of Randolph*,<sup>6</sup> the Appeals Court upheld the superior court's determination that the town's board of selectmen had been arbitrary, capricious, and unreasonable in denying the plaintiff a common victualler's license for a proposed restaurant in a shopping center.<sup>7</sup> Although the board had not stated any reason for its denial or kept any record of its proceeding that was appropriate for review, it brought forth three reasons for denying the permit in the superior court.<sup>8</sup> The board maintained that, according to its interpretation of the by-law's parking regulations, McDonald's could not provide sufficient parking for the facility.<sup>9</sup> The board also claimed that the restaurant would increase traffic, endangering students from the nearby high school who would patronize it.<sup>10</sup> Finally, the board stated that appropriate plans showing the restaurant's interior layout had not been filed, as required by chapter 140, section 6 of the General Laws.<sup>11</sup>

The Appeals Court quickly dismissed the board's claim that the area leased by the restaurant in the shopping center was a separate lot requiring sufficient parking space on the lot itself for the restaurant's patrons. The court found that the plaintiff's lease with the shopping center provided the

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<sup>3</sup> See Huber, *Land Use and Planning Law*, 1962 ANN. SURV. MASS. LAW, § 13.6

<sup>4</sup> 331 Mass. at 559-60, 120 N.E.2d at 919.

<sup>5</sup> See Huber, *Zoning and Land Use*, 1979 ANN. SURV. MASS. LAW, § 15.7.

<sup>6</sup> 1980 Mass. App. Ct. Adv. Sh. 97, 399 N.E.2d 38.

<sup>7</sup> *Id.* at 99, 399 N.E.2d at 41.

<sup>8</sup> *Id.* at 98, 399 N.E.2d at 40.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* G.L. c. 140, § 6, provides in pertinent part that

"[a] common victualler's . . . license may be issued to an applicant therefor if at the time of his application he has upon his premises the necessary implements and facilities for cooking, preparing and serving food for strangers and travelers. . . . An applicant for a license as a common victualler . . . , proposed to be exercised upon premises which have not been equipped with fixtures or supplied with necessary implements and facilities for cooking, preparing and serving food . . . shall file with the licensing authorities a plan showing the location of counters, tables, ranges, toilets and in general the proposed set-up of the premises . . . which he proposes to have upon said premises if and when the license may issue, together with an itemized estimate of the cost of said proposed set-up and of such fixtures, and of the implements and facilities necessary for cooking, preparing and serving food. . . ."

*Id.*

restaurant with rights to the common parking facilities of the center that were adequate for its parking needs.<sup>12</sup> This arrangement would satisfy the applicable section of the town by-law covering parking requirements for joint facilities.<sup>13</sup>

The court also rejected the town's second claim, finding that the evidence amply supported the trial judge's conclusion that the proposed facility would not have a detrimental impact on traffic in the area and would create a safety hazard for the high school students.<sup>14</sup> The center itself had been built with knowledge of the proximity of the high school, fire station, and other public facilities.<sup>15</sup> One of the two original lead stores, which had since left the center, drew heavier traffic than was presently using the access road and had contained a separate restaurant licensed by the board.<sup>16</sup> The remaining lead store had an eating establishment, and the center also contained a separate licensed restaurant.<sup>17</sup> A Burger King was on the same road only 900 feet from the high school.<sup>18</sup> In addition, the site for the restaurant was in a relatively empty spot in the shopping center,<sup>19</sup> and the restaurant's peak hours would not coincide with the arrival or departure of the high school buses, periods that were covered by police and traffic duty.<sup>20</sup> The court found it significant that traffic signals near the school had been approved six years before the plaintiff's application but were never installed<sup>21</sup> and noted that the accident rate in the vicinity was "low to average," consisting primarily of minor property damage.<sup>22</sup> Finally, the fact that the center was not located near a major highway indicated that it would not attract additional outside traffic, but would only serve those already in the area.<sup>23</sup>

The court also determined that the trial judge was justified in impliedly denying the board's claim that the plaintiff did not meet the requirements of chapter 140, section 6.<sup>24</sup> Even though there was little evidence in the record, the court concluded that adequate compliance could have been satisfied by plans submitted at the board's initial hearing or through information conveyed to the board by other departments involved in the plaintiff's proposal.<sup>25</sup>

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<sup>12</sup> 1980 Mass. App. Ct. Adv. Sh. at 98, 399 N.E.2d at 40.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 99, 399 N.E.2d at 40.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*, 399 N.E.2d at 41.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

While acknowledging that a local board, in its capacity as a licensing authority, has considerable discretion in performing this function and that a judge may not substitute his judgment for the board's,<sup>26</sup> the court emphasized that certain standards of decisionmaking must be met: "A board which has power to grant or withhold a permit must decide 'in a fair, judicial and reasonable manner upon the evidence as presented . . . keeping in mind the objects of the applicable regulation.'"<sup>27</sup> The court also noted that an unsuccessful applicant for a common victualler's license can prevail when it can be shown that, in refusing to grant the license, the licensing authority has "proceeded upon grounds erroneous in law or [has] otherwise violated legal rights of the [applicant]."<sup>28</sup>

Although the court found that the superior court judge had correctly concluded that the board's reasons for denying the permit did not satisfy these standards, it ruled that the judge had improperly ordered the license to issue rather than remanding the matter to the board for further proceedings.<sup>29</sup> Therefore, the court vacated the judgment and entered a new judgment annulling the board's decision and directing the board to hold further proceedings necessary for reconsideration of the plaintiff's application in light of the opinion.<sup>30</sup> The court added that such reconsideration could include a request by the board for an update of the plans required by chapter 140, section 6.<sup>31</sup>

In another special permit case, *Garvey v. Board of Appeals of Amherst*,<sup>32</sup> the Appeals Court found that the local board of appeals had not acted in excess of its authority in granting a special permit and reversed the decision of the superior court invalidating the permit.<sup>33</sup> The permit allowed the defendant applicant to use a lot in a residentially zoned district as a parking area for a maximum of fourteen cars.<sup>34</sup> One of the conditions imposed on the permit was that it would terminate if the defendant's nearby lot, zoned for commercial use, ceased to be used for a commercial purpose.<sup>35</sup> Several homeowners appealed to the superior court, which invalidated the permit on the grounds that the board's decision would allow the introduction of a non-residential use into a residential area.<sup>36</sup> The only question raised on ap-

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<sup>26</sup> *Id.*

<sup>27</sup> *Id.* (citing *Board of Health of Woburn v. Sousa*, 338 Mass. 547, 553, 156 N.E.2d 52, 57 (1959)).

<sup>28</sup> 1980 Mass. App. Ct. Adv. Sh. at 99, 399 N.E.2d at 41 (citing *Liggett Drug Co. v. License Commissioners of N. Adams*, 296 Mass. 41, 44, 4 N.E.2d 628, 631 (1936)).

<sup>29</sup> 1980 Mass. App. Ct. Adv. Sh. at 99-100, 399 N.E.2d at 41.

<sup>30</sup> *Id.* at 100, 399 N.E.2d at 41.

<sup>31</sup> *Id.*

<sup>32</sup> 1980 Mass. App. Ct. Adv. Sh. 415, 400 N.E.2d at 880.

<sup>33</sup> *Id.*, 400 N.E.2d at 881.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*



peal was the board's authority to grant the permit, not the adequacy of the board's findings.<sup>37</sup>

The Appeals Court outlined the limitations of the role of the reviewing court in examining the decision of the local board of appeals. The trial judge must hear the matter *de novo* and determine the legal validity of the board's decision on the basis of his fact-finding.<sup>38</sup> The board's granting of a permit must be upheld if it is for a use that is "in harmony with the general purpose and intent of the ordinance or by-law,"<sup>39</sup> and the decision does not rest on "a legally untenable ground"<sup>40</sup> and is not unreasonable, whimsical or arbitrary.<sup>41</sup> The court emphasized that "[a] court may not substitute its judgment for that of the board."<sup>42</sup>

Because the Amherst zoning by-law specifically authorizes the issuance of a special permit for a commercial parking lot in a residentially zoned area when the board finds that specified standards have been met, the court concluded that the board could not be found to have acted beyond its authority when it determined that those standards were met.<sup>43</sup> Likewise, the decision was not the result of whim or caprice and did not permit a use not contemplated by the by-law, which the court understood to be the trial judge's ruling.<sup>44</sup> The court, therefore, entered a new judgment that the board did not exceed its authority and that the board's decision was affirmed.<sup>45</sup>

Special permits are specifically provided for in the Zoning Act<sup>46</sup> and in ordinances and should not, therefore, be considered extraordinary departures from a zoning scheme. While the court continues its *Pendergast* policy in protecting the legitimate discretionary powers of the local board, it also will react against attempts by either the board or reviewing court to deny permits on invalid grounds.

**§ 10.8. Variance—Substantial Derogation Criterion.** Local planning boards may grant variances from zoning by-laws only if certain statutory requirements are met.<sup>1</sup> These requirements include, *inter alia*, that there be no substantial departure from the intent and purpose of the Zoning Enabling Act. In *Cavanaugh v. DiFlumera*,<sup>2</sup> the Appeals Court reversed a trial

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<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* (quoting from G.L. c. 40A, § 9, as appearing in St. 1975, c. 808, § 3).

<sup>40</sup> 1980 Mass. App. Ct. Adv. Sh. at 415, 400 N.E.2d at 881, (citing *Caruso v. Pastan*, 1 Mass. App. 28, 29, 294 N.E.2d 501, 502 (1973)).

<sup>41</sup> 1980 Mass. App. Ct. Adv. Sh. at 415, 400 N.E.2d at 881.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 416, 400 N.E.2d at 882.

<sup>46</sup> G.L. c. 40A, § 9.

§ 10.8. <sup>1</sup> 3 R. ANDERSON, *AMERICAN LAW OF ZONING* (2d ed. 1977), § 18.08.

<sup>2</sup> 1980 Mass. App. Ct. Adv. Sh. 535, 401 N.E.2d 867.

court's annulment of a variance granted by the Agawam Planning Board.<sup>3</sup> In finding that the planning board had properly granted the variance, the court explained that which would comport with the mandates of the Zoning Enabling Act.<sup>4</sup>

In *Cavanaugh*, the owners of the land in question had purchased the land and building in order to operate a general store.<sup>5</sup> The building had been constructed in the 1920's as a commercial garage, before zoning had been instituted in Agawam.<sup>6</sup> Following its use as a commercial garage, the structure was used for various commercial purposes. Each structure was operated under variations of the zoning law. The most recent of those variances was one granted in 1967 to allow the owners to operate a general store.<sup>7</sup> In 1974, a subsequent owner of the property was denied permission to use the building for offices, on the basis that this variance for a general store was still in effect.<sup>8</sup>

When the present owners bought the premises in 1976, intending to use it as a general store, they received assurances from the building inspector and the town records that the lot did, in fact, have a variance for that purpose.<sup>9</sup> The plaintiffs spent considerable funds renovating the building, which had become deteriorated and rat-infested.<sup>10</sup> In 1977, the abutting neighbor in-

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<sup>3</sup> *Id.* at 541, 401 N.E.2d at 871.

<sup>4</sup> This case was decided under the former Zoning Enabling Act because the new Zoning Act did not take effect in Agawam until 1978. The provisions of section 15 of the former Zoning Enabling Act outline the power of the board of appeals

"[t]o authorize upon appeal, or upon petition in cases where a particular use is sought for which no permit is required, with respect to a particular parcel of land or to an existing building thereon a variance from the terms of the applicable zoning ordinance or by-law where, owing to conditions especially affecting such parcel or such building but not affecting generally the zoning district in which it is located, a literal enforcement of the provisions of the ordinance or by-law would involve substantial hardship, financial or otherwise to the appellant, and where desirable relief may be granted without substantial detriment to the public good and without nullifying or substantially derogating from the intent or purpose of such ordinance or by-law, but not otherwise."

The corresponding section of the new Zoning Act, G.L. c. 40A, § 10, as amended by St. 1975, c. 808, retains these requirements, which remain essentially unchanged, but adds an additional conjunctive requirement that the circumstances creating the hardship relate to the soil conditions, shape, or topography of the land or structure. In the present case, it is likely that the restricted frontage of the land would meet this requirement. Another provision added to this section requires that, in order for a use variance to be granted, the town must expressly allow such variances in its ordinance. The applicability of this requirement to the present case would depend on the specific provisions of the Agawam ordinance. See Huber, *Zoning and Land Use*, 1976 ANN. SURV. MASS. LAW § 15.6, for a discussion of the substantive changes in the new variance-granting provisions.

<sup>5</sup> 1980 Mass. App. Ct. Adv. Sh. at 537, 401 N.E.2d at 869.

<sup>6</sup> *Id.* at 537, 401 N.E.2d at 869.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

initiated an action to enforce the provisions of the zoning by-law and revoke the owners' building permit.<sup>11</sup> She was granted relief on the basis that the supposed "variances" granted to the owners' predecessors were, instead, permits to continue nonconforming uses, which had now been eliminated by abandonment.<sup>12</sup> The owners appealed this ruling and, while the appeal was pending, applied for a variance.<sup>13</sup> When the variance was granted, they dropped their appeal.<sup>14</sup> The neighbor then challenged the variance, and the trial judge annulled the variance on the sole ground that it derogated from the intent and purpose of the zoning by-law.<sup>15</sup> The owners appealed that decision.

The Appeals Court noted that the trial judge's findings clearly supported a determination that the plaintiffs met the statutory requirements that the circumstances especially affect the land, involve substantial hardship, and pose no detriment to the public good.<sup>16</sup> The land had restricted frontage that precluded construction of any new building because of dimensional requirements.<sup>17</sup> In sum, the judge determined that the site was unusable for any purpose under the ordinance without a variance.<sup>18</sup>

Further, the trial court also had found that the use granted by the variance not only would not constitute a detriment to the public good, but that it would substantially benefit the district.<sup>19</sup> This benefit stemmed from improving a badly deteriorated building and providing a needed service for residents of planned low-income and handicapped housing.<sup>20</sup> In addition, its location on a major artery near a cemetery served to minimize its effect on the residential nature of the district.<sup>21</sup> The Appeals Court noted in conclusion that the judge's only basis for annulling the board's decision was his determination that the variance derogated from the intent and purpose of the by-law.<sup>22</sup>

In reversing the trial judge's decision, the Appeals Court noted that all of the findings that the judge applied to the issue of public detriment applied also to the derogation question.<sup>23</sup> The court emphasized that the deviation from the by-law must be *substantial* and that, barring a significant detraction from the zoning plan, the discretionary power of the local board must

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<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 537-38, 401 N.E.2d at 869.

<sup>13</sup> *Id.* at 538, 401 N.E.2d at 869.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 536, 401 N.E.2d at 868.

<sup>16</sup> *Id.* at 535-36, 401 N.E.2d at 868.

<sup>17</sup> *Id.* at 536-37, 401 N.E.2d at 869.

<sup>18</sup> *Id.* at 537, 401 N.E.2d at 869.

<sup>19</sup> *Id.* at 538, 401 N.E.2d at 869-70.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*, 401 N.E.2d at 870.

<sup>22</sup> *Id.* at 536, 401 N.E.2d at 868.

<sup>23</sup> *Id.* at 538, 401 N.E.2d at 870.

be upheld.<sup>24</sup> The court pointed out that every variance, by definition, involves some derogation from the by-law.<sup>25</sup> Thus, the court stated, a finding of a substantial deviation must be found before the board approval could be annulled.<sup>26</sup>

The court pointed to a number of facts established by the trial judge that supported a determination that this use would not be in conflict with the intent and purpose of the by-law. These included more attractive use, benefit to the district, the history of nonconforming uses at the site, an already heterogeneous neighborhood, the existence of a town by-law that allows business use, the relative isolation of the site, and the restrictions that were imposed on the variance to limit its effect.<sup>27</sup> The court also noted that the only person in the area that could be injured by the variance was the plaintiff-neighbor and found that this was mitigated by the existence of commercial uses at the site for 30 years.<sup>28</sup>

The court also considered important what it termed the "exceptional circumstances" arising from the history of the case, in which the owners relied in good faith upon prior zoning decisions regarding the land that had been declared invalid retroactively.<sup>29</sup> Additionally, the court pointed out that the owners' withdrawal of their appeal of that decision was undoubtedly predicated upon their obtaining of the variance.<sup>30</sup> Although it emphasized the above unique circumstances, the court also noted that the facts in the case were parallel to numerous other decisions in which variances were upheld because the land could not be developed for any use permitted by the ordinance.<sup>31</sup>

While affirming the necessity that all the requirements of the enabling act be met in the grant of a variance, this decision also emphasizes the fact that variances should not be viewed as extraordinary departures from the zoning plan. They are "safety valves" from the strict requirements of a plan that are specifically provided for in the statute. Once an applicant has met the more difficult requirements of showing unique circumstances and substantial hardship and proving that the use will not be a detriment to the public good, he or she cannot be denied a variance granted by the discretion of the local board simply because the use deviates in some minor way from the ordinance, for that is the very idea behind a variance.

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<sup>24</sup> *Id.* at 539, 401 N.E.2d at 870.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 539, 401 N.E.2d at 870.

<sup>27</sup> *Id.* at 539-41, 401 N.E.2d at 870-71.

<sup>28</sup> *Id.* at 540, 401 N.E.2d at 871.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 538, 401 N.E.2d at 869.

<sup>31</sup> *Id.* at 541, 401 N.E.2d at 871.

**§ 10.9. Interpretation of Local By-Law.** During the *Survey* year, in *Farmer v. Town of Billerica*,<sup>1</sup> the Supreme Judicial Court held invalid a local building inspector's interpretation of the term "buffer zone" in a local zoning ordinance.<sup>2</sup> The building inspector's interpretation of the term precluded any improvement of the land or any use of the land.<sup>3</sup> The Court determined that this interpretation amounted to an illegal confiscation of the land.<sup>4</sup>

The zoning ordinance in question, which was passed by the town of Billerica in 1979, changed the zoning of the plaintiffs' land from a residential district to a "buffer zone."<sup>5</sup> Land adjoining the plaintiffs' land was rezoned by the same ordinance to become a "general business district."<sup>6</sup> In 1979, the Billerica building inspector interpreted ordinance as requiring that the "buffer zone" must remain unbuilt and unused for any purpose.<sup>7</sup> The land court held this interpretation valid.<sup>8</sup> The plaintiffs appealed to the Supreme Judicial Court, claiming that the land court's ruling was "confiscatory and unreasonable."<sup>9</sup>

The Attorney General also filed a brief with the Supreme Judicial Court as *amicus curiae*.<sup>10</sup> The Attorney General argued that the town should have taken the land by eminent domain if it wanted to preclude all possible uses.<sup>11</sup>

The Court held that the zoning ordinance could not be interpreted to preclude all uses of the plaintiffs' land.<sup>12</sup> The Court noted that the town meeting's warrant for the zoning ordinance that created the "buffer zone" had not intended "to impose zoning requirements stricter than those then existing."<sup>13</sup> Consequently, the Court refused to construe the "ambiguous reference" to a "buffer zone" as an attempt to exceed the town meeting's authority under the warrant article.<sup>14</sup> Rather, the Court interpreted "buffer

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§ 10.9. <sup>1</sup> 1980 Mass. Adv. Sh. 1957, 409 N.E.2d 762.

<sup>2</sup> *Id.* at 1958, 409 N.E.2d at 763.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 1957, 409 N.E.2d at 763.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*, 409 N.E.2d at 762.

<sup>10</sup> *Id.*, 409 N.E.2d at 763.

<sup>11</sup> *Id.* The Attorney General also contended that the plaintiffs' failure to object immediately to the rezoning did not help the town's case. *Id.* (citing *Barney & Carey Co. v. Milton*, 324 Mass. 440, 445 (1949)).

<sup>12</sup> 1980 Mass. Adv. Sh. at 1957, 409 N.E.2d at 763. The Court noted that the building inspector's interpretation of the ordinance would preclude the plaintiffs' even from building a fence. *Id.*

<sup>13</sup> *Id.* at 1957, 409 N.E.2d at 763.

<sup>14</sup> *Id.*

zone'' to exempt the plaintiffs' land from the contemporaneous rezoning of the adjoining land into a business district.<sup>15</sup> Because the plaintiffs' land had been zoned as residential when the ordinance was passed, the Court concluded that the land was to remain zoned for residential uses.<sup>16</sup> The Court construed the ordinance in this manner to avoid considering its illegality and possible unconstitutionality.<sup>17</sup>

The *Farmer* case serves as a reminder of the potential consequences of hasty or imprecise draftsmanship in local ordinances. Although these ordinances are drafted often in the heat of town meetings, the ordinances carry the force of law when passed and incorporated into the town's by-laws.

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<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*