CHAPTER 11

Zoning and Land Use

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§11.1. Zoning: Public Purpose Educational Facility Exemption. *Harbor Schools, Inc. v. Board of Appeals of Haverhill*[1] is the first reported Massachusetts case to decide what constitutes a public purpose educational facility for purposes of the Zoning Act's exemption for such facilities from local zoning ordinances and by-laws. The case was decided under section 2 of the former Zoning Act,[2] but its application would seem to extend to the new Act.[3]

Harbor Schools, a non-profit corporation with three facilities in Maine and Massachusetts, provided live-in care and education for emotionally disturbed children.[4] It applied for and received a building permit from the Town of Haverhill in order to make repairs on an existing building in contemplation of its use as a residential school.[5] The Town later revoked the permit because of its impression that the proposed facility did not fall within the class of facilities exempted from local zoning regulation by former section 2.[6] Harbor Schools appealed the Town's decision of revocation to the superior court.[7]

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§11.1. [1] 5 Mass. App. 600, 366 N.E.2d 764 (1977).

[2] Former G.L. c. 40A, § 2 provided in relevant part: "[N]o ordinance or by-law which prohibits or limits the use of land for any church or other religious purpose or for any educational purpose which is religious, sectarian, denominational or public shall be valid."

[3] G.L. c. 40A, § 3, *added by* Acts of 1975, c. 808, § 3, is the successor statute to former G.L. c. 40A, § 2. It provides in relevant part:

> No zoning ordinance or by-law shall . . . prohibit, regulate or restrict the use of land or structures for religious purposes or for education 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 non-profit 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.

[4] 5 Mass. App. at 602, 366 N.E.2d at 766.

[5] *Id.* at 601, 366 N.E.2d at 765.

[6] *Id.*

[7] *Id.*

The superior court referred the case to a master. On the basis of the master's report, the court found that Harbor Schools operates "facilities of an educational nature which serve a public purpose." [8] Accordingly, the superior court declared that Harbor Schools was exempt under former chapter 40A, section 2, from the use restrictions of the Haverhill zoning ordinance.[9] The Board of Appeals of Haverhill and a Haverhill resident appealed.[10]

The standard of review used by the Appeals Court was whether the master's findings were adequate to support the superior court's judgment.[11] In assessing the adequacy of these findings, the Appeals Court set forth the substance of the master's report.

The master had reviewed the operation of a functioning Harbor Schools facility in Amesbury, Massachusetts, which was similar to the two other Harbor Schools located in Maine.[12] He found that the school's purpose was the "education and improvement of emotionally disturbed children," [13] most of whom were referred by the Department of Public Welfare.[14] All the enrolled students needed special attention and individual care because of their emotional and psychological problems. Some of the students were so severely maladjusted that it was impossible for them to remain in a public school environment.[15] The master found that Harbor Schools met these individualized needs through provision of specially trained teachers, an amply qualified director, diagnostic testing to identify individual needs, and standardized testing to measure achievement.[16] The master noted that the Harbor Schools' educational purpose was clearly set forth in its articles of incorporation and was recognized by federal tax exemptions granted the school as a non-profit educational institution.[17] Another finding was that the Department of Public Health had granted the Haverhill site Harbor Schools three month interim approval as an institution to which children with special educational needs might be referred.[18]

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[8] *Id.*, 366 N.E.2d at 765-66.
[9] *Id.*, 366 N.E.2d at 766.
[10] *Id.*
[11] *Id.* at 602, 366 N.E.2d at 766.
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.* at 603, 366 N.E.2d at 767.
[16] *Id.* at 603-04, 366 N.E.2d at 766-67.
[17] *Id.* at 604, 366 N.E.2d at 767.
[18] *Id.* at 607, 366 N.E.2d at 768. By statute, "[t]he curriculum at such an institution must for approval be equivalent, insofar as the department [of education] deems feasible, to the curriculum of children of comparable age and ability in the public schools of the commonwealth." *See* G.L. c. 71B, § 10, inserted by Acts of 1972, c. 766, § 11.

The Board of Appeals' contention before the master was that "the use to which the building is to be put [by Harbor Schools] is merely a care facility for children, with underlying medical facilities and with minimal educational aspects . . . ." [19] In light of the master's report, the Board shifted its attack on appeal to the contention that "at the very most" the educational purpose of the proposed Harbor Schools facility was an equal objective with a rehabilitative purpose.[20] The Appeals Court rejected this argument, reasoning that the words "education" and "rehabilitation" were not so distinct in function that the master was "required to quantify them relative to each other. They are not mutually exclusive." [21] The court then set out to define the word "educational" as that term appeared in former section 2 of chapter 40A.[22]

Since this was a case of first impression, the court looked to cases outside the zoning arena for guidance. It drew on Massachusetts precedents broadly defining the word "education" for the purpose of property tax exemptions.[23] It determined that the definition provided by *Mount Hermon Boys' School v. Gill* [24] in 1887 comports with the more modern one found in Webster's Third New International Dictionary. Webster's defines education as "the act or process of providing with knowledge, skill, competence, or usu[ally] desirable qualities or behavior or character or of being so provided esp[ecially] by a formal course of study, instruction, or training." [25]

Citing other Massachusetts tax exemption cases,[26] the Appeals Court found that live-in accommodations are not inconsistent with educational purposes.[27] Relying on yet another Massachusetts tax exemption case and on persuasive precedent from Connecticut and New York zoning cases, the Appeals Court concluded that an institution does not lose its educational character because its enrollment is confined to emotionally disturbed children.[28] The Appeals Court found further support for its

[19] 5 Mass. App. at 606, 366 N.E.2d at 768. The language is taken from the master's report.

[20] *Id.*

[21] *Id.*

[22] See note 2 *supra.*

[23] *See* Assessors of Dover v. Dominican Fathers Province of St. Joseph, 334 Mass. 530, 541, 137 N.E.2d 225, 231-32 (1956); Emerson v. Trustees of Milton Academy, 185 Mass. 414, 418, 70 N.E. 442, 443 (1904); Mount Hermon Boys' School v. Gill, 145 Mass. 139, 146, 13 N.E. 354, 357 (1887).

[24] 145 Mass. 139, 146, 13 N.E. 354, 357 (1887).

[25] *See* 1. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY at 723 (1976).

[26] *See* South Lancaster Academy v. Lancaster, 242 Mass. 553, 556, 136 N.E. 626, 629 (1922); Trustees of Phillips Academy v. Andover, 175 Mass. 118, 125, 55 N.E. 841, 843 (1900); President & Fellows of Harvard College v. Cambridge, 175 Mass. 145, 146-47, 55 N.E. 844, 845 (1900).

[27] 5 Mass. App. at 605, 366 N.E.2d at 768.

[28] *Id.* at 605-06, 366 N.E.2d at 768, *citing* Assessors of Lancaster v. Perkins School, 323 Mass. 418, 421-22, 82 N.E.2d 883, 885 (1948) (retarded or badly

broad definition of the term "educational" in the public policy of the commonwealth as expressed by the legislature in providing for an education for every child, and that a child's special needs must be considered in order for him to realize his educational potential.[29] While chapter 71B emphasizes education of special needs children in the regular public schools, the court noted that the statute contemplates that such education may take place at a residential school.[30] The Department of Education's interim approval of Harbor Schools under section 10 of chapter 71B was found to support the master's finding that Harbor Schools conducts systematic instruction on an individualized basis while it assists in the correction of emotional disturbances.[31]

To qualify for zoning exemption under former chapter 40A, section 2, a facility must be more than "educational."[32] It must also be either "public" or "religious" in nature. In addressing the question of the public nature of Harbor Schools, the Appeals Court cited the general standard, enunciated in an earlier case defining "public" for the purpose of former chapter 40A, section 2: the purpose of the facility "is to be determined by application of the well established principles which have been applied under other statutes or legal rules to determine whether the purpose of educational or other institutions is public or private as shown in the operations of the institutions and the benefit conferred thereby."[33] The master's findings that Harbor Schools' activities were not commercial in character, that they were not motivated by personal profit and that they generally served a public purpose were decisive in the Appeals Court's determination that Harbor Schools was a public institution.[34] The Appeals Court thus affirmed the judgment of the superior court that Harbor Schools was a public educational institution for the purpose of former chapter 40A, section 2.[35]

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adjusted children requiring special education or medical treatment); Armstrong v. Zoning Board of Appeals, 158 Conn. 158, 161 n.1, 168, 257 A.2d 799, 801 n.1, 804 (1969) (children with mild emotional disturbances, utilizing tutoring, remedial education, and rehabilitative techniques); Wiltwyck School for Boys, Inc. v. Hill, 11 N.Y.2d 182, 190, 193, 227 N.Y.S.2d 655, 658-59, 661, 182 N.E.2d 268, 271, 273 (1962) (emotionally disturbed delinquent, dependent, or neglected boys requiring special attention).

[29] 5 Mass. App. at 606, 366 N.E.2d at 768, *citing* G.L. c. 71B, § 1, *inserted by* Acts of 1972, c. 766, § 11.

[30] 5 Mass. App. at 607, 366 N.E.2d at 768, *citing* G.L. c. 71B, § 2, *inserted by* Acts of 1972, c. 766, § 11.

[31] 5 Mass. App. at 607, 366 N.E.2d at 768. See note 18 *supra*.

[32] See note 2 *supra*. This dual requirement does not exist in the new enactment. See note 3 *supra*.

[33] 5 Mass. App. at 607, 366 N.E.2d at 769, *citing* Worcester v. New England Institute and New England School of Accounting, Inc., 335 Mass. 486, 493, 140 N.E.2d 470, 474 (1957).

[34] 5 Mass. App. at 607-08, 366 N.E.2d at 769.

[35] *Id.*

Harbor Schools' broad definition of the term "educational" does not provide limitless statutory exemption from municipal zoning ordinances for any residential facility serving disturbed youngsters. The public policy to educate all children and the particular facts of this case, i.e., qualified teachers, systematic instruction and testing, and Department of Education interim approval, were important considerations in the Appeals Court's determination that Harbor Schools proposed an educational and public facility entitled to exemption from local zoning ordinances. Moreover, one of the definitions of "education" adopted by the court stressed a formal course of study.[36] A departure from the traditional classroom regimen for the education of children with special needs would fit this definition, but it would seem that some demonstrable level of education and educational standards must exist for a finding of educational purpose. The conjunction of *all* the indicators of educational purpose found in *Harbor Schools* should not be necessary for a residential facility to qualify for the exemption formerly found in section 2, but now found in section 3 of chapter 40A, but the mere provision of residential facilities and care directed at the children's disturbances would not be sufficient alone to qualify an institution for the statutory exemption.

§11.2. Consideration of Tidelands in Minimum Lot Size. Generally the term "lot" in a zoning ordinance has no fixed meaning. Its meaning must be derived from its context and the circumstances in which it is used.[1] In *Becket v. Building Inspector of Marblehead*,[2] the issue before the Appeals Court was whether tideland—that area of the shore alternately exposed and flooded by the tides—could be included in the makeup of a lot in order to meet the minimum lot area requirement of the Marblehead zoning by-law.[3]

Massachusetts property law traditionally viewed tidal areas as land. Private ownership of tidelands was recognized by the colonial ordinance of 1641-1647, which, in order to encourage littoral owners to build wharves, extended private title to littoral property as far as mean low water line or 100 rods (1650 feet) from mean high water line, which-

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[36] See text at note 24 *supra.*

§11.2. [1] *See* Moynihan, *Real and Personal Property,* 1954 ANN. SURV. MASS. LAW § 1.4 at 8.

[2] 1978 Mass. App. Ct. Adv. Sh. 185, 373 N.E.2d 1195.

[3] *Id.* at 188, 373 N.E.2d at 1197. The relevant by-law defined the word "Lot" as "[a] single area of land defined by metes, bounds, or boundary lines in a duly recorded deed or shown on a duly recorded plan." It defined "Lot Area" as "[t]he horizontal area within the exterior lines of the lot, exclusive of any area in a public or private street or way." *See id.* at 190-91, 373 N.E.2d at 1198. The by-law was later amended to specifically exclude tidelands. See text at note 20 *infra.*

ever was less.[4] This private right of ownership was made subject only to the public right of fishing, fowling, and navigation.[5]

The land which was the subject of the *Becket* suit, "Lot 4," had a total area of approximately 41,000 square feet of upland and approximately 7,500 square feet of adjoining tidelands.[6] It was situated in a district which required a minimum lot area of 20,000 square feet as a condition for obtaining a building permit.[7] Rockett, the trustee of the land, subdivided Lot 4 into two separate lots, one of which, "Lot 4A," was composed of upland of sufficient area to qualify for a permit to construct a single-family dwelling.[8] But one subdivision, "Lot 4B," met the area requirement only if the 7,500 square feet of tideland was included in the total area.[9]

The Marblehead building inspector issued building permits for both lots.[10] The plaintiffs, neighboring landowners, contested the issuance of the permits and sought a writ of mandamus in superior court to compel their revocation.[11] The superior court dismissed the portion of the complaint relating to "Lot 4A" but revoked the building permit issued for "Lot 4B."[12] The order of revocation was based on the court's conclusion that the zoning by-law was designed to prevent construction of residences on small lots of land and that this purpose would be defeated if the defendants were allowed to include tideland area in the total lot area.[13]

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[4] 1978 Mass. App. Ct. Adv. Sh. at 191, 373 N.E.2d at 1198, *citing* Opinion of the Justices to the House of Representatives, 365 Mass. 681, 684-88, 313 N.E.2d 561, 565-66 (1974). The Massachusetts rule granting private ownership to coastal property down to the mean low water mark is distinctly a minority view. *See generally* Student Comment, *Public Right of Passage along the Coast: Opinion of the Justices to the House of Representatives,* 1974 ANN. SURV. MASS. LAW § 16.30, at 389-400 for a comparison of the Massachusetts rule to the rules of other jurisdictions.

At common law, private ownership in coastal lands extended only as far as the mean high water mark. Beyond that point, ownership was held by the Crown subject to certain rights of public use. *See Opinion of the Justices,* 365 Mass. at 684, 313 N.E.2d at 565.

[5] *Opinion of the Justices,* 365 Mass. at 685, 313 N.E.2d at 566.

[6] 1978 Mass. App. Ct. Adv. Sh. at 185, 373 N.E.2d at 1196.

[7] *Id.* at 187, 373 N.E.2d at 1196.

[8] *Id.* at 185-86, 373 N.E.2d at 1196.

[9] *Id.* at 187, 373 N.E.2d at 1196. "Lot 4B" was somewhat "L" shaped; it met the Marblehead street frontage requirement of 100 feet, but tapered off somewhat as it ran toward the waterfront. The 7500 square feet of tideland included in "Lot 4B" were connected to an upland strip of land one foot wide and 129 feet long, which extended beyond the bulk of "Lot 4B" in a manner adjacent to the oceanward line of "Lot 4A." *Id.,* 373 N.E.2d at 1196-97.

[10] *Id.* at 186, 373 N.E.2d at 1196.

[11] *Id.*

[12] *Id.* The court also enjoined further construction of a dwelling on "Lot 4B" and ordered the owner to remove all construction theretofore on the lot. *Id.*

[13] *Id.* at 190, 373 N.E.2d at 1198.

In interpreting the intent and meaning of the Marblehead by-law, the superior court proceeded as if there were no definitions to guide it. Instead, the court construed the by-law to exclude tidelands because, without such a construction, a disparity in usable upland lot sizes would be created within the zoning district if tidelands were included in determining lot area.[14] This disparity would result because tideland area varies inversely with the slope of the bank: the steeper the slope, the less tideland is exposed during low tide. In the district in question varying slopes created tidelands ranging in width from as little as three feet to as much as seventy feet.[15]

The Appeals Court rejected the reasoning of the superior court and vacated the judgment as it related to "Lot 4B."[16] The Appeals Court refused to adopt the analysis of the court below because it was based upon the superior court's conclusion as to the intent of the zoning by-law without regard to its actual text.[17] As it read at the time the building permits were granted, the Marblehead zoning by-law only excluded from the definition of "Lot Area" area in "a public or private street or way."[18] Since the by-law made only this qualification, the Appeals Court concluded that the people of the community, who were familiar with the variegated nature of the shore, expressed their intent through their zoning by-laws to include all other land, including tideland, within the lot lines.[19]

The by-laws which were in effect when the permits were issued were later amended to specifically exclude ". . . any horizontal area subject to oceanic tidal action and below mean high water . . . ."[20] The Appeals Court cited this passage as implicit support for an interpretation of the

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[14] *Id.* at 189-90, 373 N.E.2d at 1197-98.

[15] *Id.* at 189, 373 N.E.2d at 1197. The superior court's reasoning can be illustrated from the following example. Suppose Lot I consists of an upland area measuring 100 feet along the shore and street and 130 feet between the shore and street. This area, consisting of 13,000 square feet, would not by itself meet the Marblehead minimum lot size of 20,000 square feet. But if the lot were situated where, due to a gentle slope on the shore, the tideland extends 70 feet, the owner might claim that the 7,000 square feet of tideland would bring his property within the minimum lot size. The owner of nearby Lot II, with the same upland dimensions, but with a precipitous slope at water's edge, could not meet the minimum lot size because his tideland, which we will consider to be three feet wide, would only amount to 300 square feet. His total upland and tideland lot area would amount to only 13,300 feet. The disparity arises because, as a practical matter, only the upland area can be developed.

[16] *Id.* at 186, 373 N.E.2d at 1196. The judgment dismissing the complaint relative to "Lot 4A" was not appealed. *Id.*

[17] *Id.* at 190, 373 N.E.2d at 1198.

[18] See note 3 *supra.*

[19] 1978 Mass. App. Ct. Adv. Sh. at 191-92, 373 N.E.2d at 1198.

[20] *See id.* at 193 n.7, 373 N.E.2d at 1199 n.7.

prior version of the by-laws which would allow the area of the tidelands to be included in the definition of "Lot Area." [21]

The court also addressed other contentions made by the plaintiffs that were not passed upon by the superior court. The plaintiffs argued that since the tideland of "Lot 4B" was connected to the upland only by a strip of land one foot wide and 129 feet long,[22] it was inaccessible and therefore inconsistent with a reasonable construction of the words "Lot" and "Lot Area." [23] Using the same reasoning employed in its construction of "Lot" and "Lot Area" above, the court rejected this contention and ruled that if the by-law were intended to restrict a lot to readily accessible land, it would have so provided expressly.[24] The court also refused to infer from the fact that the upland and tideland areas were separately bounded and described in petitioner's deed that they were intended to be separate lots.[25]

The plaintiffs' final contention was that "Lot 4B" violated a provision of the dimensional regulation requiring a special permit before a lot may be reduced in width by more than twenty-five percent at the point where the principal structure is located.[26] The Appeals Court declined to pass on this contention because it did not possess sufficient facts regarding "Lot 4B's" configuration to enable it to determine if the dimensional regulation was met.[27] Instead, the court vacated the judgment with regard to "Lot 4B," and remanded the case to the superior court for further fact determinations.[28]

In its decision, the Appeals Court rejected the superior court's attempt to glean the statutory purpose of the zoning by-law from extrinsic facts and found the purpose in the express definitions of the words "Lot" and "Lot Area" within the context of the by-law and the supposed common understanding of those words by the people of the community. In doing so the Appeals Court was implicitly following established maxims of construction in the zoning field that, if possible, a zoning by-law will be interpreted in a manner which sustains its validity,[29] and that the words of a by-law must be construed reasonably according to the context in which they appear [30] and their common and approved usage.[31]

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[21] *Id.* at 193, 373 N.E.2d at 1199.
[22] See note 9 *supra.*
[23] 1978 Mass. App. Ct. Adv. Sh. at 193, 373 N.E.2d at 1199.
[24] *Id.* at 194, 373 N.E.2d at 1199.
[25] *Id.*
[26] *See id.* at 195, 373 N.E.2d at 1200.
[27] *Id.* at 196-97, 373 N.E.2d at 1200.
[28] *Id.* at 197, 373 N.E.2d at 1200.
[29] Doliner v. Town Clerk of Millis, 343 Mass. 10, 14, 175 N.E.2d 925, 927 (1961).
[30] Rose v. Commissioner of Public Health, 361 Mass. 625, 630, 282 N.E.2d 81, 84 (1972).

The effect of this rather literal approach without regard for extrinsic factors might be inferred from the subsequent amendment of the Marblehead by-law which indicated that tidelands are to be excluded in computing minimum lot area. *Becket* will encourage the drafting of specifically detailed by-laws leaving little room for judicial interpretation concerning statutory purpose. Such detailed by-laws will obviate the dangers of literal yet untoward judicial constructions that fail to achieve the community's purpose in setting minimum lot sizes.

§11.3. Eminent Domain: Evidence of Fair Market Value. When a parcel of land is taken by eminent domain, how is the land's fair market value to be determined for purposes of compensating the owner? The three chief methods used by real estate appraisers have been summarized in *State v. Wilson.*[1] They are:

> 1. The current cost of reproducing a property less depreciation from deterioration and functional and economic obsolescence [the "DRC" method]. 2. The value which the property's net earning power will support, based upon a capitalization of net income [the "income capitalization" method]. 3. The value indicated by recent sales of comparable properties in the market [the "market study" method].[2]

In *Correia v. New Bedford Redevelopment Authority,*[3] the Supreme Judicial Court reviewed the suitability of these methods and, most significantly, reformulated the guidelines for utilizing the DRC method, the least favored method of the three. The plaintiff was the owner of two parcels of land which were taken by the New Bedford Redevelopment Authority.[4] In the basement of one of the buildings on the land was a tire retreading shop. The rest of the building was used for installing tires and for selling tires, automotive supplies, and household goods.[5] Not satisfied with the award offered by the Authority, the plaintiff brought an action for assessment of damages under chapter 79, section 12.[6] At the trial, the plaintiff was permitted to introduce evidence of the cost of reproducing the buildings. A jury awarded the plaintiff $429,000 and a judgment was entered for him.[7] The Authority appealed,

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[31] Foster v. Mayor of City of Beverly, 315 Mass. 567, 569, 53 N.E.2d 693, 694 (1944).

§11.3. [1] 6 Wash. App. 443, 493 P.2d 1252 (1972).

[2] *Id.* at 447-48, 493 P.2d at 1256, *citing* AMERICAN INSTITUTE OF REAL ESTATE APPRAISERS, THE APPRAISAL OF REAL ESTATE 60 (5th ed. 1967).

[3] 1978 Mass. Adv. Sh. 1483, 377 N.E.2d 909.

[4] *Id.*, 377 N.E.2d at 910.

[5] *Id.* at 1484, 377 N.E.2d at 910-11.

[6] *Id.* at 1483, 377 N.E.2d at 910.

[7] *Id.*

claiming that evidence of value based on the DRC method should not have been admitted.[8]

The Appeals Court reversed the judgment of the superior court, finding error in the admission of DRC evidence.[9] The court held that such evidence should be used only when a) reproduction of the premises would have been reasonable, and b) it is *impossible* to determine the property's value utilizing the conventional fair market or income capitalization values.[10] The court was of the view that proof of market value was not a practical impossibility under the conventional methods, because the plaintiff's expert had testified to a value based on income capitalization.[11]

The Supreme Judicial Court granted the plaintiff's motion for further appellate review,[12] reversed the decision of the Appeals Court, and affirmed the judgment of the superior court.[13] The Court noted initially that the measure of damages in an eminent domain case is the property's fair market value at the time of the taking: this is "the highest price which a hypothetical willing buyer would pay to a hypothetical willing seller in an assumed free and open market." [14] The Court then set forth the three methods identified in *State v. Wilson*,[15] noting that in Massachusetts the methods are not equally applicable or readily interchangeable in particular cases.[16] It stressed that the DRC method is "limited to special situations in which data cannot be reliably computed under the other two methods." [17] It pointed out that this method is appropriate for unique or special purpose [18] property because there, conventional

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[8] *Id.* at 1483, 1484, 377 N.E.2d at 910-11.

[9] Correia v. New Bedford Redevelopment Authority, 5 Mass. App. 289, 294, 296, 362 N.E.2d 538, 542 (1977).

[10] *Id.* at 291-92, 362 N.E.2d at 540-41.

[11] *Id.* at 293-94, 362 N.E.2d at 541-42.

[12] 372 Mass. 873, 362 N.E.2d 538 (1977).

[13] 1978 Mass. Adv. Sh. at 1494, 377 N.E.2d at 914-15.

[14] *Id.* at 1484, 377 N.E.2d at 911.

[15] See text at note 2 *supra.*

[16] 1978 Mass. Adv. Sh. at 1486, 377 N.E.2d at 911.

[17] *Id., citing* Newton Girl Scout Council, Inc. v. Massachusetts Turnpike Authority, 335 Mass. 189, 194-95, 138 N.E.2d 769, 773 (1956).

[18] Special purpose property is property adapted for a specialized use. In *Newton Girl Scout Council,* note 17 *supra,* the Court identified as such property "service-type properties like churches, convents, hospitals, country clubs, school and college premises and buildings of religious and charitable societies and similar organizations." 335 Mass. at 196, 138 N.E.2d at 774. The *Correia* Court indicated that the above phrase was no more than a "generalization":

> [W]e did not purport, as the defendant here seems to argue, to state an inflexible rule strictly limiting the range of permissible applications of the DRC or any other method. Indeed, the cases cited in *Newton Girl Scout Council, Inc.,* show that departures from the "norm" of comparable sale approaches as

valuation methods do not operate well.[19] For instance, the market study method may be difficult to apply because willing buyers and sellers do not exist, thus making realistic comparisons difficult.[20] The income capitalization method is based on the supposed income a property would bring through rental.[21] For special purpose property, this method tends to produce a figure less than the real value of the property.[22] The DRC method may be the best way to establish the value of a special purpose property. However, the DRC method frequently results in "more liberal awards than would be reached by alternative methods of appraisal."[23] Therefore, values based on this method, not surprisingly, are usually offered in evidence by the property owner and objected to by the property taker.[24]

An example of an appropriate case for the application of the DRC method offered by the Court was *Newton Girl Scout Council, Inc. v. Massachusetts Turnpike Authority*.[25] In that case, use of the DRC method was allowed to determine the value of a private wooded camping area, where the property was "of a type, not frequently bought or sold, but usually acquired by their owners and developed from the ground up, so that the cost of land plus the reproduction cost (less depreciations where appropriate) of improvements may be more relevant than in the ordinary case."[26] While the DRC method is most frequently utilized in cases involving charitable and public service-type properties, as in the *Newton Girl Scout Council Case*, the *Correia* Court expressly stated that no rule exists strictly limiting the application of the DRC method to such properties.[27] Use of the DRC method, the Court noted, has also been permitted where "certain commercial and industrial properties" are involved.[28]

The Court described the DRC method as a more complex and resourceful means of determining the real value of special purpose property which may be helpful "where the evidence warrants the conclusion that the real value of a property taken by eminent domain cannot be

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evidence of value for so-called special purpose properties have been allowed for certain commercial and industrial properties.
1978 Mass. Adv. Sh. at 1487, 377 N.E.2d at 912.

19 1978 Mass. Adv. Sh. at 1486-88, 377 N.E.2d at 911-12.

20 *Id.* at 1486, 377 N.E.2d at 911-12.

21 *See* 4 P. NICHOLS, THE LAW OF EMINENT DOMAIN § 12.32[3][c] (3d ed. 1979).

22 *See* Supplemental Brief for Plaintiff-Appellee at 12, Correia v. New Bedford Redevelopment Authority, 1978 Mass. Adv. Sh. 1483, 377 N.E.2d 909.

23 *See* 2 L. ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN at 1 (2d ed. 1953).

24 *Id.*

25 335 Mass. 189, 138 N.E.2d 769 (1956).

26 *Id.* at 194-95, 138 N.E.2d at 773.

27 1978 Mass. Adv. Sh. at 1487, 377 N.E.2d at 912. See note 18 *supra.*

28 *Id.*

shown by [the market study method or income capitalization method]." [29] However, one danger posed by the DRC method is that excessive awards may be made for property taken unless the obsolescence and inadequacy of the special purpose property as well as its physical depreciation are adequately discounted.[30]

The Supreme Judicial Court, finding the impossibility test too rigid in light of the uncertainties involved in the valuation of real estate,[31] overturned the Appeals Court ruling. The Court emphasized that the DRC method has a disfavored status based on the practical danger of excessive awards due to the possibility of inadequate consideration of depreciation factors, and the collective experiences of real estate practitioners, commentators, and courts.[32] However, the Court held that the "need" for DRC evidence in cases of difficult valuations of unique buildings which are used for special or unusual purposes, and which are not frequently bought or sold, not the "impossibility" of use of other methods, should determine its admissibility.[33] In such a case, the Court reasoned, it is difficult to reach a reliable figure for fair market value based on the exclusive use of any one method of valuation, and it is unreasonable to impose a strict barrier to the reasonable use of the DRC method where plausible, but not wholly satisfactory, calculations may be made based upon more conventional methods.[34] The Court held that "the trial judge should be allowed to exercise sound discretion in determining when special conditions exist so as to justify the use of such data." [35]

Applying this rule to the facts of the case, the Court held that when expert testimony showed that the structure was unique, that there were no sales of comparable real estate in the area at the time, and that the net income capitalization method was at best conjectural, and where the trial judge gave proper weight to the DRC method evidence in his charge to the jury, admission of that evidence was not error.[36]

The first criterion for the use of DRC evidence is that the property is used for a special purpose or contains a unique structure. The Court

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[29] 1978 Mass. Adv. Sh. at 1487-88, 377 N.E.2d at 912, *quoting* Commonwealth v. Massachusetts Turnpike Authority, 352 Mass. 143, 147-48, 224 N.E.2d 186, 190 (1967).

[30] 1978 Mass. Adv. Sh. at 1488, 377 N.E.2d at 912.

[31] *Id.* at 1492, 377 N.E.2d at 914.

[32] *Id.*

[33] *Id.*

[34] *Id.* at 1491, 377 N.E.2d at 913.

[35] *Id.* at 1493, 377 N.E.2d at 914. This is a significant relaxation of the Appeals Court's formulation of the admissibility of such evidence. The Appeals Court required the trial court to make a preliminary finding that valuation under conventional methods is impossible before DRC evidence may be admitted. *See* 5 Mass. App. at 293, 294, 362 N.E.2d at 541, 542.

[36] 1978 Mass. Adv. Sh. at 1493-94, 377 N.E.2d at 914.

noted the unique aspects of Correia's building, such as the special weight-bearing construction, the hydraulic lifts, and the service pits.[37] The owner had removed the fixtures and put them in another building,[38] leaving only the special weight-bearing construction as the special or unique feature of the property.[39] While labeling this a close case, the Court held that the trial judge did not abuse his discretion in finding the property to be special purpose property.[40]

Since the Court indicated this is a close case, certain aspects of the decision should be read narrowly. It does not expand the use of DRC method evidence beyond property with a unique feature for which there is no ready market. However, this case does probably indicate the outer limit for the use of DRC evidence for commercial property, particularly because, in addition to the unique aspect of the property, the Court stressed the unreliability of the data resulting from more conventional methods of valuation.[41] The Court further pointed out that the DRC method evidence was not conclusive as to value, but was to be considered along with all other evidence and that the trial judge had instructed the jury as to the appropriate weight it should be given.[42]

Perhaps what is most significant about *Correia* is that the Court retreated from its earlier statements which seemed to set up an "impossibility" test for use of the DRC method.[43] The general criticism of DRC, as opposed to income capitalization and market study, is that it is considered unreliable. Where the property is unique or special property, the opposite is true, and DRC is more reliable than the two more con-

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[37] *Id.* at 1493, 377 N.E.2d at 914. The unique aspects are more clearly noted in the opinion of the Appeals Court, which set forth the substance of the plaintiff's witness' testimony. These factors were that the floor of the facility was of steel-reinforced concrete designed to bear the weight of heavy trucks, the building was wired to power electric tools specific to tire retreading and refitting, it had a steam-generating boiler for use in retreading, its doors could accommodate large trucks, and it contained several alignment pits and hydraulic lifts. 5 Mass. App. at 292, 362 N.E.2d at 541. One might legitimately wonder why the Supreme Judicial Court considered this building unique. Its description resembles nothing more than a well-equipped, albeit large, service station facility of which there must be scores throughout the commonwealth.

[38] Supplemental Brief for Defendant-Appellant at 9, Correia v. New Bedford Redevelopment Authority, 1978 Mass. Adv. Sh. 1483, 377 N.E.2d 909.

[39] *Id.*

[40] 1978 Mass. Adv. Sh. at 1493, 377 N.E.2d at 914.

[41] *Id.*

[42] *Id.* at 1494, 377 N.E.2d at 914.

[43] The Court stated: "The Appeals Court's statement of an 'impossibility' test in this case finds support in what may be unnecessarily broad language in some of our older cases." The Court cited as such cases Tigar v. Mystic River Bridge Authority, 329 Mass. 514, 518, 109 N.E.2d 148, 151 (1952); Cochrane v. Commonwealth, 175 Mass. 299, 303, 56 N.E. 610, 611 (1900). 1978 Mass. Adv. Sh. at 1491-92 and n.4, 377 N.E.2d at 913 and n.4.

ventional methods. There, it is not logical that the "possibility," albeit speculativeness, of the conventional methods should serve as a bar to the DRC method. While the Court stated that the three methods are not "equally applicable or . . . interchangeable,"[44] *Correia* nevertheless makes clear that in some instances two methods of valuation will be desirable in a single case.

§11.4. Nonprohibitable Use: Abortion Clinic. The United States Supreme Court decision in *Roe v. Wade*[1] established that the individual's right to privacy comprehends a pregnant woman's right to an abortion during the early stages of pregnancy. *Roe* prohibits the states from "interpos[ing] material obstacles to the effectuation of a woman's counselled decision to terminate her pregnancy during her first trimester."[2] In *Framingham Clinic v. Board of Selectmen of Southborough*[3] the Supreme Judicial Court found—and invalidated—such a material obstacle in the form of a zoning by-law prohibiting abortion clinics.

Framingham Clinic proposed to offer its clients family planning and gynecological services, including termination of pregnancies during the first trimester, all on an outpatient basis.[4] The clinic was to be housed in an office building located in an industrial park district, pursuant to the Southborough zoning by-law permitting "Office Buildings" at the proposed site.[5]

In order to obtain a determination of need from the Department of Public Health,[6] Framingham Clinic was required to show compliance with applicable zoning by-laws.[7] The Board of Selectmen and the Town Counsel of Southborough assured Framingham Clinic of its compliance,[8] and preliminary steps in the Department of Public Health approval process for the issuance of a determination of need for the clinic then took place.[9] Before final Department of Public Health approval was given, however, the Southborough Planning Board initiated action to amend the by-laws in order to preclude the operation of the clinic. The amend-

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[44] 1978 Mass. Adv. Sh. at 1486, 377 N.E.2d at 911.

§11.4. [1] 410 U.S. 113 (1973).

[2] Framingham Clinic v. Board of Selectmen of Southborough, 373 Mass. 279, 288, 367 N.E.2d 606, 612 (1977).

[3] 373 Mass. 279, 367 N.E.2d 606 (1977).

[4] *Id.* at 280, 367 N.E.2d at 607.

[5] *See* SOUTHBOROUGH MASS. ZONING BY-LAW, § IV, 7, A (2) (reproduced 373 Mass. at 281 n.3, 367 N.E.2d at 608 n.3).

[6] G.L. c. 111 §§ 25C, 51; MASSACHUSETTS DEPARTMENT OF PUBLIC HEALTH, DETERMINATION OF NEED REGULATIONS, 105 Code Mass. Regs. 100 *et. seq.*

[7] 373 Mass. at 280, 367 N.E.2d at 608.

[8] *Id.* at 280-81, 367 N.E.2d at 608.

[9] *Id.* at 281, 367 N.E.2d at 608.

ment, which prohibited operation of abortion clinics in all zoning districts, was approved in a special town meeting.[10]

The plaintiffs, Framingham Clinic, Inc. (a for-profit corporation), its three directors, its medical director (a physician), and two women residents of Southborough, joined in an action commenced in the Supreme Judicial Court for Suffolk County seeking to have the Southborough zoning amendment declared invalid and its enforcement enjoined.[11] Justice Wilkins reserved and reported the case for determination by the full bench.[12]

The majority opinion of the Supreme Judicial Court held the by-law amendment invalid on due process and equal protection grounds.[13] Citing *Roe v. Wade*, the Court found the effect of the by-law to be an extreme intrusion into a woman's fundamental right to privacy.[14] The Court allowed that some regulation of the "effectuation" of an abortion decision during the first trimester might be permissible,[15] but it declined to refine its analysis further because the by-law on its face violated the basic right of privacy with no acceptable justification.[16] The majority further characterized the by-law amendment as discriminatory in its treatment of abortion clinics.[17] Thus, the by-law, allowing lawfully operated medical clinics to do business within the Town of Southborough only if they do not perform admittedly lawful abortions, arbitrarily burdened exercise of the constitutionally guaranteed right to an abortion and violates equal protection of the law.[18] For these two reasons the Southborough zoning by-law amendment was declared invalid.

Framingham Clinic differs from most cases that have arisen concerning limitations on abortion, because the physical plant, and not the activities of personnel, was the object of the regulation. Nevertheless, the Supreme Judicial Court, citing a 1917 United States Supreme Court decision,[19] reaffirmed the principle that a law exercising the zoning power may not be framed in a manner offensive to constitutionally protected

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[10] *Id.* at 281-82, 367 N.E.2d at 608. The amendment added "Abortion Clinics" as the fifth of the "Prohibited Uses—All Districts" to SOUTHBOROUGH MASS. ZONING BY-LAW § VIII, 8. *Id.* at 282, 367 N.E.2d at 608.

[11] 373 Mass. at 279, 367 N.E.2d at 607.

[12] *Id.* at 282-83, 367 N.E.2d at 609.

[13] *Id.* at 283, 367 N.E.2d at 609.

[14] *Id.*

[15] *Id.* at 284, 367 N.E.2d at 610.

[16] *Id.*

[17] *Id.* at 285, 367 N.E.2d at 610.

[18] *Id.* at 284-85, 367 N.E.2d at 610.

[19] Buchanan v. Worley, 245 U.S. 60 (1917). *Cf.* Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977) (refusal to rezone from single family to multi-family residential use held not to be racially discriminatory).

freedoms.[20] In so holding, the majority opinion rejected the Town's arguments that "public sentiment" as expressed through the vote of the town meeting should be given effect.[21] The Court found that argument irrelevant and dangerously susceptible to deprivation of liberty through tyranny of the majority.[22]

The Court also rejected the Town's arguments that the zoning by-law amendment was valid because the clinic would be a profit-making venture,[23] because other such clinics are available elsewhere in the state,[24] and because the state is under no obligation to finance nontherapeutic abortions.[25]

The concurring opinion of Chief Justice Hennessey [26] maintained that the by-law was invalid as a matter of statutory construction, thus making it unnecessary to reach the constitutional principles of *Roe v. Wade*.[27] The concurring justices considered that Southborough's regulation of abortion clinics was preempted by the legislature's delegation of that authority to the Department of Public Health.[28] General Laws chapter 111, sections 25C and 51, regulate the process whereby a clinic obtains approval to operate within the state. The concurrence cited *Bloom v. Worcester*,[29] for the standard to be applied to determine whether state law preempts local regulation. This standard holds that even in the absence of express indication of the legislature's intention to preempt the field, inference of such intent may be made if circumstances so indicate.[30]

The concurring opinion also stated that the zoning enabling statute, which requires uniform regulations for each class of kind of use,[31] did not authorize the Southborough by-law because there was no rational basis for excluding only those clinics performing abortions.[32]

Framingham Clinic, while decided primarily on the grounds of equal protection and due process, reaffirms an old principle of zoning law in the modern context of the continuing abortion controversy. A validly

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20 373 Mass. at 286, 367 N.E.2d at 611.
21 *Id.* at 287, 367 N.E.2d at 611.
22 *Id.*
23 *Id.*
24 *Id.* at 287, 367 N.E.2d at 611-12.
25 *Id.* at 288, 367 N.E.2d at 612.
26 *Id.* at 288-89, 367 N.E.2d at 612-13. Justice Quirico joined in the opinion of the Chief Justice.
27 *Id.*, 367 N.E.2d at 612.
28 *Id.* at 289, 367 N.E.2d at 612.
29 363 Mass. 136, 293 N.E.2d 268 (1973).
30 *Id.* at 155, 293 N.E.2d at 280.
31 *See* former G.L. c. 40A, § 2. The current version is G.L. c. 40A, § 3.
32 373 Mass. at 289, 367 N.E.2d at 612-13.

adopted zoning by-law is invalid when it effectively deprives individuals of their constitutionally protected freedoms. Municipalities may not undermine a constitutional guarantee by adopting zoning by-laws which exclude abortion clinics altogether. However, a municipality is not prohibited from exercising any reasonable regulation of abortion clinics, so a regulation as to location within certain specified districts is still permissible.

§11.5. Principal and Accessory Uses. A "principal use" of property is the primary purpose or function that a parcel of land or a building serves or is intended to serve,[1] while an "accessory use" is a subordinate use that is incidental and related to the principal use.[2] During the *Survey* year the Appeals Court found occasion to carefully delineate and distinguish these two types of uses in *Town of Foxborough v. Bay State Harness Horse Racing and Breeding Association, Inc.*[3]

Bay State leased to Jerome Coffman the parking lots that served its race track facility in Foxborough, for the purpose of operating a flea market on Sundays.[4] Coffman planned to charge individual dealers for booth space and charge patrons for parking. Patrons were not to be charged for admission to the market, however.[5] The Town of Foxborough sought and was granted an injunction prohibiting the operation of the flea market because it allegedly violated the provisions of the Town's special use district zoning by-law.[6] The Appeals Court, reversing the judgment and injunction entered by the superior court on behalf of the Town, rejected Foxborough's assertion that the flea market was an accessory use to the race track and parking lots which use was prohibited by the by-law's accessory use clause.[7]

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§11.5. [1] 3 R. M. ANDERSON, AMERICAN LAW OF ZONING § 16.11 (2d ed. 1977).

[2] *Id.*

[3] 5 Mass. App. 613, 366 N.E.2d 773 (1977).

[4] *Id.* at 614, 366 N.E.2d at 775.

[5] *Id.* at 615, 366 N.E.2d at 776.

[6] *Id.*, 366 N.E.2d at 775. Another basis that was advanced for the injunction was that the flea market use violated certain provisions of the Sunday closing laws, particularly G.L. c. 136, §§ 4 & 5. The Appeals Court held that the Sunday closing laws did not provide a basis for an injunction. Section 4 was not applicable because of the absence of an admission fee; there was no contention that the parking fee constituted a "requisite for admission." *Id.* at 619, 373 N.E.2d at 778. Moreover, § 5 was not applicable because the types of wares to be sold, "various articles such as paintings, antiques, hand crafted items and the like," are exempted from § 5 by the provisions of § 6.

[7] 5 Mass. App. at 616, 366 N.E.2d at 776. The clause lists as a prohibited accessory use: "8. Trailers or other temporary vehicles or structures for displaying goods or storing them for direct delivery to retail customers."

The court rejected out of hand the Town's contention that the use of the premises as a flea market was specifically prohibited as an "[o]ther amusement and recreation service, outdoor" use. The court could see nothing in the flea market

The court first noted that there must be a sufficient nexus between the principal use and the alleged accessory use in order to characterize the challenged use as accessory. The simple fact that the same locus is utilized for two dissimilar purposes is not sufficient to constitute the required nexus,[8] if the alleged accessory use is not dependent upon or pertinent to the principal use.[9] Quoting *Lawrence v. Zoning Bd. of North Branford*,[10] a Connecticut case, the court said an accessory use must be not only subordinate to the principal use, it must also be attendant or concomitant to the principal use.[11] The *Lawrence* court defined an accessory use as "a use which is customary in the case of a permitted use and incidental to it."[12] It then went further to define the crucial words "incidental" and "customary." "Incidental" means that the use is subordinate and minor in significance to the principal use, but it also bears a reasonable relationship to the principal use.[13] "Customary" means that the use is usual in connection with the principal use as evidenced by common and long practice.[14]

Applying this reasoning, the Appeals Court found no connection between the racetrack and the flea market other than their sharing the same premises.[15] Accordingly, the court found that the flea market was not an accessory use to the racetrack, but was a separate principal use.[16]

The court, having made the determination that the flea market was a principal use, applied the customary analysis treating the principal use separately from the accessory use, in order to see if the flea market could be brought within the permitted principal use of a "retail establishment" under the Foxborough by-law.[17] Construing the by-law as a whole, the court found that the accessory use clause did not act to prohibit a principal retail business simply because it is conducted outdoors.[18] The

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use "which would lend plausability to the notion that the operation somehow provides 'recreational shopping' rather than 'serious shopping' . . . assuming that there may be circumstances which would make such a distinction viable." *Id.*

[8] *Id.* at 616-17, 366 N.E.2d at 776-77, *citing* Needham v. Winslow Nurseries, Inc., 330 Mass. 95, 111 N.E.2d 453 (1953) (holding that the sale of Christmas trees and wreaths not grown on the premises is not an accessory use because it is the sale of dead, rather than living, plants).

[9] 5 Mass. App. at 618, 366 N.E.2d at 777, *quoting Winslow Nurseries*, note 8 *supra*, 330 Mass. at 101, 111 N.E.2d at 457.

[10] 158 Conn. 509, 264 A.2d 552 (1969).

[11] 5 Mass. App. at 618, 366 N.E.2d at 777, *quoting Lawrence*, note 10 *supra*, 158 Conn. at 512-13, 264 A.2d at 554.

[12] 158 Conn. at 511, 264 A.2d at 554 (citations omitted).

[13] *Id.* at 512, 264 A.2d at 554.

[14] *Id.* at 512-13, 264 A.2d at 554.

[15] 5 Mass. App. at 616, 366 N.E.2d at 776.

[16] *Id.* at 617, 366 N.E.2d at 777.

[17] *Id.* at 619, 366 N.E.2d at 778.

[18] *Id.* at 617, 366 N.E.2d at 777.

court construed the term "establishment" for the purposes of the by-law as indicating a distinct physical place of business [19] whose location is fixed.[20] The establishment need not be enclosed [21] and the individual booths need not be permanently affixed.[22] This definition would include businesses, such as the flea market operation, which operate periodically at the same locus. Thus the Appeals Court held that the flea market was a principal use permitted as a retail establishment within the meaning of the Foxborough by-law.[23]

While some zoning ordinances define the term "accessory use" within the ordinance itself, others do not. Where the term is not defined in the ordinance it may be necessary for the court to define it within its construction of the ordinance. *Town of Foxborough* represents the first explicit judicial definition in Massachusetts of the term "accessory use" in the absence of a definition provided in the by-law. The construction given by the Appeals Court conforms to typical definitions included in by-laws,[24] by requiring that the accessory use be subordinate to the principal use. The court's construction does not specifically require that the accessory use be "customarily incidental" to the principal use, a limitation that is typically present in a by-law definition of the term.[25] Nevertheless, a "customarily incidental" limitation may be implicit in the requirement that the accessory use be attendant or concomitant to the principal use since the sources cited by the court to support that requirement include the phrase "customarily incidental" in their definitions.[26] Such a result would seem to follow logically because a use may be subordinate, and have a rational nexus to the principal use, yet still not be appropriate for the district.[27]

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[19] *Id., citing* A.H. Phillips, Inc. v. Walling, 324 U.S. 490, 496 (1945); Ford Motor Co. v. Director of the Division of Employment Security, 326 Mass. 757, 762, 96 N.E.2d 859, 862 (1951).

[20] 5 Mass. App. at 617, 366 N.E.2d at 777, *quoting* 1 WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY at 778 (1976).

[21] 5 Mass. App. at 617, 366 N.E.2d at 777.

[22] *Id.* at 617-18, 366 N.E.2d at 777, *citing* Commonwealth v. Morrison, 197 Mass. 199, 201, 83 N.E. 415, 415-16 (1908), which described the daily operation of a lunch wagon as being at a fixed place despite the fact that the wagon was driven off each day.

[23] 5 Mass. App. at 619, 366 N.E.2d at 778.

[24] *See* 2 R.M. ANDERSON, AMERICAN LAW OF ZONING § 9.28 (2d ed. 1977).

[25] *See Lawrence,* note 10 *supra,* 158 Conn. at 511, 264 A.2d at 554, *citing* 1 R.M. ANDERSON, AMERICAN LAW OF ZONING § 8.26 (1st ed. 1968).

[26] *See* 5 Mass. App. at 618, 366 N.E.2d at 777, *citing Lawrence,* note 10 *supra,* 158 Conn. at 512-13, 264 A.2d at 554; 3 R.M. ANDERSON, AMERICAN LAW OF ZONING § 16.11, at 31 (2d ed. 1977); 3 N. WILLIAMS, AMERICAN LAND PLANNING LAW § 74.14, at 415 (1975).

[27] *See, e.g., Lawrence,* note 10 *supra,* 158 Conn. at 514-15, 264 A.2d at 555-56 (upholding zoning board of appeals' determination that the raising of goats and chickens to feed the family is not customarily incidental to a residential use in the center of town).

Rather than concluding with its holding that the flea market was not an accessory use, the court went further to determine if the flea market could qualify as a permitted principal use within the locality's zoning by-law. In so doing, the Appeals Court seemed to follow a rule of strict construction since conducting retail business was a permitted use and the by-law did not explicitly prohibit outdoor retail business, which, the court reasoned, it easily could have done.[28]

§11.6. Judicial Power to Order Issuance of Special Permits. Massachusetts zoning laws provide for the granting of special permits to exempt the recipient from specified restrictions of a locality's zoning regulations.[1] These exceptions, however, must be "in harmony with the general purpose and intent of the ordinance or by-law." [2] Although the granting of special permits is discretionary,[3] General Laws chapter 40A, section 4, has been interpreted to require that local ordinances must provide adequate standards for the guidance of the special permit granting authority.[4] The special permit granting authority for its part must "set forth clearly the reason or reasons for its decisions." [5] If the reasons for the denial of a special permit are legally invalid, the superior court in which review of the permit granting authority's decision is sought may, in certain circumstances, itself order that a permit be granted.[6]

In *Cape Ann Development Corp. v. City of Gloucester (Cape Ann I)*,[7] the plaintiff developer had obtained statutory approval of its perimeter plan for a shopping center in a district permitting such use by operation of General Laws chapter 41, section 81P.[8] Section 7A of the Zoning Enabling Act protected the use of land shown on a statutorily approved plan from changes in local zoning ordinances for three years.[9] Subsequent to plaintiff's procuring approval, the City amended its zoning

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[28] 5 Mass. App. at 618, 366 N.E.2d at 778.

§11.6. [1] *See* former G.L. c. 40A, § 4. The current version will be found at G.L. c. 40A, § 9.

[2] *Id.*

[3] *Id.* Discretion is indicated by the permissive word "may" in the statute.

[4] Josephs v. Board of Appeals of Brookline, 362 Mass. 290, 294-95, 285 N.E.2d 436, 439 (1972), *citing* MacGibbon v. Board of Appeals of Duxbury, 356 Mass. 635, 638, 255 N.E.2d 347, 350 (1970).

[5] *See* former G.L. c. 40A, § 18. The current version will be found at G.L. c. 40A, § 15.

[6] Cape Ann Development Corp. v. City Council of Gloucester, 1978 Mass. Adv. Sh. 596, 373 N.E.2d 218. Judicial review of decisions of the special permit granting authority is provided for by G.L. c. 40A, § 21 (*amended by* Acts of 1975, c. 808, § 3; current version at G.L. c. 40A, § 17).

[7] Cape Ann Land Development Corp. v. City of Gloucester, 371 Mass. 19, 353 N.E.2d 645 (1976). For a discussion of this case, *see* Huber, *Zoning and Land Use*, 1977 ANN. SURV. MASS. LAW § 15.6.

[8] 371 Mass. at 20, 353 N.E.2d at 645-46.

[9] The current version of former § 7A will be found at G.L. c. 40A, § 6.

ordinance to prohibit a shopping center on the developer's land and adopted regulations that required a special permit from the City Council before a shopping center could be constructed.[10] When the developer's application for a building permit was denied, it appealed the denial to the superior court, and also sought declaratory relief regarding the effect of the amended zoning restrictions on its right to build the planned shopping center.[11]

The Supreme Judicial Court, modifying and affirming the judgment of the superior court held that during the protection of section 7A the City Council could deny a special permit for the developer's failure to comply with the shopping center requirements of the zoning ordinance except for those requirements that are practically prohibitive of the use.[12] But the Court also held that the City Council could not erode the protection of section 7A by refusing to grant a special permit simply for the reason that the locus would be used for a shopping center.[13] The Court also rejected the City's challenge to the superior court's retention of jurisdiction of the declaratory judgment proceeding. Because the developer could institute a new proceeding if the special permit was denied, the Court found "practical merit" in the superior court's retention of jurisdiction.[14]

Subsequent to the Court's Cape Ann I decision, the City Council denied the special permit on five grounds. Three of these grounds related to traffic congestion, and the other two related to the cost of street improvement and the vitality of the City's downtown area.[15] The superior court granted the developer's motion for summary judgment, thereby annulling the City Council's decision, and ordered the City Council to issue the special permit.[16] On appeal, in *Cape Ann Land Development Corp. v. City of Gloucester (Cape Ann II)* the Supreme Judicial Court, in light of its decision in *Cape Ann I*, ruled that the grounds for denial of the special permit were legally invalid, and it affirmed the superior court's order.[17] The Court held that under the circumstances it was proper for the superior court judge to order issuance of the special permit.[18]

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[10] 371 Mass. at 20-21, 353 N.E.2d at 646.
[11] *Id.* at 21, 353 N.E.2d at 646.
[12] *Id.* at 24, 353 N.E.2d at 648.
[13] *Id.*
[14] *Id.* at 25, 353 N.E.2d at 648.
[15] Cape Ann Land Development Corp. v. City of Gloucester, 1978 Mass. Adv. Sh. 596, 373 N.E.2d 218, 219.
[16] *Id.*, 373 N.E.2d at 219.
[17] *Id.*
[18] *Id.*

The court's authority to issue an order to the appropriate local agency to grant a variance or special permit is derived from chapter 40A, section 17 [19] which gives the court the power to ". . . make such other decree as justice and equity may require." However, such authority is rarely exercised because the statute may not be read as permitting judicial encroachment into the realm of administrative discretion.[20]

The circumstances under which a court may order the issuance of a special permit or a variance, rather than remanding the case to the zoning board or appropriate local governing body, were enumerated in *Lapenas v. Zoning Board of Appeals of Brockton*,[21] a case involving the issuance of a variance. The *Lapenas* Court noted that if a variance had been denied solely on a legally invalid ground and the zoning board had indicated that otherwise a variance would have been granted, the reviewing court may order its issuance.[22] Another ground for court-ordered issuance without remand is that the decision was "unreasonable, whimsical, capricious or arbitrary." [23] As such, a decision would be an abuse of the discretionary power of the local agency.

When a court decides that there are no legally valid grounds for the denial of a special permit, the city or town that denied the permit may not reconsider the application unless new data becomes available or additional grounds for denying the permit exist.[24]

A judicial order to grant a special permit or variance is an extraordinary remedy that has been used rarely and only in unusual circumstances.[25] The courts are understandably hesitant to substitute their own judgment for the discretionary judgment of local authorities on matters of local concern. In this case the order is appropriate as it prevents the City from contravening the legal protection afforded the developer under section 7A for reasons that run counter to the Court's earlier decision in *Cape Ann I*.

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[19] The parallel section of the former Zoning Act will be found at G.L. c. 40, § 21.

[20] *See* Pendergast v. Board of Appeals of Barnstable, 331 Mass. 555, 120 N.E.2d 916 (1954).

[21] 352 Mass. 530, 533-34, 226 N.E.2d 361, 364 (1967).

[22] *Id.* at 533-34, 226 N.E.2d at 364.

[23] *Id.* at 534, 226 N.E.2d at 364.

[24] *See Cape Ann II*, 1978 Mass. Adv. Sh. at 596, 373 N.E.2d at 219.

[25] *See* MacGibbon v. Board of Appeals of Duxbury, 369 Mass. 512, 340 N.E.2d 487 (1976) (special permit ordered where landowner's application for special permit had been pending for thirteen years and had thrice been denied on legally untenable grounds); Lapenas v. Zoning Board of Appeals of Brockton, 352 Mass. 530, 226 N.E.2d 361 (1967) (court order for special permit held not to invade power of zoning board of appeals where the only discretionary act of the board would be electing to record its recognition of a legal right).

§11.7. Zoning Regulation of Condominium Conversion. During the *Survey* year the power of a town to a regulate the conversion of existing structures to condominium-type ownership, via the zoning power, was at issue. In *Goldman v. Town of Dennis* [1] the owner of a cottage colony [2] that was a non-conforming use contended that a Dennis by-law amendment prohibiting conversion of a non-conforming cottage colony to condominiums was invalid.[3] The plaintiff-owner advanced three reasons in support of his challenge. These were: 1) that a town may not regulate or prevent creation of condominiums; 2) that the Zoning Enabling Act [4] only permits local regulation of the use of land, and not of its ownership form; and 3) that the by-law violated the constitutional requirement of equal protection.[5] The Court rejected all three contentions and affirmed the decision of the Land Court upholding the by-law as amended.[6]

Addressing first the plaintiff's contention that a town may not regulate or prevent the creation of condominiums, the Court ruled that chapter 183A, which governs condominiums, does not create an exception to the Zoning Enabling Act.[7] This ruling was based upon the reasoning that section 15 of chapter 183A, exempting the division of a building into units from the operation of the Subdivision Control Law,[8] would be unnecessary if chapter 183A overrode the provisions of other statutes.[9] Therefore, since an exemption from zoning laws is not expressly stated in the statute, condominiums are subject to regulation through the zoning by-laws.

Turning to plaintiff's second contention, the Court noted that former section 2 of the Zoning Enabling Act authorized regulation of the use of buildings, structures, and land. Such authority was limited, however, by former section 5 [10] which made zoning by-laws inapplicable to a use

§11.7. [1] 1978 Mass. Adv. Sh. 1236, 375 N.E.2d 1212.

[2] The meaning of the term "cottage colony" was at issue in *Goldman*. The Land Court defined it as a "group of small summer vacation homes" and the Supreme Judicial Court accepted this definition. *Id.* at 1239, 375 N.E.2d at 1214.

[3] DENNIS, MASS. ZONING BY-LAW § 2.4.3.6 provided:

> An existing non-conforming cottage colony may not be converted to a single family dwelling use under separate ownership unless the lot upon which each building is located complies with minimum requirements for single family dwellings in the zoning district in which the land is located, and such non-conforming cottage colony may not be converted to single family use under condominium type ownership unless the lot meets the minimum requirements for open space village development.

[4] *See* G.L. c. 40A, § 3. The case was decided under the former Act, for which the parallel provision was G.L. c. 40A, § 2.

[5] 1978 Mass. Adv. Sh. at 1237, 375 N.E.2d at 1213.

[6] *Id.* at 1238-40, 375 N.E.2d at 1213-14.

[7] *Id.* at 1237, 375 N.E.2d at 1213.

[8] *See* G.L. c. 41, §§ 81K-81GG.

[9] 1978 Mass. Adv. Sh. at 1237-38, 375 N.E.2d at 1213.

[10] The current version, G.L. c. 40, § 6, specifically provides that zoning by-laws shall be applicable "to any change or substantial extension of such use."

existing at the time of the adoption of the by-law "to the extent to which it is used at the time of adoption" [11] of the by-law. Section 5 further provided that a zoning by-law will apply to the use of non-conforming property which is subsequently used for the same purpose as it was at the time of the adoption of the by-law but "to a substantially greater extent." [12] Thus, a change of use or a substantial extension of use will bring the non-conforming property within the application of the zoning by-law, despite the section 5 protection for non-conforming uses.

The Court observed that it would have been reasonable for the town to believe that conversion of the cottage colony to single family condominiums would encourage an expansion from seasonal summer use to year round use.[13] Thus, conversion would constitute not only a change in the form of ownership but also an extension of a non-conforming use. The Court cited *McAleer v. Board of Appeals of Barnstable,*[14] in which it distinguished between a permissible increase in the intensity of a use within the non-conforming use privilege and an unlawful expansion of a non-conforming use.[15] Such a distinction depends upon the spirit of the by-law.[16] If a by-law does not prohibit an extension of the non-conforming use through a mere increase of the non-conforming use in time, such increase is permissible.[17] However, if the by-law expressly prohibits a change or extension of a non-conforming use, it may validly inhibit expansion of the non-conforming use from seasonal to year-round.[18]

Interpreting the words of the Dennis by-law, the Court found it not to be a prohibition of condominium-type ownership, but an explicit limitation on the expansion of the non-conforming use that is merely phrased in terms of ownership.[19] As such, the limitation is a valid regulation of change of use.[20] Accordingly, the conversion of a seasonal cottage colony to condominiums which might be used on a year round basis may be validly prohibited under that by-law.

The plaintiff's final contention was that the by-law unlawfully discriminated between a cottage colony and a motel in violation of equal

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11 *See* former G.L. c. 40A, § 5.
12 *Id.*
13 1978 Mass. Adv. Sh. at 1238, 375 N.E.2d at 1214.
14 361 Mass. 317, 280 N.E.2d 166 (1972).
15 *Id.* at 323, 280 N.E.2d at 170.
16 *Id.*
17 *Id.* at 324, 280 N.E.2d at 170. This was the nature of the by-law at issue in *McAleer,* so the increase in operation of a lodge from seasonal to year-round use was a permitted extension.
18 *Id.* at 323, 280 N.E.2d at 170.
19 1978 Mass. Adv. Sh. at 1238-39, 375 N.E.2d at 1214.
20 *Id.*

protection of the laws. The Court upheld the Land Court's ruling that the difference in usage between a motel, which is typically used by particular individuals for one or two nights throughout the year, and a cottage colony, which is used for longer periods but only during the summer, was sufficient constitutional justification for the difference in their treatment.[21]

The result reached by the Court was a sound one. Property held under condominium type ownership must be subject to valid zoning regulations.[22] The type of ownership alone should not be sufficient to exempt a property from the operation of zoning by-laws. If it were, a mere change in the form of ownership would allow a property owner to circumvent zoning regulations and render them ineffective.[23]

Valid zoning by-laws do not regulate condominiums on the basis of their form of ownership, but on the basis of the bulk of the structure, lot area, or use of the property as authorized by former section 2. The Dennis by-law prohibits not only condominium conversion of a cottage colony, but also conversion to separately owned single family dwellings.[24] Under both forms of ownership conversion is prohibited only where lot size does not meet the appropriate minimum requirements. Thus the by-law regulates use based on lot area, and not on form of ownership.

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[21] *Id.* at 1239-40, 375 N.E.2d at 1214. The plaintiff also raised a vagueness challenge to the ordinance, claiming that it did not adequately define the term "cottage colony." The court held that since the issue was not briefed on appeal, it was waived. It also accepted the Land Court's definition, which is set forth *supra* at note 2.

[22] This is recognized *sub silentio* in the Appeals Court decision in Perry v. Building Inspector of Nantucket, 4 Mass. App. 467, 472, 350 N.E.2d 733, 736 (1976).

[23] The Land Court gave the example of a single family residence converted to condominium ownership. If exempt from the zoning laws, each floor could be sold as a condominium unit, thereby allowing multiple family use in a single family district. *See* Sarris v. Dennis, Docket No. 76255 (Land Court, Mass., Oct. 8, 1976).

[24] See note 3 *supra.*