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Chapter 15: Zoning and Land Use

Richard G. Huber

CHAPTER 15

Zoning and Land Use

RICHARD G. HUBER*

§15.1. Zoning—Section 6 Protection—Time of Filing an Application for a Building Permit. Section 6 of the new Zoning Act[1] provides for a protection or zoning freeze period of three years, running from the date of a local planning board's endorsement that a plan does not require approval under the Subdivision Control Law.[2] During this period, the use of the land shown on such a plan is governed by the applicable provisions of the zoning ordinance or by-law in effect at the time of the submission of the plan, rather than by any subsequent amendments enacted prior to the developer's application for a building permit.[3] Therefore, a developer's seasonable application for a building permit may not be denied on the grounds that the proposed use is prohibited under the new ordinance or by-law.

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* RICHARD G. HUBER is Dean and Professor of Law at Boston College Law School. The author acknowledges with gratitude the extensive work of his research assistant, Patrick O'Mally, a second year student at Boston College Law School, in the preparation and writing of this chapter.

§15.1. [1] G.L. c. 40A, § 6.

[2] *Id.* This section provides, in pertinent part:

> When a plan referred to [in] section eighty-one P of chapter forty-one has been submitted to a planning board and written notice of such submission has been given to the city or town clerk, the use of the land shown on such a plan shall be governed by the applicable provisions of the zoning ordinance or by-law in effect at the time of the submission of such plan while such plan is being processed under the subdivision control law including the time required to pursue or await the determination of an appeal referred to in said section, and for a period of three years from the date of endorsement by the planning board that approval under the subdivision control law is not required, or words of similar import.

Id. The Subdivision Control Law, G.L. c. 41, §§ 81K-81GG, requires that any plan for proposed subdivisions of land in any city or town where the Subdivision Control Law is in effect must be submitted to and approved by the planning board of such city or town. G.L. c. 41, § 81O. Chapter 40A, § 6, quoted above, applies to plans which do not propose subdivisions and which are excluded from the general requirements of approval. Section 81P provides that such excluded plans must be submitted to the planning board for an endorsement that approval is not required. *Id.* For a discussion of the new Zoning Act, *see* Huber, *Zoning and Land Use*, 1976 ANN. SURV. MASS. LAW §§ 15.1-15.10, at 449-91.

[3] G.L. c. 40A, § 6. For text see note 2 *supra.*

During the *Survey* year, the Appeals Court clarified the actions a developer must take within the three-year period in order to avail himself of section 6 protection. In *Falcone v. Zoning Board of Appeals of Brockton*,[4] the landowner plaintiff applied for endorsement of a plan that he believed did not require approval under the Subdivision Control Law.[5] The zoning board so endorsed the plan on April 13, 1973.[6] Subsequently, on November 24, 1975, the city enacted a flood plain ordinance whereby a portion of the landowner's property came within a "Major Importance" sub-district.[7] On April 12, 1976, one day before the expiration of the three-year protection period, the plaintiff applied for a permit to build thirty-five multi-family apartment buildings.[8] No attempt was made to comply with the provisions of the flood plain ordinance, although 78 of the proposed 210 units would lie within the "Major Importance" sub-district.[9] On May 14, 1976, the city denied the application for failure to comply with the requirements of that ordinance.[10] The plaintiff appealed the denial to the zoning board of appeals, contending that section 6 protected him against application of the flood plain ordinance.[11] The board affirmed the denial on the basis that the protection period had expired by the time the application was denied.[12] The plaintiff then filed an appeal from the denial of the building permit to the superior court, which in turn affirmed the denial.[13] The plaintiff appealed the judgment to the Appeals Court.[14]

The issue before the court was whether the mere filing of a building permit application within the three-year period is sufficient to assure the developer of section 6 protection.[15] In resolving this issue, the court examined applicable prior case law[16] and considered itself faced with

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[4] 1979 Mass. App. Ct. Adv. Sh. 1149, 389 N.E.2d 1032.

[5] *Id.* at 1149, 389 N.E.2d at 1032.

[6] *Id.* at 1150, 389 N.E.2d at 1032.

[7] *Id.* The Court does not discuss a "Major Importance" subdistrict as it is defined under the Brockton zoning law.

[8] *Id.*

[9] *Id.*

[10] *Id.* Although on May 29, 1973, the property was rezoned to permit only single family residential uses, the city did not rely on this change as a basis for denying the plaintiff's building application. The parties agreed that had the plaintiff not sought to build on that portion of the property within the "Major Importance" sub-district, the application would not have been denied. *Id.* at n.1.

[11] *Id.* at 1150, 389 N.E.2d at 1033.

[12] *Id.* at 1150-51, 389 N.E.2d at 1033.

[13] *Id.* at 1149, 1151, 389 N.E.2d at 1032, 1033.

[14] *Id.* at 1149, 389 N.E.2d at 1032.

[15] *Id.* at 1152, 389 N.E.2d at 1033.

[16] *Id.* at 1151-52, 389 N.E.2d at 1033. In so doing, the Court considered cases concerned with certain provisions of former G.L. c. 40A, § 7A, the section from which the current § 6 is drawn. The language in both sections is identical in all material respects. 1979 Mass. App. Ct. Adv. Sh. at 1150 & n.2, 1151, 389 N.E.2d at 1003 & n.2.

apparently conflicting dicta [17] from the cases of *Green v. Board of Appeal of Norwood* [18] and *Cape Ann Land Development Corp. v. Gloucester.*[19] In *Green,* a developer's application for a building permit, submitted fourteen months prior to the expiration of the statutory protection period then in effect, was not denied by local officials until more than a year after the protection period had expired.[20] In that case, the appeals court held that the protection afforded by the statute could not be lost through a local official's inaction.[21] In addition, the Court stated, by way of dictum, that "the period of protection provided for in § 7A [extends] to building permit applications filed, but not approved, before the expiration of the period of protection provided therein." [22] In *Cape Ann,* decided two years later, the plaintiff's application for a building permit was denied, and the plaintiff appealed.[23] Although the running of the zoning freeze period was not in issue, the Supreme Judicial Court acknowledged, in dictum, that the running of the three-year period of the zoning freeze would be suspended from the time the permit was denied, until the "disposition of all bona fide appeals." [24] The *Cape Ann* Court did not address the holding of *Green,* but left open the possibility that "in particular circumstances (such as where the denial is unreasonably delayed), the running of the statutory period may be suspended at a date earlier than the date on which a building permit is denied." [25]

Faced with these apparently conflicting dicta, the Appeals Court adopted what it deemed the *Cape Ann* position, and held that the mere filing of a permit application does not toll the running of the protection

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[17] *Id.* at 1152, 389 N.E.2d at 1033.

[18] 2 Mass. App. Ct. 393, 313 N.E.2d 451 (1974).

[19] 371 Mass. 19, 353 N.E.2d 645 (1976). For a discussion of *Cape Ann,* see Huber, *Zoning and Land Use,* 1977 ANN. SURV. MASS. LAW § 15.6, at 322-25.

[20] 2 Mass. App. Ct. at 394-95, 313 N.E.2d at 452-53.

[21] *Id.* at 396, 313 N.E.2d at 454.

[22] *Id.* at 396-97, 313 N.E.2d at 454, *quoted in* 1979 Mass. App. Ct. Adv. Sh. at 1152, 389 N.E.2d at 1033-34.

[23] 371 Mass. at 21, 353 N.E.2d at 646.

[24] *Id.* at 23 n.5, 353 N.E.2d at 647 n.5.

[25] *Id., quoted in* 1979 Mass. App. Ct. Adv. Sh. at 1153, 389 N.E.2d at 1034. The *Falcone* Court does not explain why it finds these two statements to be conflicting; nor does it emphasize that *Green* is a decision of the Appeals Court, and *Cape Ann* is a decision of the Supreme Judicial Court. The *Falcone* Court apparently understood the *Green* opinion to hold that an application filed at any time within the three year period is protected by the zoning freeze. In contrast, the court interpreted the quoted *Cape Ann* dictum to indicate that, except for the possibility of special circumstances, any suspension for tolling of the statutory period could begin only after a denial of the application. Hence, only an application which was received *and acted upon* prior to the end of the three year period would be eligible to take advantage of the § 6 freeze period. In the case of a denial, the period would be tolled until for appeals.

period.[26] The court emphasized that the plaintiff, by not applying for a permit until the last day before the protection period expired, had made it impossible to secure the approvals necessary for the issuance of the permit before the expiration date.[27] Therefore, the plaintiff's application was not entitled to the protection of the section 6 zoning freeze. Without that protection, the plaintiff had to bear the risk of subsequent zoning changes, and his application would be controlled by the zoning ordinance in effect at the time of the decision on the application.[28]

Falcone represents a limitation upon the protection afforded by section 6.[29] The decision unequivocally holds that in normal circumstances the developer must complete the application process within the three-year period. The mere filing of an application within that period is not always sufficient to assure protection against changes in the zoning laws. Section 6 will not protect a developer unless he has given the local authorities a reasonable time to act upon his application before the period expires. Hence, the effect of *Falcone* is to allow a developer actually less than the statutorily prescribed three years, in which to file his application.

The decision reflects a basic preference in these circumstances for the community interest over the interests of the private landowner. While acknowledging that section 6 was designed to protect a developer during the planning stages of a building project[30] the Court's application of the statute runs counter to the interests of the developer. The decision suggests that the court considers it the responsibility of the developer to protect his own interests, and the protection afforded by section 6 will not be extended to accommodate him. Furthermore, the statutory provision represents a modification of zoning policy determined by the local community. Since such exceptions have traditionally been narrowly construed by courts, the court's decision in *Falcone* follows that tradition of protecting the community's right to determine its own policies with a minimum of interference from state law.

§15.2. Zoning—Regulation of Religious and Educational Uses. In a very interesting case that arose during the *Survey* year, the Appeals Court was required to examine the extent to which a municipality may regulate the uses of property owned or leased by a religious sect or

[26] 1979 Mass. App. Ct. Adv. Sh. at 1153, 389 N.E.2d at 1034.
[27] *Id.* at 1154, 389 N.E.2d at 1034.
[28] *See id.*
[29] For text of § 6 see note 2 *supra.*
[30] 1979 Mass. App. Ct. Adv. Sh. at 1151, 389 N.E.2d at 1033 (citing McCarthy v. Board of Appeals of Ashland, 354 Mass. 660, 663, 241 N.E.2d 840, 843 (1968); Nyquist v. Board of Appeals of Acton, 359 Mass. 462, 465, 269 N.E.2d 654, 656 (1971).

denomination. Under section 3 of the new Zoning Act,[1] land or structures used for educational or religious purposes are exempt from zoning ordinances or by-laws that would effectively prohibit or limit such uses.[2] These uses are not, however, totally exempt from all local regulation. Section 3 explicitly provides that religious or educational uses may be subject to reasonable regulations concerning bulk, dimensional, and parking requirements.[3] In *The Bible Speaks v. Board of Appeals of Lenox*,[4] the Appeals Court clarified the limitations on municipal regulation inherent in that section.

The town of Lenox, at its annual town meeting of May 7, 1976, accepted the provisions of the new Zoning Act and also amended its zoning by-law to include a section covering religious and educational uses.[5] As amended, the by-laws provided that all new religious and educational uses in residential districts, or changes in such uses, would be permitted only upon obtaining a special permit granted at the discretion of the zoning board of appeals.[6] In conjunction with the application for a special permit, the religious or educational institution seeking the permit was required to submit a precise site plan, accompanied by an informational statement detailing the probable impact of the proposed use upon the character of the particular neighborhood involved.[7] Additionally, the proposed use was required to meet certain access and dimensional requirements.[8]

The case came to the Appeals Court as a consolidation of five separate actions instituted by The Bible Speaks, a non-profit religious and educational corporation, which conducts a bona fide educational enterprise on its campus in Lenox.[9] All five actions involved applications filed subsequent to the town's acceptance of the new Zoning Act, but prior to June 30, 1978.[10] In three of the actions, the plaintiff had applied for

§15.2. [1] G.L. c. 40A, § 3.

[2] *Id.* Section 3 provides in pertinent part:

> [N]or shall any such ordinance or by-law prohibit, regulate or restrict the use of land or structures for religious purposes or for educational purposes on land owned or leased 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.

For a discussion of the new Zoning Act, see Huber, *Zoning and Land Use*, 1976 ANN. SURV. MASS. LAW §§ 15.1-15.10, at 449-91.

[3] G.L. c. 40A, § 3.

[4] 1979 Mass. App. Ct. Adv. Sh. 1362, 391 N.E.2d 279.

[5] *Id.* at 1364, 391 N.E.2d at 280.

[6] *Id.* at 1364-65 & n.6, 391 N.E.2d at 280-81 & n.6.

[7] *Id.* at 1364 n.5, 391 N.E.2d at 280 n.5.

[8] *Id.*

[9] *Id.* at 1363-68 & n.4, 391 N.E.2d at 280-82 & n.4.

[10] *Id.* at 1364-67, 391 N.E.2d at 280-82.

and had been granted special permits to change the use of three of its buildings.[11] These special permits were granted, however, subject to the plaintiff's compliance with specific conditions affecting the use of the three existing buildings involved. The permits also contained general conditions which affected the plaintiff's general educational activities and which were unrelated to the three buildings for which the change of use was sought.[12] The plaintiff thereafter filed a complaint in superior court seeking relief from the general conditions imposed on all three change of use permits.[13] The remaining two actions resulted from the building inspector's denial of the plaintiff's applications for building permits to erect hooded lights thirty-five feet high on a campus softball field and to convert an existing shed near the field into a snack bar.[14] The Board of Appeals affirmed these denials, concluding that in both instances the proposed change of use required a special permit to be granted by the board before a building permit could be issued.[15] The plaintiff brought separate actions against the building inspector and the board to test the validity of these denials.[16]

All five actions were consolidated for trial before a district judge sitting under statutory authority.[17] At the conclusion of the trial, the judge ruled that the specific conditions attached to the grants of the special permits were valid, and that the board had authority to deny the building permit to erect the hooded lights.[18] The judge concluded, however, that the board had no authority to impose the general conditions upon the grant of the special permits, nor to deny the building permit for conversion of the shed into a snack bar.[19] The plaintiff appealed from the judgment as to the softball field lights, and the building inspector and the board appealed the judgments concerning the change-of-use rulings and the snack bar.[20]

Initially, the Appeals Court noted that it was satisfied with the result reached by the trial judge in all but the decision concerning the lights.[21] The court emphasized, however, that its disposition of the issues was based upon the conclusion that the Lenox by-law exceeded tolerably permissible limits in its regulation of educational uses.[22] It

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11 *Id.* at 1365, 391 N.E.2d at 281.
12 *Id.* at 1365-66 & n.7, 391 N.E.2d at 281 & n.7.
13 *Id.* at 1367, 391 N.E.2d at 281.
14 *Id.*, 391 N.E.2d at 281-82.
15 *Id.* at 1367-68, 391 N.E.2d at 282.
16 *Id.* at 1368, 391 N.E.2d at 282.
17 *Id.* at 1368-69, 391 N.E.2d at 282.
18 *Id.* at 1369, 391 N.E.2d at 282.
19 *Id.*
20 *Id.*
21 *Id.* at 1369, 391 N.E.2d at 282-83.
22 *Id.*

was not based upon the opinion of the district court judge that the board had exceeded its authority under the by-law.

Before explaining how it reached its conclusion, however, the court addressed the plaintiff's view of how the new zoning law should be interpreted and applied to its use of land. The Appeals Court rejected the plaintiff's argument that it was entirely exempt from the effect of chapter 40A of the General Laws and from any local zoning regulations enacted pursuant to that act.[23] The plaintiff based its contention on language appearing in chapter 808, section 6, of Acts of 1975. This section provides that "the provisions of chapter forty A of the General Laws, as amended by section three of this act shall not be deemed to affect any church or other facilities used for religious purposes in existence or under construction prior to June thirtieth, nineteen hundred and seventy-eight."[24] The plaintiff claimed that this language was a legislative restatement of the Dover Amendment,[25] which was part of the predecessor of the new section 3 of chapter 40A of the General Laws.[26] The Dover Amendment invalidated any by-law or ordinance which prohibited or limited the use of land for religious or educational purposes.[27] Its purpose was to foreclose towns from exercising preferences with regard to what kinds of educational or religious denominations it would welcome.[28] Since the plaintiff's principal function was to educate and train people for the ministry, the plaintiff argued that its use of property was a religious use for purposes of section 6.[29] Therefore, the plaintiff concluded, since all of its projects were started prior

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[23] *Id.* at 1370-72, 391 N.E.2d at 283-84.

[24] Acts of 1975, c. 808, § 6.

[25] The Acts of 1950, c. 325, inserted the following language into G.L. c. 40, § 25, a predecessor of the present G.L. c. 40A, § 3: "No by-law or ordinance which prohibits or limits the use of land for any church or other religious purpose or which prohibits or limits the use of land for any religious, sectarian or denominational educational purpose shall be valid." This language became known as the Dover Amendment. *See* 1979 Mass. App. Ct. Adv. Sh. at 1370 n.10, 391 N.E.2d at 283 n.10. In Sisters of the Holy Cross of Massachusetts v. Brookline, 347 Mass. 486, 198 N.E.2d 624 (1964), the Court struck down the application of single-family residence dimensional requirements to a sectarian educational institution as being in violaton of the Dover Amendment. *Id.* at 494, 198 N.E.2d at 631. The Court did not decide, however, whether dimensional requirements not affecting the use of the land would validly apply to a religious or educational institution. *Id.* at 495 n.9, 198 N.E.2d at 631 n.8. In Radcliffe College v. Cambridge, 350 Mass. 613, 215 N.E.2d 892 (1966), the Court held that the Dover Amendment did not bar regulations which did not "impede" or "limit" the use of the land for educational purposes. *Id.* at 618, 215 N.E.2d at 896.

[26] 1979 Mass. App. Ct. Adv. Sh. at 1372, 391 N.E.2d at 284.

[27] See text of Dover Amendment at note 25 *supra.*

[28] *See* 1979 Mass. App. Ct. Adv. Sh. at 1377, 391 N.E.2d at 286.

[29] *Id.* at 1372, 391 N.E.2d at 284.

to June 30, 1978, they were exempt from the application of chapter 40A and any local regulation enacted pursuant to the Zoning Act.[30]

The Appeals Court rejected the broad interpretation suggested by the plaintiff and instead adopted a narrower position, which limited the uses exempt under section 6 to those uses that are intrinsically accessory to a church.[31] The court denied that section 6 of chapter 808 of the Acts of 1975 was a restatement of the Dover Amendment.[32] The court viewed section 6 as a special non-conforming use provision of limited life.[33] By examining and interpreting sections 3 and 6 together, in light of the case law, the Court concluded that:

> [Section] 6 was designed to permit exclusively church-like properties to continue projects under construction without encumbrance by local zoning by-laws until June 30, 1978, irrespective of a town's earlier acceptance of c. 808, while § 3 was intended to authorize a town such as Lenox, upon its acceptance of c. 808, to impose the type of regulations described in that section on sectarian educational uses or other religious uses which are not intrinsically accessory to a church.[34]

Thus, in the court's view, the two sections taken together serve to denominate religious and sectarian educational uses as two separate categories. Only the former is exempt from local regulation prior to June 30, 1978, while the latter may be subject to the type of regulations described in section 3 of general laws chapter 40A.[35]

In light of its interpretation of sections 3 and 6 of chapter 808 of the Act of 1975, the Appeals Court ruled that the plaintiff's proposed uses were not exempt from local regulation.[36] The court concluded that the plaintiff's uses did fit within the broad definition of "education" as the term has been defined by case law,[37] and were clearly educational in nature rather than religious.[38] Therefore, they fell into the sectarian

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[30] *Id.*

[31] *Id.* at 1373, 391 N.E.2d at 284.

[32] *Id.* Instead, the court stated that it was G.L. c. 40A, § 3, appearing in the Acts of 1975, c. 808, § 3, that was intended by the legislature to synthesize the Dover Amendment and the case law construing it. *Id.* at 1372-73, 391 N.E.2d at 284. See note 2 *supra* for the text of G.L. c. 40A, § 3.

[33] 1979 Mass. App. Ct. Adv. Sh. at 1373, 391 N.E.2d at 284.

[34] *Id.*

[35] *See id.* at 1373 & n.11, 391 N.E.2d at 284 & n.11. See text of G.L. c. 40A, § 3, at note 2 *supra*.

[36] 1979 Mass. App. Ct. Adv. Sh. at 1374, 391 N.E.2d at 285.

[37] *See e.g.*, Radcliffe College v. Cambridge, 350 Mass. 613, 618, 215 N.E.2d 892, 895 (1966), Mount Hermon Boys' Sch. v. Gill, 145 Mass. 139, 146, 13 N.E. 354, 351 (1887).

[38] 1979 Mass. App. Ct. Adv. Sh. at 1373-74, 391 N.E.2d at 284-85.

educational use category and were subject to the bulk, dimensional, and parking requirements permitted by section 3 of chapter 40A.[39]

After determining that the plaintiff's proposed uses were subject to local regulation, the court proceeded to invalidate those sections of the Lenox by-law[40] that it considered went beyond the "reasonable regulations" permitted by section 3.[41] The court first addressed that section of the by-law requiring every non-municipal educational institution planning any change in its buildings or structures to file a site plan and informational statement with the board.[42] The court found that such requirements were inappropriate for changes in educational uses because it exceeded the scope of all the reasonable bulk, dimensional, and parking requirements that could legitimately be imposed.[43] Furthermore, it appeared to the court that the board of appeals, by combining the site plan and informational statement requirements with another provision that made new or changed educational uses dependent upon the discretionary grant of a special permit, was attempting to exercise essentially planning board functions and pursue its own notions of land use planning.[44] The court emphasized that the combination of these sections invested the board with a considerable amount of discretionary authority over an educational institution's use of its facilities.[45] Such discretionary authority allowed for the possible subordination of the educational use to the board's own planning goals, even to the extent of impermissibly limiting or prohibiting the use. Therefore, the court concluded, the imposition of special permit requirements upon legitimate educational uses, which had been expressly authorized to exist as of right in any zone, was clearly contrary to the intent of the legislature in enacting section 3.[46]

In considering its final disposition of the case, the court treated the plaintiff's multiple actions as requests for declaratory relief.[47] In granting such relief, the court determined that portions of the Lenox by-law were in conflict with the new Zoning Act, despite the presumptive validity of municipal zoning regulations.[48] Rather than invalidate the entire section of the by-law, however, the court held that those

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[39] *Id.* See text of G.L. c. 40A, § 3, at note 2 *supra.*

[40] Zoning by-law of Lenox, §§ 6 & 9.18 *quoted in* 1979 Mass. App. Ct. Adv. Sh. at 1364-65 n.5 & 6, 391 N.E.2d at 280-81, n.5 & 6.

[41] *Id.* at 1374-78, 391 N.E.2d at 285-87.

[42] *Id.* at 1375-77, 391 N.E.2d at 285-86.

[43] *Id.* at 1376, 391 N.E.2d at 286.

[44] *Id.*

[45] 1979 Mass. App. Ct. Adv. Sh. at 1377, 391 N.E.2d at 286.

[46] *Id.*

[47] *Id.* at 1378, 391 N.E.2d at 286.

[48] *Id.* *See* Crall v. Leominster, 362 Mass. 95, 102, 284 N.E.2d 610, 615 (1972).

portions imposing bulk, dimensional, and parking requirements were severable and were valid.[49] The remaining portions, those that imposed the requirements of a site plan, informational statement, and special permit before educational or religious institutions could expand, were held to be invalid.[50] The court thus ruled that the plaintiff was not required to apply for a special permit as a condition precedent to obtaining a building permit for the construction of the hooded lights;[51] nor was it required to obtain either a special permit or a building permit to convert the shed into a snack bar.[52] Finally, the court annulled the general conditions annexed to the three change-of-use cases, with the notation that occupancy of the buildings could be conditioned upon compliance with the applicable parking requirements.[53]

For a variety of reasons, municipalities have often attempted to exclude religious and educational uses from residential areas. In many instances, the rationale employed to justify such exclusion may represent no more than a thinly-veiled attempt to discriminate against an unpopular sect, the exclusion of which is deemed desirable according to community opinion. In addition, since the congregations of religious sects are often comprised of people drawn from outside the community, the removal of property from the tax rolls for new religious or educational purposes increases the community's tax burden without benefiting its citizens. For this reason, a community may engage in a type of fiscal discrimination and seek to inhibit new and expanding religious or educational uses. The Dover Amendment,[54] enacted to prevent these types of discrimination, achieved its desired aim at the expense of the complete removal of the regulation of religious and educational uses from community control. The special zoning status afforded such uses may, however, create problems that are best left to local control. For example, such uses typically generate high-traffic conditions, at least during certain times of the week, and a community may well be concerned about the use's impact upon the traffic patterns of a residential neighborhood. The site plan and informational statement requirements of the Lenox by-law reflect this concern.

The position adopted by the Appeals Court in *The Bible Speaks* strikes a balance between the interests of the community and the interests of religious and educational organizations. By invalidating the site plan and informational statement requirements, the Appeals Court has re-

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[49] 1979 Mass. App. Ct. Adv. Sh. at 1378, 391 N.E.2d at 287.
[50] *Id.*
[51] *Id.*
[52] *Id.* at 1379, 391 N.E.2d at 287.
[53] *Id.*
[54] See text and notes at notes 25-28 *supra.*

jected the proposition, accepted in other jurisdictions,[55] that severe traffic congestion problems resulting from a religious or educational use in a residential area is sufficient to justify the exclusion of the use from the neighborhood. The decision does not, however, completely ignore the community's concern for such problems. The decision, while giving effect to the clear intent of the legislature to allow some local control over the traffic patterns of residential areas, permits this control to be exercised only in the form of parking requirements. It also makes clear that it is the responsibility of the municipality to determine the amount of parking required to offset traffic congestion. *The Bible Speaks* indicates that the court would be reluctant to accept any form of local regulation beyond that expressly described in section 3.[56] Nevertheless, the flexible position adopted by the Appeals Court protects the community interest without total exclusion of religious and educational uses from residential neighborhoods.

Finally, the court's extension of the definition of the term "education" to include the use of land for lighted softball fields and snack bars is also significant. The court gives every indication that such uses, at least when in conjunction with a bona fide educational program, are uses for educational purposes, and therefore, are not subject to local prohibitions or limitations. Therefore, so long as the applicable height restrictions are met, an educational institution may construct lighted softball fields and snack bars as of right.

§15.3. Zoning—Definition of "Lot." During the 1979 *Survey* year, the Appeals Court was again faced with what has proven to be a difficult, or at least frequently litigated, zoning problem, the zoning definition of "lot." The issue before the court in *Heald v. Zoning Board of Appeals of Greenfield*[1] was whether, for purposes of the application of the Greenfield zoning by-law, the word "lot" should mean a lot as described in a deed, record, plan, or other source of title, or should mean contiguous lots held in common ownership.[2]

[55] Most notably, California, Connecticut, Florida and Oregon. For a leading case from each respective jurisdiction, see Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. City of Porterville, 90 Cal. App. 2d 656, 203 P.2d 823 (1949), *appeal dismissed*, 338 U.S. 805 (1949); West Hartford Methodist Church v. Zoning Bd. of Appeals of West Hartford, 143 Conn. 263, 121 A.2d 640 (1956); Miami Beach United Lutheran Church of the Epiphany v. City of Miami Beach, 82 So. 2d 880 (Fla. 1955); Milwaukie Co. of Jehovah's Witnesses v. Mullen, 214 Ore. 281, 330 P.2d 5 (1958), *appeal dismissed* and *cert. denied* 359 U.S. 436 (1959). For a discussion of the above cases, and of the exclusion of religious and educational uses from residential areas because of their high-traffic generating capacity, see 3 N. WILLIAMS, JR., AMERICAN LAND PLANNING LAW § 77.12, at 589 (1975).

[56] G.L. c. 40A, § 3. See text of statute at note 2 *supra*.

§15.3. [1] 1979 Mass. App. Ct. Adv. Sh. 520, 387 N.E.2d 170.

[2] *Id.* at 520, 387 N.E.2d at 171.

In this case, the plaintiff Heald owned four adjoining parcels of land that had been recorded on a grid mode plan in December 1890.[3] The arrangement of the parcels on the plan was such that only one fronted on what is presently Federal Street in Greenfield.[4] By 1950, however, the boundaries of the parcels had been altered so that now four of the new total of five parcels fronted Federal Street.[5] The plaintiff apparently had acquired title to three of his four parcels from previous owners, who held them in common ownership at the time of Greenfield's adoption of a zoning by-law in 1957, although the deed into the common owners described the land by reference to three separate prior deed descriptions.[6] Of the plaintiff's four parcels, three fronted on Federal Street and the fourth (back lot) ran directly behind the others.[7] The 1957 by-law and zoning map established a commercial district along Federal Street "for depth of lot but not greater than 400 feet."[8] When the plaintiff applied for a building permit to build a fast food restaurant on three of his lots, including the back lot, the permit was denied by both the building inspector and the board of appeals.[9]

On appeal to the superior court, the trial judge compared the original 1957 by-law with Greenfield's 1965 zoning law amendment, which included a revised definition of "lot."[10] In his memorandum of decision, the judge stated that under the earlier 1957 definition of "lot,"[11] the back lot could not be used for commercial purposes.[12] The revised definition of "lot," however, permitted commonly owned contiguous parcels to be considered one lot for zoning purposes and therefore did not prohibit commercial use of the back lot.[13] Consequently, the judge

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[3] *Id.*

[4] See diagram, *id.* at 522, 387 N.E.2d at 172.

[5] *Id.*

[6] *Id.* at 521, 387 N.E.2d at 172.

[7] See diagram, *id.* at 522, 387 N.E.2d at 172.

[8] *Id.* at 521, 387 N.E.2d at 173.

[9] *Id.* at 521, 387 N.E.2d at 171.

[10] *Id.* at 523, 387 N.E.2d at 173. The 1957 by-law, as first enacted, defined "lot" as "a piece or parcel of land occupied or to be occupied by one main building and its accessory buildings." *Id.* at 521, 387 N.E.2d at 172-73. The 1965 revised definition of "lot" read:

> A continuous parcel of land meeting the lot requirement of the by-law for the district in which the land is situated, and if occupied by a building or buildings, meeting the minimum yard requirements of that district and having the required frontage on a street or on such other means of access as may be determined in accordance with the provisions of the law to be adequate as a condition of the issuance of a building permit.

Id. at 523, 387 N.E.2d at 173.

[11] See note 10 *supra.*

[12] 1979 Mass. App. Ct. Adv. Sh. at 523, 387 N.E.2d at 173.

[13] *Id.* All parties agreed that the Court must apply the 1965 by-law. It was also agreed that the only significance of the 1957 by-law was that it might serve as a guide to interpreting the applicable provisions of the 1965 by-law. *Id.*

annulled the decision of the board, in effect requiring the issuance of a building permit.[14] The intervenors in the case appealed.[15]

The Appeals Court affirmed the judgment of the lower court, but disagreed with that court's interpretation of the 1957 definition of "lot."[16] The intervenors, on appeal, had argued that the 1965 definition worked no material change in the 1957 definition.[17] According to their argument, if the 1957 definition determined what was a lot by reference to the source of title or assessor's plan, as the trial judge apparently implied, and the 1965 amendment worked no material change, then the plaintiff owned four separate zoning "lots" and should be denied the use of the back lot for commercial purposes. The Appeals Court rejected this argument, concluding that under both the 1957 and the 1965 definitions a common owner could treat parcels with separate sources of title as one "lot" for zoning purposes.[18] The court cited with approval a consistent line of Supreme Judicial Court decisions holding that, in the absence of specific zoning code provisions defining "lot" in terms of sources of title or assessor's plans, adjoining parcels may be considered one lot for zoning purposes.[19] Furthermore, the Appeals Court noted a recent statement of its own: "[T]he usual construction of the word 'lot' in a zoning context ignores the manner in which components of a total given area have been assembled and concentrates instead on the question whether the sum of the components meet [sic] the requirements of the by-law."[20] Thus, even if the 1965 amendment worked no material change in the definition of "lot," the by-law would still permit the plaintiff to treat his contiguous parcels of land as one "lot" for zoning purposes.

In its opinion, the court emphasized that a zoning code must remain responsive to changing patterns of land use. These changes frequently require land assembly and realignment of historic lot lines.[21] A contrary interpretation would restrict landowners to descriptions of record,

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[14] *Id.* at 521, 387 N.E.2d at 171.

[15] *Id.*

[16] *Id.* at 520, 523-24, 387 N.E.2d at 173.

[17] *Id.* at 523, 387 N.E.2d at 173.

[18] *Id.* at 523-24, 387 N.E.2d at 173.

[19] *Id.* at 524, 387 N.E.2d at 173. *See* Gaudet v. Building Inspector of Dracut, 358 Mass. 807, 808, 265 N.E.2d 375, 376 (1970) (rescript opinion); Vassalotti v. Board of Appeals of Sudbury, 348 Mass. 658, 661, 204 N.E.2d 924, 926-27 (1965); Vetter v. Zoning Bd. of Appeal of Attleboro, 330 Mass. 628, 630, 116 N.E.2d 277, 278 (1953).

[20] 1979 Mass. App. Ct. Adv. Sh. at 524, 387 N.E.2d at 173 (quoting Becket v. Building Inspector of Marblehead, 1978 Mass. App. Ct. Adv. Sh. 185, 194, 373 N.E.2d 1195, 1199). For a discussion of *Becket*, see Huber, *Zoning and Land Use*, 1978 ANN. SURV. MASS. LAW § 11.2, at 244-48.

[21] 1979 Mass. App. Ct. Adv. Sh. at 525, 387 N.E.2d at 173.

thereby preventing many contemporary uses of land that generally require land assembly.[22] Furthermore, the court noted that some land assembly must have been contemplated by the Greenfield by-law, which permits commercial development to a depth of four hundred feet.[23]

The problem exemplified by the *Heald* case occurs frequently in zoning law. *Heald* demonstrates with particular clarity the significant role that the definition of a lot may play in determining which uses of property are allowable under an ordinance or by-law. The decision specifically addresses the common cause of such disputes, namely, the anachronistic conception of a lot as a tract of land with only one building. To some extent, the traditional definition of a lot is perpetuated by the zoning plan itself. A zoning ordinance or by-law normally speaks in terms of lots in restricting the uses of land, as was the case in *Heald.* Since the predominant use restriction of any zoning plan is for single-family residential use, the plan and accompanying map may reserve large tracts of vacant land for future residential development. These tracts may be divided into lots as a means of density control. Lot size and minimum yard requirements may be imposed to ensure privacy and to reduce the danger to public health. Such requirements also allow a community to regulate the placement of homes, thereby facilitating the development of the amenities of the area. The single-family landowner, who must comply with such regulations and who is assessed for the value of his lot for tax purposes, thereafter often misconceives the boundaries of his residential lot as constituting the boundaries of a zoning lot.

Modern multi-family, as well as commercial and industrial, uses, however, require the assembly of many of these traditional single-family residential lots to develop a usable area. These assembled parcels become the new "lot" for purposes of zoning regulation. The retention by title and assessment records of the old descriptions of "lots" is, as the court noted, irrelevant to the use of the word "lot" for zoning purposes. Even single-family residences are in most cases built on large tracts, which may well have been assembled. Hence, the use of the term "lot" as a type of density control and as a device to regulate the placement of homes can often be anachronistic. For this reason, cluster zoning and other flexible devices have been developed, even for single-family residential building, to facilitate the best possible use of land, and to facilitate the development of amenities for those homes built as a single unit.

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[22] *See id.*
[23] *Id.* at 525, 387 N.E.2d at 174.

The importance of the *Heald* decision lies in its rejection of the traditional definition of a lot. Although each of the plaintiff's parcels was assessed separately at values suggesting residential use, the court summarily rejected the argument that their status for zoning purposes should be determined by their assessment history.[24] It is clear that a zoning lot is not necessarily the same as a tax lot, although the two are often confused. Moreover, the court emphasized that a municipality must use express language in order to restrict the use of property in terms of a lot as identified by its source of title. In so doing, it indicated that the rules of judicial construction favor the more expansive use of the land.[25] *Heald* points out that zoning ordinances and by-laws often may not reflect this approach to the assembly of land into new and generally larger and different tracts.

§15.4. Eminent Domain—Special and Peculiar Injury. One recurrent and difficult problem arising in eminent domain cases involves compensation for losses suffered when no part of the landowner's property is actually taken. Section 12 of chapter 79 of the General Laws states the rule as follows: "In determining the damages to a parcel . . . injured when no part of it has been taken, regard shall be had only to such injury as is special and peculiar to such parcel . . . ."[1] Following the doctrine established in *Hyde v. City of Fall River*,[2] the Massachusetts courts have construed very narrowly the words "special and peculiar injury." The *Hyde* decision interpreted the statutory language to require that the injury suffered not be the same in kind as that suffered by the public generally.[3] The most common situation in which damages are sought when no actual taking has occurred involves impairment of a landowner's access to his property because of some governmental action.[4] Generally, the landowner's remedy is the initiation of an action to recover damages for a reduction in the usefulness of his parcel. Often the main issue in such cases arising under section 12 is whether the

[24] *Id.* at 527, 387 N.E.2d at 174.
[25] *See id.* at 526, 387 N.E.2d at 174.

§15.4. [1] G.L. c. 79, § 12.
[2] 189 Mass. 439, 75 N.E. 953 (1905).
[3] *Id.* at 440, 75 N.E. at 953. This early leading case construed § 12 so narrowly that recovery in access cases was possible in only a very few situations. For a discussion of the harshness of the rule, see Mr. Justice Cutter's dissent in Tassinari v. Massachusetts Turnpike Auth., 347 Mass. 222, 226-30, 197 N.E.2d 584, 586-89 (1964) *noted in* D'Agostine & Huber, *Land Use Planning*, 1964 ANN. SURV. MASS. LAW § 14.23, at 177-78.
[4] *See, e.g.*, LaCroix v. Commonwealth, 348 Mass. 652, 205 N.E.2d 228 (1965) (construction of a limited access highway) *noted in* D'Agostine & Huber, *Land Use Planning*, 1965 ANN. SURV. MASS. LAW § 14.26, at 205-08; Betty Corp. v. Commonwealth, 354 Mass. 312, 237 N.E.2d 26 (1968) (construction of a barrier by the Department of Public Works) *noted in* Huber & Mills, *Land Use Planning Law*, 1968 ANN. SURV. MASS. LAW § 12.11, at 356-58.

impairment of access suffered by the landowner is such as to constitute a "special and peculiar injury." When such an injury is found, the landowner is entitled to recover damages as measured by the reduction in value of the property.

During the 1979 *Survey* year, the Supreme Judicial Court re-examined the nature of a "special and peculiar injury" in the impairment of access situation. In *Malone v. Commonwealth*,[5] the landowner sought damages for the reduction in value of his property which resulted from the relocation of a part of a state highway onto which the property abutted.[6] Both prior to and after the relocation, the plaintiffs operated a gift shop on the situs.[7] Before the relocation, the parcel fronted a portion of Route 10 that formed a curve or crescent.[8] The relocation project straightened the highway by means of a new section connecting the terminal points of the curve, and the curved portion was rebuilt as a connector road in the shape of a half-circle.[9] As a result of the highway's relocation, the plaintiffs' property fronted the connector road rather than the highway itself. Thus, a motorist's view of the gift shop as it was approached along the highway was substantially impaired.[10] At the trial, a real estate developer testified that the highest and best use of the property after the relocation was for storage, rather than for a retail store such as was operated by the plaintiffs.[11] Consequently, at the conclusion of the trial, the jury awarded $6,200 in damages to the plaintiffs for the permanent diminution in the market value of the property.[12] The Commonwealth appealed, and the case was transferred to the Supreme Judicial Court upon its own motion.[13]

In reversing the trial court's award, the Supreme Judicial Court initially distinguished between "impairment of access which if substantial may figure as special and peculiar injury deserving compensation,"[14] and mere "diversion of traffic which lies outside the compensable category even if it results in a decline in the property's market value."[15]

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[5] 1979 Mass. Adv. Sh. 1250, 389 N.E.2d 975.

[6] *Id.* at 1250, 389 N.E.2d at 976.

[7] *Id.* at 1251, 1253, 389 N.E.2d at 976, 977.

[8] *Id.* at 1251-52, 389 N.E.2d at 977.

[9] *Id.* at 1252, 389 N.E.2d at 977.

[10] *See id.* From one direction, the view of the shop was partially obstructed by an embankment, while from the other, the line of sight to the shop was obscured by trees which the plaintiffs were unable to obtain permission to remove. *Id.* & n.5.

[11] *Id.* at 1253, 389 N.E.2d at 977.

[12] *Id.* at 1250-51, 389 N.E.2d at 976.

[13] *Id.* at 1251, 389 N.E.2d at 976.

[14] *Id.* at 1254, 389 N.E.2d at 978.

[15] *Id.* This distinction has been well-settled under Massachusetts law since Stanwood v. Malden, 157 Mass. 17, 31 N.E. 702 (1892), in which Holmes, J., wrote "[I]t is not enough to show that a shop has suffered by the diversion of

In the Court's view, the proper test of "special and peculiar" injury in the access situation is the assessment of a variety of factors, including the existence, availability, and feasibility of access routes in connection with the uses of the property.[16] In applying this test to the facts of the case, the Court determined that there had been no actionable impairment of access, since the property remained fully accessible to both the plaintiffs and their patrons.[17] The Court considered that the plaintiffs' relation to the road system had not been unreasonably impaired.[18] Rather, the plaintiffs' loss resulted from a diversion of traffic, which did not rise to the level of a compensable injury under the traditional Massachusetts approach.[19]

The Court also rejected the plaintiffs' argument that changes in traffic patterns not so drastic as to amount to a deprivation of "access," but nevertheless causing material injury to property values, were deserving of compensation.[20] The Court admitted that such an argument had some persuasive force. It also recognized a more general argument for exceeding conventional legal bounds in order to compensate a range of intangible private losses incident to carrying out public projects.[21] The Court cited economic efficiency and a general consistency with the fundamental principles of the law of eminent domain as justification for such an argument.[22] Nevertheless, the Court declined to extend compensation beyond its traditional limits, primarily on the theory that the attributes of private property are such as to preclude compensation in each instance where a particular injury follows upon governmental action.[23] Under this theory, compensation flows from the deprivation of some property right. In the Court's view, the advantages enjoyed by a landowner as a result of pre-existing traffic patterns could not be considered such a right.[24] The Court also indicated that its decision was based in part upon the fear that the expense of litigating claims and of compensating for such "comparatively impalpable" injuries might

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travel, or that the owner finds travel less convenient at a distance from his place, if the access to the system of public streets remains substantially unimpaired." *Id.* at 19, 31 N.E. at 703.

16 1979 Mass. Adv. Sh. at 1257, 389 N.E.2d at 979.

17 *Id.* at 1257-58, 389 N.E.2d at 979.

18 *See id.* at 1257, 389 N.E.2d at 979.

19 *Id.* at 1258, 389 N.E.2d at 979.

20 *Id.* at 1258-59, 389 N.E.2d at 979-80.

21 *Id.*

22 *Id.* at 1259, 389 N.E.2d at 980. For discussion of these arguments, see, Van Alstyne, *Just Compensation* of *Intangible Detriment: Criteria for Legislative Modifications in California,* 16 U.C.L.A. L. REV. 491, (1969); *cf.* Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law,* 80 HARV. L. REV. 1165 (1967).

23 *See* 1979 Mass. Adv. Sh. at 1260, 389 N.E.2d at 980.

24 *Id.*

unduly discourage public projects in the first instance.[25] Therefore, while acknowledging that the current limitation of liability may be somewhat arbitrary, the Court nonetheless acquiesced in the limitations as it has been developed over the years and vacated the judgment award.[26]

The *Malone* decision indicates that the Supreme Judicial Court has shifted away from the extremely narrow interpretation of section 12 embodied in the *Hyde* doctrine. The standard adopted by the Court for determining whether there has been a special and peculiar injury involves consideration of the degree of the loss of access suffered and not whether the landowner's loss was unique in the sense that it was not shared in some small part by the general public. This position is the reverse of that taken in *Hyde*. Furthermore, the Court's discussion of the possibility of extending compensation beyond its conventional legal limits suggests a fundamental sympathy for the plight of the landowner. Thus, while the Court declined to uphold compensation upon the facts of *Malone*,[27] the decision indicates that the Court may be more receptive to findings of special and peculiar damages than in the past. If so, the harshness of the *Hyde* doctrine may perhaps finally be eliminated in a broad category of situations.

§15.5. The Protection of Coastal Wetlands—Local Regulations—Unconstitutional Taking. In *Lovequist v. Conservation Commission of Dennis*,[1] the Supreme Judicial Court was required to examine the validity of the wetlands protection by-law of the town of Dennis, as well as the validity of action taken by the town conservation commission under the by-law. Substantial portions of the by-law involved were directly modeled upon the commonwealth's Wetlands Protection Act.[2]

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[25] *Id.* at 1260, 389 N.E.2d at 980-81.

[26] *Id.* at 1261, 389 N.E.2d at 981.

[27] The Court expressly stated that "loss of access need not be complete to justify an award." *Id.* at 1256, 389 N.E.2d at 979. The facts of the case in *Malone*, however, did not justify a finding of any loss of access, but only the loss of visibility of the shop from the relocated highway.

§15.5. [1] 1979 Mass. Adv. Sh. 2210, 393 N.E.2d 858.

[2] The Wetlands Protection Act, G.L. c. 131, § 40, provides in relevant part:

> No person shall remove, fill, dredge or alter any bank, fresh water wetland, coastal wetland, beach, dune, flat, marsh, meadow or swamp bordering on the ocean or any estuary, creek, river, stream, pond, or lake . . . without filing written notice of his intention to so remove, fill, dredge or alter . . . to the conservation commission . . . of a city in which the proposed activity is to be located . . . .
>
> The conservation commission . . . receiving notice under this section shall hold a public hearing on the proposed activity . . . .
>
> If after said hearing the conservation commission . . . determine[s] that the area on which the proposed work is to be done is significant to public or private water supply, to ground water supply, to flood control, to storm damage

The by-law, however, also included a section that empowered the town's conservation commission to deny permission for any removal, dredging, filling, or altering of any land within the town if the commission decides that such denial is necessary to preserve the environmental quality of that land or contiguous lands.[3] The *Lovequist* decision addresses the question of whether a local conservation committee's exercise of such power is in derogation of state law.

The plaintiffs in *Lovequist* owned a tract of land in Dennis. They wished to subdivide a portion of the property into house lots for single-family residences.[4] To that end, the plaintiffs filed a written notice of intent to construct a road over adjoining marshlands to facilitate service to the proposed subdivision.[5] By filing the notice of intent, the plaintiffs triggered proceedings under both the Wetlands Protection Act[6] and the Dennis by-law.[7] At the conclusion of the required public hearing, the Dennis Conservation Commission denied the plaintiffs' application on the grounds that the construction of the road would have a detrimental impact upon the environment of both subject and contiguous lands.[8] The plaintiffs appealed the denial to the superior court. The superior court remanded the case to the commission for further hearings and reconsideration, while retaining jurisdiction.[9] At the conclusion of the additional hearings, the commission again denied the plaintiffs' application. It concluded that the proposed road construction would create serious groundwater and water pollution problems.[10] When the matter was returned to superior court, the court dismissed the original complaint and entered judgment affirming the commission's denial of the construction permit.[11] The case was thereafter transferred to the Supreme Judicial Court upon its own motion.[12]

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prevention, to prevention of pollution, to protection of land containing shellfish, or to the protection of fisheries, such conservation commission . . . shall . . . impose such conditions as will contribute to the protection of the interests described herein, and all work shall be done in accordance therewith.

Id. Article 15, section 1, of the by-laws of the town of Dennis is directly modeled upon these provisions of the Wetlands Protection Act. *See* 1979 Mass. Adv. Sh. at 2212 n.3, 393 N.E.2d at 860 n.3.

3 1979 Mass. Adv. Sh. at 2212 n.3, 393 N.E.2d at 860 n.3.

4 *Id.* at 2210-11, 393 N.E.2d at 860.

5 *Id.* at 2211, 393 N.E.2d at 860.

6 G.L. c. 1131, § 40. See note 2 *supra* for text of statute.

7 1979 Mass. Adv. Sh. at 2211, 393 N.E.2d at 860. See note 2 *supra* for text of applicable laws.

8 *Id.* at 2212-13, 393 N.E.2d at 861.

9 *Id.* at 2213, 393 N.E.2d at 861.

10 *Id.*

11 *Id.*

12 *Id.*

In affirming the trial court's decision, the Supreme Judicial Court initially rejected the plaintiffs' contention that the Dennis wetlands protection by-law was void under the Home Rule Amendment[13] as inconsistent with the Zoning Act.[14] The plaintiffs maintained that since the by-law regulated land use, it was by nature a zoning enactment.[15] Relying upon *Rayco Investment Corp. v. Selectmen of Raynham*,[16] where the Supreme Judicial Court had found that a town by-law limiting the total number of trailer park licenses in the town was a zoning regulation,[17] the plaintiffs argued that the enactment of ordinances or by-laws regulating land use must likewise comply with the manner and method mandated by the Zoning Act.[18] Citing other Supreme Judicial Court decisions approving a town's wetlands by-law as a valid exercise of its zoning power,[19] the plaintiffs urged the generalized view that all local wetlands enactments are zoning measures.[20] Therefore, their argument concluded, the town's failure to comply with the procedural protections of the Zoning Act rendered the local wetlands by-law invalid under the Home Rule Amendment, since the Zoning Act prescribes the ways in which a municipality may exercise its zoning power.[21]

In rejecting the plaintiffs' argument, the Court ruled that not all ordinances or by-laws that regulate land use are to be considered zoning regulations.[22] The Court distinguished *Rayco*, by emphasizing the historical context of the by-law at issue in that case. It observed that the by-law considered in *Rayco* had purported to cover the subject of trailer parks in a comprehensive fashion.[23] In *Lovequist*, however, there was no evidence of any comprehensive zoning by-law governing wetland activities in Dennis.[24] Moreover, the Court stated that *Rayco* "nowhere

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[13] MASS. CONST. amend. art. 2, § 6. This section provides, in part:

> Any city or town may, by the adoption, amendment, or repeal of local ordinances or by-laws, exercise any power or function which the general court has 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 . . . .

[14] G.L. c. 40A. *See* 1979 Mass. Adv. Sh. at 2214-15, 393 N.E.2d at 861-62.

[15] 1979 Mass. Adv. Sh. at 2215, 393 N.E.2d at 862.

[16] 368 Mass. 385, 331 N.E.2d 910 (1975).

[17] *Id.* at 393, 331 N.E.2d at 914.

[18] 1979 Mass. Adv. Sh. at 2215, 2217, 393 N.E.2d at 862, 863.

[19] *See, e.g.*, MacGibbon v. Board of Appeals of Duxbury, 369 Mass. 512, 340 N.E.2d 487 (1976) (*MacGibbon III*); Turnpike Realty Co. v. Dedham, 362 Mass. 221, 284 N.E.2d 891 (1972), *cert. denied*, 409 U.S. 1108 (1973); Golden v. Selectmen of Falmouth, 358 Mass. 519, 265 N.E.2d 573 (1970).

[20] 1979 Mass. Adv. Sh. at 2215, 393 N.E.2d at 862.

[21] *Id.* *See* Canton v. Bruno, 361 Mass. 598, 282 N.E.2d 87 (1972).

[22] 1979 Mass. Adv. Sh. at 2215-16, 393 N.E.2d at 862.

[23] *Id.* at 2218, 393 N.E.2d at 863 (quoting Rayco Inv. Corp. v. Selectmen of Raynham, 368 Mass. 385, 393, 331 N.E.2d 910, 914 (1975)).

[24] *Id.*

suggests that municipal regulations that simply overlap with what may be the province of the local zoning authority are to be treated as zoning enactments which must be promulgated in accordance with the requirements of G.L. c. 40A." [25] In determining that the Dennis wetlands by-law should not be considered a zoning regulation, the Court also examined the purpose of the by-law and its impact upon land use. This examination led the Court to conclude that the by-law did not embody the typical concerns usually reflected in the zoning process. Rather, it manifested one dominant purpose, the protection of wetland values.[26] The Court found the Dennis wetlands by-law comparable to an earth removal enactment, a type of general by-law expressly authorized by statute.[27] The Court observed that non-zoning earth removal enactments need not comply with the prescriptions of the Zoning Act, since those prescriptions are applicable only if a town chooses to adopt a zoning by-law.[28] Moreover, the Court noted that such enactments have been found valid even when a town has adopted a zoning by-law.[29] Thus, the Court concluded that the Dennis wetlands by-law was not a zoning regulation. Therefore, it was not invalid for failure to comply with the procedural protections of the Zoning Act.

The Court also rejected the plaintiffs' assertions that the Dennis by-law conflicted with the Wetlands Protection Act [30] and was therefore invalid under the Home Rule Amendment.[31] The plaintiffs first maintained that since the Wetlands Protection Act did not give any express or implied powers to a municipality to enact wetlands by-laws outside of a zoning framework, the enactment of a general rather than a zoning by-law for wetlands protection purposes contravened the statute.[32] In rejecting this contention, the Court concluded that the wetlands statute in no way intimated such a result.[33] Furthermore, the Court noted that the Home Rule Amendment itself suggested the contrary conclusion.[34]

The Court similarly rejected the plaintiffs' second contention that the Dennis by-law conflicted with the Wetlands Protection Act because the by-law allowed the conservation commission to prohibit outright any

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25 *Id.*

26 *Id.* at 2217, 393 N.E.2d at 862.

27 *Id.* at 2216, 393 N.E.2d at 862. See G.L. c. 40, § 21(17), which empowers municipalities to enact prohibitions against earth removal.

28 1979 Mass. Adv. Sh. at 2216, 393 N.E.2d at 862.

29 *Id.* (Citing Beard v. Salisbury, 1979 Mass. Adv. Sh. 1703, 1708 n.7, 392 N.E.2d 832, 835 n.7; Byrne v. Middleborough, 364 Mass. 331, 334, 304 N.E.2d 194, 196 (1973)).

30 G.L. c. 131, § 40. See note 2 *supra* for text of statute.

31 1979 Mass. Adv. Sh. at 2218, 393 N.E.2d at 863.

32 *Id.*

33 *Id.*

34 *Id.* at 2219, 393 N.E.2d at 863.

disturbance of covered lands.[35] The Court found that the language of the Wetlands Protection Act permitting conservation commissions to "impose such conditions as will contribute to the protection of the interests" described therein did not forbid the granting of such authority to conservation commissions.[36] The Court reaffirmed the position it had taken in *Golden v. Selectmen of Falmouth*,[37] where it had stated that the Wetlands Protection Act set forth minimum standards only, "leaving local communities free to adopt more stringent controls." [38] Refusing to distinguish *Golden* on the basis that it involved a consideration of a zoning by-law rather than the general by-law involved in the instant case, the Court stated, "[W]e can conceive of no reason why the Wetlands Protection Act would be any more frustrated by a by-law enacted pursuant to town powers outside the zoning authority." [39] Finally, the Court noted that for nearly five years the regulations promulgated under the wetlands protection statute had accorded conservation commissions the prerogative to prohibit construction which might injure wetland areas.[40] Consequently, the Court concluded that the by-law's allowance of a total ban on the disturbance of covered areas did not represent a conflict between state and local law.

Having concluded that the by-law did not conflict with the Wetlands Protection Act, the Court disagreed with the plaintiffs' final claim that the conservation commission's denial of the construction permit amounted to an unconstitutional taking of property without compensation.[41] The plaintiffs argued that the loss of anticipated profits resulting from development of the property warranted due process protection.[42] The Court refused to accept the plaintiff's position. Instead it characterized an unlawful taking as a governmental action "which strip[s] private property 'of all practical value to [the owners] or to anyone acquiring it, leaving them only with the burden of paying taxes on it.' " [43]

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[35] *Id.*

[36] *Id.* (quoting G.L. c. 131, § 40).

[37] 358 Mass. 519, 526, 265 N.E.2d 573, 577 (1970). For a discussion of *Golden*, *see* Huber, *Land Use Law*, 1971 ANN. SURV. MASS. LAW § 17.3, at 489-90.

[38] 1979 Mass. Adv. Sh. at 2219, 393 N.E.2d at 863 (quoting *Golden*, 358 Mass. at 526, 265 N.E.2d at 577).

[39] *Id.*

[40] *Id.* For the applicable regulations, see regulations under the Wetlands Protection Act, 310 C.M.R. § 10.

[41] 1979 Mass. Adv. Sh. at 2225, 393 N.E.2d at 866. The plaintiffs also raised arguments concerning the bias of members of the Dennis Conservation Commission and the sufficiency of the evidence supporting the commission's decisions. *Id.* at 2220-25, 393 N.E.2d at 864-65.

[42] *Id.* at 2225, 393 N.E.2d at 866.

[43] *Id.* at 2226, 393 N.E.2d at 866 (quoting MacGibbon v. Board of Appeals of Duxbury, 356 Mass. 635, 641, 255 N.E.2d 347, 352 (1970) (*MacGibbon II*), *quoted in* MacGibbon v. Board of Appeals of Duxbury, 369 Mass. 512, 517, 340

Since the Court determined that practical uses of the property remained available to the plaintiffs, it ruled that no unconstitutional taking resulted from the commission's actions.[44]

The *Lovequist* decision indicates the extent to which the Supreme Judicial Court is willing to accept the involvement of local communities in conservation efforts. The Court had previously concluded that the protection of coastal wetlands for environmental reasons was a proper public purpose for the exercise of the municipality's zoning power.[45] In *Lovequist,* the Court found the conservation of natural resources to be a permissible exercise of the municipality's general powers as well. Thus, a municipality that chooses not to adopt a zoning by-law is not deprived of an opportunity to participate in conservation efforts. Furthermore, as long as a property owner is not deprived of all practical uses of his property, following *Lovequist,* it should make no difference that the municipality's exercise of its general powers exceeds state law in conserving natural resources.

§15.6. Zoning Appeals Procedure—Non-Jurisdictional Defects. In *Twomey v. Board of Appeals of Medford,*[1] the Court of Appeals considered whether a plaintiff's failure to comply strictly with the notice and procedure provisions of section 17 of the new Zoning Act [2] deprived the court of jurisdiction to hear an appeal from a zoning board decision. The plaintiffs were an unincorporated association of abutters and neighbors of a tract of land located in Medford and owned by the defendant Trustees of Tufts College.[3] Tufts had been granted variances and a special permit by the defendant Board of Appeals of Medford.[4] As prescribed by section 17,[5] the plaintiffs filed an appeal from the decision

N.E.2d 487, 490 (1976) (*MacGibbon III*)). For an extensive discussion of the taking issue, see Student Comment, *Zoning and Land Use,* 1976 ANN. SURV. MASS. LAW § 15.16, at 511-42.

44 1979 Mass. Adv. Sh. at 2226-27, 393 N.E.2d at 866.

45 *See* MacGibbon v. Board of Appeals of Duxbury, 369 Mass. 512, 517, 340 N.E.2d 487, 490 (1976) (*MacGibbon III*).

§15.6. 1 1979 Mass. App. Ct. Adv. Sh. 1236, 390 N.E.2d 272.

2 G.L. c. 40A, § 17, as in effect prior to Acts of 1978, c. 478, § 32. The relevant portions of section 17, which remained unaffected by the 1978 amendment, are as follows:

> To avoid delay in the proceedings, instead of the usual service of process, the plaintiff shall within fourteen days after the filing of the complaint, send written notice thereof, with a copy of the complaint, by delivery or certified mail to all defendants, including the members of the board of appeals or special permit granting authority and shall within twenty-one days after the entry of the complaint file with the clerk of the court an affidavit that such notice has been given. If no such affidavit is filed within such time the complaint shall be dismissed . . . .

3 1979 Mass. App. Ct. Adv. Sh. at 1236 n.1, 390 N.E.2d at 272 n.1.

4 *Id.* at 1237, 390 N.E.2d at 273.

5 G.L. c. 40A, § 17. See note 2 *supra.*

of the board within the twenty-day period following the filing of the board's decision.[6] On the same day as they filed their appeal, the plaintiffs served the city clerk in hand with a copy of the complaint. They also served copies of the complaint by certified mail to the chairman of the Board of Appeals and the president of Tufts College.[7] A certificate of service meeting these facts had been attached to the complaint.[8] Three weeks later, but after the expiration of the fourteen-day notification period of section 17,[9] the plaintiffs again served the board chairman and the president of Tufts, this time by deputy sheriff.[10] Within the following week, the plaintiffs also sent copies of their complaint by certified mail to the remaining three members of the Board of Appeals.[11] No affidavit of service to these remaining board members was filed with the clerk of the court.[12]

Tufts moved to dismiss the complaint on the ground that the superior court lacked subject matter jurisdiction because the plaintiffs had neither served the board within the statutory fourteen-day period, nor filed an affidavit of service, both as required by section 17.[13] The board had previously filed an answer, and at no time did it raise any of the procedural defects asserted by Tufts.[14] Tufts' motion to dismiss was allowed by the superior court and a judgment was entered for Tufts.[15] Subsequently, the judgment was amended to include all defendants.[16]

The Court of Appeals reversed the judgment and reinstated the complaint.[17] Initially, the court noted that it would be guided by the recent decision of *Pierce v. Board of Appeals of Carver*,[18] where the Supreme Judicial Court held that not all errors in the procedure of such actions required dismissal as a matter of law.[19] Citing *Pierce*, the

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6 1979 Mass. App. Ct. Adv. Sh. at 1237, 390 N.E.2d at 273.

7 *Id.*

8 *Id.*

9 G.L. c. 40A, § 17. See note 2 *supra*.

10 1979 Mass. App. Ct. Adv. Sh. at 1237, 390 N.E.2d at 273.

11 *Id.*

12 *Id.* at 1237-38, 390 N.E.2d at 273.

13 *Id.* at 1238, 390 N.E.2d at 273. *See* G.L. c. 40A, § 17, reprinted at note 2 *supra*. The defendants also asserted two other grounds for dismissal not relevant to this discussion. *See* 1979 Mass. App. Ct. Adv. Sh. at 1238, 390 N.E.2d at 273.

14 1979 Mass. App. Ct. Adv. Sh. at 1238, 390 N.E.2d at 273.

15 *Id.*

16 *Id.*

17 *Id.* at 1244, 390 N.E.2d at 276.

18 369 Mass. 804, 343 N.E.2d 412 (1976), *noted in* Huber, *Zoning and Land Use*, 1976 ANN. SURV. MASS. LAW § 15.14, at 498-501.

19 1979 Mass. App. Ct. Adv. Sh. at 1239-40, 390 N.E.2d at 274. *See* 369 Mass. at 807-08, 343 N.E.2d at 414. *Pierce* was decided under the former Zoning Enabling Act, G.L. c. 40A, § 21, as in effect prior to the present Zoning Act, G.L. c. 40A, § 17. Among the numerous differences between the two sections is the presence in the latter of an additional provision that this author, in 1976 ANN.

court stated that the plaintiffs, by serving the city clerk in hand with a copy of the complaint, had furnished "constructive notice" to all interested parties.[20] The court also noted that all of the board members had received actual notice, although it was not timely.[21] Repeating the view adopted in *Pierce*, the court stated that in such situations the determinative issue is whether the defendants were prejudiced by the irregular manner of service.[22] Since neither defendant had either alleged or demonstrated prejudice resulting from the irregular service, the court consequently concluded that neither defect was fatal to the action.[23]

The *Twomey* decision is consistent with the recent trend in appellate court decisions concerning the effects of procedural defects upon an appeal of a zoning decision.[24] Notwithstanding the explicit language of the statute, the Appeals Court in *Twomey* ruled that neither the failure to serve all defendants in a timely fashion, nor the failure to file an affidavit of service is per se a jurisdictional defect requiring dismissal of the action.[25] According to the Appeals Court, such procedural defects are jurisdictional only if the defendant can show actual resulting prejudice.[26] Absent such prejudice, the court is not automatically denied jurisdiction to hear the complaint. In determining whether the action should be allowed to proceed, the judge may consider the extent to which the defects have interfered with the achievement of the purposes implicit in the statutory scheme.[27] Thus, the interests of both the zoning authority and "persons aggrieved" are afforded adequate protection.

Twomey should not be interpreted, however, as giving a carte blanche to those who fail to comply with the provisions of section 17.[28] In its decision, the Appeals Court distinguished its own prior decision of

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SURV. MASS. LAW, § 15.4, at 470, concluded made defects in procedure or notice jurisdictional. The Appeals Court's interpretation of the statute in the present case, however, indicates that the judicial attitude adopted with reference to § 21 of the Zoning Enabling Act has been adopted in its entirety with reference to § 17 of the new Zoning Act. Therefore, the aforementioned additional provision does not have the effect anticipated by this author.

20 1979 Mass. App. Ct. Adv. Sh. at 1240, 390 N.E.2d at 274.

21 *Id.*

22 *Id.*

23 *Id.* at 1240-41, 390 N.E.2d at 274 (citing Shaughnessy v. Board of Appeals of Lexington, 357 Mass. 9, 255 N.E.2d 367 (1970)).

24 The list of other procedural defects that are not jurisdictional includes the failure to attach a copy of the board of appeals' decision to the copy of the complaint served on the defendants or filed with the clerk and the failure to name the original applicant or a board member as a defendant, resulting in lack of service upon those parties. *See* Pierce v. Board of Appeals of Carver, 369 Mass. 804, 809, 343 N.E.2d 412, 415 (1976).

25 *See* 1979 Mass. App. Ct. Adv. Sh. at 1240, 390 N.E.2d at 274.

26 *See id.* at 1240-41, 390 N.E.2d at 274.

27 *See id.* at 1240-42, 390 N.E.2d at 274-75.

28 G.L. c. 40A, § 17, for text of statute, see note 2 *supra.*

Curico v. Russo,[29] in which the court affirmed a superior court judge's discretionary denial of a motion to amend a complaint so as to include all required defendants.[30] The court emphasized that in *Curico*, unlike *Twomey*, none of the defendants had even been given notice, timely or otherwise.[31] This distinction suggests that in circumstances where the statutory requirements have never been met, a reviewing court will not upset the trial judge's dismissal of the complaint. Where the requirements have been fulfilled, however, but were not timely or otherwise procedurally accurate, *Twomey* implies that a reviewing court will examine the decision, and, unless the defendant has demonstrated actual prejudice to the satisfaction of the reviewing court, reinstate the complaint.

§15.7. Zoning Appeals—The Scope of Judicial Review. Under the doctrine of *Pendergast v. Board of Appeals of Barnstable*,[1] the power of a reviewing court to reverse a local zoning board of appeals' denial of an application for a variance or special permit is extremely limited. The Supreme Judicial Court has determined that a judge may exercise the power in only two situations: (1) when the variance or special permit was denied solely upon a legally untenable ground, and the board stated that the variance or special permit would have been granted but for that ground; or (2) when the decision not to grant the variance or special permit was "unreasonable, whimsical, capricious, or arbitrary and so illegal."[2] Embodied in this doctrine is the general concept of the proper scope of judicial review of administrative decisions: specifically, a reviewing court may not place itself in the position of the board of appeals. Since a reviewing court does not possess the same discretionary power as does an administrative agency, the court may not substitute its own judgment for that of the board. Despite the long history and continued vitality of the *Pendergast* doctrine, several cases[3] arose during the *Survey* year that tested the extent of the doctrine's application.

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[29] 3 Mass. App. Ct. 730, 326 N.E.2d 30 (1975).

[30] *Id.* at 730-31, 326 N.E.2d at 31-32.

[31] 1979 Mass. App. Ct. Adv. Sh. at 1241, 390 N.E.2d at 275.

§15.7. [1] 331 Mass. 555, 120 N.E.2d 916 (1954), *noted in* Sacks & Curran, *Administrative Law*, 1954 ANN. SURV. MASS. LAW § 14.25, at 147-51.

[2] 331 Mass. at 559-60, 120 N.E.2d at 919.

[3] Board of Selectmen of Stockbridge v. Monument Inn, Inc., 1979 Mass. App. Ct. Adv. Sh. 1561, 391 N.E.2d 1265; Subaru of New England, Inc. v. Board of Appeals of Canton, 1979 Mass. App. Ct. Adv. Sh. 2024, 395 N.E.2d 880; Geryk v. Zoning Appeals Bd. of Easthampton, 1979 Mass. App. Ct. Adv. Sh. 2277, 396 N.E.2d 733; Board of Appeals of Dedham v. Corporation Tifereth Israel, 1979 Mass. App. Ct. Adv. Sh. 332, 386 N.E.2d 772.

In two cases,[4] the Appeals Court considered lower court decisions ordering the grant of a variance or special permit. In *Subaru of New England, Inc. v. Board of Appeals of Canton*,[5] the plaintiff had applied for a special permit to build a warehouse and office building on a parcel of land lying within a flood plain district.[6] Although the property was zoned industrial, the Canton by-law prohibited the filling of land in the flood plain district except by special permit.[7] The zoning board denied the plaintiff's application on the ground that the proposed filling might adversely affect the flood control characteristics and water storage capacity of the district.[8] The trial judge, after an independent examination of the evidence, found that the effect of the proposed facility upon the water storage capacity would be minimal.[9] He therefore ruled that the board had acted unreasonably and arbitrarily.[10] Accordingly, the judge ordered the board to issue the permit.[11]

On appeal, the Appeals Court reversed, holding that it is "the board's evaluation of the seriousness of the problem, not the judge's, which is controlling."[12] The court emphasized that the board's intended discretion would be eliminated if a denial of a permit could be held to be arbitrary whenever the board, upon the facts found by the trial judge, could have issued the permit.[13] The court concluded that the board's concern for lost storage capacity and the danger of flooding was reasonable, and therefore, that its decision must prevail.[14]

In *Geryk v. Zoning Appeals Board of Easthampton*,[15] the plaintiffs sought a variance which would have permitted them to divide one lot into two lots, each of which would have been less than the prescribed minimum lot area.[16] The permit sought would also have permitted the erection of a two-family house on one of the new lots in a district where two-family houses were not permitted by right.[17] The board of appeals

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[4] Subaru of New England, Inc. v. Board of Appeals of Canton, 1979 Mass. App. Ct. Adv. Sh. 2024, 395 N.E.2d 880; Geryk v. Zoning Appeals Bd. of Easthampton, 1979 Mass. App. Ct. Adv. Sh. 2277, 396 N.E.2d 733.

[5] 1979 Mass. App. Ct. Adv. Sh. 2024, 395 N.E.2d 880.

[6] *Id.* at 2025, 395 N.E.2d at 881.

[7] *Id.*

[8] *Id.* at 2026, 395 N.E.2d at 881.

[9] *Id.* at 2058, 395 N.E.2d at 882.

[10] *Id.*

[11] *Id.* at 2028, 395 N.E.2d at 881.

[12] *Id.* at 2030, 395 N.E.2d at 883 (quoting Copley v. Board of Appeals of Canton, 1 Mass. App. Ct. 821, 296 N.E.2d at 716 (1973)).

[13] *See id.* at 2028-29, 395 N.E.2d at 882.

[14] *Id.* at 2030, 395 N.E.2d at 883.

[15] 1979 Mass. App. Ct. Adv. Sh. 2277, 396 N.E.2d 733.

[16] *Id.*

[17] *Id.* at 2277, 396 N.E.2d at 733-34.

denied the application.[18] During the course of their appeal to the superior court, the plaintiffs opted to pursue a different variance, one which would have allowed them to locate one single-family residence on each undersized lot.[19] Consequently, the trial judge annulled the board's decision and ordered it to grant a variance for the construction of two single-family houses.[20]

The Appeals Court reversed the judgment, stating that under section 17 of chapter 40A[21] of the General Laws a reviewing court does not have the power to reshape in this manner the relief originally sought from the board of appeals.[22] After reviewing the *Pendergast* doctrine, the court concluded that "[b]y substituting forms of relief different from those originally asked for, the court engages exactly in the sort of administrative intervention which *Pendergast* warns against."[23] Consequently, the court entered a judgment affirming the board's denial of the application.[24]

These two decisions exemplify the extent of the protection afforded the decisions of local boards of appeals under the *Pendergast* doctrine. The application of the doctrine is not limited to situations in which the board of appeals had previously denied an application for a variance or special permit, however. Two other *Survey* year decisions illustrate the full extent to which the doctrine protects local decisions against judicial intervention.

In *Board of Appeals of Dedham v. Corporation Tifereth Israel,*[25] the board of appeals had previously granted a special permit upon condition that the applicant not use a particular private way for access to the property.[26] The applicant's subsequent appeal to the board for removal of the condition was denied.[27] On appeal to the superior court, the trial judge, finding that there was no direct vehicular access to the property other than the private way, ruled that the board's decision to deny the applicant access from the private way was unreasonable.[28]

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18 *Id.* at 2277, 396 N.E.2d at 733.
19 *Id.* at 2277, 396 N.E.2d at 734.
20 *Id.* at 2278, 396 N.E.2d at 734.
21 G.L. c. 40A, § 17, provides for judicial review of zoning board of appeals decisions.
22 1979 Mass. App. Ct. Adv. Sh. at 2278, 396 N.E.2d at 734.
23 *Id. See* Strand v. Planning Bd. of Sudbury, 5 Mass. App. Ct. 18, 21-23, 358 N.E.2d 842, 844-46 (1977).
24 1979 Mass. App. Ct. Adv. Sh. at 2279, 396 N.E.2d at 734.
25 1979 Mass. App. Ct. Adv. Sh. 332, 386 N.E.2d 772.
26 *Id.* at 332, 386 N.E.2d at 773.
27 *Id.*
28 *Id.*

Therefore, the judge annulled the condition imposed upon the permit, in effect ordering the grant of an unconditional permit.[29]

The Appeals Court reversed the judgment, concluding that the trial judge had erred in removing the condition.[30] According to the court, the *Pendergast* doctrine does not give the judge the power to order modifications of a permit.[31] The court, noting that the board was better equipped than a court to consider any modifications or changes of permits, stated, "It is for the board alone to determine whether a permit should be granted with or without the condition." [32] Accordingly, the court entered a judgment affirming the decision of the board.[33]

The language of the court in *Corporation Tifereth Israel* should not be interpreted to mean that a judge may never order modification of a permit. A fourth *Survey* year case, *Board of Selectmen of Stockbridge v. Monument Inn, Inc.*,[34] indicated one circumstance in which the Appeals Court will uphold a trial judge's modification of a permit. In *Monument Inn*, a lower court judge, in a good faith effort to resolve a dispute concerning whether a special permit had been granted subject to conditions, affirmed the permit subject to eight conditions, none of which had been imposed by the board under its grant to the permit.[35] The Appeals Court, agreeing with both parties that the judge had erred in imposing conditions not part of the permit as originally granted, reversed the judgment and remanded the case of the superior court.[36] The court stated in dicta, however, that "[m]odification of a special permit by the court is permitted where it is clear from the record that

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[29] *See id.* The permit as originally granted was subject to the condition "that access to this property be from Boston only with no access provided from Ware Street." The judge amended the special permit by striking out the quoted language. *Id.*

[30] *See id.* at 332-33, 386 N.E.2d at 773-74.

[31] *Id.* at 332, 386 N.E.2d at 774 (quoting Strand v. Planning Bd. of Sudbury, 5 Mass. App. Ct. 18, 22, 158 N.E.2d 842, 845 (1977)).

[32] *Id.* at 333, 386 N.E.2d at 774, (citing Gulf Oil Corp. v. Board of Appeals of Framingham, 355 Mass. 275, 244 N.E.2d 311 (1969); Copley v. Board of Appeals of Canton, 1 Mass. App. Ct. 821, 296 N.E.2d 716 (1973)).

[33] *Id.*

[34] 1979 Mass. App. Ct. Adv. Sh. 1561, 391 N.E.2d 1265.

[35] *Id.* at 1564, 1567, 391 N.E.2d at 1267, 1268. The dispute involved a letter agreement between the board and certain abutters, which set forth restrictions upon the applicant's use of the property. The official notification to the applicant advising that its application had been granted, however, did not specifically refer to the letter or to the conditions state therein. The eight conditions imposed by the lower court judge were derived largely from "Recommendations" submitted by him at an earlier stage of the litigation. *Id.* at 1562-64 & n.5, 391 N.E.2d at 1266-67 & n.5. 391 N.E.2d at 1266-67 & n.5.

[36] *Id.* at 1566-69, 391 N.E.2d at 1267-69.

exactly the same ultimate result would occur from a remand as that effected by the decree." [37]

The situations in which modification is permitted under the *Pendergast* doctrine are perhaps best illustrated by a 1975 decision. In *Chira v. Planning Board of Tisbury*,[38] a zoning board had granted special permits allowing a developer to construct attached and detached buildings on the locus.[39] A lower court judge, ruling that the board had exceeded its authority, entered decrees modifying the special permits accordingly.[40] On appeal, the Appeals Court determined that the board had exceeded its authority under the applicable zoning laws by allowing the construction of attached buildings.[41] The record clearly indicated, however, that the board had intended to authorized development within the fullest extent allowable under the zoning laws.[42] Therefore, the court concluded that "no useful purpose would be served by a remand" [43] and upheld modification by the lower court.[44]

Chira establishes that a reviewing court judge need not mechanically remand cases to the zoning board when it is clear that modification of the permit by the court would produce precisely the same result. It is equally clear, however, that the judge may not substitute his own judgment for that of the board as an element of that modification. The situation presented by *Corporation Tifereth Israel* illustrates this distinction. The lower court judge, finding that it was unreasonable to deny the applicant access from the private way, annulled the condition, in effect ordering the grant of an unconditional permit.[45] Had he instead remanded the case to the zoning board, the permit may possibly have been granted subject to other conditions limiting the applicant's access from or use of the private way. It was clear from the record that the board did not wish to grant an unconditional permit.[46] Therefore, by in effect ordering the grant of an unconditional permit, the judge substituted his own judgment for that of the board. Such modifications by a court, which effectively usurp the discretionary power of the zoning authority, are not permitted under the *Pendergast* doctrine.

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[37] *Id.* at 1567, 391 N.E.2d at 1268 (quoting Chira v. Planning Bd. of Tisbury, 3 Mass. App. Ct. 433, 440, 333 N.E.2d 204, 209 (1975)).
[38] 3 Mass. App. Ct. 433, 333 N.E.2d 204 (1975).
[39] *Id.* at 434, 439, 333 N.E.2d at 206, 209.
[40] *Id.* at 439, 333 N.E.2d at 209.
[41] *Id.*
[42] *See id.* at 440, 333 N.E.2d at 209.
[43] *Id.*
[44] *Id.*
[45] *See* 1979 Mass. App. Ct. Adv. Sh. at 332, 386 N.E.2d at 773.
[46] *See id.*

Analysis of these decisions indicates that a judge may modify the grant of a conditional permit only when he may order the grant of the permit itself. Consequently, the protection provided by the *Pendergast* doctrine extends to all decisions of the local zoning boards, thereby insuring that such boards will continue to retain their usual administrative discretion. As a result, as the above discussion demonstrates, anyone seeking to overturn a zoning board decision in a variance or special permit case faces a difficult task.

§15.8. Eminent Domain—Assessment of Damages. One of the most frequently litigated issues in eminent domain cases involves the determination of the amount of damages the taking authority must pay to the landowner. In the commonwealth, the amount of the award must be determined by applying an objective standard: the owner of the land is entitled to recover its fair market value considered in light of the "highest and best use to which the land could reasonably be put." [1] This traditional standard frequently raises issues concerning the admissibility of certain evidence used by the fact finder to arrive at the property's fair market value. During the 1979 *Survey* year, two cases [2] dealt with this aspect of the damages issue.

In *Roach v. Newton Redevelopment Authority*,[3] the plaintiff owned seven parcels of land that were taken by the defendant Redevelopment Authority as part of its urban renewal program.[4] The parcels had been acquired by the plaintiff at various times. All but one were zoned for single-family residential use.[5] The one parcel not so zoned remained unzoned at the time of the taking.[6] At the non-jury trial, the plaintiff contended that the highest and best use of the property was for commercial uses.[7] In support of this contention, evidence was introduced tending to show both that the land was suitable for commercial use and that a private owner could obtain rezoning for such use.[8] The

§15.8. [1] Colonial Acres, Inc. v. Town of North Reading, 3 Mass. App. Ct. 384, 386, 331 N.E.2d 549, 550 (1975), *noted in* Huber, *Zoning and Land Use*, 1975 ANN. SURV. MASS. LAW, § 19.20, at 555; Skyline Homes, Inc. v. Commonwealth, 362 Mass. 684, 685, 290 N.E.2d 160, 161 (1972).

[2] Roach v. Newton Redev. Auth., 1979 Mass. App. Ct. Adv. Sh. 2197, 396 N.E.2d 170; Ux v. Town of North Reading, 1979 Mass. Adv. Sh. 268, 398 N.E.2d 489.

[3] 1979 Mass. App. Ct. Adv. Sh. 2197, 396 N.E.2d 170.

[4] *See id.* at 2197, 2198, 2200, 396 N.E.2d at 172, 173, 174.

[5] *Id.* at 2198, 396 N.E.2d at 173.

[6] *Id.* at n.3.

[7] *Id.* at 2199, 396 N.E.2d at 173.

[8] *Id.* at 2198-2200, 396 N.E.2d at 173-74. The relevant evidence presented by the plaintiff included proof that the parcels had been assembled for development, that existing buildings had been removed, that the site had been leveled and graded, that necessary utilities were proximate and available, that public transportation was nearby and accessible, and that there had been much commercial development in the immediate vicinity, a large part of which involved changes in zoning classifications. *Id.* at 2198, 396 N.E.2d at 173.

evidence also indicated that some of the land had been so rezoned after the takings, upon petitions filed by the defendant.[9] Based upon the evidence produced, the judge at the non-jury trial found that the highest and best use of the plaintiff's land would be for commercial uses, that it was reasonably probable that a private developer could obtain a zoning change to permit such uses, and that the defendant had subsequently obtained such a zoning change and had utilized the land for commercial purposes.[10] Damages were assessed accordingly.[11] At the subsequent jury trial, the findings from the non-jury case were introduced into evidence and read to the jury by the trial judge.[12] The plaintiff also introduced evidence that other commercial zoning changes in the immediate area had been allowed within a reasonable time prior to the taking.[13] The trial judge, however, excluded the plaintiff's offer of evidence concerning the post-taking rezoning.[14] At the conclusion of the trial, the jury assessed damages consistent with the findings of the judge at the non-jury trial.[15] The defendant appealed, claiming that the judge in the non-jury trial erred in admitting evidence of the subsequent zoning change. He claimed that this error was in turn reflected in the jury's verdict.[16]

The Appeals Court, in upholding the jury's verdict,[17] first considered whether evidence of the zoning change could be admissible at all as bearing upon the value of the land. The court noted that "[t]he fact that a potential use is prohibited by the zoning law at the time of the taking does not preclude its consideration."[18] The court required only that the granting of the prohibited use not be unduly speculative.[19] The court observed that the trial judge has a margin of discretion in determining whether there is sufficient proof to warrant consideration of the issue by the trier of fact.[20] In this instance, the court was satis-

[9] *Id.* at 2200, 396 N.E.2d at 174.

[10] *Id.* at 2200-01, 396 N.E.2d at 174.

[11] Damages were assessed in the amount of $559,481. *Id.* at 2201, 396 N.E.2d at 174.

[12] *Id.* at 2201 & n.9, 396 N.E.2d at 174-75 & n.9.

[13] *Id.* at 2201, 396 N.E.2d at 175.

[14] *Id.* at 2202, 396 N.E.2d at 175.

[15] *See id.* Although consistent with the finding that the highest and best use of the property was for commercial uses, the jury assessed damages in the amount of $1,186,101, more than double that assessed by the judge in the non-jury trial. *Id.* at 2202, 396 N.E.2d at 175.

[16] *See id.* at 2198, 396 N.E.2d at 173.

[17] *Id.*

[18] *Id.* at 2202, 396 N.E.2d at 175 (citing Lee v. Commonwealth, 361 Mass. 864, 281 N.E.2d 239 (1972); Wenton v. Commonwealth, 335 Mass. 78, 81-82, 138 N.E.2d 609, 611-12 (1956)).

[19] *Id.*

[20] *Id.* (citing Skyline Homes, Inc. v. Commonwealth, 362 Mass. 684, 687, 290 N.E.2d 160, 162 (1972)).

fied that the evidence established sufficient probability that a private developer could have the property rezoned to permit the judge to allow consideration of that issue.[21] Moreover, the court indicated that, even apart from the disputed evidence, proof of considerable commercial development nearby was sufficient to permit a judge in his discretion to allow the prospect of a zone change to be considered as bearing on the value of the land taken.[22]

After determining that evidence of the likelihood of a zoning change was admissible, the court turned to the question of whether it could admit evidence that the defendant, after the taking, had petitioned for and received a zoning change.[23] The court acknowledged the general rule that an actual zoning change which occurs as a result of the project for which the property is taken should not be considered in valuing the property.[24] The court recognized, however, that proof of a zoning change subsequent to the taking is "significant evidence of the existence at the time of the taking of a reasonable probability of change."[25] In the court's view, the critical issue in *Roach* was whether the judge could reasonably find that there was a likelihood that a private developer, as well as the taking authority, could have obtained the rezoning.[26] If such was the case, the court ruled, the judge could admit such evidence as additional proof of "a reasonable prospect of change bearing on value."[27] The court concluded that sufficient proof had been offered to support the judge's decision to admit the evidence of the zoning change.[28]

The court also ruled that the trial judge's treatment of the issue at the jury trial constituted an independent basis for upholding the verdict.[29] The court emphasized that the issue of the probability of a

[21] *Id.*

[22] *Id.* at 2203, 396 N.E.2d at 175 (citing Skyline Homes, Inc. v. Commonwealth, 362 Mass. 684, 688, 290 N.E.2d 160, 163 (1972)).

[23] *Id.* at 2203, 396 N.E.2d at 176.

[24] *Id.* at 2204, 396 N.E.2d at 176. The Court considered the question to be one of first impression, as no Massachusetts decision directly on point had been brought to their attention. *Id.* The Court found persuasive authority, however, in the logic of decisions close on point and in authority from other sources. *Id. See, e.g.*, Cole v. Boston Edison Co., 338 Mass. 661, 665-66, 157 N.E.2d 209, 212 (1959); Smith v. Commonwealth, 210 Mass. 259, 263, 96 N.E. 666, 668 (1911); May v. Boston, 158 Mass. 21, 29, 32 N.E. 902, 904 (1893); State v. Kruger, 77 Wash. 2d 105, 459 P.2d 648 (1969); 4 NICHOLS' EMINENT DOMAIN § 12.322(1) (rev. 3d ed. 1980) and authorities cited in n.7.1 at 12-655; Annot., 9 A.L.R.3d 291, 320-23 (1966).

[25] 1979 Mass. App. Ct. Adv. Sh. at 2204-05, 396 N.E.2d at 176.

[26] *Id.* at 2205, 396 N.E.2d at 176. *See* 4 NICHOLS' EMINENT DOMAIN § 12.322(2) (rev. 3d ed. 1980).

[27] 1979 Mass. App. Ct. Adv. Sh. at 2205, 396 N.E.2d at 176-77.

[28] *Id.* at 2205, 396 N.E.2d at 177.

[29] *Id.* at 2206, 396 N.E.2d at 177.

private developer obtaining rezoning was submitted to the jury by way of a special question. Thus, the jury's attention was confined solely to this issue.[30] The trial judge's instructions to the jury contained no reference to the disputed finding on the defendant's rezoning, and the jury was specifically instructed that they could not consider any activity pertaining to the urban renewal project.[31] Consequently, since the defendant did not object to the instructions on the zoning question or on the weight to be given the non-jury findings, the Appeals Court ruled that the introduction of such findings into evidence did not constitute reversible error.[32]

In the second *Survey* year case concerning the assessment of damages for eminent domain takings, the Supreme Judicial Court, in *Ux v. Town of North Reading*,[33] found that the exclusion of certain evidence did constitute reversible error.[34] At the jury trial, the plaintiff's expert witness testified that the highest and best use of the land taken was for a subdivision into three single-family lots. As such, the value of the land was $54,427.[35] The witness further testified that in the event that the land could not be subdivided, it would have a value of $32,250 as a single residential lot.[36] The defendant town introduced the testimony of two experts, one of whom valued the land at $6,500 and the other at $9,200.[37] The town sought to prove that the soil conditions prevented use of the land for residential purposes. For this purpose, it sought to introduce into evidence two maps, one a "Geological Survey Map" and the other a "Soil Conservation Map," both of which were incorporated into the town's zoning by-law.[38] The maps showed the soil conditions of the area, including wetlands areas and out-croppings of ledge in the town.[39] The trial judge refused to admit either map into evidence.[40] The judge also refused to admit the town planning board's "Rules and Regulations Governing the Subdivision of the Land."[41] The defendant claimed that these regulations were relevant to determining whether planning board approval was required for subdivision.[42] The jury returned a verdict of $25,000 in damages, and the town appealed.[43]

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30 *Id.*
31 *Id.* at 2206-07, 396 N.E.2d at 177.
32 *Id.* at 2207-08, 396 N.E.2d at 177-78.
33 1979 Mass. Adv. Sh. 2681, 398 N.E.2d 489.
34 *Id.* at 2682, 398 N.E.2d at 490.
35 *Id.* at 2681, 398 N.E.2d at 490.
36 *Id.*
37 *Id.*
38 *Id.*
39 *Id.*
40 *Id.*
41 *Id.* at 2683, 398 N.E.2d at 491.
42 *Id.*
43 *Id.* at 2681, 398 N.E.2d at 490.

On appeal, the Supreme Judicial Court reversed, holding that it was error for the trial judge to have refused to admit into evidence the maps and the planning board regulations.[44] The Court observed first that the suitability of the plaintiff's land for residential development was a legitimate matter of inquiry at the trial.[45] It then noted that the presence of wetland or ledge on or near the parcel might affect the suitability of the land for residential purposes and, therefore, might bear on the value of the land.[46] The Court reasoned that the two maps, if properly authenticated, would be admissible to show that all or part of the land was not suitable for residential purposes.[47] Similarly, the Court held that the exclusion of the town planning board's "Rules and Regulations Governing the Subdivision of Land" was erroneous.[48] During the trial, an issue had arisen concerning whether subdivision of the parcel into three lots would require planning board approval.[49] Section 81L of chapter 41 of the General Laws states that planning board approval is not required for subdivision when each resulting lot would front on a public way, on a way shown on a plan previously approved under the subdivision control law, or on "(c) a way in existence when the subdivision control law became effective in the . . . town in which the land lies."[50] The issue of whether the plaintiff's plan required planning board approval turned upon whether a way near the parcel fell within the language of clause (c)) quoted above.[51] The Court noted that by the terms of clause (c), the decision whether the road fell within the clause's language was vested in the planning board in the first instance. Thus, it concluded that the board's rules and regulations governing the subject were relevant, material evidence and should have been admitted.[52] Furthermore, the Court emphasized that the judge, by apparently assuming that a division of the parcel would not require approval, had deprived the town of an opportunity to present evidence which, if believed, would permit the fact finder to reach the contrary conclusion.[53] Hence, the Court concluded that the maps and the planning board regulations should have been admitted to aid in determining the value of the land taken.

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[44] *Id.* at 2682, 2683, 398 N.E.2d at 490, 491.
[45] *Id.* at 2682, 398 N.E.2d at 490.
[46] *Id.*
[47] *Id.*
[48] *Id.* at 2683, 398 N.E.2d at 491.
[49] *Id.* at 2682, 398 N.E.2d at 491. G.L. c. 41, § 81L, provides that the division of a parcel of land into two or more lots constitutes a "subdivision" and consequently must have planning board approval, unless certain specified conditions exist. *Id.*
[50] G.L. c. 41, § 81L.
[51] 1979 Mass. Adv. Sh. at 2682, 398 N.E.2d at 491.
[52] *Id.* at 2682-83, 398 N.E.2d at 491.
[53] *Id.* at 2683, 398 N.E.2d at 491.