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CHAPTER 15

Zoning and Land Use

RICHARD G. HUBER*

§ 15.1. Constitutional Validity of Frontage Requirements — Inverse Condemnation. During the *Survey* year, the Supreme Judicial Court in *MacNeil v. Town of Avon*¹ reversed an earlier decision in which the Appeals Court had invalidated, on constitutional grounds, a particular application of a local zoning by-law requiring at least 200 feet of frontage as a prerequisite for a special permit to build multiple housing units.² In so doing, the Court rejected a public benefit-private interest balancing approach for determining whether the specific application of a zoning by-law constitutes an unconstitutional taking of land. Moreover, the Court held that reasonable frontage requirements are constitutional because they may further legitimate objectives of zoning which substantially relate to the public interest.³

The interrelated provisions of the fifth and fourteenth amendments of the United States Constitution that prohibit the taking of property without just compensation and the deprivation of property without due process of law, respectively, are the two principal mandates under which a zoning by-law might be found unconstitutional.⁴ It is well-established that the

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§ 15.1. ¹ 386 Mass. 339, 435 N.E.2d 1043 (1982).

² 1981 Mass. App. Ct. Adv. Sh. 1287, 422 N.E.2d 479. See Huber, *Zoning and Land Use*, 1981 ANN. SURV. MASS. LAW, § 11.5, at 255-56.

³ *Id.* at 342-43, 435 N.E.2d at 1046.

⁴ See generally J. NOWAK, R. ROTUNDA AND J. YOUNG, CONSTITUTIONAL LAW 480-96 (1981) [hereinafter cited as NOWAK]. In addition, MASS. CONST. Part 1 art. 10 provides that: "whenever the public exigencies require that the property of an individual should be appropriated for public use, he shall receive a reasonable compensation therefor."

The fifth amendment protection against the taking of land without just compensation is applicable to the states through the fourteenth amendment. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 122 (1978) (citing, *Chicago, Burlington & Turney R.R. Co. v. City of Chicago*, 166 U.S. 226, 239 (1877)). The *Chicago Burlington* case can equally be understood as interpreting the taking clause to be a necessary requirement implicit within the meaning of due process. 166 U.S. at 239; see also NOWAK, *supra*, at 482-83. Whether addressing the taking issue as arising from incorporation or substantive due process analysis, it is clear that the two constitutional provisions are intertwined.

enactment of comprehensive zoning regulations generally represents a valid exercise of the police power.⁵ Nevertheless, a due process violation exists if the land use or zoning ordinance is “clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.”⁶ As a corollary, the foregoing standard is applicable to an otherwise constitutional ordinance which may be suspect only as applied to the specific attributes of a particular parcel of land.⁷ In an action contesting a community’s exercise of the zoning power, the plaintiff must prove that the ordinance in question is arbitrary and unreasonable and must overcome a strong presumption in favor of constitutionality.⁸ The level of proof needed to overcome the presumption is that which removes the issue from the realm of reasonable debate⁹ or beyond reasonable doubt.¹⁰

In addition to due process considerations, a zoning ordinance must not be implemented so that it results in a taking of property without just compensation. Most land use regulatory schemes, even those which significantly affect the value of property, are generally held not to be confiscatory and thus do not require the payment of compensation.¹¹ There is, however, a certain point at which a regulation’s effect upon property rights is so great as to constitute the exercise of the power of eminent domain.¹² The problem, of course, is determining when this point is reached. Although the United States Supreme Court has yet to set forth a clearly defined approach for deciding the “taking” issue,¹³ and thus has allowed states to proscribe independently the scope of land use and zoning laws through judicial interpretation,¹⁴ several factors have been

⁵ See *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

⁶ *Id.* at 395.

⁷ *Nectow v. City of Cambridge*, 277 U.S. 183, 185, 188 (1928); see also *Jenckes v. Building Commissioner of Brookline*, 341 Mass. 162, 165-66, 167 N.E.2d 752, 760 (1960).

⁸ See generally 1 R. ANDERSON, *AMERICAN LAW OF ZONING* § 3.14 (2d ed. 1976); *Turnpike Realty Co. v. Dedham*, 362 Mass. 221, 233, 284 N.E.2d 891, 898-99 (1972), cert. denied, 409 U.S. 1108 (1973).

⁹ *Turnpike Realty*, 362 Mass. at 233, 284 N.E.2d at 898-99; see also 1 R. ANDERSON, *supra* note 8, at § 3.22.

¹⁰ *Knight v. Building Inspector of Shrewsbury*, 4 Mass. App. Ct. 826, 826, 350 N.E.2d 468, 468 (1976); see also, 1 R. ANDERSON, *supra* note 8, at § 3.22.

¹¹ See generally *Mugeler v. Kansas*, 123 U.S. 623 (1887); *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); see also *Hadachek v. Sebastian*, 239 U.S. 394 (1915) (diminution in value of plaintiffs land from \$800,000 to \$60,000 did not require compensation); *Metromedia Inc. v. San Diego*, 433 U.S. 490 (1981) (property use controls constraining freedom of speech yet furthering an aesthetic public interest are valid exercises of the police power for which compensation is not required); Huber, *Zoning and Land Use*, 1981 ANN. SURV. MASS. LAW § 11.2, at 244-49.

¹² *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

¹³ See NOWAK, *supra* note 4, at 483, 485.

¹⁴ For examples of how several jurisdictions have handled the “taking” issue, see:

established by the United States Supreme Court at one time or another as dispositive in a “taking” inquiry. Foremost on the list has been the degree of diminution in value of the plaintiff’s land. For example, in *Pennsylvania Coal Co. v. Mahon*,¹⁵ which struck down a state statute that effectively eliminated the right of a coal company to mine on its privately held land, the Supreme Court stated: “[W]hen [the extent of diminution] reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain and compensation to sustain the act.”¹⁶ The “taking” inquiry has also been held to necessitate a judicial weighing of public interests served by the ordinance against the extent of the plaintiff’s loss of property rights. The case of *Agins v. City of Tiburon*¹⁷ is illustrative of what may be called a “balancing approach.”¹⁸ In upholding the facial constitutionality of a zoning by-law that prohibited plaintiffs from constructing multiple residential dwellings,¹⁹ the United States Supreme Court explained:

The zoning ordinances benefit the appellants as well as the public by serving the city’s interest in assuring careful and orderly development of residential property for open space areas. There is no indication that the appellant’s 5-acre tract is the only property affected by the ordinances. Appellants therefore will share with other owners the benefits and burdens of the city’s exercise of its police power. *In assessing the fairness of the zoning ordinances, these benefits must be considered along with any diminution in market value that the appellants might suffer.*²⁰

Student Comment, *Zoning and Land Use*, 1976 ANN. SURV. MASS. LAW § 15.16, at 511-42; Glink, *New Developments in Land Use and Environmental Regulation*, 1983 INST. ON PLAN. ZON. & EMINENT DOMAIN 3-9; Sackman, *When is a ‘Taking’ Not a ‘Taking’? (Police Power vis-a-vis Eminent Domain)*, 1982 INST. ON PLAN. ZON. & EMINENT DOMAIN 201; Freilich, *Solving the ‘Taking’ Equation: Making the Whole Equal to the Sum of Its Parts*, 1982 INST. ON PLAN. ZON. & EMINENT DOMAIN 301.

¹⁵ 260 U.S. 393 (1922).

¹⁶ *Id.* at 413.

¹⁷ 447 U.S. 255 (1980).

¹⁸ See also *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962). It is worth noting that *Pennsylvania Coal*, usually interpreted as propounding a diminution in value test, is arguably viewed as intending a balancing formula. See Michaelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 HARV. L. REV. 1165, 1911 n.53 (1967).

¹⁹ The local zoning ordinance at issue in *Agins* limited the extent of development of plaintiff’s land to single-family units (up to 5), accessory buildings and open space uses. 447 U.S. at 262. Such uses would only be permitted upon the submission of “a plan compatible with ‘adjoining patterns of development and open space.’ ” *Id.* Moreover, the local authorities also took into consideration its policy “to preserve the surrounding environment” and “whether the diversity of new construction will be offset by adjoining open spaces.” *Id.*

²⁰ *Id.* at 262-63 (citations omitted) (emphasis added). The *Agins* opinion then directly continues:

Although the ordinances limit development, they neither prevent the best use of appellants’ land . . . nor extinguish a fundamental attribute of ownership. . . .

The foregoing principles were addressed by the Supreme Judicial Court in *MacNeil v. Town of Avon*.²¹ The plaintiff in *MacNeil* owned an inverted “L” shaped lot with an area of 137,000 square feet and frontage of 190 feet.²² The property was situated in a district zoned for certain types of residential uses.²³ Specifically, the local by-laws allowed single family, two-family, or duplex housing units so long as the lot was not less than 25,000 square feet and the amount of frontage was not under 150 feet.²⁴ In addition, a special permit could be obtained for buildings containing more than two dwelling units if the applicant’s lot contained no less than 40,000 square feet and 200 feet of frontage.²⁵ The plaintiff’s land satisfied the area requirement for multiple housing use by nearly three and one-half times, yet fell short of the frontage prerequisite by ten feet. Consequently, the plaintiff who wanted to build multiple housing sought a declaratory judgment that the 200-foot frontage stipulation could not be constitutionally applied to her property.²⁶

The Court discerned two separate issues: (1) whether the plaintiff could demonstrate that the requirements of the by-law as applied were “clearly arbitrary, having no substantial relation to the public health, safety, morals or general welfare;” and (2) whether the ordinance resulted in a taking of land without compensation.²⁷ An affirmative answer to either inquiry would invalidate the by-law as applied.

Addressing the due process issue, the Court in *MacNeil* found that the plaintiff failed to sustain her burden of proof and establish that the 200-foot frontage prerequisite for a permit to build multiple housing units was “unreasonable and arbitrary” under the *Euclid* due process standard.²⁸ According to the Court, “reasonable” frontage restrictions are constitutional because they are consistent with the legitimate goals of zoning, thereby substantially relating to the public safety, health and welfare.²⁹

[Because] the appellants are free to pursue their reasonable investment expectations by submitting a development plan to local officials . . . it cannot be said that the impact of general land-use regulations has denied appellants the “justice and fairness” guaranteed by the Fifth and Fourteenth Amendments.

Id.

For a closer examination of this case, see Beach, *Agins v. the City of Tiburon: A Balancing Framework For “Takings” Challenges of Zoning Ordinances*, 1981 DET. L. REV. 179-201.

²¹ 386 Mass. 339, 435 N.E.2d 1043 (1982).

²² *Id.* at 339, 435 N.E.2d at 1044.

²³ *Id.*

²⁴ *Id.* at 340, 435 N.E.2d at 1044.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 340-41, 435 N.E.2d at 1045.

²⁸ *Id.*

²⁹ *Id.* at 341, 435 N.E.2d at 1045 (citing *Caires v. Building Commissioner of Hingham*, 323 Mass. 589, 594, 83 N.E.2d 550, 554 (1949)).

These goals “include lessening congestion in the streets, conservation of health, securing safety from fire and other dangers, provision of adequate light and air, prevention of overcrowding of land, and guidance of undue concentration of population.”³⁰ The Court gave two explanations, consistent with these objectives, for the municipality’s enactment of the regulation. First, multiple housing units might require greater frontage than single family units in order to provide access for an anticipated need for a larger fire fighting force.³¹ Second, the number of cars traveling to and from a residential lot and parking adjacent to its frontage may be directly proportional to the number of dwelling units present.³² Thus, the frontage prerequisite could prevent traffic problems that would hinder emergency vehicles.³³

The plaintiff argued that the by-law was “unreasonable and arbitrary” as applied because the ten-foot difference between the frontage of his property, 190 feet, and the by-laws requirement, 200 feet, could not affect the legitimate interests of the public.³⁴ In response, the Court ruled that effective frontage limitations needed “lines [to] be drawn somewhere” and consequently a *per se* constitutional zoning ordinance would not be invalidated simply because the locus “almost meets the by-law requirement.”³⁵

Concluding that a “taking” did not occur, the Court stressed that the plaintiff’s property could be used for purposes which did not require a special permit, such as for single and two-family structures.³⁶ According to the Court, the fact that the regulation probably resulted in a decrease in the market value of the land was not controlling.³⁷ The application of a zoning regulation, the Court stated, is not invalid “because it prevents the land from being put to its most profitable use, or because the value of the land is substantially diminished.”³⁸ Rather, the Court noted, the appropriate standard is that a “regulation constitutes a taking only if it ‘deprives the [plaintiff’s] land of all practical value to [her] or to anyone acquiring it, leaving them only with the burden of paying taxes on it.’ ”³⁹ The *MacNeil* Court thereby adopted a strict diminution in value standard. Presumably,

³⁰ 386 Mass. at 342, 435 N.E.2d at 1046.

³¹ *Id.*

³² *Id.*

³³ *Id.* at 342-43, 435 N.E.2d at 1046.

³⁴ *Id.*

³⁵ *Id.* at 343, 435 N.E.2d at 1046.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 341, 435 N.E.2d at 1045 (quoting *MacGibbon v. Bd. of Appeals of Duxbury*, 356 Mass. 635, 641, 255 N.E.2d 347 (1970)).

the degree of diminution needed to amount to a compensable taking must be that which effectively removes the practical value of the land.⁴⁰

Prior to the *MacNeil* and *Agins* decisions, however, several Supreme Judicial Court cases took a different approach and considered the degree of benefit furthered by a zoning regulation as well as the severity of the plaintiff's property loss in resolving the taking inquiry. For example, in *Barney and Carey v. Town of Milton*⁴¹ an ordinance limiting the plaintiff's land to residential uses was found unconstitutional as applied to the plaintiff's swamp-land. Although the *Barney* Court did not explicitly promulgate a balancing test, the essential element of its rationale was that the aesthetic benefits furthered by the ordinance were outweighed by the finding that the plaintiff had only a potential future market for the residential uses permitted.⁴² In *Jenckes v. Building Commissioner of Brookline*⁴³ the relevant by-law prohibited construction on any lot not adjacent to a private or public passageway at least 40 feet in width.⁴⁴ The Court invalidated the by-law because it affected a vacant lot in a community in which several buildings already standing were inconsistent with the regulation.⁴⁵ The Court concluded: "[T]he injury to the owner of this isolated lot is so harsh 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."⁴⁶ Again, the Supreme Judicial Court in *Turnpike Realty Co. v. Dedham*⁴⁷ used balancing language in upholding the challenged application of a by-law permitting only "woodland, grassland, wetland, agriculture, horticulture or recreational use of land or water not requiring filling."⁴⁸ The Court explained that "[a]lthough it is clear that the petitioner is substantially restricted in its use of the land, such restrictions

⁴⁰ Arguably, a "taking" might occur if a certain level of the property value is still present. The possibility rests on the three slightly varying ways in which the *MacNeil* Court describes the degree of diminution in value required before a taking occurs: "all practical value" was used at the point where the Court initially defined the standard to be applied; "so much of the practical use" was presented in the section which applied the standard; and "such a deprivation of the practical uses" was set forth in the concluding paragraph of the opinion. 386 Mass. at 341, 343-44, 435 N.E.2d at 1045-46. The position is further supported by the precedential weakness of the "all practical value" method which arises from dicta in *MacGibbon v. Bd. of Appeals of Duxbury*, 356 Mass. 635, 641, 255 N.E.2d 347, 352 (1970).

⁴¹ 324 Mass. 440, 87 N.E.2d 9 (1949).

⁴² *Id.* at 446-48, 87 N.E.2d at 13-15.

⁴³ 341 Mass. 162, 167 N.E.2d 757 (1960).

⁴⁴ *Id.* at 163, 167 N.E.2d at 758.

⁴⁵ *Id.* at 165, 167 N.E.2d at 759.

⁴⁶ *Id.* at 166, 167 N.E.2d at 760.

⁴⁷ 362 Mass. 221, 284 N.E.2d 891 (1972).

⁴⁸ *Id.* at 229, 284 N.E.2d 899-900 (1972).

must be balanced against the potential harm to the community from overdevelopment of a flood plain area.”⁴⁹

Despite the foregoing cases, the *MacNeil* Court did not apply a formula that would compare and evaluate public benefits and private losses.⁵⁰ Although the Court fully recognized the balancing language present in the *Jenckes* and *Barney* decisions, it nevertheless ruled that the wording therein was dicta and that those decisions in fact simply applied the principles of the instant case.⁵¹ Indeed, the relevant zoning regulations in those cases apparently did deprive the plaintiffs of all practical use of their land.⁵² Thus, the three decisions are consistent.

In view of the United States Supreme Court’s decision in *Agins*, however, the possibility of using a balancing approach to resolve a “taking” problem should not be disregarded in cases that must evaluate the facial constitutionality of a zoning ordinance as opposed to its application to a particular tract of land.⁵³ There are, for example, situations in which zoning or land use regulations which protect vital interests of the public on a broad scale could not feasibly be implemented if compensation were required, and yet their application may deprive the plaintiff of all practical

⁴⁹ *Id.* at 235, 284 N.E.2d at 900. The Court in *Turnpike Realty* also announced that “[a]lthough a comparison of values before and after is relevant . . . it is by no means conclusive.” *Id.* at 236, 284 N.E.2d at 900. For further balancing language in Massachusetts cases, see *Simon v. Needham*, 311 Mass. 560, 565, 42 N.E.2d 516, 519 (1942); *Gem Properties, Inc. v. Bd. of Appeals of Milton*, 341 Mass. 99, 167 N.E.2d 315 (1960); Huber, *Zoning and Land Use*, 1960 ANN. SURV. MASS. LAW § 13.3, at 134-35.

⁵⁰ 386 Mass. at 343, 435 N.E.2d at 1046.

⁵¹ *Id.* at 344, 435 N.E.2d at 1046.

⁵² *Jenckes*, 341 Mass. at 165, 167 N.E.2d at 759; *Barney and Carey*, 324 Mass. at 446, 87 N.E.2d at 9. Similarly in *Turnpike Realty*, not cited by the *MacNeil* Court for the purpose of recognizing its balancing language, the plaintiff’s ability to use the locus only for woodland, grassland, wetland, agriculture, horticulture or recreational uses did not deprive him of “all beneficial uses.” 362 Mass. at 229, 284 N.E.2d at 899. *But see McGibbon v. Bd. of Appeals of Duxbury*, in which similar restrictions did deny plaintiffs all practical uses. 356 Mass. 635, 640-41, 255 N.E.2d 347, 351 (1970). It is important to note, however, that the *McGibbon* decision, in reaching this conclusion, did not address any constitutional problems; rather, it proscribed the scope of a municipality’s regulatory authority under the Zoning Enabling Act, G.L. c. 40A. See *McGibbon v. Bd. of Appeals of Duxbury*, 369 Mass. 523, 525, 344 N.E.2d 185, 186 (1976).

The Court in *MacNeil* also recognized *Metzger v. Brentwood*, 117 N.H. 492, 501-03, 374 A.2d 954, 957 (1977), which seemed to adopt a balancing formula. 386 Mass. at 342, 435 N.E.2d at 1046-47. In *Metzger*, the Supreme Court of New Hampshire struck down a specific application of a local 200 foot frontage prerequisite to residential building. 117 N.H. at 503, 374 A.2d at 958. The *MacNeil* Court responded to this analogous case by explaining that in *Metzger*, the “application of the by-law would apparently have deprived the landowner of any practical use of the land.” 386 Mass. at 344, 435 N.E.2d at 1047 (citing *Carbonneau v. Exeter*, 119 N.H. 259, 264, 401 A.2d 675, 679 (1979)).

⁵³ The United States Supreme Court in *Agins* only considered the facial constitutionality of the zoning regulation challenged therein. 447 U.S. at 254.

value of the land. On the other hand, an ordinance might foster a legitimate yet relatively trivial public interest while denying the plaintiff close to but not all of the practical value of his land. Thus, a rigid diminution in value standard applied under all circumstances could result in some difficult decisions.⁵⁴

§ 15.2. Exclusionary Zoning. Exclusionary zoning as a descriptive term embraces certain economic and social theories. The term has been defined as the combination of local zoning practices that results in the closing of suburban housing markets to low and moderate income families where economic, social, or racial segregation is the real purpose or actual result.¹ In 1968, a report by the Legislative Research Council of the Massachusetts Senate concluded that Massachusetts zoning practices contributed to the exclusion of low and moderate income housing development in suburban areas, and that if existing practices remained unregulated, the supply of vacant land would be eliminated because communities are not inclined to act on their own to alleviate the problem, and courts are unwilling to intervene as long as the discrimination involved is economic.²

The Anti-Snob Zoning Act (the "Act")³ was enacted to deal with this problem. The Act provides for an expedited procedure to enable public agencies, limited dividend organizations, and non-profit organizations that propose construction of low or moderate income housing to override local zoning by-laws and ordinances that restrict this type of housing development. Perhaps the most significant aspect of the Act is section 21 which allows the local zoning board of appeals to issue a single comprehensive permit, thereby eliminating the need for filing an individual application with each local agency or official having jurisdiction over an aspect of the proposal.⁴ Pursuant to section 21, the zoning board of appeals must notify any applicable local boards of the filing of an application for a comprehensive permit for the construction of low or moderate income housing.⁵ Within thirty days of the qualified developer's filing of a proposal with the board, the board is required to conduct a public hearing

⁵⁴ NOWAK, *supra* note 4, at 486 (emphasis added). Ultimately, however, the decision not to adopt a balancing approach may make very little difference in the outcome of most cases.

§ 15.2. ¹ See 2 R. ANDERSON, *American Law of Zoning* § 8.02 (2d ed. 1976).

² MASS. SEN. REP. 1133, 1968 Session (June 1968), cited in *Bd. of Appeals of Hanover v. Housing Appeals Committee*, 363 Mass. 339, 350, 294 N.E.2d 393, 403 (1973).

³ G.L. c. 40B, §§ 20-23. See D'Agostine and Huber, *Land Use Planning Law*, 1964 ANN. SURV. MASS. LAW § 14.1, at 164-66; Rodgers, *Snob Zoning in Massachusetts*, 1970 ANN. SURV. MASS. LAW § 18.1, at 486-89; Sherer, *Snob Zoning: Development in Massachusetts and New Jersey*, 7 HARV. J. OF LEGIS. 245, 257 (1970).

⁴ G.L. c. 40B, § 21.

⁵ *Id.*

on the proposal.⁶ The board must render a decision within forty days of the termination of the public hearing.⁷ The zoning board of appeals' failure to conduct a public hearing or to render a decision on the proposal within the required time limits results in the constructive grant of the comprehensive permit by the board.⁸ The constructive grant of a comprehensive permit may, however, be appealed by an aggrieved party if such an appeal is filed within twenty days of the constructive issuance of the permit.⁹

During the *Survey* year in *Milton Common Associates v. Board of Appeals of Milton*¹⁰ the Appeals Court addressed two questions regarding the constructive grant of a comprehensive permit. The court was asked to determine when a public hearing ends for purposes of calculating whether a permit is deemed to have been issued through failure of the board to act, and what event begins the twenty-day period during which an aggrieved party may appeal the issuance of a constructive permit.¹¹

Milton Common Associates ("MCA") had applied to the Zoning Board of Appeals of Milton ("Board") for a comprehensive permit to build low and moderate income housing. Public hearings on MCA's proposal began on June 9, 1980 and continued over twelve sessions through December 15, 1980.¹² At the December 15th meeting the chairman stated, "[A]t the outset, with the hope and expectation that we are going to finish tonight, I am going to schedule a deliberative session of the Board for January 21, 1981, here at the school."¹³ The chairman stated that the January meeting would be an open session in which the Board would conduct its deliberations in public; however, no input from the public would be allowed. The meeting was to be open to the public only to satisfy the statutory requirement of the open meeting law.¹⁴ Accordingly, no views or opinions of the public were allowed at this meeting; only debate among the Board members was allowed.¹⁵ Several Board members understood that the forty-day period for the Board's decision did not start to run until the end of this deliberative session.¹⁶

The Appeals Court, however, distinguished public hearings from de-

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ G.L. c. 40A, § 17.

¹⁰ 14 Mass. App. Ct. 111, 436 N.E.2d 1236 (1982).

¹¹ *Id.* at 112, 436 N.E.2d at 1237-38.

¹² *Id.*

¹³ *Id.* at 112, 436 N.E.2d at 1238.

¹⁴ See G.L. c. 39, § 23B; *York v. Bd. of Appeals of Newburyport*, 10 Mass. App. Ct. 587, 410 N.E.2d 725 (1980).

¹⁵ 14 Mass. App. Ct. at 113, 436 N.E.2d at 1238.

¹⁶ *Id.*

liberative sessions. The court found aspects of a public hearing, specifically “ ‘the opportunity for interested persons to appear and express their views pro and con,’ ”¹⁷ to be lacking in the deliberative session. The parties present at the deliberative session had been “instructed to keep their lips sealed while the board pondered.”¹⁸ The court therefore held that “public hearings end when the right of interested parties to present information and argue is cut off.”¹⁹

The Board argued that the deliberative session was public because members of the Board asked questions of MCA and they agreed to answer all questions posed to them. The court found that such answers on specific items of information could not extend the duration of the public hearings because there was no opportunity for either party to persuade or contradict. Furthermore, the court noted, “if asking a question during the course of a hearing in and of itself kept open a hearing which was otherwise concluded, it would be a simple matter to keep hearings open indefinitely and to frustrate the streamlined procedure which the anti-snob zoning act sought to introduce.”²⁰ Thus, according to the court, the start of the forty-day period within which the Board had to make a decision was December 15, 1980. A permit was therefore constructively granted to MCA on January 26, 1981, the fortieth day having fallen on a Saturday.

Determination of the date when the comprehensive permit is deemed to be constructively granted is important because aggrieved parties have to appeal the grant of a comprehensive permit within twenty days after the zoning board of appeals files notice of the granting of a permit.²¹ The court in *Milton Common Associates* noted that a strict reading of the statute would allow a “new round of court proceeding[s] . . . since the board has not, to this day, issued a permit, let alone filed notice with the town clerk.”²² The court therefore held that the triggering of the appeal period on a constructively granted permit was not when the zoning board of appeals filed notice with the town clerk, but the date on which the permit was deemed to have been constructively granted.²³ The court stated, “In view of the strict time discipline which chapter 40B imposes on local boards and the legislative intent to effect an expedited procedure, it would be contrary to the statutory scheme if the date from which to count for

¹⁷ *Id.* at 114-15, 436 N.E.2d at 1239 (citing *Wiley v. Town Council of Barrington*, 106 R.I. 544, 261 A.2d 627 (1970)).

¹⁸ *Id.* at 115, 436 N.E.2d at 1239.

¹⁹ *Id.*

²⁰ *Id.*

²¹ See *Huber, Zoning and Land Use*, 1981 ANN. SURV. MASS. LAW § 11.6, at 256-57.

²² 14 Mass. App. Ct. at 116, 436 N.E.2d at 1240.

²³ *Id.* at 120, 436 N.E.2d at 1242.

purposes of judicial review were other than the date on which approval was constructively granted."²⁴

One purpose of the Act is to "streamline" local permit procedures.²⁵ Under a strict reading of the Act, if a zoning board of appeals failed to grant a certificate evidencing a constructive grant of the permit, however, the applicant would have to go to court to compel the "observance of the 'expedited' procedure,"²⁶ for if he waited, the waiting period could be indefinite. Clearly this interpretation is contrary to the intent of the Act, for the Appeals Court has stated that these time limits are to be "enforced with strictness."²⁷ The purpose of the Act is to allow localities to voice their opinions and have some control over low and moderate income housing projects, but not to undermine these projects through exclusionary zoning practices or continued delay in granting permits.

The effect of *Milton Common Associates v. Board of Appeals of Milton* is to force zoning boards of appeals to decide on applications for comprehensive permits and report their decisions appropriately to the town clerk. With delaying tactics now unavailable, a board is forced to determine whether the project is "consistent with local needs."²⁸ Under the Act a developer may appeal the denial of a grant of a comprehensive permit by a zoning board of appeals to the State Housing Appeals Committee.²⁹ The Committee can override a board's decision if they find it is not reasonable and "consistent with local needs."

The statutory definition of "consistent with local needs" includes general language and a mathematical formula for evaluating regulations, local ordinances and by-laws and requirements, as they apply to a housing proposal.³⁰ The general language of the definition states that regulations and requirements are consistent with local needs if they are reasonable in view of the regional need for low and moderate income housing as considered in view of five factors: (1) the number of low income persons in the municipality affected; (2) the need to protect the health and safety of the occupants of the proposed housing or the residents of the city or town; (3) the promotion of better site and building design in relation to the surroundings; (4) the preservation of open spaces; and (5) the application of such regulations and requirements as equally as possible to both sub-

²⁴ *Id.* at 118-19, 436 N.E.2d at 1241.

²⁵ *See id.*

²⁶ *Id.*

²⁷ 13 Mass. App. Ct. 1053, 1054, 434 N.E.2d 672, 674 (1982).

²⁸ G.L. c. 40B, § 23; *see Bd. of Appeals of Hanover v. Housing Appeals Committee*, 363 Mass. 339, 364, 294 N.E.2d 393, 415 (1973); Huber, *Land Use*, 1973 ANN. SURV. MASS. LAW § 12.10, at 415-22; Comment, *Land Use*, 1973 ANN. SURV. MASS. LAW § 12.30, at 454-73.

²⁹ G.L. c. 40B, § 23.

³⁰ G.L. c. 40B, § 20.

sidized and non-subsidized housing. The mathematical formula incorporated into the definition provides three exceptions to the requirements of the general language. Satisfaction of any one of these three exceptions provides conclusive evidence that the community has met its low and moderate income housing obligation. The three exceptions are: (1) where low or moderate income housing exists in excess of ten percent of the housing units reported in the latest decennial census of the city or town; (2) where low or moderate income housing exists on sites comprising one-and-one-half percent or more of the total land area zoned for commercial, residential or industrial use; and (3) where the application before the board would result in the commencement of construction during that calendar year of low or moderate income housing on sites comprising more than three-tenths of one percent of land zoned for commercial, residential or industrial uses in the community or on ten acres of such land, whichever is greater. In computing the land area of a community, land owned by the United States, the state or any political subdivision must be excluded from the total land area.³¹

In a second *Survey* year decision concerning the comprehensive permit process under the Act, *Zoning Board of Appeals of Wellesley v. Housing Appeals Committee*,³² the Supreme Judicial Court held that a decision of the Wellesley Zoning Board of Appeals ("Board") denying the grant of a comprehensive permit was not reasonable and consistent with local needs.³³ In this case Cedar Street Associates ("CSA") applied for and was granted a comprehensive permit under sections 20-23 of chapter 40B on condition that CSA would apportion at least eighty percent of the units for the elderly as well as obtain the necessary financing. CSA obtained a loan from the Massachusetts Housing Finance Agency ("MHFA") with conditions that the development provide only ten rent subsidized units for the elderly, eight rent subsidized units for families and eighteen units for rental at market rates. The Board, after being notified of these conditions, required CSA to file another application for a comprehensive permit, which the Board subsequently denied.³⁴ The reasons for the denial were: "the proposed site was not equipped to provide the facilities necessary for a high density population; . . . the project was detrimental to the health and safety of the anticipated occupants and their neighbors; and . . . the planning objections incidental to the development outweighed the need for low or moderate income housing."³⁵

CSA appealed the Board's decision to the Housing Appeals Committee

³¹ G.L. c. 40B, § 20.

³² 385 Mass. 651, 433 N.E.2d 873 (1982).

³³ *Id.* at 652, 433 N.E.2d at 875.

³⁴ *Id.* at 653, 433 N.E.2d at 875.

³⁵ *Id.*

(“HAC”) pursuant to section 22 of chapter 40B, claiming that the decision was not reasonable and consistent with local needs. The Board conceded that Wellesley had not met its minimum housing obligation under the mathematical formula and that there was an absolute need for more apartments for low and moderate income individuals.³⁶ The Board, however, moved to dismiss the appeal to HAC on the ground that HAC lacked jurisdiction over the subject matter.³⁷ HAC denied the Board’s motion, ruling that the project was low or moderate income housing under section 20 of chapter 40B because it was financed by the MHFA.³⁸ HAC then held the Board’s decision was not reasonable and consistent with local needs because the same objections were raised and discussed by the Board when granting the first comprehensive permit. HAC directed the Board to grant the comprehensive permit; the Board appealed to the superior court. The superior court held in favor of the HAC and the Board then appealed to the Supreme Judicial Court.

The Supreme Judicial Court was confronted with two issues: (1) whether a development financed by MHFA, which includes units rented at fair market value, is low or moderate income housing within the definition provided in section 20 of chapter 40B; and (2) whether the decision of HAC was supported by substantial evidence. The Court, in deciding whether a development financed by the MFHA which included units rented at market rates was low or moderate income housing, examined the regulations of the Department of Community Affairs (“DCA”) promulgated under the statute. These regulations provide that “[l]ow or moderate income housing shall include without limitation units of housing constructed under . . . MHFA Mortgage Loans.”³⁹ The Court noted that these administrative regulations were not binding on the Court, but decided to give “great weight to a ‘reasonable construction of a regulatory statute adopted by the agency charged with [its] enforcement.’”⁴⁰ The Court examined the legislative history behind the establishment of the MHFA and found that its purpose was “to promote the construction of low or moderate income housing projects which also include units rented at fair market value . . . [so that] low income families will be allowed to live in decent apartments, without identification, in close proximity to families of differing economic and social levels.”⁴¹ The Court found DCA’s regulation, which included MHFA financed projects within the

³⁶ *Id.* at 658, 433 N.E.2d at 877.

³⁷ *Id.* at 653, 433 N.E.2d at 875.

³⁸ *Id.*

³⁹ MASS. ADMIN. CODE tit. 760, § 30(b)(2)(i)(2).

⁴⁰ 385 Mass. at 654, 433 N.E.2d at 876 (citing *School Committee of Springfield v. Bd. of Educ.*, 362 Mass 417, 441 n.22, 287 N.E.2d 438, 455 n.22 (1972)).

⁴¹ *Id.* at 655, 438 N.E.2d at 876.

definition of low and moderate income housing, to be reasonable and consistent with the statute.⁴² Thus, the Court found that HAC had correctly exercised jurisdiction over the CSA development project.⁴³

Turning to the second issue, the Court addressed the Board's claim under chapter 30A of the General Laws that HAC's decision ordering issuance of a comprehensive permit was unsupported by substantial evidence.⁴⁴ According to the Court, HAC can overturn a board's decision if that decision is not reasonable and consistent with local needs. In making this determination, HAC must decide whether the need for low or moderate income housing outweighs valid planning objections to the proposal such as health, site, design, and space.⁴⁵ Furthermore, HAC's decision must be upheld if it is supported by substantial evidence.⁴⁶ The Court stated that "[s]ubstantial evidence is such evidence as a reasonable mind might accept as adequate to support a conclusion,"⁴⁷ and "a court may not displace an administrative board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*."⁴⁸ The Court, citing HAC's reliance on the Board's prior granting of the comprehensive permit and HAC's inspection of the site, held that HAC's decision was supported by substantial evidence, and that HAC had applied the correct standard when it balanced the need for low and moderate income housing against the planning board's objections to the application.⁴⁹

This opinion by the Supreme Judicial Court extends the authority of the HAC by permitting its reach to extend to developments which include both low and moderate income housing and units rented at market rates. This decision in effect affirms HAC's policy not only to provide housing for low or moderate income individuals, but also to provide housing which will integrate them into the community by enabling them to live in decent housing without identification. In addition, the decision also addresses HAC's concern over towns allowing low or moderate income housing only when it is housing for the elderly. The intent of the Anti-Snob Zoning Act was not to provide housing only for the elderly but for low and moderate income families as well. If towns are allowed to provide low and

⁴² *Id.*

⁴³ *Id.*

⁴⁴ See G.L. c. 30A, § 14; and G.L. c. 40B, § 22.

⁴⁵ 385 Mass. at 656, 433 N.E.2d at 877 (citing *Bd. of Appeals of Hanover v. Housing Appeals Committee*, 363 Mass. 339, 294 N.E.2d 393 (1973)).

⁴⁶ *Id.*

⁴⁷ *Id.* at 657, 433 N.E.2d at 877 (citing G.L. c. 30A, § 1(6)).

⁴⁸ *Id.* (citing *Labor Relations Commission v. University Hosp. Inc.*, 359 Mass. 516, 269 N.E.2d 682 (1977)).

⁴⁹ 385 Mass. at 658-59, 433 N.E.2d at 878.

moderate income housing only for the elderly, then they are still in essence practicing exclusionary zoning.

To further understand the principles behind exclusionary zoning, a look at a New Jersey case decided during the *Survey* year is helpful. *Southern Burlington County NAACP v. Township of Mount Laurel* (“*Mount Laurel II*”)⁵⁰ is a reaffirmation and modification of an earlier decision by the Supreme Court of New Jersey, *Southern Burlington County NAACP v. Township of Mount Laurel* (“*Mount Laurel I*”).⁵¹ *Mount Laurel II* exhibits the problems of judicially adopted anti-snob zoning devices. The six cases comprising *Mount Laurel II* “[a]ll involve questions arising from the *Mount Laurel* doctrine.” . . . “They demonstrate the need to put some steel into that doctrine. The deficiencies in its application range from uncertainty and inconsistency at the trial level to inflexible review criteria at the appellate level.”⁵² The New Jersey Supreme Court in *Laurel II*, however, recited that the basis behind *Mount Laurel I* was correct; the state controls the use of all the land therein, and in exercising such control it cannot favor the rich over the poor.⁵³

The clarity of the constitutional obligation is seen most simply by imagining what this state could be like were this claim never to be recognized and enforced: poor people forever zoned out of substantial areas of the state, not because housing could not be built for them but because they are not wanted; poor people forced to live in urban slums forever, not because suburbia, developing rural areas, fully developed residential sections, seashore resorts, and other attractive locations could not accommodate them, but simply because they are not wanted. It is a vision not only at variance with the requirement that the zoning power be used for the general welfare but with all concepts of fundamental fairness and decency that underpin many constitutional obligations.⁵⁴

After reaffirming the basic principles of the “*Mount Laurel* doctrine,” the court in *Mount Laurel II* changed the administrative aspects of *Mount Laurel I*. The court provided for three judges to hear all litigation brought under the *Mount Laurel* doctrine, providing for uniform decisions and thereby simplifying the scope of litigation as well as increasing the speed of the trials.⁵⁵ This is the problem that Massachusetts attempted to ad-

⁵⁰ 92 N.J. 158, 456 A.2d 390 (1982). This action is a collection of six separate cases all involving the same or similar issues.

⁵¹ 67 N.J. 151, 336 A.2d 713 (1975); see Huber, *Zoning and Land Use*, 1975 ANN. SURV. MASS. LAW § 19.1, at 515, for a discussion of *Mount Laurel I*.

⁵² 92 N.J. at 198-99, 456 A.2d at 410.

⁵³ *Id.* at 209, 456 A.2d at 415.

⁵⁴ *Id.* This concern of the New Jersey court expresses the unstated concern of MHFA and HAC in the *Bd. of Appeals of Wellesley* case (see *supra* text accompanying notes 32-49). Not only the elderly but the poor as well should be allowed to live in suburbia; neither group should be forced to live in areas comparable to Newark and Camden. See *id.* at 215 n.5, 456 A.2d at 415 n.5.

⁵⁵ 92 N.J. at 216, 253, 352, 456 A.2d at 419, 439, 490.

dress through the establishment of HAC and the structure of a process with mandatory time limits to be strictly enforced, a system and intent explained in *Milton Common Associates v. Board of Appeals of Milton*⁵⁶ and *Massachusetts Bread Co., Inc. v. Brice*.⁵⁷ Also, *Mount Laurel II* cited the use of New Jersey's State Department Guide Plan to provide an objective basis for determining if a town has met its obligation for low and moderate income housing or if such an obligation should be imposed on a town.⁵⁸

Mount Laurel II goes beyond the Massachusetts Anti-Snob Zoning Act in that it recognizes not only the need to remove local zoning restrictions, but also to force localities to provide "a realistic opportunity for such housing" to be built.⁵⁹ The New Jersey Supreme Court places an affirmative obligation on the municipality to help developers obtain federal and state housing subsidies. A municipality must pass a "resolution of need" if one is required or grant a tax abatement if such action will allow a developer to receive a federal grant.⁶⁰ The New Jersey court also requires municipalities not meeting their low and moderate income housing obligations to establish inclusionary zoning devices, specifically: incentive zoning;⁶¹ mandatory set-asides;⁶² zoning for mobile homes;⁶³ and providing least cost housing.⁶⁴

⁵⁶ 14 Mass. App. Ct. 111, 436 N.E.2d 1236 (1982). See *supra* notes 10-31 and accompanying text.

⁵⁷ 13 Mass. App. Ct. 1053, 434 N.E.2d 672 (1982). See *supra* note 27 and accompanying text.

⁵⁸ This requirement is tantamount to the Massachusetts test of "consistent with local needs." See *supra* text at notes 30-31. Both tests require that low and moderate income housing cannot be forced upon a municipality if that municipality has made an effort to provide its fair share of low and moderate income housing. New Jersey, like Massachusetts, now takes a regional approach to the low income housing problem instead of limiting its consideration to individual towns. See generally G.L. c. 40B, §§ 1-29.

⁵⁹ 92 N.J. at 264, 456 A.2d at 444.

⁶⁰ *Id.* (referring to the state housing subsidy program requiring a resolution of need, N.J. STAT. ANN. 55, 145-6(b), and the Federal Community Development Block Grant Program, 42 U.S.C. §§ 5301-5320 (1982 Supp.).

⁶¹ 92 N.J. at 266, 456 A.2d at 445. Incentive zoning is a technique where developers are permitted density bonuses. A developer can increase the permitted density of a project, allowing for savings in construction and land costs. These savings are to be passed on to the purchasers theoretically allowing persons of low or moderate income housing to purchase the homes. See Fox & Davis, *Density Bonus Zoning to Provide Low and Moderate Cost Housing*, 3 HASTINGS CONST. L.Q. 1015, 1060-62 (1976).

⁶² 92 N.J. at 267, 456 A.2d at 446. Mandatory set-asides are devices to require a developer to establish a certain percent of the development to be reserved for low and moderate income housing. See Fox & Davis, *supra* note 61, at 1065-66.

⁶³ 92 N.J. at 274, 456 A.2d at 450. Zoning for mobile homes is recognized by the court as an affordable alternative for low income individuals in lieu of the purchase of more costly housing or paying high rents. Thus, municipalities in New Jersey will no longer be permitted to ban mobile homes.

⁶⁴ 92 N.J. at 277-78, 456 A.2d at 451. Least cost housing is defined by the courts as "the

Massachusetts does not require affirmative steps to provide low income housing, but if cases similar to *Zoning Board of Appeals of Wellesley v. Housing Appeals Committee*⁶⁵ continue to appear, the Massachusetts courts may seek to require that affirmative steps be taken by Massachusetts cities and towns. Since the enactment of the Anti-Snob Zoning Act in Massachusetts in 1969, only twenty-five percent of the 351 cities and towns in Massachusetts have utilized the comprehensive permit process, and of the 14,834 housing units applied for, only 3,462 have been built, and of these 3,462 units, forty percent are for elderly housing, thirty-six percent are for family housing and twenty-four percent are for mixed elderly and family housing.⁶⁶ Although the Act has facilitated the construction of some low and moderate income housing, the efforts needed to get a comprehensive permit and carry a project through to construction have often been difficult.⁶⁷ The Act thus has provided an adequate starting point in addressing the severe shortage of low and moderate income housing in the state, but HAC and the courts are displeased with its limited effectiveness. The only way to ensure that the intent of the Act, to provide housing for low and moderate income individuals, is fulfilled may be to adopt an approach similar to that of New Jersey's affirmative requirements as described in *Mount Laurel II*.

§ 15.3. Zoning — Challenging Constructive Approval of a Variance. An applicant for a variance is protected under the Massachusetts Zoning Act (the "Act") from the inaction of a permit granting authority by the following provision of section 15:

The decision of the board shall be made within seventy-five days after the date of the filing of an appeal, application or petition Failure by the board to act within said seventy-five days shall be deemed to be the grant of the relief, application or petition sought, subject to an applicable judicial appeal as provided for in this chapter.¹

The granting of an application under such conditions has come to be known as "constructive" approval.² As section 5 clearly indicates, a

least expensive housing that builders can provide after removal by the municipality of all excessive restrictions and exactions and after thorough use by a municipality of all affirmative devices that might lower costs." *Id.* The removal of restrictions includes only those "not essential for safety and health." *Id.*

⁶⁵ 385 Mass. 651, 433 N.E.2d 873 (1982). See *supra* notes 32-49 and accompanying text.

⁶⁶ Reed, *Tilting at Windmills: The Massachusetts Low and Moderate Income Housing Act*, 4 WEST, N.E. L. REV. 105, 125 (1982) (citing G. RUBEN & C. WILLIAMS, COMPREHENSIVE PERMITS FOR HOUSING LOWER INCOME HOUSEHOLDS IN MASSACHUSETTS. (Citizens Housing and Planning Associates Inc. (Dec. 1979)).

⁶⁷ G. RUBEN & C. WILLIAMS, *supra* note 66, at 10.

§ 15.3. ¹ G.L. c. 40A, § 15.

² Most of the litigation involving constructive approval in the land use area has come from cases involving subdivision control. G.L. c. 41, § 81U provides, in pertinent part:

Failure of the planning board either to take final action or to file with the city or town

constructively granted variance may be challenged pursuant to the procedures described in the Act. Section 17 of the Act governs such judicial review, and states in pertinent part:

Any person aggrieved by a decision of the board of appeals or any special permit granting authority . . . may appeal . . . by bringing an action within twenty days after the decision has been filed in the office of the city or town clerk.³

The wording of section 17, however, does not specifically address judicial review of constructive approval.⁴ Taken literally, section 17 authorizes only the running of the appeals period after a decision is filed. Thus, a significant dilemma arises concerning the appropriate time for challenging constructive approval of a variance. The question arises whether the appeals period runs from the date relief is constructively granted⁵ or from an indeterminate later date upon which a decision is finally filed. The Appeals Court examined this issue during the *Survey* year. In *Noe v. Board of Appeals of Hingham*⁶ a majority of the court held that the twenty-day period for filing an appeal under section 17 of the Act does not begin to run for an adjoining landowner challenging constructive approval of a variance until a decision has been filed with the town clerk.⁷

In *Noe*, the owners of the lot in question applied to the Hingham Board of Appeals ("Board") for a variance in order to avoid the local zoning law's side yard requirements.⁸ More than twenty days following the date upon which the Board's inaction ripened into a constructive grant, the

clerk a certificate of such action regarding a [subdivision] plan submitted by an applicant within sixty days after each submission . . . shall be deemed to be an approval thereof.

³ G.L. c. 40A, § 17. This section applies equally to constructive approval of a special permit under G.L. c. 40A, § 9.

⁴ In contrast, the subdivision control law provides that if a plan is constructively approved:

[T]he city or town clerk shall, after the expiration of twenty days without notice of appeal . . . , issue a certificate stating the date of the submission of the plan for approval, the fact that the planning board failed to take final action and that the approval resulting from such failure has become final.

G.L. c. 41, § 81V. See *supra* note 2. Section 81BB of the same chapter further declares:

Any person . . . aggrieved by the failure of [a planning board] to take final action concerning [a subdivision plan] within the required time may appeal . . . provided, that such appeal is entered . . . within twenty days after the expiration of the required time as aforesaid

⁵ Apparently, this was the interpretation given in one well respected analysis of commonwealth zoning law. See Healy, *Massachusetts Zoning Practice Under the Amended Enabling Act*, 64 MASS. L. REV. 149, 164 (1979).

⁶ 13 Mass. App. Ct. 103, 430 N.E.2d 853 (1982).

⁷ *Id.* at 104, 430 N.E.2d at 854.

⁸ *Id.* at 105, 430 N.E.2d at 854-55.

plaintiff, an adjoining landowner, brought suit in the superior court seeking an order instructing the Board to file a decision and a ruling against the validity of any constructively approved variance.⁹ A few days after the commencement of this action, the Board filed a decision expressly granting the variance.¹⁰ Within twenty days thereafter, the plaintiff's complaint was amended, seeking a reversal of the Board's decision.¹¹ The superior court, however, granted the owners' subsequent motion to dismiss the complaint as being "untimely."¹²

In reversing the judgment of the superior court, the Appeals Court first distinguished analogous cases that involved only an owner and the municipality from the case before it, which also concerned the rights of an aggrieved third person.¹³ In the former type of case, the court noted, a board is obligated to file a decision within the seventy-five day period of section 15; "otherwise the applicant prevails by default."¹⁴ In the latter situation, however, the court determined that the ability of an adjoining landowner to obtain judicial review of a constructively granted variance, or of a later filed decision expressly granting the variance, should not depend upon whether the aggrieved party "fails to run off to the appropriate court house within twenty days of the date of the constructive grant."¹⁵

Second, the Appeals Court emphasized the importance of a precise time at which the appeals period under section 17 would commence.¹⁶ The court noted that this consideration had been a primary factor in the disposition of *Building Inspector of Attleboro v. Attleboro Landfill, Inc.*,¹⁷ in which the Supreme Judicial Court, dealing with constructive

⁹ *Id.* The plaintiff also sought an injunction which was denied for failure to first pursue various forms of administrative relief. *Id.* at 105 n.4, 430 N.E.2d at 855 n.4. As the court noted, such relief is discussed in *Neuhaus v. Building Inspector of Marlboro*, 1981 Mass. App. Ct. Adv. Sh. 161, 415 N.E.2d 235; 13 Mass. App. Ct. at 105 n.4, 430 N.E.2d at 855 n.4.

¹⁰ 13 Mass. App. Ct. at 105, 430 N.E.2d at 855.

¹¹ *Id.*

¹² *Id.* At this juncture the case presented a rather unusual procedural problem. Briefly, there had been some confusion as to whether the aforesaid motion should be handled as one for summary judgment pursuant to MASS. R. CIV. P. 56, or one to dismiss for lack of jurisdiction pursuant to MASS. R. CIV. P. 12(b)(1) or 12(h)(3). *Id.* at 105 nn. 5-6, 430 N.E.2d at 855 nn. 5-6. The court concluded that the latter was more appropriate and that the lower court had erred in reaching the merits of a case it had ordered dismissed. *Id.* at 105 n.6, 430 N.E.2d at 855 n.6. Prospective litigants would be advised to check the record in detail.

¹³ *Id.* at 108, 430 N.E.2d at 856.

¹⁴ *Id.* at 107, 430 N.E.2d at 856 (quoting *Rinaudo v. Zoning Bd. of Appeals of Plymouth*, 1981 Mass. Adv. Sh. 1653, 421 N.E.2d 439.)

¹⁵ *Id.* at 108, 430 N.E.2d at 856.

¹⁶ *Id.*

¹⁷ 1981 Mass. Adv. Sh. 1653, 423 N.E.2d 1009.

approval of special permits under section 9 of the Act, stated that “unless the board’s decision is filed with the clerk, there would be no commencement of the statutory time within which appeals may be taken.”¹⁸

Finally, the court in *Noe* reasoned that the relevant statutory language placed particular emphasis upon the filing of a decision with the town or city clerk.¹⁹ The court referred to the notice provisions of section 15 which require that an applicant and other affected parties²⁰ be informed that “appeals, if any, shall be made pursuant to section seventeen and shall be filed within twenty days after the date of filing such notice in the office of the city or town clerk.”²¹ In addition, the court noted that section 17, which confers appellate jurisdiction under the Act, requires that such an appeal be made “within twenty days after the decision has been filed in the office of the city or town clerk”²² and further provides that “there shall be attached to the complaint a copy of the decision appealed from, bearing the date of filing thereof, certified by the city or town clerk with whom the decision was filed.”²³

The root of the problem in this case is the lack of a definitive procedure dealing specifically with constructive approval under the Act.²⁴ The underlying issue, therefore, becomes whose rights, those of the applicant or those of the adjoining landowner, should prevail given the statutory ambiguity. The Appeals Court, consistent with the historical policy to favor appeals by adjoining landowners,²⁵ is ultimately willing to preserve

¹⁸ *Id.* at 1655, 1656, 423 N.E.2d at 1010-11, *quoted in* 13 Mass. App. Ct. at 108, 430 N.E.2d at 857. The dissent found the court’s analysis of *Attleboro Landfill* insufficient. 13 Mass. App. Ct. at 111, 430 N.E.2d at 858 (Dreben, J., dissenting). According to the dissent, an applicant for a variance is unable to rely upon board inaction under the majority’s holding, while the adjoining landowner is given “what may be an unlimited period of time to cloud the rights of a landowner to use his land Such an unlimited appeal period is contrary to our appellate practice generally, . . . and to the legislative mandate in similar matters, G.L. c. 41, § 81U.” *Id.* Justice Dreben would have ruled that the twenty day appeals period begins to run immediately upon the date where inaction has matured into a constructive approval so long as the aggrieved person had notice of the original application as required by G.L. c. 41A, § 11. *Id.* at 112, 430 N.E.2d at 859.

¹⁹ 13 Mass. App. Ct. at 104, 430 N.E.2d at 857.

²⁰ G.L. c. 40A, § 11 lists those individuals who are entitled to such notice as “the petitioner, abutters, owners of land directly opposite on any private or public street or way, and abutters to the abutters within three hundred feet of the property line of the petitioner.”

²¹ 13 Mass. App. Ct. at 109, 430 N.E.2d at 857 (quoting G.L. c. 40A, § 15).

²² *Id.* (quoting G.L. c. 40A, § 17).

²³ *Id.*

²⁴ The court in *Noe* recognized that the statutes dealing with constructive approval of variances (and special permits) were hastily added to the Zoning Act “without recognizing the need for a change in § 17 which would provide alternative appeal periods comparable to those in c. 41, § 81BB.” *Id.* at 109 n.10, 430 N.E.2d at 857 n.10. *See, e.g.*, 1975 Senate Journal at 2211, 2215; 1975 House Journal at 2939, 2993, 3037-38.

²⁵ 5 N. WILLIAMS, AMERICAN LAND PLANNING LAW §§ 134.02-134.03, at 38-41.

the right of appeal under certain circumstances. Perhaps the court implicitly indicated this in *Noe* when it described the twenty-day appeals period as being “precariously extrapolated” from section 17.²⁶ It would seem, however, that the technical requirements of filing which permeate section 17 are no less “extrapolated.”

Given the increase in the number of cases involving constructive approval under the Zoning Act,²⁷ a statutory change that would protect an applicant for a variance from what could be an unlimited appeals period may be in order.²⁸ Such a change might allow the landowner to do some act amounting to a recording of the constructively approved variance with the city or town clerk.²⁹ The appeals period would then run from the date of this recording, which under the amendment would be synonymous to filing a decision under sections 15 and 17. This proposed change would require the landowner to inform those entitled to notice of the original application under section 11 of the Act about the status of the application and the running of the appeals period. Such a resolution would also help to alleviate any title problems that may occur if any of the “bundle of rights” is exchanged between the date of the constructive grant and the running of the appeals period. This self-help approach seems most desirable because the applicant, being the one most anxious to have the relief granted, is usually in the best position to pursue such measures.³⁰

Later during the *Survey* year the Appeals Court addressed a closely related matter in *Girard v. Board of Appeals of Easton*.³¹ In that case, the owners of two neighboring parcels of land sought, *inter alia*, a variance from the lot size requirements of the applicable Easton by-law in order to

²⁶ 13 Mass. App. Ct. at 106 n.7, 430 N.E.2d at 856 n.7.

²⁷ See, e.g., *Pasqualino v. Bd. of Appeals of Wareham*, 14 Mass. App. Ct. 989, 440 N.E.2d 523 (1982); *Shea v. Bd. of Aldermen of Chicopee*, 13 Mass. App. Ct. 1046, 434 N.E.2d 214 (1982).

²⁸ The dissent in *Noe* emphasizes this problem. See *supra* note 18.

²⁹ This is quite different from the protection currently afforded by section 81V of the Subdivision Control Law (see *supra* note 4) which merely keeps the responsibility to record an approval in the hands of the authorities and may leave the applicant in the position of having to pursue the extraordinary and often illusive relief of a writ of mandamus. G.L. c. 41, § 81V. See *supra* notes 2 and 3.

³⁰ In contrast to the Subdivision Control Law (see G.L. c. 41, § 81W) the Zoning Act does not provide for the amendment or rescission of a variance or special permit once it is approved. Although a regularly granted variance or special permit “may impose conditions, safeguards and limitations” of time and use (G.L. c. 40A, § 10 and § 9, respectively) no such condition could attach to a constructively granted variance or special permit. Thus, the risk of permanent damage to land or community is an unfortunate consequence of constructive approval which nevertheless must be balanced against the need to protect both the landowner from the unreasonable loss of the use of his land and the community in general from administrative folly.

³¹ 14 Mass. App. Ct. 334, 439 N.E.2d 308 (1982).

construct a single-family house.³² The Board, however, failed to file a decision within the seventy-five day statutory period, thereby constructively approving the variance.³³ The plaintiff appealed the constructive grant under section 17 of the Act before any decision was filed with the town clerk.³⁴ In *Noe*, the Appeals Court intentionally postponed a determination of the proper time and method of obtaining judicial review when a board has yet to file any decision, before or after the seventy-five days, with the town or city clerk.³⁵ The court in *Girard* resolved the issue by holding that the period before a decision is filed is a suitable time to challenge a constructively granted variance under section 17.³⁶ The court's rationale focused on the principle that "when statutes fix a certain time after a procedural event for taking action, the action may be taken before the event."³⁷ The opinion also explained that such action is not prejudicial to the defendant when, as was the case in *Girard*, the facts upon which the action is based are generally known.³⁸ Finally, the court pronounced: "[I]t is a general policy of the law to prevent loss of valuable rights . . . because [something] was done too soon."³⁹ Taken together, the *Noe* and *Girard* decisions make it clear that a constructively granted variance may be challenged by an aggrieved third party other than the municipality at any time between its becoming effective and twenty days after a decision has been filed with the town or city clerk.

§ 15.4. Zoning Act — Prior Nonconforming Use — Challenge to Building Permit — Statute of Limitations. The Zoning Act (the "Act") permits lawfully established uses of real property that come in conflict with subsequently passed zoning ordinances to continue.¹ The Act's protection of these prior nonconforming uses ceases, however, if there is a "change or substantial extension of such use[s]."² During the *Survey* year in *Cape Resort Hotels Inc. v. Alcoholic Licensing Board of Falmouth*,³ the Supreme Judicial Court used this latter clause to remove the status of a resort hotel as a valid prior nonconforming use. Nevertheless, the Court

³² *Id.* at 335, 439 N.E.2d at 309.

³³ *Id.* at 337, 439 N.E.2d at 310.

³⁴ *Id.*

³⁵ 13 Mass. App. Ct. at 110, 430 N.E.2d at 857.

³⁶ 14 Mass. App. Ct. at 337-38, 439 N.E.2d at 311.

³⁷ *Id.* (citing *Tanzilli v. Cassassa*, 324 Mass. 113, 85 N.E.2d 220 (1949)).

³⁸ *Id.* at 338, 439 N.E.2d at 311.

³⁹ *Id.* (quoting *Becton, Dickinson & Co. v. State Tax Comm'n*, 374 Mass. 230, 372 N.E.2d 1254 (1978)).

§ 15.4. ¹ G.L. c. 40A, § 6.

² *Id.*

³ 385 Mass. 205, 431 N.E.2d 213 (1982).

also held that a significant portion of the hotel premises, which had been developed under a building permit more than six years prior to the filing of suit, was immune from challenge under the statute of limitations set forth in section 7 of the Act.⁴

The facility at issue in *Cape Resort* was situated in a residential district and had functioned as a protected nonconforming use since 1926.⁵ In 1926 the hotel was comprised of a dining room, kitchen, lobby, reading area, sitting room, porch, and guest rooms.⁶ The hotel had no separate bar directly serving patrons but did serve alcoholic beverages in its dining room.⁷ A standard entertainment program included a pianist or trio at dinner followed by card games or movies ordinarily lasting until about ten p.m.⁸ From time to time a dance or concert attracting the general public was featured that would conclude at about one a.m.⁹ The Court described the nonconforming use as it existed in 1926 as a “traditional, full service summer resort hotel for mostly middle aged and older clientele.”¹⁰

From about the mid-1950’s until the late 1970’s the resort hotel gradually developed into a modern entertainment complex with three separate bar rooms, each having distinct entertainment offerings.¹¹ The “pub,” formerly the reading room, had a “jukebox,” games and live music during the evenings; the “show lounge,” once guest room space, offered live entertainment, including musical groups and dancing; and the “disco,” occupying the space previously used for the dining room, featured a large dance floor accompanied by lighting displays and sound producing equipment.¹² Furthermore, noise and parking problems had developed, and, consequently, abutters to the facility were occasionally disturbed until two or three a.m.¹³

In ruling upon the nonconforming use status of the resort hotel, the

⁴ *Id.* at 217, 431 N.E.2d at 220. The relevant portion of G.L. c. 40A, § 7 provides: [I]f real property has been used in accordance with the terms of the original building permit . . . no action, criminal or civil, the effect or purpose of which is to compel the abandonment, limitation or modification of the use allowed by said permit or the removal, alteration or relocation of any structure erected in reliance upon said permit by reason of any alleged violation of the provisions of this chapter, or of any ordinance or by-law adopted thereunder, shall be maintained, unless such action, suit or proceeding is commenced . . . within six years next after the alleged violation of law.

⁵ 385 Mass. at 211, 431 N.E.2d at 217.

⁶ *Id.* at 208, 431 N.E.2d at 215.

⁷ *Id.*

⁸ *Id.* at 208-09, 431 N.E.2d at 215-16.

⁹ *Id.* at 209, 431 N.E.2d at 216.

¹⁰ *Id.* at 208, 431 N.E.2d at 215.

¹¹ *Id.* at 209, 210, 431 N.E.2d at 216.

¹² *Id.*

¹³ *Id.* at 211, 431 N.E.2d at 217.

Supreme Judicial Court relied upon the three-prong inquiry set forth in *Bridgewater v. Chuckran*:¹⁴ “(1) whether the use reflects the ‘nature and purpose’ of the use prevailing when the zoning by-law took effect . . . , (2) whether there is a difference in the quality or character, as well as the degree of use and . . . (3) whether the current use is ‘different in kind in its effect on the neighborhood.’ ”¹⁵ *Bridgewater* further places on the landowner engaging in the nonconforming use the burden of demonstrating that under the foregoing standards, a change or substantial extension in use does not exist.¹⁶ The *Cape Resort* Court applied the *Bridgewater* inquiries *in seriatim*. The present use of the property, according to the Court, did not reflect the nature and purpose of the original nonconforming use.¹⁷ Rather, the Court found that the major functioning of the hotel had “changed dramatically” from providing room and board to offering extensive entertainment facilities geared to appeal to a younger and larger clientele.¹⁸ The Court next concluded that the present hotel facilities differed from the 1926 version in quality, character and degree of use.¹⁹ The Court referred to the transformation of the uses of each of the hotel rooms and the servicing of a younger clientele to support this conclusion.²⁰ In addition, the Court emphasized that, unlike the 1926 operation, a substantial majority of the hotel’s revenues were being obtained through the sale of alcohol.²¹ Moreover, the Court observed, the previous modes of entertainment, such as cards and movies, were replaced by nightclub activity.²² To complete the *Bridgewater* analysis, the Court found that the current uses of the property affected the neighborhood in a greatly different manner than the uses prevalent in 1926.²³ Most significant was the evolved ability of the nightclubs to provide service for more than 800 people at a time, thus resulting in traffic and noise problems that created a disturbance to the community.²⁴ Based upon these conclusions, the *Cape Resort* Court revoked the status of the hotel facility as a protected nonconforming use.²⁵

Despite the Court’s ruling revoking the hotel’s protection as a valid nonconforming use, the hotel owners were nevertheless able to maintain the operation of their “show lounge,” which had been constructed under

¹⁴ 351 Mass. 20, 217 N.E.2d 726 (1966).

¹⁵ *Id.* at 23, 217 N.E.2d at 727-28.

¹⁶ *Id.* at 24, 217 N.E.2d at 728.

¹⁷ 385 Mass. at 212, 431 N.E.2d at 217.

¹⁸ *Id.* at 212-13, 431 N.E.2d at 217-18.

¹⁹ *Id.* at 213, 431 N.E.2d at 218.

²⁰ *Id.*

²¹ *Id.* at 214, 431 N.E.2d at 218.

²² *Id.*

²³ *Id.* at 216, 431 N.E.2d at 219.

²⁴ *Id.*

²⁵ *Id.*

a 1961 building permit.²⁶ The Act provides that an action to restrict the uses that are allowed by a building permit must be initiated within six years after the alleged violation of law began.²⁷ Because the improvements constructed under the 1961 permit were completed more than six years prior to the filing of suit, and the “show lounge” was being “used in accordance with the terms of the original building permit,” the statute of limitations contained in section 7 of the Act applied.²⁸ The Court rejected the argument that the term “real property” in section 7 connotes “raw land” and that, therefore, the words “original building permit” in that by-law refer only to a permit allowing the construction of an independent structure.²⁹ Such an interpretation would mean that “no alterations of or additions to existing buildings, even those undertaken in accordance with properly issued building permits, would be protected by the section 7 statute of limitations.”³⁰ This would be contrary to the Legislature’s intent to set a time after which the issuance of a building permit could not be challenged as being contrary to zoning law.³¹

The hotel owners also presented three separate arguments in an attempt to block the effect of the loss of valid nonconforming use status. First, the hotel owners claimed that the authority to maintain the current uses of the hotel should be implied by the issuance of a 1969 variance for a parking lot.³² The Court found this approach to be insufficient since the operation of the hotel facilities was simply not at issue when the local board approved the 1969 variance.³³

Second, the hotel owners claimed that the theories of laches and estoppel provided defenses to the enforcement of nonconforming use related by-laws.³⁴ In rejecting this notion, the *Cape Resort* Court described the distinguishing characteristics of its decision in *Chilson v. Zoning Board of Appeals of Attleboro*,³⁵ which seemingly applied the doctrine of laches. In *Chilson* the town building inspector had expressly approved the transference of a nonconforming use from one building to another.³⁶ This

²⁶ *Id.* at 217, 431 N.E.2d at 220.

²⁷ *See supra* note 3 (relevant text of section 7).

²⁸ *Id.* at 219, 431 N.E.2d at 221.

²⁹ *Id.* at 218, 431 N.E.2d at 220.

³⁰ *Id.*

³¹ *Id.* at 218, 431 N.E.2d at 220-21. An outdoor porch, enclosed in 1956, was not protected under section 7 because the hotel owners failed to demonstrate that the improvement was used in accordance with the permit authorizing its construction. *Id.* at 219, 431 N.E.2d at 221.

³² *Id.* at 219-20, 431 N.E.2d at 221.

³³ *Id.*

³⁴ *Id.* at 224, 431 N.E.2d at 223.

³⁵ 344 Mass. 406, 182 N.E.2d 535 (1962).

³⁶ *Id.* at 408, 182 N.E.2d at 537.

change was motivated by the town's repositioning of a street and was ruled to be "colorably within the exemption applicable to nonconforming uses."³⁷ The *Cape Resort* Court explained that the "dramatic" changes in nonconforming uses in this case were not approved by any municipal officials nor were they colorably within the protection afforded by section 6 of the Act.³⁸ Thus the Court refused to weaken the established rule in Massachusetts that laches and estoppel are not defenses in a suit brought to enforce municipal zoning regulations.³⁹

Lastly, the Court refuted the argument that the restriction of dance and music in any nonconforming hotel conflicted with the right of free speech protected under the first and fourteenth amendments of the United States Constitution and article sixteen of the Declaration of Rights of the Massachusetts Constitution.⁴⁰ The Supreme Judicial Court determined that its decision in *Commonwealth v. Sees*,⁴¹ which invalidated under article sixteen the specific application of a municipal regulation that prohibited topless dancing in a bar, was not germane to the instant case. The municipal authorities in *Sees* applied the regulation there in an unacceptable manner by "distinguishing protected expression on the basis of content" without any demonstrated public interest.⁴² No similar type of conduct was alleged by the hotel owners in the present case and *Sees* would not be interpreted to mean that "an owner of a nonconforming hotel has an absolute right to develop facilities for music and dancing on as large a scale as he sees fit."⁴³ For these reasons, the Court found that an abridgment of constitutional rights had not been demonstrated.⁴⁴

The *Cape Resort* Court also addressed the nonconforming use status of two of the resort's subsidiary structures. An impermissible change in use had occurred in one building that had been converted from a lodging house for resort employees to quarters for paying guests.⁴⁵ According to the Court, such a change of use was a "commercial venture" providing a new form of service that was unacceptable under the relevant local by-law and section 6 of the Act.⁴⁶ The status of the second subsidiary building, however, remained unchanged.⁴⁷ The building had been sold in 1962 by

³⁷ *Id.* at 409, 182 N.E.2d at 538.

³⁸ 385 Mass. at 225, 431 N.E.2d at 224.

³⁹ *Id.* See *McAleer v. Bd. of Appeals of Barnstable*, 361 Mass. 317, 280 N.E.2d 166 (1972); *Ferrante v. Bd. of Appeals of Northampton*, 345 Mass. 158, 186 N.E.2d 471 (1962).

⁴⁰ 385 Mass. at 225, 431 N.E.2d at 224.

⁴¹ 374 Mass. 532, 373 N.E.2d 1151 (1978).

⁴² 385 Mass. at 225, 431 N.E.2d at 224.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 222, 431 N.E.2d at 222.

⁴⁶ *Id.* at 223, 431 N.E.2d at 223.

⁴⁷ *Id.* at 220-21, 431 N.E.2d at 221-22.

previous owners of the hotel and reconveyed thirteen years later to the current owners.⁴⁸ The same use of the building, to provide lodging for paying guests, was maintained at all relevant times.⁴⁹ The relevant local ordinance stated that “when a nonconforming use has been discontinued for a period of one year, it shall not be reestablished.”⁵⁰ Referring to prior case law, the Court noted that “discontinued” in the above quoted ordinance connotes “abandonment”⁵¹ and accordingly the principle that a conveyance of property does not amount to the abandonment of a valid nonconforming use was applicable.⁵² Therefore, the Court needed only to restate that the building had always been used for the same purposes to dispose of the issue.⁵³

§ 15.5. Reestablishment of Lapsed Variance. The scope of variance granting power of a municipality is limited by the final paragraph of section 10 of the Zoning Act,¹ which states: “If the rights authorized by a variance are not exercised within one year of the date of grant of such variance they shall lapse, and may be reestablished only after notice and a new hearing pursuant to this section.” During the *Survey* year in *Hunters Brook Realty Corporation v. Zoning Board of Appeals of Bourne*,² the Appeals Court construed this provision of section 10 as reflecting a “bright line test” and consequently held that a party seeking the reestablishment of a lapsed variance must make a new and independent showing that the conditions for the granting of a variance exist.³ The court’s decision reversed the superior court’s ruling that the holder of a lapsed variance is entitled to regain his former rights so long as there have not been any material changes in the applicable zoning law or in the various qualities of the land itself since the date the variance was initially granted.⁴

The developer in *Hunters Brook Realty* desired to build both town houses and cluster homes on a parcel of land zoned partly for residential use and partly for scenic development.⁵ The developer applied for and

⁴⁸ *Id.* at 220, 431 N.E.2d at 221-22.

⁴⁹ *Id.* at 221, 431 N.E.2d at 222.

⁵⁰ *Id.* at 220, 431 N.E.2d at 222.

⁵¹ *Id.* (citing *Pioneer Insulation & Modernizing Corp. v. Lynn*, 331 Mass. 560, 120 N.E.2d 913 (1954)).

⁵² *Id.* at 221, 431 N.E.2d at 222 (citing *Wayland v. Lee*, 325 Mass. 637, 91 N.E.2d 835 (1950); *Revere v. Rowe Contracting Co.*, 326 Mass. 884, 289 N.E.2d 830 (1972)).

⁵³ *Id.*

§ 15.5. ¹ G.L. c. 40A, § 10.

² 14 Mass. App. Ct. 76, 436 N.E.2d 978 (1982).

³ *Id.* at 77, 84, 436 N.E.2d at 979, 983.

⁴ *Id.* at 84, 436 N.E.2d at 980.

⁵ *Id.*

received variances from local ordinances prescribing relevant dimensional and intensity of use requirements.⁶ Certain conditions were then attached to the variances following an appeal by the town planning board to the superior court.⁷ The developer failed to exercise the rights authorized by the variances within a year of the superior court's judgment, however, and eventually its application to reestablish the variances pursuant to section 10 of the Zoning Act was denied by the zoning board of appeals.⁸

The Appeals Court based its decision to uphold the board's denial on a combination of the literal meaning of the words in the last paragraph of section 10 and the relevant legislative history.⁹ The "operative words of the statute," "shall," "may," "lapse," and "pursuant," were each individually defined using prior case law and primary definitional sources.¹⁰ The Appeals Court concluded:

Based on these simple and straightforward definitions, the words used in the last paragraph of [section] 10, read in context with the rest of the statute, convey the clear impression that variance rights which are not seasonably exercised will automatically become void; that the holder of a lapsed variance who seeks to reestablish rights must initiate a new proceeding under [section] 10; [and] that he must therefore make a new showing of the requirements set out in the first paragraph of that statute.¹¹

Accordingly, the court held, "it is for the board . . . to decide the matter [of reestablishment of a lapsed variance] in the exercise of its discretion."¹²

§ 15.6. Special Permits — Interpretation of Local Law. The zoning board of appeals is generally the tribunal of first impression when an issue involves the interpretation of local law.¹ Although a zoning board's construction of an ordinance is entitled to great deference, a court will nevertheless reverse a decision that conflicts with its view of legislative

⁶ *Id.* at 77-78, 436 N.E.2d at 980.

⁷ *Id.* at 78, 436 N.E.2d at 980.

⁸ *Id.* at 79, 436 N.E.2d at 981.

⁹ *Id.* at 80-83, 436 N.E.2d at 981-83. The relevant legislative history indicated that the Legislature "considered and rejected language which could have left the criteria for reestablishing a lapsed variance open to local definition and control." *Id.* at 83, 436 N.E.2d at 983.

¹⁰ *Id.* at 80, 436 N.E.2d at 982. The court determined that, as used in section 10, "shall" communicates an "imperative obligation," "may" indicates "the existence of discretion," "lapse" means to "become void or ineffective" and relates to "the termination of a right or privilege . . . through failure of some contingency," and "pursuant" means "in conformance to or agreement with." *Id.*

¹¹ *Id.* at 80-81, 436 N.E.2d at 982.

¹² *Id.* at 81, 436 N.E.2d at 982.

§ 15.6. ¹ 3 R. ANDERSON, AMERICAN LAW OF ZONING § 19.18, at 423 (2d ed. 1977).

construction.² At times, judicial and administrative construction are entirely consistent,³ and in some instances, as in the *Survey* year decision of *Balas v. Board of Appeals of Plymouth*,⁴ a court will even expand the scope of a board's previous interpretation.

In *Balas* the local zoning board of appeals granted a special permit with environmental design conditions to the developer and owners of the prospective site of a shopping center.⁵ The board of appeals stated, however, that "all conditions must be satisfied in the form of existing consultant reports, binding agreements, and plans approved and endorsed by the [p]lanning [b]oard."⁶ The board also "expressly reserved to itself the right to review those plans which the planning board *disapproved*."⁷ The plaintiff brought an action challenging the board's decision as being in excess of its authority. In affirming the decision of the board, the superior court determined that the condition that the board imposed applied not only to plans disapproved by the planning board but also to those approved.⁸

On review, the Appeals Court found the superior court's conclusion acceptable, especially given the "complex and detailed" nature of the applicable Plymouth zoning by-law.⁹ The Appeals Court, however, held that, in order for the board to act within its authority, it would have to extend its previous decision through an amendment specifically reserving the right to review plans *approved* by the planning board.¹⁰

In another *Survey* year decision, *Howland v. Board of Appeals of Plymouth*,¹¹ the Appeals Court again considered the proper construction of a Plymouth zoning ordinance, this time concerning the parking facility standards within a waterfront district. The local provisions at issue in-

² *Id.* See also *Pendergast v. Bd. of Appeals of Barnstable*, 331 Mass. 555, 120 N.E.2d (1954); Huber, *Zoning and Land Use*, 1979 ANN. SURV. MASS. LAW § 15.7, at 428.

³ 3 R. ANDERSON, *supra* note 1, at § 19.18, at 423.

⁴ 13 Mass. App. Ct. 995, 432 N.E.2d 742 (1982).

⁵ *Id.* at 995, 432 N.E.2d at 743.

⁶ *Id.* at 996, 432 N.E.2d at 743-44 (brackets supplied). The "board of appeals" should not be confused with the "planning board." The latter is responsible for adopting zoning regulations and is sometimes replaced by the board of selectman. G.L. c. 40A, § 6. The former is the authority designated to hear appeals from any person "aggrieved" under the Zoning Enabling Act. G.L. c. 40A, § 13. The planning board does, however, act as an appeal forum from the point in time that an ordinance is adopted until the mayor or selectmen appoints the members of the board of appeals, G.L. c. 40A, § 14.

⁷ *Id.* at 995, 432 N.E.2d at 743 (emphasis added).

⁸ *Id.* at 996, 432 N.E.2d at 744.

⁹ *Id.*

¹⁰ *Id.* (emphasis added). The court therefore remanded the case with instructions that if the board made the appropriate change within thirty days, the superior court judgment that the board did not exceed its authority would stand. *Id.* at 997, 432 N.E.2d at 744.

¹¹ 13 Mass. App. Ct. 520, 434 N.E.2d 1286 (1982).

cluded the requirements that: (1) "parking space . . . be on the same lot as the principal use served, or if not reasonably possible, in the same district within 400 feet of the principal building;" (2) "[s]uch off premises parking shall be in possession, by deed or lease of the owner of the use served;" and (3) there be at least one parking space per three seats or "one space for each 50 square feet of gross floor area, whichever is greater."¹² The defendant in *Howland* applied for a special permit to construct a second floor and terrace on his restaurant.¹³ The restaurant was situated on the town wharf.¹⁴ In granting the special permit, the zoning board of appeals found that the town wharf had sufficient parking and that no variance was required.¹⁵ The plaintiffs were unsuccessful in their appeal of this decision to the superior court.¹⁶ That court found that the municipally owned wharf was itself a "lot" under the applicable Plymouth zoning by-law, while the land associated with the restaurant itself was but a "parcel" of that lot.¹⁷ In applying this determination to the relevant facts the superior court ruled that "ample parking exists, owned by the owner of [the wharf] . . . , within the confines of [the wharf] and within 400 feet of [the restaurant]."¹⁸ The judge, apparently focusing on the requirement that the parking be on the lot served, therefore held that the conditions of the local by-law were satisfied.¹⁹

The Appeals Court reversed. The intent behind the relevant ordinance as perceived by the court from the wording of the law proved to be dispositive. The court stated:

By the use of language that required parking to be located "on the same lot as the principal use served," it was the intent of the zoning by-law to have parking located on the premises where the use was located, if possible. The language in the by-law shows that it is the person who possesses the special use who must have the required number of parking spaces . . . not the owner of the 'lot' or 'parcel' on which the use will be located.²⁰

Because there was insufficient space for parking on the restaurant owner's premises and the option of leasing or purchasing parking space within 400 feet of the locus was not exercised, the court concluded that the requirements of the zoning by-law were not met.²¹ Moreover, the Appeals Court ruled that the lower court's finding of "ample parking" space was

¹² *Id.* at 522-23, 434 N.E.2d at 1288 (brackets supplied).

¹³ *Id.* at 520, 434 N.E.2d at 1287.

¹⁴ *Id.*

¹⁵ *Id.* at 521, 434 N.E.2d at 1287.

¹⁶ *Id.* at 522, 434 N.E.2d at 1288.

¹⁷ *Id.*

¹⁸ *Id.* (brackets added).

¹⁹ *Id.*

²⁰ *Id.* at 522-23, 434 N.E.2d at 1288.

²¹ *Id.* at 523, 434 N.E.2d at 1288.

erroneous because the superior court judge had failed to apply the numerical standard delineated in the local by-law.²²

The decision of the Appeals Court in *Howland* properly interprets the language of the Plymouth zoning law. The superior court's decision may, however, have been a more sensible resolution of the issue. Nevertheless, it is inappropriate in this type of case for a court to overrule the local law, even when it appears that the letter of the local ordinance does not follow the general policy behind it. It is certainly possible that the purpose of the local law examined in *Howland*, to provide adequate parking, was satisfied by the wharf parking space then available. Such a decision, however, is one to be made by the municipality, not by the court.

²² *Id.* (citing *Josephs v. Bd. of Appeals of Brookline*, 362 Mass. 290, 285 N.E.2d 436 (1972)).

