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Chapter 11: Zoning and Land Use

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CHAPTER 11

Zoning and Land Use

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§ 11.1. Municipal Regulation of Billboards—Aesthetic Zoning—Commercial Free Speech. During the 1981 *Survey* year, the Appeals Court examined the validity of billboard restrictions imposed under local zoning bylaws. In *Maurice Callahan and Sons v. Outdoor Advertising Board*,[1] the plaintiff billboard owners challenged the denial of their billboard permit renewals as violative of the First Amendment. The plaintiff claimed that a town of Lenox bylaw that prohibited all off premises signs infringed the plaintiff's constitutionally protected freedom of expression.[2]

The regulation of billboard number, height, and placement is an exercise of a community's police power. Billboard regulation is justified as a means of promoting the public safety and general welfare.[3] In Massachusetts, the Supreme Judicial Court has held that aesthetic considerations provide an adequate basis for the regulation of billboard advertising.[4] Recent United States Supreme Court decisions have upheld local ordinances restricting commercial speech based upon the police power.[5] The scope of the police power as a restriction on noncommercial communication is, however, far from settled.

In *Callahan*, the Lenox zoning bylaw effectively eliminated all off premises signs and billboards.[6] The bylaw permitted one or two small signs for each residential lot, limiting the content of the signs to information identifying the premises and occupants.[7] The bylaw limited the commercial and industrial districts, containing the plaintiff's billboards, to signs identifying the location, occupants, services and products available on the premises.[8]

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§ 11.1. [1] 1981 Mass. App. Ct. Adv. Sh. 1760, 427 N.E.2d 25.

[2] *Id.* at 1762, 427 N.E.2d at 25.

[3] 1 & 3 R. ANDERSON, AMERICAN LAW OF ZONING §§ 7.16, 15.82 - 88 (2d ed. 1977).

[4] *See* John Donnelly & Sons v. Outdoor Advertising Board, 369 Mass. 206, 339 N.E.2d 709 (1975); *see* Huber, *Zoning and Land Use*, 1976 ANN. SURV. MASS. LAW § 15.15.

[5] *See generally* Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981).

[6] 1981 Mass. App. Ct. Adv. Sh. at 1764, 417 N.E.2d at 28.

[7] § 7.8.1 of Lenox bylaw.

[8] *Id.* at § 7.9.1.

General regulations for all signs including the number, location and permitted exceptions to the general regulations were included in the bylaw.[9]

In reviewing the applications for the plaintiff's permit renewals, the Outdoor Advertising Board determined that the plaintiff's signs were in violation of the local zoning bylaw, thereby providing the grounds for denial.[10] Judicial review of the decision by the superior court resulted in a summary judgment for the Outdoor Advertising Board.[11] The superior court relied on *John Donnelly & Sons v. Outdoor Advertising Board*[12] as controlling authority in upholding the validity of the Lenox billboard restriction.[13] The plaintiff then sought review by the Appeals Court. Addressing the first amendment claim, the Appeals Court held that the zoning prohibition constituted a restriction on commercial speech rather than noncommercial speech.[14] Because the lack of restriction on noncommercial expression was not restricted, the plaintiff was precluded from utilizing the overbreadth doctrine. The overbreadth doctrine allows a party to rely upon the ordinance's effect on the entire community instead of the more limited effect on the parties before the court.[15] Thus, the Court found it unnecessary to evaluate a local zoning board's prohibition of noncommercial, ideological communication because the record below indicated that the billboards in question had never displayed any form of noncommercial communication.[16]

Examining the bylaw as a commercial expression restriction, the Appeals Court held that the recent United States Supreme Court test for determining the validity of such restrictions had been satisfied.[17] The test as explained in *Central Hudson v. Public Service Commission*[18] requires:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.[19]

The Appeals Court then compared the Lenox bylaw to a San Diego, California ordinance recently examined by the United States Supreme Court in

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[9] *Id.* at § 7.7.1.

[10] 311 Code of Mass. Regs § 3.04(7) (1978).

[11] 1981 Mass. App. Ct. Adv. Sh. at 1760-61, 427 N.E.2d at 26.

[12] 369 Mass. 206, 339 N.E.2d 709 (1975).

[13] 1981 Mass. App. Ct. Adv. Sh. at 1762, 427 N.E.2d at 27.

[14] *Id.* at 1765, 427 N.E.2d at 28.

[15] *See* Metromedia, Inc., 453 U.S. at 504 n.11; Central Hudson Public Service Commn. 447 U.S. 557, 563 (1980).

[16] 1981 Mass. App. Ct. Adv. Sh. at 1765, 427 N.E.2d at 28-29.

[17] *Id.* at 1766, 427 N.E.2d at 29.

[18] 447 U.S. 557 (1980).

[19] *Id.* at 563.

Metromedia, Inc. v. City of San Diego.[20] In *Metromedia*, the Supreme Court upheld the validity of the San Diego ordinance as a proper restriction on commercial speech.[21] The restriction promoted governmental interests in traffic safety and city appearance.[22] The Supreme Court invalidated the ordinance, however, because noncommercial expression was unconstitutionally restricted.[23] The Appeals Court applied the *Metromedia* rationale only as to commercial speech restriction because in *Callahan* the plaintiff's billboard did not convey noncommercial messages.

The Appeals Court's approval of the *Metromedia* rationale should serve to alert local zoning authorities to the increasingly unsettled nature of zoning restrictions on billboard advertising. Although the court cites *Metromedia* with approval to support the validity of the Lenox bylaw, the *Metromedia* decision does not represent as strong a precedent as the Appeals Court seems to indicate. A closer examination of *Metromedia* reveals that a community's restrictions on billboards will be scrutinized closely.

In *Metromedia*, the owners of some 500 to 800 outdoor advertising display signs[24] challenged the validity of a local ordinance restricting billboard advertising. The United States Supreme Court reversed the California Supreme Court in a plurality decision[25] holding the ordinance to be an improper exercise of the police power. The decision has been characterized as a virtual Tower of Babel for city planning commissions and zoning boards from which no definitive principles can be clearly drawn.[26]

The San Diego ordinance prohibited all outdoor advertising except signs identifying the premises, the owner and occupant of the site, or signs advertising goods or services available on the premises.[27] Generally, on site commercial advertising was allowed provided it was related to the premises. Metromedia, Inc. alleged that the ordinance represented total prohibition of the outdoor advertising industry, a confiscation in violation of the four-

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[20] 453 U.S. 490 (1981).

[21] *Id.* at 512.

[22] *Id.* at 507.

[23] *Id.* at 521.

[24] *Id.* at 496. Defined by the California Supreme Court as a rigidly assembled sign, display or divide permanently attached to a building or other inherently permanent structure constituting, or used for the display of, a commercial or other advertisement to the public. Metromedia, Inc. v. San Diego, 26 Cal.3d 848, 852 n.2, 64 Cal. Rptr. 510, 513 n.2, 610 P.2d 407, 410 n.2 (1980).

[25] Metromedia, Inc. v. City of San Diego, 453 U.S. at 521. Justice White wrote and announced the opinion of the Court joined by Justices Stewart, Marshall and Powell. Justice Brennan, joined by Justice Blackmun, concurred in judgment. Justices Stevens, Burger and Rehnquist dissented writing separately.

[26] 453 U.S. at 570 (Rehnquist, J., dissenting).

[27] San Diego Ordinance No. 10795 (New Series) enacted March 14, 1972 (cited in 453 U.S. at 493 n.1).

teenth amendment and a violation of the first amendment rights of free expression.[28] The trial court held the ordinance to be a violation of first amendment rights and an improper exercise of the police power.[29] The California Court of Appeals affirmed the trial court's decision solely on the basis of its finding concerning the police power.[30] The California Supreme Court reversed, holding that the city was promoting legitimate interests of public safety and the general welfare, and rejected all first amendment claims.[31] The appeal to the United States Supreme Court involved claims of first and fourteenth amendment violations by the city of San Diego.[32]

Justice White delivered the Court's plurality opinion noting preliminarily that at times societal interests may outweigh first amendment values.[33] A community regulating the noncommunicative aspects of billboard advertising must balance its interests in regulating the large, immobile and permanent structures with the individual's right to expression.[34] Justice White assessed Metromedia's first amendment claims in terms of the restriction on commercial and noncommercial speech.

The plurality found that the San Diego ordinance was a valid restriction on commercial speech, although the plurality noted that a valid prohibition of commercial speech does not necessarily validate restrictions on noncommercial speech.[35] The city's justifications for restricting commercial communication did not convince the plurality to sustain the prohibition of noncommercial expression contained in the ordinance. The plurality held that a city "[m]ay not conclude that the communication of commercial information concerning goods and services connected with a particular site is of greater value than the communication of noncommercial messages."[36] A city does not have the same range of choices when deciding to distinguish between the value of commercial and noncommercial speech. Because some noncommercial messages were allowed to be conveyed on some San Diego billboards, the Court reasoned that all billboards must be allowed to convey noncommercial messages.[37]

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[28] Metromedia, Inc. v. City of San Diego, 453 U.S. at 498.

[29] *Id.* at 497.

[30] *Id.*

[31] *Id.* at 497-98.

[32] *Id.* at 498.

[33] *Id.* at 501.

[34] *Id.* at 502.

[35] *Id.* at 504-05. In Virginia Pharmacy Board v. Virginia Consumer Council, 425 U.S. 748 (1976), the Court held that speech proposing a commercial transaction was entitled to some First Amendment protection, although not equivalent to the protection extended to noncommercial speech.

[36] *Id.* at 513.

[37] *Id.* at 515.

The plurality opinion concluded by determining the proper level of judicial review of the ordinance as a restriction on first amendment rights. Justice White stated that a reviewing court must find more than a rational relationship between the governmental interests and the statutory means of promoting those interests.[38] The San Diego ordinance was invalid because the city did not show a heightened relationship.[39]

Unlike the plurality, Justice Brennan viewed the San Diego ordinance as a total ban on outdoor advertising. Brennan asserted that the ordinance was invalid, and the plurality's commercial, noncommercial expression dichotomy was constitutionally unsound.[40] The concurrence suggested that a city may ban billboards provided that three standards are met.[41] First, the government must show that it has a sufficiently substantial interest in banning the billboards. Second, the governmental interest must be directly furthered by the ban. Third, the government must show that anything less than the total ban would not promote the governmental interest as well.

The concurrence rejected the plurality's position that the ordinance validly regulated commercial expression.[42] The concurrence contended that the commercial-noncommercial approach of the plurality would open the door to situations in which noncommercial speech could be prohibited under the guise of commercial speech regulation, subject only to the discretion of a local zoning authority.[43] This potential for intrusive government restriction on legitimate expression is a factor in favor of invalidating the ordinance.[44]

Justice Stevens, dissenting, agreed that the ordinance constituted a total ban of outdoor advertising[45] but found the ordinance constitutionally valid.[46] Finding no indication of governmental bias and no evidence of a lack of suitable means of alternate communication, Justice Stevens held the ordinance valid. He explained that the essential concern embodied in the First Amendment is that the government does not dictate the topics for public debate or impose its viewpoint on the public.[47]

Chief Justice Burger's dissent characterizes the plurality opinion as typifying a federal body usurping authority from a local government.[48] The Chief Justice viewed the controversy as involving the basic authority of

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[38] *Id.* at 517.
[39] *Id.* at 521.
[40] *Id.* at 522 (Brennan, J., concurring).
[41] *Id.* at 527 (Brennan, J., concurring).
[42] *Id.* at 534-40 (Brennan, J., concurring).
[43] *Id.* at 537-38 (Brennan, J., concurring).
[44] *Id.* at 540 (Brennan, J., concurring).
[45] *Id.* at 540 (Stevens, J., dissenting).
[46] *Id.* at 542 (Stevens, J., dissenting).
[47] *Id.* at 553 (Stevens, J., dissenting).
[48] *Id.* at 556 (Burger, C.J., dissenting).

local government to protect its citizens' legitimate interests in city appearance and traffic safety. The duty of the Court in reviewing this type of statute is to determine whether the legislative approach is essentially neutral and leaves open other means for conveying the restricted communication. The Chief Justice noted that the Court should not make the primary policy decision, which is better made at the local level.[49] The Chief Justice concluded that the ordinance was a valid exercise of the police power, finding a wide range of alternatives available for communicating the restricted messages.[50] Also, in his opinion the record indicated no attempt by San Diego to suppress any category of messages or any particular point of view.[51]

In conclusion, local zoning authorities should find little consolation in the *Metromedia* decision as a guide for evaluating billboard restrictions. The decision does indicate that although city aesthetics are a legitimate objective of the police power, any restriction of first amendment rights must be justified fully by the local authorities.

§ 11.2. Zoning—Live Entertainment—First Amendment. The power of a municipality to enact comprehensive zoning ordinances consistently has been upheld since the United States Supreme Court's decision in *Village of Euclid v. Ambler Realty Co.*[1] Nevertheless, zoning ordinances are still open to constitutional challenge on the grounds that the ordinances represent impermissible governmental intrusions on individual liberty interests protected by the United States Constitution.[2] The United States Supreme Court, during the *Survey* year, examined the tension between a community's exercise of its zoning power and an individual's exercise of first amendment rights of free expression. In *Schad v. Borough of Mount Ephraim*,[3] a plurality of the Court reversed the criminal convictions of bookstore operators charged with violating the local zoning ordinance prohibiting live entertainment in commercial zones. Although the borough was empowered to enact comprehensive zoning ordinances, the overbreadth of the live entertainment ordinance and the insufficient justification for the prohibition by Mount Ephraim constituted an unlawful intrusion on first amendment rights.[4]

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[49] *Id.* at 561 (Burger, C.J., dissenting).

[50] *Id.* at 562-63 (Burger, C.J., dissenting).

[51] *Id.* at 562 (Burger, C.J., dissenting).

§ 11.2. [1] 272 U.S. 365 (1926); *See generally* 2 R. ANDERSON, AMERICAN LAW OF ZONING § 3.0 et seq. (2d ed. 1977).

[2] 2 R. ANDERSON, *supra* note 1 at 3.10.

[3] 452 U.S. 61 (1981).

[4] *Id.* at 71-72.

In *Schad*, appellants operated an adult bookstore, selling adult books, magazines and films. The store also provided private showings of adult films in coin operated booths.[5] The bookstore was located in a commercial zone[6] of Mount Ephraim and successfully had obtained from the borough an amusement license permitting the coin-operated film booths.[7] These booths were later modified to allow customers to view nude dancers behind a glass panel of the booth.[8] Complaints soon were filed against the operators of the bookstore, charging that the dancing violated a Mount Ephraim zoning ordinance prohibiting live entertainment in a commercial zone.[9]

The operators were convicted and fined in municipal court for violating the zoning ordinance.[10] The Camden County Court took the case on appeal. After a trial *de novo* on the municipal court record, the operators again were convicted.[11] Responding to the first and fourteenth amendment claims, the county court agreed that live nude dancing was constitutionally protected by the first amendment, but the matter before the court concerned only zoning regulation so the court was not required to evaluate the appellants' constitutional claims.[12] The court supported this position by citing *Young v. American Mini Theatres*,[13] stating "[t]he mere fact that the commercial exploitation of material protected by the first amendment is subject to zoning and other licensing requirements is not a sufficient reason for invalidating these ordinances."[14] The Appellate Division of the New Jersey Superior Court endorsed the reasoning of the Camden County Court and affirmed the convictions.[15] The New Jersey Supreme Court denied further review.[16] The basis of appellant's appeal to the United States Supreme Court was that the criminal penalties imposed under a zoning ordinance prohibiting all live entertainment in areas zoned for commercial use violated their right of free expression guaranteed by the first and fourteenth amendment.

Generally, a zoning ordinance is a type of legislative act presumed to be constitutional and valid.[17] A zoning ordinance affecting only property

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[5] *Id.* at 62.
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.* at 63.
[10] *Id.* at 64.
[11] *Id.*
[12] *Id.*
[13] 427 U.S. 50 (1976).
[14] 452 U.S. at 64 (citing Young v. American Mini Theatres, 427 U.S. at 62).
[15] *Id.* at 65.
[16] *Id.*
[17] *See generally* 2 ANDERSON, AMERICAN LAW OF ZONING § 3.14.

rights will withstand judicial review successfully if it is rationally related to legitimate state concerns and does not deprive the owner of the economically viable use of his property.[18] When, however, a zoning ordinance affects a constitutionally protected "liberty" interest, the reviewing court must evaluate the ordinance with a higher level of scrutiny.[19] The court must determine whether: (a) the ordinance is narrowly drawn;[20] (b) the ordinance furthers a substantial government interest;[21] and (c) those government interests could not be served by means less intrusive on the protected activity.[22] This application of heightened scrutiny relates to the government interests advanced by the ordinance and the means chosen to further those government interests.[23]

The Supreme Court's plurality opinion[24] reversed the criminal convictions because Mount Ephraim had not adequately justified its infringement on the bookstore operator's First Amendment right of free expression.[25] Justice White, writing the plurality opinion, at the outset affirmed the principle that entertainment is a protected form of expression under the First Amendment and that the presence of nudity does not justify the withdrawal of First Amendment protection.[26]

The plurality opinion evaluated the validity of the zoning ordinance by employing a two-step process. Step one involved a determination of the level of scrutiny to be applied to the statute. The borough argued that, because a zoning ordinance was involved, the ordinance only need be rationally related to a legitimate government interest. The plurality disagreed, holding that the borough's ordinance "[s]ignificantly limits communicative activity within the borough,"[27] thereby requiring the highest level of scrutiny to be applied by a reviewing court.[28] Mount Ephraim's reliance on *Young v. American Movie Theatres, Inc.* was not accepted by the plurality.[29] *Young* had regulated the density of adult movie theatres, while not totally prohibit-

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[18] 452 U.S. at 68 (*citing* Agins v. City of Tiburon, 447 U.S. 255, 260 (1980); Village of Belle Terre v. Boraas, 416 U.S. 1 (1974); Euclid v. Ambler Realty Co. 272 U.S. 365 (1926)).

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.* at 70.

[23] *Id.* at 71.

[24] Justice White delivered the opinion of the Court; Justice Blackmun filed a concurring opinion; Justice Powell filed a concurring opinion joined by Justice Stewart; Justice Stevens an opinion concurring in judgment; Justice Burger filed a dissenting opinion joined by Justice Rehnquist.

[25] *Id.* at 72.

[26] *Id.* at 65.

[27] *Id.* at 71.

[28] *Id.*

[29] *Id.* at 71-72.

ing the theaters in commercial districts.[30] The Mount Ephraim ordinance, as enforced, banned all live entertainment without adequate justification.

The borough argued that live entertainment in the commercial zone would conflict with the community plan to create a commercial area catering only to the immediate needs of its residents.[31] The immediae needs would involve those types of items usually purchased outside the borough, which were occasionally forgotten by residents, such as items generally found at a convenience store.[32] This argument was dismissed as patently insufficient owing to obvious contradictions in the text of the full zoning ordinances which clearly allowed a wide range of commercial uses far beyond the immediate needs of the borough's residents.[33]

Mount Ephraim's second justification was that live entertainment may be excluded in order to avoid problems with parking, trash, police protection and medical facilities.[34] This justification failed because the borough produced no evidence supporting the existence of these problems.[35] The plurality found that it is not self-evident that any greater problems would be posed that did not currently exist incident to existing permitted uses under the ordinance.[36] The ordinance was not drawn narrowly enough to accommodate the problems occurring owing to live commercial entertainment and no evidence was presented to show that a less intrusive ordinance would not meet the needs of the town.[37]

As a "time, place and manner" restriction Mount Ephraim argued that its ordinance is reasonable but the borough did not support its reasons for prohibiting live entertainment while permitting other commercial uses.[38] The crucial question for such a restriction is "[w]hether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time."[39] Mount Ephraim did not substantiate the restriction's validity because the restriction left open no alternative avenues of communication.[40] The presence of similar live entertainment in neighboring communities was irrelevant because the residents of Mount Ephraim had no political control over permitted uses in other communities.[41]

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[30] *Id.* at 71.
[31] *Id.* at 72.
[32] *Id.*
[33] *Id.* at 73.
[34] *Id.*
[35] *Id.*
[36] *Id.* at 73-74.
[37] *Id.* at 74.
[38] *Id.* at 74-75.
[39] *Id.* at 75 (citing Grayned v. City of Rockford, 408 U.S. 104, 116-17 (1972)).
[40] *Id.* at 75-76.
[41] *Id.* at 76-77.

The White plurality did not find that a community may not restrict first amendment activities; the plurality stated only that a community's restrictions will be held to the highest level of scrutiny in terms of the substantial government interests advanced by the ordinance as well as the means for promoting these interests.[42] Mount Ephraim simply did not substantiate its restrictive zoning ordinance adequately.[43]

In a separate concurrence, Justice Blackmun joined the plurality opinion to clarify two points. The first point was that a local zoning ordinance must withstand more than the minimal scrutiny of a rational relationship test when Constitutional rights are restricted.[44] Justice Blackmun emphasized that the plurality opinion should make it clear that "where First Amendment interests are at stake, zoning regulations have no . . . 'talismatic immunity from Constitutional challenge.' "[45] In his second point, Justice Blackmun agreed with the plurality's position that Mount Ephraim could not justify its elimination of live entertainment by showing that other nearby localities provide the locally restricted entertainment.[46]

Justice Powell's opinion, joined by Justice Stewart, concurred with the plurality opinion that Mount Ephraim failed to justify its broad restriction on protected expression.[47] The concurrence left open the possibility that a more carefully drafted ordinance validly could regulate or ban live commercial entertainment.[48]

Justice Stevens, concurring in the judgment, agreed in principle with the dissent's position that although nude dancing was protected by the first amendment, Mount Ephraim could prohibit it.[49] Owing to the ambiguity in the record and the broadness of the statute, however, the borough did not carry its burden of demonstrating that a uniform policy of regulation existed and was enforced in a content-neutral fashion.[50]

Chief Justice Burger and Justice Rehnquist dissented, viewing the issue in the case as whether Mount Ephraim could ban nude dancing which was employed as "bait" to induce customers into adult bookstores.[51] While the dissent acknowledged that first amendment rights might be affected by the broad restriction, the dissent found the ordinance valid.[52] The dissent stated

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[42] *Id.* at 67.

[43] *Id.* at 72.

[44] *Id.* at 77 (Blackmun, J., concurring).

[45] *Id.* (Blackmun, J., concurring) (citing Young v. American Mini Theatres, 427 U.S. 50, 75 (1976)).

[46] *Id.* at 77-78 (Blackmun, J., concurring).

[47] *Id.* at 79 (Powell, J., concurring).

[48] *Id.* (Powell, J., concurring).

[49] *Id.* at 83 (Stevens, J., concurring).

[50] *Id.* at 83-84 (Stevens, J., concurring).

[51] *Id.* at 86 (Burger, C.J., dissenting).

[52] *Id.* at 86-87 (Burger, C.J., dissenting).

that the borough had acted only to keep this type of entertainment off its doorsteps, while not suppressing any point of view or any category of ideas.[53] The dissent attached importance to the principle that federal court power to alter a community's choice of government should be exercised sparingly.[54] The dissent made no comment on the adequacy of Mount Ephraim's justifications for enacting the statute.

The Supreme Court's decision in *Schad* is in accord with recent Massachusetts decisions examining the validity of local police power ordinances restricting the exercise of first amendment rights.[55] As an expression of national policy, *Schad* assumes that first amendment rights are not restricted readily. Most cases similar to *Mount Ephraim* fail because the zoning (or other similar) laws are adopted without adequate proof of serious deleterious effect of the activity restricted and tend to be merely broad expressions of the moral standards of the community and its agents. Local governments should muster facts that indicate clearly an adverse impact of the activity on the public. Absent such facts, the first amendment rights of free expression cannot be limited.

§ 11.3. Zoning—Standing as a Person Aggrieved. In order for a person to satisfy standing requirements in an action for judicial review of a decision of the Board of Appeals or special permit granting authority, one must be a "person aggrieved."[1] The Appeals Court, in *Owens v. Board of Appeals of Belmont*,[2] ruled that standing is satisfied if two requirements are met. First, a party must be a nearby property owner who received notice pursuant to chapter 40A, section 11 of the General Laws, or an abutter or an abutter of an abutter.[3] The facts of the case must raise the possibility of tangible harm to the person's property.[4] Second, the person claiming that he is aggrieved has to assert an interest in having the district in which he owns property remain uniform.[5] Persons have no standing before the board of appeals if their property lies some distance from the site, and if they have nothing more than a general civic interest in enforcing the zoning ordinance.[6]

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[53] *Id.* at 88 (Burger, C.J., dissenting).

[54] *Id.* (Burger, C.J., dissenting).

[55] *See, e.g.*, Commonwealth v. Sees, 374 Mass. 765, 373 N.E.2d 1151 (1978) (Revere ordinance held a violation of Massachusetts Constitution Art. 16 protecting free speech.) For a discussion of this case *see* Ortwein, *Constitutional Law*, 1978 ANN. SURV. MASS. LAW § 12.4.

§ 11.3. [1] G.L. c. 40A, § 17.

[2] 1981 Mass. App. Ct. Adv. Sh. 731, 418 N.E.2d 635. This case is also discussed in § 11.9, *infra*.

[3] *Id.* at 731, 418 N.E.2d at 637.

[4] *Id.*

[5] *Id.* at 732, 418 N.E.2d at 637.

[6] *Id.* at 731, 418 N.E.2d at 637.

In *Owens*, an action was brought to annul a variance and special permit. The variance and special permit was granted to developer for the construction of a cluster development and conversion of a mansion into six condominium units.[7] This development was to be constructed in an area zoned for single family units.[8] All but one of the plaintiffs were denied standing because they could not meet the requirements of more than a general civic interest, and because they were not abutters or abutters of an abutter.[9]

The Appeals Court decided, in *Redstone v. Board of Appeals of Chelmsford*,[10] that receipt of notice alone will not satisfy the standing requirements. In *Redstone*, the plaintiffs could not establish evidence of any tangible harm other than a resulting effect of business competition.[11] Two banks were the opposing parties in this dispute.[12] Included with the defendant bank were the owners of the property in question and the Board of Appeals.[13] The contested permit allowed a side yard to be used as a parking lot for the defendant bank.[14] The plaintiff bank could show only that the side yard of the subject property, not visible from its ground floor, could be seen from the northernmost corner of its building.[15]

The Appeals Court in *Redstone* also noted that it is "hard to imagine what infringements of their legal rights the plaintiffs, who use their estates for business purposes, could conjure up from the varying of a by-law provision designed to protect persons who use their property for residential purposes."[16] The court noted that chapter 40A differentiates between "persons aggrieved" as set out in section 17, and "parties in interest," as involved in section 11.[17] Thus, the court continued, a right to receive notice does not give rise to a standing to sue.[18]

Owens and *Redstone* followed the principles enunciated in *Waltham Motor Inn, Inc. v. La Cava*.[19] In *La Cava*, notice alone was sufficient to establish a presumption that a person was aggrieved[20] but evidence actually presented determined whether a person had standing when his standing was

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[7] *Id.* at 731, 418 N.E.2d at 636. *See* § 11.9 *infra* for a discussion on the Cluster Zoning Issue.

[8] 1981 Mass. App. Ct. Adv. Sh. at 732, 418 N.E.2d at 637.

[9] *Id.* at 731, 418 N.E.2d at 637.

[10] 1981 Mass. App. Ct. Adv. Sh. at 351, 416 N.E.2d 543.

[11] *Id.* at 353, 416 N.E.2d at 544.

[12] *Id.* at 351-52, 416 N.E.2d at 543.

[13] *Id.* at 351, 416 N.E.2d at 543.

[14] *Id.*

[15] *Id.* at 352, 416 N.E.2d at 543.

[16] *Id.* at 353, 416 N.E.2d at 544.

[17] *Id.*

[18] *Id.*

[19] 3 Mass. App. Ct. 210, 326 N.E.2d 348 (1975). For an analysis of this case see Huber, *Zoning and Land Use*, 1975 ANN. SURV. MASS. LAW § 19.5.

[20] 3 Mass. App. Ct. at 214, 326 N.E.2d at 352.

challenged.[21] *Redstone* and *Owens* maintain the principle that notice confers a presumption of standing, while a challenge to standing will overcome that presumption. Additionally, *Redstone* rejects business competition as a ground for showing that the challenger is a person aggrieved.

The line of cases, *Circle Lounge & Grille, Inc. v. Board of Appeals of Boston*,[22] *Waltham Motor Inn, Inc. v. La Cava* and *Redstone*, indicate a trend that sets out a dual standard for determining if one is a person aggrieved. It will be much easier for a residential property owner to establish standing than an owner of property in a business district. Regarding residential areas, as long as property abuts or is nearby, and notice was received by the owner, the notice itself implies the possibility of some tangible harm. If a residential property owner is some distance away, of course, the presumption of harm is not present, and to establish standing one must assert more than a general civic interest in enforcement of the ordinance.

When there is a question regarding a development or application for a special permit in a business district, standing is presumed until challenged. Once challenged the courts have stated, in dicta, that it would be difficult for a business to challenge the variance of a by-law because the by-laws essentially are for protection of residential property.[23] The Appeals Court cases go back to the principle enunciated in *Circle Lounge and Grille, Inc. v. Board of Appeals of Boston*. In *Circle Lounge and Grille*, the Supreme Judicial Court announced that a person aggrieved must suffer more than the general damages suffered by the public and more than a loss of the value of the person's business.[24] To satisfy the requirement for a person aggrieved, the landowner must allege that his land suffers damages which affect the value of the land, rather than damage to the value of the business located on the land.[25]

The question of whether loss of a business's value will satisfy the standing requirements of chapter 40A, section 17 appears to be settled. The cause for confusion was the Supreme Judicial Court's ruling in *Shoppers' World, Inc. v. Beacon Terrace Realty, Inc.*[26] In *Shoppers' World*, the Court found that a theater corporation had standing as an aggrieved party to challenge a special permit allowing the construction of two theaters in the same zoning district across the street from the plaintiff's business.[27] In *Shoppers' World*,

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[21] *Id.* at 215, 326 N.E.2d at 352.

[22] 324 Mass. 427, 86 N.E.2d 920 (1949). *See* D'Agostine and Huber, *Land Use Planning Law*, 1967 ANN. SURV. MASS. LAW § 11.5, for a discussion of this case and issue.

[23] 1981 Mass. App. Ct. Adv. Sh. at 353, 416 N.E.2d at 544.

[24] 324 Mass. at 429, 86 N.E.2d at 922 (1949). *See* D'Agostine and Huber, *Land Use Planning Law*, 1967 ANN. SURV. MASS. LAW § 11.5, at 202.

[25] *See* D'Agostine and Huber, *Land Use Planning Law*, 1967 ANN. SURV. MASS. LAW § 11.5, at 202.

[26] 353 Mass. 63, 228 N.E.2d 446 (1967).

[27] *Id.* at 66, 228 N.E.2d at 448.

however, the defendants did not challenge the standing of the plaintiff on appeal.[28] Thus, *Shoppers' World* cannot be viewed as a holding that business competition constitutes a ground for standing. The line of cases starting with *Circle Lounge* clearly holds the contrary, if the standing issue is contested.

§ 11.4. Zoning—Implying Permitted Use. During the *Survey* year, the Supreme Judicial Court was called upon to determine whether a medical clinic offering gynecological services, including abortions, constituted a permitted use under the zoning bylaw enacted by the town of Framingham. Permitted uses for this property included professional medical offices and hospitals, both private and public.[1]

In *Framingham Clinic, Inc. v. Zoning Board of Appeals of Framingham*,[2] the clinic sought facilities suitable for operating a gynecological clinic.[3] The president of Framingham Clinic, interested in facilities in Framingham's business district, received a preliminary opinion from the town building commissioner that the proposed use was permitted as of right under provisions of the zoning bylaw.[4] Framingham comprehensively regulates the use of land in the town, dividing the area into six classes of districts.[5] The two districts involved in the controversy are the residence and business districts. The residence district allows professional offices within the residence of a physician in addition to allowing private and public hospitals. The business district allows all uses permitted in the residence district as well as business and professional offices. With the exception of thirty-nine stated uses all other uses are prohibited, unless authorized by the zoning board of appeals. The facility was clearly within the Framingham business district.[6]

After acquiring and leasing the land, the Clinic applied to the building commissioner for a building permit.[7] Prior to the Clinic's submission of final floor plans, the building commissioner withdrew his original opinion

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[28] *Id.* at 66 n.1, 228 N.E.2d at 448 n.1.

§ 11.4. [1] Section III F of Framingham Zoning By-Law (cited in part at Framingham Clinic, Inc. v. Zoning Board of Appeals of Framingham, 1981 Mass. Adv. Sh. 109, 115, 415 N.E.2d 840, 844-45.

[2] 1981 Mass. Adv. Sh. 109, 415 N.E.2d 840.

[3] *Id.* at 110, 415 N.E.2d at 842. A prior Supreme Judicial Court decision, Framingham Clinic, Inc. v. Selectmen of Southborough, 373 Mass. 279, 367 N.E.2d 606 (1977) dealt with Framingham Clinic's attempt to open a similar clinic in Southborough. *See* Huber, *Zoning and Land Use*, 1978 ANN. SURV. MASS. LAW § 11.4.

[4] 1981 Mass. Adv. Sh. at 111, 415 N.E.2d at 843.

[5] *Id.* at 115, 415 N.E.2d at 844.

[6] *Id.* at 111, 415 N.E.2d at 842.

[7] *Id.* at 112, 415 N.E.2d at 843.

that the Clinic constituted a permitted use under the zoning bylaw.[8] The commissioner notified the Framingham Board of Selectmen that the plaintiffs would be required to obtain a special permit from the zoning board of appeals before a building permit could issue.[9] The commissioner stated that the Clinic was not a professional office within the meaning of the bylaw and that the operation of the facility would not "protect and promote life," a stated purpose of the zoning bylaw.[10]

Pursuant to the zoning bylaw and General Laws, chapter 40A, sections 8 and 15, the Clinic sought a reversal of the building commissioner's decision from the zoning board of appeals.[11] The board affirmed the building commissioner's determination.[12] Pursuant to Section 17 of the Zoning Act, the Clinic appealed this decision to the superior court.[13] The superior court granted the Clinic's motion for summary judgment, holding that the operation of the Clinic was a permitted use under the Framingham bylaw and the zoning board of appeals had presented no genuine issue of material fact to defeat the motion.[14] The superior court ordered the issuance of a permit as of right to the Framingham Clinic without additional proceedings.[15] The Supreme Judicial Court affirmed the superior court.[16]

The board of appeals first noted that the Clinic was not a professional office, hospital or one of the expressly enumerated uses contained in the bylaw. Because the potential use was not one of the expressly enumerated uses contained in the bylaw, the Clinic was required to obtain a special permit from the zoning board of appeals.[17] The Court regarded the resolution of this issue as a question of law because the bylaw does not define the terms "professional office" of "hospital."[18] The Court evaluated the terms under ordinary principles of statutory construction, deriving the usual and accepted meaning of the terms from sources presumably known to the enactors of the bylaws.[19] The omission of the word "clinic" in the Framingham zoning bylaw was not determinative of the issue. The Court examined the definition of "clinic" and "professional" as found in the dictionary, the General Laws and other relevant legal authorities, and held the gynecolog-

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[8] *Id.* at 112-13, 415 N.E.2d at 843.
[9] *Id.*
[10] *Id.* at 113, 415 N.E.2d at 844.
[11] *Id.* at 114, 415 N.E.2d at 844.
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.* at 114-15, 415 N.E.2d at 844.
[16] *Id.* at 116, 415 N.E.2d at 845.
[17] *Id.*
[18] *Id.*
[19] *Id.*

ical clinic to be a professional office and a permitted use under the zoning bylaw.[20]

Even though the bylaw authorized only two assisting personnel for physician's offices located in a residence district, this limitation did not indicate that a similar restriction would be imposed in the business district. The Court stated that "absent some express limitation, the right to employ personnel and facilities reasonably necessary to a particular professional use is implicit in the authorization to establish a professional office."[21] The Court interpreted the statute to allow greater latitude in employing assisting personnel because the business district was a less restrictively zoned area.

Of greater importance for the Court were the bylaw provisions allowing hospitals and professional offices in the business district. Although the Court interpreted the term "professional offices" to include the Clinic, the fact that hospitals were also permitted uses according to the bylaw indicated that Framingham had established a spectrum of permitted uses for the business district. The Court stated, "When a municipality allows as of right, uses which lie at both ends of the spectrum in terms of a particular category of uses—less importance need be attached to fixing where on that spectrum a specific use lies."[22] The Court was not persuaded that the proposed clinic would have an impact on the community differing significantly from the currently permitted uses.

The Court also affirmed the superior court's order, requiring the issuance of the building permit rather than remanding the case for further proceedings.[23] When the applicant for a building permit satisfies the burden of establishing that a permit should issue as a matter of right, the superior court must order the issuance of the permit.

For local zoning boards, the decision indicates that although a zoning bylaw contains certain specific permitted uses, other unexpressed, yet permitted, uses do exist. The Court did find that Framingham had established a series of uses in enacting the bylaw, and that uses other than those specifically permitted uses were also permitted. The Court did not suggest, however, that a use within this spectrum could not be prohibited expressly by a bylaw amendment.

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[20] 1981 Mass. Adv. Sh. at 117-18, 415 N.E.2d at 845-46. The Court relied on WEBSTER'S NEW INT'L DICTIONARY at 503 and 1975-76 (2d ed. 1959), G.L. c. 111, § 52, the cases of People v. Dobbs Ferry Medical Pavilion, Inc., 33 N.Y.2d 584, 585, affirming 40 App. Div.2d 324 (N.Y. 1973) and U.S. v. Laws, 163 U.S. 258, 266 (1896), and R. ANDERSON, AMERICAN LAW OF ZONING § 16.11 at 69 (2d ed. 1977).

[21] 1981 Mass. Adv. Sh. at 119, 415 N.E.2d at 846-47.

[22] *Id.* at 119-20, 415 N.E.2d at 847.

[23] *Id.* at 122, 415 N.E.2d at 848.

§ 11.5. Zoning—Frontage Requirements. Minimum lot size and minimum frontage requirements are basic tools of zoning for controlling population density.[1] Minimum frontage provisions generally require that each lot be provided with specific access or have a specific amount of frontage on a public way.[2] A community operating under a valid zoning bylaw may include minimum frontage as a part of its comprehensive plan, but this does not preclude a challenge to the provisions. A landowner still may show that the minimum frontage provision may not be applied lawfully to his property.[3] Judicial review of these bylaw provisions requires a balancing of the public benefit and the loss of private property rights.

During the *Survey* year, the Appeals Court examined the validity of the Town of Avon's zoning bylaw that required a minimum frontage of two hundred feet for a lot in a residential district used for multiple dwelling units. In *MacNeil v. Town of Avon*[4] the court held that the public gain from the application of the frontage requirement was slight, while the harm to the plaintiff's property was great. Thus, the court invalidated the bylaw as it applied to the specific property.[5] The Appeals Court also disapproved of the land court's reasoning that the same factors should be examined to support the validity of minimum frontage and minimum lot size.[6]

The plaintiff required a special permit to build multiple units in the town's residential district.[7] In order to obtain a special permit, the parcel of land needed a 200 foot frontage. Moreover, the parcel had to meet the minimum acreage requirement of 40,000 square feet. The lot size requirement was satisfied while the lot's frontage was only 190 feet.[8]

The Appeals Court determined that *Barney & Carey Co. v. Town of Milton*[9] was controlling.[10] The court emphasized that the imposition of the zoning requirement must have a real or substantial relation to the public health, public safety or public welfare.[11] The court held that the 190 foot

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§ 11.5. [1] 2 R. ANDERSON, AMERICAN LAW OF ZONING §§ 9.60-.61 (2d ed. 1977).

[2] *Id.* at § 9.61.

[3] *See* Huber, *Zoning and Land Use*, 1960 ANN. SURV. MASS. LAW § 13.13; Barney & Carey Co. v. Town of Milton, 324 Mass. 440, 445, 87 N.E.2d 9 (1949).

[4] 1981 Mass. App. Ct. Adv. Sh. 1287, 422 N.E.2d 479.

[5] *Id.* at 1291, 422 N.E.2d at 481.

[6] *Id.* at 1288 n.1, 422 N.E.2d at 480 n.1 (*citing* Dolan v. Board of Appeals of Chatham, 359 Mass. 699, 700-01, 270 N.E.2d 917, 918-19 (1971); Howland v. Acting Superintendent of Bldgs & Inspector of Bldgs of Cambridge, 328 Mass. 155, 159-60, 102 N.E.2d 423, 425-26 (1951); Spalke v. Board of Appeals of Plymouth, 7 Mass. App. Ct. 683, 389 N.E.2d 788 (1979)).

[7] *Id.* at 1287-88, 422 N.E.2d at 479.

[8] *Id.*

[9] 324 Mass. 440, 87 N.E.2d 9 (1949).

[10] 1981 Mass. App. Ct. Adv. Sh. at 1288, 422 N.E.2d at 479.

[11] *Id.* at 1289, 422 N.E.2d at 480.

frontage was sufficient to provide for the safety and access of the lot.[12] The 200 foot frontage requirement was found to have no rational relationship to any of the purposes which would justify the requirement.[13]

The Appeals Court, in an effort to provide guidance to local planning authorities, endorsed a balancing test for determining the validity of these types of zoning restrictions.[14] As stated in *Jenckes v. Building Commissioner of Brookline*,[15] the test is whether "[t]he injury to the owner of the isolated lot is so harsh and substantial in comparison with the trivial public benefit, if any, from application of the amendment to the lot, as to make that application confiscatory and an invalid taking of the owner's property not justified by the police power."[16]

§ 11.6. Zoning—Constructive Approval of Special Permit. During the 1981 *Survey* year, the Supreme Judicial Court reviewed an interpretation of Massachusetts zoning law regarding special permits. In *Building Inspector of Attleboro v. Attleboro Landfill, Inc.*,[1] the Court held that a zoning board's final action on a special permit application occurs when the decision of the board is filed with the town clerk.[2] The date of final action is important in special permit cases because, "failure by a special permit granting authority to take final action upon an application for a special permit within said ninety days following the date of a public hearing shall be deemed to be a grant of the permit applied for."[3] The opinion of the Court emphasizes that in some situations compliance with the exact form of a statute is necessary if rights are to be determined with finality.

In *Attleboro Land Fill*, the defendant appealed from a permanent injunction that prohibited him from continuing the operation of his sanitary landfill in the town of Attleboro.[4] The building inspector sought equitable relief, alleging that the defendant was operating without a special permit in violation of Attleboro's zoning ordinance.[5] The landfill operator's defense was that the board had constructively granted the special permit.[6] In fact, the board of appeals had voted to deny the application for the special permit within ninety days of the public hearing on the permit, but had failed to file its decision with the town clerk until after the ninety day period.[7] A resolu-

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[12] *Id.* at 1290-91, 422 N.E.2d at 481.
[13] *Id.* at 1291, 422 N.E.2d at 481.
[14] *Id.*
[15] 341 Mass. 162, 167 N.E.2d at 757 (1960).
[16] *Id.* at 166, 167 N.E.2d at 760.
§ 11.6. [1] 1981 Mass. Adv. Sh. 1653, 423 N.E.2d 1009.
[2] *Id.* at 1656, 423 N.E.2d at 1011.
[3] G.L. c. 40A, § 9.
[4] 1981 Mass. Adv. Sh. at 1653, 423 N.E.2d at 1010.
[5] *Id.*
[6] *Id.* at 1654, 423 N.E.2d at 1010.
[7] *Id.*

tion of when final action under General Laws chapter 40A section 9 occurred disposed of the controversy.

The Court's decision was based on three considerations. First, a reading of chapter 40A in its entirety strongly implies a duty of the board of appeals to file its decision with the city clerk.[8] Second, the appeals period would become indeterminate in duration without a filing of the board's decision because the appeals period commences with the filing of the decision with the clerk.[9] Such an unlimited appeals period would be contrary to appellate practice and legislative mandate.[10] The final, and perhaps most important, factor for the Court was its previous decision in *Selectmen of Pembroke v. R & P Realty Corp.*[11] In that case, the Court held that final action of a planning board in approving a subdivision control plan occurred upon the board's filing its decision with the city clerk.[12] Thus, the Court reversed the decision of the superior court and concluded that the city of Attleboro had constructively granted the special permit.[13]

§ 11.7. Variances—Requirement of Detailed Record by Zoning Board of Appeals—Removal of Conditions on Variance. During the *Survey* year, the Massachusetts courts considered two significant cases involving variances. A zoning variance is a form of administrative relief designed to function as an "escape hatch" from the literal application of zoning bylaws that would deny a landowner all beneficial use of his property.[1] A court reviewing a zoning board of appeal decision to grant such relief must proceed with caution, keeping in mind the concerns of landowners in the community who have chosen to obey the zoning bylaws although the return on their property also may have been diminished.[2]

In *Warren v. Board of Appeals of Amherst*,[3] the Supreme Judicial Court examined the Amherst board of appeals' decision to grant the defendant a variance from the minimum frontage requirement of the Amherst bylaw. The bylaw required that lots in the single family residential district maintain a minimum frontage of one hundred feet.[4] The property of the defendant previously was part of a larger parcel which, as a whole, satisfied the re-

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[8] *Id.* at 1655, 423 N.E.2d at 1011.

[9] *Id.* at 1655-56, 423 N.E.2d at 1011.

[10] *Id.* (*citing* Mass. R.A.P. 4, G.L. c. 41, § 80).

[11] 348 Mass. 120, 202 N.E.2d 409 (1964).

[12] *Id.* at 127, 202 N.E.2d at 413.

[13] 1981 Mass. Adv. Sh. at 1658, 423 N.E.2d at 1012.

§ 11.7. [1] *See generally* 3 R. ANDERSON, AMERICAN LAW OF ZONING § 18.01 et seq. (2d ed. 1977). Of course, the express condition for the grant of a permit needs to be met.

[2] *See generally* 3 R. ANDERSON, AMERICAN LAW OF ZONING § 18.42 et seq. (2d ed. 1977).

[3] 1981 Mass. Adv. Sh. 522, 416 N.E.2d 1382.

[4] *Id.* at 524, 416 N.E.2d at 1384.

quirement.[5] In anticipation of selling the lot as the site for a single family dwelling, the defendant sought a variance.[6] The frontage of the lot was two feet short of the required one-hundred feet.[7]

The zoning board of appeals granted the variance stating three reasons.[8] First, the lot's use for a single family dwelling clearly was the only appropriate use for the land and the denial of this use would render the land useless.[9] Second, severance of the lot from the larger conforming lot created peculiar conditions.[10] Third, the intent of the bylaw would be upheld and public good maintained by granting the variance.[11]

The variance was challenged by the plaintiff, owner of the adjoining property, in an appeal to the superior court.[12] The superior court referred the matter to a master who affirmed the zoning board's granting of the variance. The superior court affirmed the decision of the master.[13] The Appeals Court summarily reversed the superior court, ordering the variance annulled on the grounds that the zoning board exceeded its authority.[14]

The Supreme Judicial Court examined two issues in affirming the decision of the Appeals Court. The first issue concerned the application of the grandfather clause exemption allowed pursuant to chapter 40A, section 6 of the General Laws. The Court refused to consider this issue owing to the inadequacy of the record before it: the text of the zoning bylaw was not part of the lower court record and a zoning bylaw is not an appropriate subject for judicial notice.[15] The Court also refused to consider the grandfather clause exemption because the possibility of the exemption was never raised before the board of appeals, the required starting point for such an exemption.[16] The Court's refusal to decide the grandfather clause issue was based upon the premise that the use is permitted as of right using a grandfather clause analysis, thus consideration by a reviewing court is appropriate only after the proper presentation and decision by the local board of zoning appeals.[17]

The second issue involved the validity of the variance granted by the board. The Court stated that a zoning board's granting of a valid variance

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[5] *Id.* at 532, 416 N.E.2d at 1388.
[6] *Id.* at 524, 416 N.E.2d at 1384.
[7] *Id.*
[8] *Id.* at 524-25, 416 N.E.2d at 1384-85.
[9] *Id.* at 525, 416 N.E.2d at 1385.
[10] *Id.*
[11] *Id.*
[12] *Id.* at 526, 416 N.E.2d at 1385.
[13] *Id.*
[14] *Id.*
[15] *Id.* at 529, 416 N.E.2d at 1386-87.
[16] *Id.* at 529, 416 N.E.2d at 1387.
[17] *Id.* at 530, 416 N.E.2d at 1388.

requires a detailed record of the board's proceedings and a decision stating the reasons supporting the decision, not merely a recital of the statutory conditions essential to the granting of a variance.[18] In the present case, the board described the size, shape, and topography of the lot as required by the statute, but failed to explain adequately the effect of the variance on the zoning district.[19] The mere fact that the only deficiency connected with the lot concerned the frontage requirement is not enough to uphold the variance. The creation of the subject lot from a conforming parcel of land does not, in itself, create a substantial hardship of the kind that would permit a valid variance. Thus, challenged variances will be sustained only if the reviewing court finds that the zoning board has provided a detailed record of the procedures followed and factors considered by the local board in granting a variance.

The second case, *Huntington v. Zoning Board of Appeals of Hadley*,[20] involved a determination of the proper procedure for removing a condition from a zoning variance. In *Huntington*, the plaintiff, an abutting landowner to the subject property, sought judicial review of a town of Hadley zoning board of appeals decision granting the removal of a condition from an existing zoning variance.[21] The defendant, owner of the subject property, operated a precast concrete manufacturing business.[22] This use was prohibited under the Hadley zoning bylaw but the defendant was allowed to continue operating his business as a nonconforming use existing prior to the adoption of the town's zoning bylaws.[23]

In 1973, the defendant petitioned the board of appeals for a variance from the zoning bylaw because he was concerned that the expansion of his business operations had exceeded the nonconforming use exemption.[24] The board granted the variance subject to several conditions. The conditions restricted the term of the variance to the life of the defendant, and prohibited any transfer of the variance to another party.[25] The validity of the 1973 variance was not challenged by any parties to this action.

The defendant petitioned the board in 1976 for a removal of the restrictions on the duration and transferability of the variance.[26] The board removed the condition, citing the substantial hardship on the defendant's estate upon his death when the enforcement of the condition would render

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[18] *Id.* at 531, 416 N.E.2d at 1388.
[19] *Id.* at 532, 416 N.E.2d at 1388.
[20] 1981 Mass. App. Ct. Adv. Sh. 1975, 428 N.E.2d 826.
[21] *Id.* at 1975, 428 N.E.2d at 827.
[22] *Id.* at 1975-76, 428 N.E.2d at 827.
[23] *Id.* at 1976, 428 N.E.2d at 827.
[24] *Id.*
[25] *Id.*
[26] *Id.*

the specialized manufacturing operation useless, causing a period of uncertainty and lost income for the defendant's family.[27] The board concluded that the removal of the condition would cause no detriment to the public and approved the removal.[28]

The plaintiff, as an abutting landowner, brought an action against the board of appeals and the defendant alleging that the board had exceeded its authority in allowing the modification of the 1973 variance.[29] The plaintiff claimed that the board's action represented the grant of a new variance and the statutory requirements for a new variance had not been satisfied.[30] The trial court, however, found the statutory requirements for a variance were satisfied and that, as a practical matter, the board's action represented a modification of the variance rather than a new grant.[31]

Reviewing the decision of the trial court, the Appeals Court found it unnecessary to evaluate the controversy in terms of whether the board of appeals had granted a modification of an existing variance or the granting of a new variance. The court "analyzed [the board's action] in terms of the nature and effect of the condition itself and in light of the statutory concerns relevant to the grant of a variance."[32] The court emphasized that the applicable section of the Zoning Act allows variances based on circumstances relating to the "soil conditions, shape, or topography" of the land or structures and not upon circumstances resulting in personal hardships to the landowner.[33] A zoning variance applies to the land only and not to the land's current owner. The court held that the condition imposed by the 1973 variance was essentially personal, so its removal would be scrutinized to determine whether the board had abused its discretion.[34]

The court held the removal was within the discretionary power of the board.[35] The record before the Court did not indicate any legitimate expectation interests of the plaintiff which were ignored by the board of appeals.[36] The Court concluded that the "removal of the condition is in conformity with the goal that the zoning board law be applied to further, rather than hinder, the stabilization of land use."[37]

The Appeals Court correctly decided to refuse to categorize the board's action as either a modification of an existing variance or the granting of a

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[27] *Id.* at 1977, 428 N.E.2d at 827-28.
[28] *Id.* at 1977, 428 N.E.2d at 828.
[29] *Id.* at 1978, 428 N.E.2d at 828.
[30] *Id.*
[31] *Id.*
[32] *Id.* at 1979-80, 428 N.E.2d at 824.
[33] *Id.*
[34] *Id.* at 1984, 428 N.E.2d at 831.
[35] *Id.* at 1984-85, 428 N.E.2d at 832.
[36] *Id.* at 1985, 428 N.E.2d at 832.
[37] *Id.* at 1986, 428 N.E.2d at 832.

new variance. The Court's reasoning emphasizes that the crucial aspect for this type of inquiry is not in determining the type of administrative act performed by the board of appeals, but rather is an analysis of the substance of the variance term which the parties seek to alter.

§ 11.8. Variances and Special Permits—Requirements for Reconsideration. Section 16 of the new Zoning Act[1] contains a major revision of the provisions concerning reconsideration of an application for a variance or special permit that has been acted upon unfavorably. Under its counterpart, § 20 in the former Zoning Enabling Act,[2] a matter that has been decided unfavorably could not be reconsidered by the board of appeals within two years from the date of the decision, except when reconsideration was consented to by all but one of the members of the planning board. Under the more demanding provisions of the new act, there is an additional requirement that the permit-granting authority must make a finding of "specific and material changes in the conditions upon which the previous unfavorable action was based"[3] before such reconsideration can take place.

In *Ranney v. Board of Appeals of Nantucket*,[4] the Appeals Court addressed for the first time the question of what constitutes a sufficiently revised application to justify second review within the two-year moratorium period.

On March 28, 1978, an application was made to the board of appeals of Nantucket for a special permit to build an addition to a motel.[5] The board denied the request, and the applicant brought an action to annul the board's decision and order it to issue a permit.[6] In addition to appealing this decision, the applicant filed an altered application with the board of appeals on June 7, 1978.[7] On June 26, in compliance with the requirements of chapter

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§ 11.8. [1] G.L. c. 40A, § 16, as appearing in St. 1975, c. 808, § 3.

[2] G.L. c. 40A, § 20.

[3] G.L. c. 40A, § 16, as appearing in St. 1975, c. 808, § 3, reads, in part: "No appeal, application or petition which has been unfavorably and finally acted upon by the special permit granting or permit granting authority shall be acted favorably upon within two years after the date of final unfavorable action unless said special permit granting authority or permit granting authority finds, by a unanimous vote of a board of three members or by a vote of four members of a board of five members or two-thirds vote of a board of more than five members, specific and material changes in the conditions upon which the previous unfavorable action was based, and describes such changes in the record of its proceedings, and unless all but one of the members of the planning board consents thereto and after notice is given to the parties in interest of the time and place of the proceedings when the question of such consent will be considered."

[4] 1981 Mass. App. Ct. Adv. Sh. 12, 414 N.E.2d 373.

[5] *Id.* at 13, 414 N.E.2d at 374.

[6] *Id.*

[7] *Id.*

40A, section 16,[8] the board of appeals approved, after unanimous consent by the planning board, reconsideration of the application and made a determination that the second application contained specific and material changes.[9] A month later, on July 27, the board of appeals granted the special permit.[10] A group of neighbors appealed this action, claiming that the grant of the permit was beyond the board's authority.[11]

The Appeals Court quickly rejected the neighbors' claim that the board had failed to give notice to interested parties of the proceedings at which it considered allowing the second application.[12] Not only did the record of the trial court contain evidence that the notice requirements of section 16[13] were met through mail and publication, but the neighbors were in attendance and well-prepared at the meeting, negating any claim of prejudice even if notice had been deficient.[14]

As a backdrop to its discussion of what constitutes "specific and material changes," the court set forth the countervailing policy considerations underlying statutory provisions such as section 16. These provisions serve to ensure the finality of administrative decisions, thereby protecting parties from repeatedly having to contest the same issues, while also granting the local board some flexibility to reconsider a request when conditions have changed.[15] The court also emphasized that it is principally a function of the local board to determine whether the conditions have changed sufficiently and that such decisions, including the board's discretionary power to give weight to "differences which in an absolute sense are relatively minor,"[16] should be given deference by the reviewing court.[17]

Since an application for a project that is materially different from an earlier one has never been considered a reapplication or come under the restrictions of section 16 or its predecessor in the Zoning Enabling Act, the court reasoned that the changes governed by section 16 must necessarily involve something less than radical differences.[18] It then addressed those changes cited by the board:

1. revision of the outdoor lighting plan so that all lights were flush with the ceiling and elimination of direct lights or fixtures which might be visible in any direction from an elevation twenty feet above the level of the parking area;

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[8] *See* note 3, *supra*.
[9] 1981 Mass. App. Ct. Adv. Sh. at 13, 414 N.E.2d at 375.
[10] *Id.*
[11] *Id.* at 13-14, 414 N.E.2d at 375.
[12] *Id.* at 14, 414 N.E.2d at 375.
[13] *See* note 3, *supra*.
[14] 1981 Mass. App. Ct. Adv. Sh. at 14-15, 414 N.E.2d at 375.
[15] *Id.* at 15, 414 N.E.2d at 375-76.
[16] *Id.* at 16, 414 N.E.2d at 376.
[17] *Id.*
[18] *Id.* at 16-17, 414 N.E.2d at 376.

2. installation of blackout drapes in the windows of the proposed addition;
3. installation of sound insulating materials in the exterior walls of the proposed addition so as to suppress noise;
4. landscaping of parking area along its westerly boundary with an eight foot privet hedge.[19]

Each responded to a specific ground of refusal by the board on the initial application.[20] The court noted that although each change, taken separately, had a "cosmetic quality," the total result was a less obtrusive building, a clear response to the board's earlier objections.[21] The court also accepted as a valid change of condition the board's determination that it had erred in its conclusion on the first application that the proposed addition would adversely affect traffic on the street and the value of residential properties.[22] In doing so, the court rejected the neighbors' contention that a hearing on a second application should be limited to the evidence received at the hearing on the first. The trial court's findings that the reapplication contained "significant and substantial" revisions were thus affirmed.[23]

The court also addressed another objection by the neighbors regarding a deferred decision on the roof color that was brought in a third action.[24] A condition of the special permit granted by the board had been the requirement that the roof have suitable covering such as shingles and that the color of the covering be approved by the city's Historic Districts Commission and the board of appeals.[25] Final approval for the color was given in April of 1979, nine months after the initial granting of the permit.[26]

The neighbors argued that the conditional language in the grant of a special permit required a further determination before the permit could issue, thereby rendering the board's decision invalid.[27] The court rejected this argument and concluded that the board had made a valid present grant of the permit, simply reserving to itself review of compliance with the conditions.[28] Furthermore, the criteria for judgment and the color choices were already before the board and had been discussed at the public hearing preceding the grant of the permit.[29] The court therefore affirmed the trial court's finding that res judicata barred this action.

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[19] *Id.* at 17, 414 N.E.2d at 376.
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.* at 18, 414 N.E.2d at 377.
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.* at 19, 414 N.E.2d at 377.

This decision provides the first guidance as to what the court will accept as "material and significant change" sufficient to justify reapplication within the two-year moratorium period of chapter 40A, section 16. It is clear that the change need not be so drastic that it amounts to a change in the project. Changes that address specific objections that were grounds for the first denial of the application would be considered material, particularly if they contribute to an overall lessening of the project's objectionable impact. Additionally, the board of appeals is not bound to accept the assumptions upon which it based its earlier unfavorable action if it finds that they resulted from erroneous information. Although the additional requirement of section 16 makes the process of obtaining reconsideration of an application more difficult, this provision of the new Zoning Act, as interpreted by the court, seems to reflect the desired goals of administrative finality and flexibility when the situation warrants it.

§ 11.9. Subdivision Control—Cluster Zoning. The case of *Owens v. Board of Appeals of Belmont*[1] addressed the issues of cluster zoning[2] and

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§ 11.9. [1] 1981 Mass. App. Ct. Adv. Sh. 731, 418 N.E.2d 635. This case is also discussed in § 11.3 *supra*, on the issue of Person Aggrieved.

[2] G.L. c. 40A, § 2 specifies the provisions that are to be included in a special permit for cluster development:

> Special permits authorizing cluster development shall provide that open land for cluster development shall be conveyed to the city or town and accepted by it for park or open space use, or be conveyed to a nonprofit organization, the principal purpose of which is the conservation of open space, or be conveyed to a corporation or trust owned or to be owned by the owners of lots or residential units within the land.

G.L. c. 40A, § 9 specifies additional provisions, and definitions relating to cluster zoning:

> Zoning ordinances or by-laws shall provide for specific types of uses which shall only be permitted in specified districts upon the issuance of a special permit. Special permits may be issued only for uses which are in harmony with the general purpose and intent of the ordinance or by-law, and shall be subject to general or specific provisions set forth therein; and such permits may also impose conditions, safeguards and limitations on time or use.
>
> Zoning ordinances or by-laws may also provide for special permits authorizing increases in the permissible density of population or intensity of a particular use in a proposed development; provided that the petitioner or applicant shall, as a condition for the grant of said permit, provide certain open space, housing for persons of low or moderate income, traffic or pedestrian improvements, or other amenities. Such zoning ordinances or by-laws shall state the specific improvements or amenities or locations of proposed uses for which the special permits shall be granted, and the maximum increases in density of population or intensity of use which may be authorized by such special permits.
>
> Zoning ordinances or by-laws may provide that special permits may be granted for multi-family residential use in nonresidentially zoned areas where the public good would be served and after a finding by the special permit granting authority, that such nonresidentially zoned area would not be adversely affected by such a residential use,

standing.[3] The Board of Appeals had authorized the construction of a multi-family cluster development in an area zoned for single family residences.[4] The plaintiff contended that the special permit issued by the Board was invalid because "the ordinance which allows the construction of multi-family developments conflicts with and is overridden by the general use provisions which call for single family residence in this zone."[5] The ordinance as amended allows "for any tract of land in a single residence district to be developed as a cluster development."[6]

The Appeals Court noted that the plaintiff's reading of the ordinance essentially limits the Board of Appeals to granting permits for projects consisting only of single-family residences clustered together.[7] The court stated that such an interpretation "would render the [cluster zoning] amendment largely superfluous and effectively nullify the purpose for which it was enacted."[8] The Appeals Court allowed the permits to stand.[9]

The purpose of cluster zoning is to maintain the same population density as if the regular zoning ordinance were followed, except that individual private open areas are decreased and pooled or common open areas are in-

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and that permitted uses in such a zone are not noxious to a multi-family use.

Zoning ordinances or by-laws may also provide that cluster developments or planned unit developments shall be permitted upon the issuance of a special permit.

"Cluster development" means a residential development in which the buildings and accessory uses are clustered together into one or more groups separated from adjacent property and other groups within the development by intervening open land. A cluster development shall be permitted only on a plot of land of such minimum size as a zoning ordinance or by-law may specify which is divided into building lots with dimensional control, density and use restrictions of such building lots varying from those otherwise permitted by the ordinance or by-law and open land. Such open land when added to the building lots shall be at least equal in area to the land area required by the ordinance or by-law for the total number of units or buildings contemplated in the development. Such open land shall either be conveyed to the city or town and accepted by it for park or open space use, or be conveyed to a non-profit organization the principal purpose of which is the conservation of open space, or to be conveyed to a corporation or trust owned or to be owned by the owners of lots or residential units within the plot. If such a corporation or trust is utilized, ownership thereof shall pass with conveyances of the lots or residential units. In any case where such land is not conveyed to the city or town, a restriction enforceable by the city or town shall be recorded providing that such land shall be kept in an open or natural state and not be built for residential use or developed for accessory uses such as parking or roadway.

[3] *See* § 11.3 *supra* for a discussion of the standing issue.

[4] 1981 Mass. App. Ct. Adv. Sh. at 732, 418 N.E.2d at 636.

[5] *Id.* at 732, 418 N.E.2d at 637.

[6] *Id.* The Cluster Development Amendment to the Belmont ordinance was enacted pursuant to the authority conferred by c. 40A, §§ 2 and 9. *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.* at 733, 418 N.E.2d at 638.

creased.[10] The common open areas can be secured by their conveyance to the municipality or through joint ownership by all the residents in the development with attached covenants. Joint ownership is contingent upon ownership of a parcel in the development. When common open areas are given to the municipality, they usually are converted to parks, recreation areas, sites for school buildings, fire stations or the like. If the common areas are owned jointly, the area set aside usually is green or recreation areas for the exclusive use of those in the development. Cluster zoning, as an alternative to large lot zoning, is used by many municipalities to control density.[11]

In *Owens*, the plaintiff also asserted that the permit granted to the real estate developer should be invalidated because the Cluster Zoning Amendment to the zoning bylaw fails to provide adequate standards to guide decision making by the Board of Appeals.[12] The Appeals Court disagreed, citing the Cluster Zoning Amendment as having "prerequisites which are more stringent than those mandated by the Zoning Enabling Act."[13] The amendment included strict regulations regarding dimensions, the number of dwelling units, and requirements for open space.[14] In essence, the Appeals Court found that the Board of Appeals had adequate guidance in decision making, and thus upheld the permit.[15]

The use of cluster zoning involves advantages and disadvantages. The better sites may be used for building, while hilly or marshy sections can be set aside for open areas. A developer also will not have to invest as much for paved streets, sidewalks, utilities, and other services, because the houses are not spread out. One of the disadvantages may be that a developer must comply with the cluster zoning regulations. Usually such a development will receive extensive review and require careful supervision by the Planning Board.[16]

A problem for the residents of a cluster development concerns the proper use and maintenance of common open areas. Covenants to promote the maintenance and proper use of the common areas may be too restrictive and others not restrictive enough. In the case of *Byrne v. Perry*,[17] the defendant had incorporated a portion of restricted land, owned in trust, to form a

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[10] 2 N. WILLIAMS, AMERICAN LAND PLANNING LAW § 47.01.

[11] *See* Appeal of Kit-Mar Builders, Inc., 439 Pa. 466, 268 A.2d 763 (1970). *See also* 2 N. WILLIAMS, AMERICAN LAND PLANNING LAW § 47.03.

[12] Owen v. Board of Appeals of Belmont, 1981 Mass. App. Ct. Adv. Sh. at 732, 418 N.E.2d at 638.

[13] *Id.* at 733, 418 N.E.2d at 638.

[14] *Id.*

[15] *Id.*

[16] 2 N. WILLIAMS, AMERICAN LAND PLANNING LAW § 47.01.

[17] 1981 Mass. App. Ct. Adv. Sh. 1202, 421 N.E.2d 1248.

buildable lot conforming to the local zoning ordinance. The area known as the "Green Belt" was to stay open in its natural state.[18] No structures were to be built upon the land. Provisions were made for a dirt driveway to remain and wells, septic systems, and underground utilities to be installed provided the "Green Belt" be restored to its natural condition. The Appeals Court found that the defendant was not in violation of this agreement because the dwelling to be built was to be entirely on the unrestricted area of the lot.[19] The court noted that the agreement prohibited construction or physical alteration except as allowed, but did not prohibit such abstract uses as the inclusion of "Green Belt" space into a lot to satisfy zoning by-law requirements.[20]

Although the open area in *Byrne v. Perry* was not an open area in a cluster development, one can see how the open areas in a cluster development could be analogized to the "Green Belt." The problem with giving up a private open area to acquire greater use of public open areas is that the loss of control and foreseeability of possible use can be troublesome. The construction of a trust to manage the land should include exclusive power to regulate the uses, both concrete and abstract. Provisions must be established for entering and leaving the association or the trust. Provisions should be included for maintenance of the land either through an annual assessment or user fees. With these considerations and others, a major problem arises. The responsibility for establishing the trust or association for the open area rests with the developer if he will sell the lots. The consequences of the actions allowed by the trust or association, however, do not affect the developer. Thus, the developer has no incentive to consider the long range consequences except those the developer foresees as affecting the immediate sales prospects. Thus, the permit granting authority must evaluate carefully a developer's request for a special cluster zoning permit.

§ 11.10. Subdivision Control—Adequacy of adjoining public ways. A stated purpose of the Subdivision Control Law is to empower the Planning Board to enforce the law "with due regard for the provision of adequate access to all of the lots in a subdivision by ways that will be safe and convenient for travel; for lessening congestion in such ways and in the adjacent public ways."[1] In *North Landers Corp. v. Planning Board of Falmouth*,[2] the issue was whether the Board could deny approval of a subdivision plan

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[18] *Id.* at 1202, 421 N.E.2d at 1249.
[19] *Id.*
[20] *Id.*
§ 11.10. [1] G.L. c. 41, § 81M.
[2] 1981 Mass. Adv. Sh. 264, 416 N.E.2d 934.

for the reason that the public way leading to the subdivision was inadequate to handle the estimated traffic increase created by the subdivision. The Court also addressed the question of whether the words "adequate access" provide a definite standard for real estate developers.

In *North Landers*, the plaintiff filed a preliminary plan for a subdivision.[3] Before the plaintiff received approval of that plan, a definitive plan was submitted for approval.[4] The definitive plan, like the preliminary plan, was not approved.[5] The board cited inadequate access of the subdivision roads to a public way, the inadequacy of a certain public way, and other reasons.[6]

The Supreme Judicial Court disagreed with the position of North Landers and held that a planning board may consider the adequacy of public ways outside the subdivision when reviewing a proposed subdivision.[7] The Court found that the statute, section 81M of chapter 41, clearly states that a planning board's duty is to lessen congestion in adjacent public ways, and coordinate the ways in the subdivision with the public ways.[8] The Court also cited numerous cases in other jurisdictions with subdivision laws similar to chapter 41 section 81M, which agree that the condition of adjacent public ways must be considered.[9]

The Court next addressed North Landers' contention that the Falmouth regulation requiring adequate access is vague, failing to give notice of what is required of prospective developers. The test for impermissible vagueness in a regulation was announced in *Castle Estates, Inc. v. Park & Planning Board of Medfield*.[10] All subdivision regulations must be "comprehensive, reasonably definite, and carefully drafted, so that owners may know in advance what is required of them."[11]

The Court, in determining whether this standard was met, first analyzed the phrase "adequate access" to determine if it constituted an indefinite term. The Court's reading of the regulation found the denotation of "adequate access" a vague term of judgment and degree.[12] The Court stated,

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[3] *Id.* at 265, 416 N.E.2d at 936.

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.* at 268, 416 N.E.2d at 938.

[8] *Id.* at 269, 416 N.E.2d at 938.

[9] *Id.* at 270, 416 N.E.2d at 938 (citing Buena Park v. Boyar, 186 Cal. App.2d 61 (1960); Nicoli v. Planning & Zoning Commission of Easton, 171 Conn. 89, 96 (1976); Arrowhead Dev. Co. v. Livingston County Rd. Comm'n, 92 Mich. App. 31 (1979); *In re* Pearson Kent Corp. v. Bear, 28 N.Y.2d 396, 399 (1971)).

[10] 344 Mass. 329, 182 N.E.2d 540 (1962).

[11] *Id.* at 334, 182 N.E.2d at 545.

[12] 1981 Mass. Adv. Sh. at 272, 416 N.E.2d at 939 (citing Freund, *The Use of Indefinite Terms in Statutes*, 30 YALE L.J. 437, 438 (1921)).

however, that the regulation must be considered in its entirety.[13] Because the local regulation draws from the language of chapter 41 section 81M, the Court examined subdivision control provisions to determine whether they define "adequate access." The term "adequate access" is common to subdivision control laws and has been applied with little difficulty in many cases. The Court emphasized the New Jersey case of *Mansfield & Suett, Inc. v. West Orange*,[14] as the seminal case for understanding the concept of access. The New Jersey Supreme Court there stated that among the goals of the New Jersey Subdivision Control Law was "the free flow of traffic with a minimum of hazard [depending] upon the number, location and width of streets."[15] The Massachusetts high Court also cited Massachusetts cases which define adequate access as "requiring a way adequate for vehicular traffic to subdivision lots,"[16] and "efficient access to each subdivision lot, for purposes of safety, convenience, and welfare."[17] Thus, the Supreme Judicial Court concluded the term "adequate access" was not vague and indefinite, and was one commonly understood.[18]

The Supreme Judicial Court then determined that the language of the entire regulation was not so broad as to fail to guide prospective developers.[19] The Court stated the *Castle Estates* test allowed for some flexibility to allow local boards to make case-by-case determinations.[20] After citing a series of cases invoking the *Castle Estates* test, including cases both upholding the regulation and striking down the regulation of subdivision plans, the Court determined that if the plan were rejected on grounds mentioned in the regulation then there was adequate notice.[21] The Court found the standard offended only when reasons not specified in the regulations are used to deny approval to a subdivision plan.[22]

The case was remanded, however, because the Court found both parties had failed to comply with statutory procedures: North Landers filed a definitive plan before rejection of its preliminary plan, and the Planning Board failed to detail how Sam Turner Road would not be adequate.

The Court in *North Landers* allowed planning boards to promulgate general requirements for regulation of subdivisions. The Planning Board

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[13] *Id.*

[14] 120 N.J.L. 145, 198 A. 225 (1938).

[15] *Id.* at 150.

[16] 1981 Mass. Adv. Sh. at 273-74, 416 N.E.2d at 940 (citing Rettig v. Planning Bd. of Rowley, 332 Mass. 476, 126 N.E.2d 104 (1955)).

[17] 1981 Mass. Adv. Sh. at 274, 416 N.E.2d at 940 (citing Gifford v. Planning Board of Nantucket, 376 Mass. 801, 383 N.E.2d 1123 (1978)).

[18] *Id.* at 274, 416 N.E.2d at 941.

[19] *Id.* at 275, 416 N.E.2d at 941.

[20] *Id.*

[21] *Id.* at 276, 416 N.E.2d at 942.

[22] *Id.*

must, however, give specific reasons for the denial of a subdivision plan. The procedure of filing two plans and of mandating specific reasons for denial of a plan is required to generate complete discussion between developers and boards. Thus, while a planning board may consider the effect a subdivision may have on the surrounding area and deny the plan on a number of health and safety reasons, those reasons must state in concrete terms the deficiency of the plan, thus providing for a fair decision.

§ 11.11. Historic Districts Act—Approval of Construction. During the 1981 *Survey* year, the Appeals Court reviewed the procedure utilized by a local government in denying a construction permit to a landowner holding property in an area regulated by the Historic Districts Act.[1] The Act was enacted in 1960 to provide for the establishment of historic zones throughout cities and towns in the Commonwealth to promote historic preservation.[2] The landowner, in *Sleeper v. Old King's Highway Regional Historic District Commission*,[3] sought the reversal of an historic district committee's denial of a permit to allow the erection of a sixty-eight foot radio antenna in the backyard of the landowner's home. The land was located in the Old King's Highway Regional Historic District, which is covered by the Act.[4]

The plaintiff landowner was an amateur radio operator attempting to facilitate his hobby by erecting a radio tower.[5] Many of the surrounding homes in the contemporary subdivision were equipped with roof mounted radio and television antennas.[6] Telephone and utility poles were present in the historic district.[7] Although the plaintiff's home was in the district, the home was of no historic significance.[8]

Section six of the Act states that no structure may be erected or altered in the historic district without the issuance of a certificate of appropriateness by the local historic district committee. In *Sleeper*, the local committee denied the certificate.[9] This denial was affirmed by the regional commission, the district court and finally the Appeals Court.[10]

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§ 11.11. [1] *See* G.L. c. 40C.

[2] *See* Huber, *Zoning and Land Use*, 1960 ANN. SURV. MASS. LAW § 13.13.

[3] 1981 Mass. App. Ct. Adv. Sh. 609, 417 N.E.2d 987.

[4] *Id.* at 610, 417 N.E.2d at 988.

[5] *Id.*

[6] *Id.* at 611, 417 N.E.2d at 988.

[7] *Id.*

[8] *Id.* at 610, 417 N.E.2d at 988.

[9] *Id.*

[10] *Id.* After the denial of a certificate of appropriateness, the landowner pursuant to G.L. c. 40C, § 11 may appeal to the regional historic district commission, whose decision may be appealed to the superior court pursuant to G.L. c. 40C, § 12A.

The committee's finding that the radio tower was grossly inappropriate for a historic district, the plaintiff argued, was erroneous, because a late twentieth century radio tower was appropriate for a late twentieth century neighborhood. The Appeals Court rejected this argument, stating that the tower's effect on the historic district as a whole is the proper measure of appropriateness.[11] The denial promoted the aesthetic "tradition of Barnstable County as it existed in the early days of Cape Cod," a purpose of the Act.[12]

The local historic district committee is authorized under section 10 of the Act to grant hardship exceptions. The court held that, because the plaintiff was pursuing only a hobby, the exception would not apply as a matter of law.[13] The court also rejected the claim of the plaintiff that the statute's criteria for determining appropriateness were impermissibly vague.[14]

The plaintiff was equally unsuccessful in his arguments based on federal law. The court agreed that the Federal Communications Act of 1934[15] preempts local regulation of radio signal transmission. The regulation of antenna height, however, was held to be a local concern in conflict with no federal law.[16] The effect of the Act on commerce was determined not so "direct and positive" as to raise a commerce clause issue.[17] The plaintiff's First Amendment argument was summarily rejected, because the court viewed the Act as a valid time, manner and place restriction.[18] The court gave similar treatment to the plaintiff's taking, due process clause argument.[19]

§ 11.12. Boards of Appeals—Relation to Planning Boards. Comprehensive zoning ordinances enacted by municipalities are adopted in large part to accomplish the separation of incompatible uses, the avoidance of overcrowding and the prevention of irregular real estate development.[1] The locality is, at least initially, divided into districts in which business, residential, and industrial uses are permitted. Standards are established for the number of dwellings, square footage, set back, and frontage. Permit procedures are instituted for such irregularities as the removal of gravel or soil.

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[11] *Id.* at 611, 417 N.E.2d at 989.

[12] *Id.* at 611-12, 417 N.E.2d at 988.

[13] *Id.* at 612-13, 417 N.E.2d at 989.

[14] *Id.* at 613, 417 N.E.2d at 990. In the words of the court: "[a] committee is to consider the historical value and significance of the structure, the general design, arrangement, texture, material, color, the setting, and immediate surroundings, with a view toward avoiding exterior effects 'obviously incongruous to the purposes set forth in this act.' " *Id.*

[15] 47 U.S.C. §§ 151-609 (1976).

[16] 1981 Mass. App. Ct. Adv. Sh. at 613-14, 417 N.E.2d at 990.

[17] *Id.* at 614, 417 N.E.2d at 990.

[18] *Id.*

[19] *Id.*

§ 11.12. [1] 4 R. ANDERSON, AMERICAN LAW OF ZONING § 23.03 (2d ed. 1977).

Zoning was first adopted based upon the conception that development would be lot-by-lot. Subdivision control was instituted for the proper development of an area within the locality. The objectives of subdivision control are to protect the community from imperfect development.[2] Subdivision control seeks to guide the planning of streets, to guarantee open space, and to provide for essential public needs.[3] Zoning regulations and subdivision controls are administered by separate boards and authorized by separate enabling acts. Because zoning regulations and subdivision controls are intended to implement a common plan for community development they must work in concert, not at cross purposes.[4]

In *Arrigo v. Planning Board of Franklin*,[5] the Appeals Court examined the differing duties of the Planning Board and the Zoning Board of Appeals. In this case the defendant developer, after selling a number of lots, held two lots, one with deficient frontage, the other with adequate frontage.[6] The defendant developer, in order to build on the deficient lot, applied for a variance.[7] Simultaneously, the developer submitted a plan which would govern only the two lots to the Planning Board, also a defendant in this action.[8] The requested variance was granted by the Zoning Board and the subdivision plan was approved by the Planning Board.[9] The decisions of both were reversed by the superior court.[10]

The Appeals Court affirmed the reversal of the board of appeals' decision granting a variance.[11] The Appeals Court stated "there were no conditions especially affecting the land in question . . . and that any hardship was purely financial and was of the [defendant developer's] own making."[12] The defendants contended that the deviation from the frontage requirement was *de minimis*. The Appeals Court, relying on *Warren v. Board of Appeals of Amherst*,[13] rejected this position.[14] In *Warren*, a variance granted for a two percent deficiency from the frontage requirement was reversed because the requirements set forth in chapter 40A section 10 had not been satisfied.[15]

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[2] *Id.*
[3] *Id.*
[4] *Id.* at § 23.20.
[5] 1981 Mass. App. Ct. Adv. Sh. 2101, 429 N.E.2d 355.
[6] *Id.* at 2102, 429 N.E.2d at 358.
[7] *Id.*
[8] *Id.*
[9] *Id.* at 2102-03, 429 N.E.2d at 358.
[10] *Id.* at 2102, 429 N.E.2d at 358.
[11] *Id.* at 2103, 429 N.E.2d at 358.
[12] *Id.*
[13] 1981 Mass. Adv. Sh. 522, 416 N.E.2d 1382.
[14] 1981 Mass. App. Ct. Adv. Sh. at 2103, 429 N.E.2d at 358.
[15] 1981 Mass. Adv. Sh. at 533, 416 N.E.2d at 1388-89.

The Appeals Court then addressed the lower court's reversal of the Planning Board's decision. The Board had decided to waive strict compliance with the frontage requirement because the defendant developer might put a dense development of eight houses in the rural area.[16] Section 81R of chapter 41, allows a planning board "in any particular case, where such action is in the public interest and not inconsistent with the intent and purpose of the [s]ubdivision [c]ontrol [l]aw, [to] waive strict compliance with its rules and regulations and with the frontage or access requirements of said law. . . ."

The Appeals Court noted the confusion over the words "said law."[17] The defendants argued that the words refer to the Subdivision Control Law.[18] The defendants noted that the Planning Board had not adopted any regulations and they need only the minimum twenty foot frontage requirement of the Subdivision Control Law.[19] Thus the defendants argued that approval was a matter of right. The plaintiff in turn argued that "said law" refers to the twenty-foot minimum specified in chapter 41 section 81L. The plaintiff states "the Planning Board has no power to waive the specified frontage [because] it is a requirement not of the Subdivision Control Law but of the Zoning by-law."[20] The plaintiff noted that a Planning Board cannot grant a variance,[21] and cannot waive strict compliance with the frontage requirement.[22]

The Appeals Court held that chapter 41 section 81L requires a subdivision to have the frontage requirement set forth in the local zoning bylaw, but absent any such local zoning bylaw, the twenty foot requirement applies.[23] The Court noted that chapter 41 section 81Q precludes the Planning Board from imposing more stringent requirements or requirements independent of the zoning by-law.[24] Because the defendant developers' plan did not comply with the zoning by-law, the defendants were not entitled as a matter of right to approval of their plan.

The Court stated that persons in the position of the defendant developer would be required to obtain two independent approvals, one from the Planning Board and one from the Zoning Board.[25] The Planning Board could waive frontage requirements under chapter 41 section 81R. The Board of

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[16] 1981 Mass. App. Ct. Adv. Sh. at 2103, 429 N.E.2d at 359.
[17] *Id.* at 2104, 429 N.E.2d at 359.
[18] *Id.*
[19] *Id.* (relying on G.L. c. 41, § 81L).
[20] *Id.* at 2105, 429 N.E.2d at 359.
[21] *Id.* (relying on G.L. c. 40A, § 10).
[22] *Id.*
[23] *Id.* at 2105, 429 N.E.2d at 360.
[24] *Id.* at 2105-06, 429 N.E.2d at 360.
[25] *Id.* at 2107, 429 N.E.2d at 360.

Appeals could grant a variance under chapter 40A section 10. These approvals would serve different purposes. In the court's view, approval of the plan by the Planning Board would give marketability to the lots through recordation, while a variance would allow the lots to be built upon.[26]

The Appeals Court determined that the defendant developer needed a waiver of strict compliance by the Planning Board.[27] The Appeals Court found the actions of the Board to be in compliance with chapter 41 section 81R.[28] The Planning Board determined the best interests of the public would be served if the plan were approved. Lacking any evidence of a different motivation, the Court would uphold the Planning Board's approval of the waiver. The decision of the Court permitted the classification of the lots as a subdivision, but no construction was permitted on the deficient lot for lack of a proper variance.[29]

Another case in which the Appeals Court defined the powers of a Planning Board vis-a-vis to a Board of Appeals was in *Planning Board of Easton v. Koening*.[30] In *Koening*, the Planning Board sought to overturn a Board of Appeals grant of a building permit to a defendant developer.[31] The Planning Board refused to release the developer from certain covenants regarding ways and services in the subdivision.[32] The defendant, rather than appealing that decision, applied for a building permit from the building inspector.[33] The building inspector denied the permit on the grounds that the covenants were not yet released by the Planning Board.[34]

This ruling was appealed by the defendant to the Board of Appeals which issued a permit subject to specific conditions.[35] The Planning Board argued that the Board of Appeals lacked jurisdiction to issue a building permit.[36] The Appeals Court held "only the planning board . . . is authorized to determine whether a subdivision covenant has been satisfied so that a building permit may be issued."[37]

From these two cases, the Appeals Court clearly has held that the areas in which a Planning Board is required to act by statute are reserved to that Board. Likewise, the statutory duties of the Board of Appeals are separate from those of the Planning Board and the two Boards may not infringe

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[26] *Id.*
[27] *Id.*
[28] *Id.* at 2107, 429 N.E.2d at 361.
[29] *Id.* at 2110, 429 N.E.2d at 362.
[30] 1981 Mass. App. Ct. Adv. Sh. 2132, 429 N.E.2d 81 (rescript opinion).
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] *Id.* at 2132, 429 N.E.2d at 82.
[37] *Id.* (citing G.L. c. 41, § 81Y). *Cf.* G.L. c. 40A, § 14.

upon each other's decisions. In the words of the Appeals Court, "the actions of neither board should bind the other, particularly as their actions are based on different statutory criteria."[38]

§ 11.13. Eminent Domain—Preclusive Effect of Prior Damages Settlement. In *McSorely v. Town of Hancock*,[1] the Appeals Court evaluated the preclusive effect of a 1969 eminent domain settlement on a subsequent damages action involving the same land. The plaintiff's dairy farm was bisected for highway construction in 1969.[2] Pursuant to eminent domain proceedings, a settlement and judgment were entered in superior court regarding that taking.[3] The plaintiff received compensation for the land taken, one drainage easement, and damages resulting from increased flooding of the plaintiff's land that rendered it incapable of use for farming.[4]

In 1974, the slope leading up to the highway began to slide, depositing large amounts of fill on the plaintiff's land.[5] The Commonwealth and the town of Hancock implemented corrective measures, which resulted in the flooding of eight acres of the plaintiff's farm land.[6] The superior court found that the value of the eight acres was $4,800, but entered a judgment of dismissal holding that the original 1969 settlement agreement and judgment between plaintiff and defendants precluded any additional compensation.[7] In the 1969 action, the plaintiff had argued that his land was incapable of being farmed and was awarded damages accordingly. The defendant later asserted that the plaintiff should be estopped from relitigating the question of damages.

The Appeals Court reversed, holding that the defendants did not meet their burden of proving that both actions were brought for the identical claim and that the prior settlement is binding.[8] The court also held that the issue presented in this action was not proved to be one which was actually litigated and determined in the prior action, in the sense of being essential to the settlements which had been entered.[9]

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[38] 1981 Mass. App. Ct. Adv. Sh. at 2107, 429 N.E.2d at 360 (1981).

§ 11.13. [1] 1981 Mass. App. Ct. Adv. Sh. 601, 417 N.E.2d 982.

[2] *Id.* at 602, 417 N.E.2d at 983.

[3] *Id.* at 603, 417 N.E.2d at 983.

[4] *Id.*

[5] *Id.*

[6] *Id.* at 602-03, 417 N.E.2d at 983-84.

[7] *Id.* at 603, 417 N.E.2d at 984.

[8] *Id.* at 603, 417 N.E.2d at 984-85 (citing RESTATEMENT (SECOND) OF JUDGMENTS § 68 Comment f (Tent. Draft No. 4 1977), and Watson v. Berman, 302 Mass. 305, 307, 19 N.E.2d 43, 44 (1939)).

[9] *Id.* (citing RESTATEMENT (SECOND) OF JUDGMENTS § 68 Comment f (Tent. Draft No. 4 1977) and Wishnewsky v. Saugus, 325 Mass. 191, 195, 89 N.E.2d 783, 786 (1950)).

The defendants asserted that, for the purposes of claim preclusion, the 1969 action determined all damages both past and future resulting from that taking, even if the Commonwealth did not utilize the rights it obtained until a later time.[10] Also, the defendants asserted, even if the damages now being sought were an unanticipated result of the 1969 taking, or there were insufficient information regarding the claim for damages in the prior action, the parties are still barred.[11]

The Appeals Court found that the extensive corrective measures taken by the defendants in 1974 constituted a second taking of the plaintiff's land and a new public improvement not within the scope of the original drainage easements acquired by the defendants.[12] Thus, this separate 1974 taking, not necessary or contemplated in the original 1969 taking,[13] entitled the plaintiff to damages independent of the 1969 taking.[14]

The defendant argued, however, that even if the plaintiff is not barred by claim preclusion, he is barred under the principles of issue preclusion. In order for a claim to be barred by issue preclusion, the issue presented in the present case must be the same issue which was decided in the prior case.[15] The issue which was ruled on in the prior case must also be one central to the judgment entered, otherwise the use of issue preclusion would not be recognized.[16]

The Appeals Court in *McSorely* ruled that, "the defendants had fallen far short of showing that damages for flooding or potential flooding of the eight acres were an essential element in the prior judgment."[17] The plaintiff had sought many elements of damages in the former action in addition to damages for flooding. Those elements which were ultimately incorporated into the award did not establish with enough clarity that the issue of damages for the flooding of the plaintiffs' eight acres was an essential component of the original settlement between the defendants and the plaintiff.[18] This action was thus remanded to the superior court for further proceedings not inconsistent with the opinion.[19]

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[10] *Id.* at 604, 417 N.E.2d at 985; *see also* 4A NICHOLS, LAW OF EMINENT DOMAIN § 14.09[3], at 14.262 (Revised 3d ed. 1982).

[11] *Id.* at 605, 417 N.E.2d at 985. *See also* RESTATEMENT (SECOND) OF JUDGMENTS § 61.1 Comment b on Clause (a) (Tent. Draft No. 5, 1978).

[12] *Id.*

[13] *Id.* (citing Lane v. Boston, 125 Mass. 519, 520 (1878); Snow v. Provincetown, 109 Mass. 123, 125 (1872); Ryan v. Boston, 118 Mass. 248, 250 (1875)).

[14] *Id.*

[15] *Id.* at 605-06, 417 N.E.2d at 985 (citing Wishnewsky v. Saugus, 325 Mass. 191, 195, 89 N.E.2d 783, 786 (1950)).

[16] *Id.* at 606, 417 N.E.2d at 985 (citing Rudow v. Fogel, 376 Mass. 587, 382 N.E.2d 1046 (1978)).

[17] *Id.* at 607, 417 N.E.2d at 986.

[18] *Id.*

[19] *Id.* at 608, 417 N.E.2d at 986.

This case at first glance appears to limit the rights of a municipality and the Commonwealth to future use of an existing easement. The question of future rights, however, is the turning point of this case. The Appeals Court noted the municipality's own admission, by its instituting a second taking, of a lack of right to accomplish the repairs under the original easement. With the complication of a second taking, the court must address the question of whether the parties view the original settlement as "reasonably probable" damages for "future necessities."[20] Here the importance of a comprehensive, forward looking statement of damages is manifest. Because the original damage settlement lacked such a statement, the court was compelled to award additional damages because the defendants could not prove the eight acres were included in the prior settlement.

[20] 4A NICHOLS, LAW OF EMINENT DOMAIN § 14.09[3], at 14.262 (Revised 3d ed. 1982).