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Chapter 4: Real Property and Conveyancing

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CHAPTER 4

Real Property and Conveyancing

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§ 4.1. Mortgages: "Due-on-sale" clause—Restraint on Alienation. Inflation has the effect of increasing litigation between banks and borrowers, as banks seek to recover loans paying interest at well below the market rate and borrowers seek to maintain the interest rates on their loans. One issue raised in this litigation is the enforceability of "due-on-sale" clauses in mortgages, which permit the lender to accelerate the repayment of principal if and when the borrower conveys the mortgaged property.[1] Some jurisdictions have held that due-on-sale clauses are unenforceable, as an unreasonable restraint on alienation, unless the lender's security is impaired by the transfer.[2]

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§ 4.1. [1] The "due-on-sale" clause construed by the Massachusetts Supreme Judicial Court in Dunham v. Ware Savings Bank, 1981 Mass. Adv. Sh. 1607, 423 N.E.2d 998, provided:

> The Mortgagor also covenants and agrees that in the event the ownership of the mortgaged premises or any part thereof shall by the voluntary or involuntary act of the Mortgagor or by operation of law or otherwise become vested in any person, partnership, corporation, trust, or association other than the Mortgagor, the entire mortgage debt then remaining unpaid shall, at the option of the Mortgagee, forthwith become due and payable.

Id. at 1608 n.4, 423 N.E.2d at 1000. A similar clause may permit the lender to accelerate the debt when the borrower further encumbers the property. The Massachusetts court explicitly took no position as to the enforceability of such a "due-on-encumbrance" clause. *Id.* at n.3. In some instruments due-on-sale and due-on-encumbrance provisions are combined in one clause. See the sample clause in Note, *Enforcement of Due on Transfer Clauses*, 13 REAL PROP., PROB. & TR. J. 891, 892 (1978).

[2] *See, e.g.*, Wellenkamp v. Bank of America, 21 Cal.3d 943, 148 Cal. Rptr. 379, 582 P.2d 970 (1978) and Tucker v. Pulaski Fed. Sav. & Loan Ass'n, 252 Ark. 849, 481 S.W.2d 725 (1972). *See also* Gore, *Enforceability of Due on Sale Clauses — A Bibliography*, 5 ALI-ABA COURSE MATERIALS J. 109 (1981); Note, *Due on Sale Clauses and Clogging the Equity of Redemption*, 36 WASH. & LEE L. REV. 1121 (1979); and Dunn & Nowinski, *Enforcement of Due on Sale Clauses — An Update*, 16 REAL PROP., PROB. & TR. J. 291 (1981).

Of course, each jurisdiction has different precedent on the subject. While the policy discussion relied upon in Wellenkamp v. Bank of America, *supra,* made the decision noteworthy, the California Supreme Court had taken a similar position four years previous in holding due-on-encumbrance clauses unenforceable unless the lender's security was impaired. *See* La Sala v. American Sav. & Loan Ass'n, 12 Cal.3d 629, 116 Cal. Rptr. 633, 526 P.2d 1169 (1974).

During the *Survey* year, the Supreme Judicial Court addressed the issue of whether due-on-sale clauses are valid. In *Dunham v. Ware Savings Bank,*[3] the court held that such clauses are fully enforceable.

The plaintiff-borrowers in *Dunham* sold their house to a buyer who attempted to assume the existing low-interest mortgage.[4] The bank accelerated its debt pursuant to a due-on-sale clause in the mortgage and commenced foreclosure proceedings.[5] The borrower and the buyer brought an action to enjoin the foreclosure, and for a declaration that the due-on-sale clause was unenforceable as an unreasonable restraint on alienation.[6]

The Supreme Judicial Court, in its opinion, acknowledged and quoted authority which has held that the due-on-sale clause is generally not a restraint on alienation.[7] It chose, however, to decide the issue on narrower grounds:

> we prefer to rest our decision on the conclusion that even if it [the due-on-sale clause] is such a restraint, its nature is such that it is enforceable. As the plaintiffs acknowledge, even if the due-on-sale clause were a restraint on alienation in the traditional sense, its enforcement must be granted if it is a reasonable restraint.[8]

The focus on "reasonableness" permitted the Court to take a broad, policy-oriented approach to its discussion, first considering the economic reasoning which caused lenders to employ the clause, and then setting out specific points which led the Court to declare it a reasonable restraint on alienation.

The opinion first explained the importance of the due-on-sale clause to the mortgage lending system. Figures submitted by amici curiae[9] demonstrated that banks reasonably expect a borrower to repay a twenty-five or thirty year mortgage loan in a shorter period, probably less than twelve years.[10] The device which triggers the payoff is the due-on-sale clause.[11] Invalidating the clause would put banks at greater risk of market fluctuations because the term of the average mortgage loan would be considerably extended.[12] To compensate for this increased risk, the Court sug-

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[3] 1981 Mass. Adv. Sh. 1607, 423 N.E.2d 998.

[4] *Id.* at 1608, 423 N.E.2d at 999.

[5] *Id.*

[6] *Id.* at 1609, 423 N.E.2d at 1000.

[7] *Id.* at 1609-10, 423 N.E.2d at 1000-01 (citing Occidental Sav. & Loan Ass'n v. Venco Partnership, 293 N.W.2d 843, 845 (Neb. 1980), Williams v. First Fed. Sav. & Loan Ass'n of Arlington, 651 F.2d 910 (4th Cir. 1981) and Crockett v. First Fed. Sav. & Loan Ass'n, 289 N.C. 620, 625, 224 S.E.2d 580, 584 (1976)).

[8] 1981 Mass. Adv. Sh. at 1611, 423 N.E.2d at 1001.

[9] The Savings Bank Association of Massachusetts and the Massachusetts Mortgage Bankers Association. *Id.* at 1611 n.5, 423 N.E.2d at 1001.

[10] *Id.* at 1612, 423 N.E.2d at 1001.

[11] *Id.*

[12] *Id.*

gested banks would have to increase the interest rate charged for new loans.[13]

The Court, in discussing the reasonableness of the due-on-sale clause, first suggested that the clause represented an equitable adjustment of rights between lender and borrower.[14] The Court viewed the clause as existing in tandem with the statutory right of the borrower to prepay.[15] Together, those devices protect both borrower and lender from unforeseen market shifts. If interest rates drop, the borrower may refinance and avoid paying higher than market interest.[16] The due-on-sale clause similarly protects the lender during periods of rising interest rates.[17]

The second issue raised by the Court was that of federal preemption.[18] Federally-chartered banks are governed by federal regulations which permit them to include due-on-sale clauses in mortgage agreements.[19] There is persuasive authority which holds that these regulations preempt state law with regard to federally-chartered institutions.[20] Although the defendant in *Dunham* was a state-chartered bank, the Supreme Judicial Court accepted the argument that state law would be preempted in the case of a federal bank. Recognizing that state banks would be placed at a severe disadvantage if federal banks were exclusively permitted to employ due-on-sale clauses, the Court concluded that the use of these clauses by state-chartered institutions could not be termed unreasonable.[21]

The Court's final point with respect to the "reasonableness" of the clause was that its invalidation would have an adverse effect on consumers.[22] Future mortgage rates would have to be sufficiently high to offset the lower rates of older, assumed mortgages.[23] "Viewed from this perspective, the

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[13] *Id.*

[14] *Id.* at 1612-13, 423 N.E.2d at 1002.

[15] *Id.* at 1613, 423 N.E.2d at 1002. G.L. c. 183 § 56 requires that "any mortgage note secured by a first lien on a dwelling house of three or less separate households" provide that the borrower have the right to prepay at any time after three years from the date of the note, and limits penalties for earlier prepayment. G.L. c. 183, § 56.

[16] 1981 Mass. Adv. Sh. at 1613, 423 N.E.2d at 1002.

[17] *Id.*

[18] *Id.*

[19] 12 C.F.R. § 545.8-3(f) (1981).

[20] Conference of Fed. Sav. & Loan Ass'ns v. Stein, 495 F. Supp. 12 (E.D. Cal. 1979), *aff'd,* 604 F.2d 1256 (9th Cir. 1979), *aff'd mem. op.,* 445 U.S. 921 (1980); Bailey v. First Fed. Sav. & Loan Ass'n, 467 F. Supp. 1139 (C.D. Ill. 1979); Glendale Fed. Sav. & Loan v. Fox, 459 F. Supp. 903 (C.D. Cal. 1978).

The Minnesota Supreme Court has held to the contrary, ruling that the use of due-on-sale clauses by federal savings and loan associations is regulated by state law. Holiday Acres No. 3 v. Midwest Fed. Sav. & Loan Ass'n of Minneapolis, 308 N.W.2d 471 (Minn. 1981).

[21] 1981 Mass. Adv. Sh. at 1615, 1619, 423 N.E.2d at 1003.

[22] *Id.*

[23] *Id.* at 1616, 423 N.E.2d at 1004.

issue then becomes whether future borrowers who borrow from the bank *through assumption of outstanding low-interest mortgages* should be entitled to subsidization by those future borrowers who borrow *directly* from the bank. We perceive no policy reason for imposing such a result."[24] The Court noted further that the invalidation of the clause could harm depositors in non-commercial banks. These banks, which hold their surplus for the depositors' benefit, would be faced with decreasing profitability of their loan portfolios.[25]

The Court thus concluded that enforcement of due-on-sale clauses was reasonable since the borrower had a counter-balancing right to prepay, since the clauses keep state-chartered banks competitive with federally-chartered banks, and since their enforcement was to the benefit of a class of consumers broader than those seeking to assume low-interest mortgage loans.[26] This policy-based decision not only achieves the ends envisioned by the Court, but also provides relief to banks seeking early termination of unprofitable loans.

§ 4.2. Condominiums—Declaration of Trust—Management. The developer of a condominium project may seek to retain control of its management during the marketing phase of the project in order to assure that the project remains attractive for potential purchasers of the unsold units or to facilitate the addition of later building phases. This is often accomplished by providing the developer with a greater voice in the organization of unit owners which manages the project than his remaining proportionate ownership in the project would otherwise entitle him. Such provisions in a unit owners' organization[1] were held enforceable by the Supreme Judicial Court in *Barclay v. DeVeau.*[2]

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[24] *Id.* at 1616-17, 423 N.E.2d at 1004 (emphasis in original).

[25] *Id.* at 1617, 423 N.E.2d at 1004.

[26] *Id.* at 1619, 423 N.E.2d at 1005.

§ 4.2. [1] A condominium consists of two elements: (1) "units", the part of the condominium containing one or more rooms, which is owned individually; and (2) "common areas and facilities", which comprise the rest of the building or project, and are owned in common by all the unit owners. G.L. c. 183A § 1. The common areas and facilities in each condominium vary, but may include the hallways and entrances to an apartment building, the utility systems, the land beneath the building(s), recreational facilities, roofs, and foundations. *Id.*

Each unit's share of the undivided ownership of the common areas and facilities is set out as a percentage in the master deed submitting the project to Chapter 183A. This percentage is required by the statute to be "in the approximate relation that the fair value of the unit on the date of the master deed bears to the then aggregate fair value of the units". *Id.* § 5(a).

The condominium is managed by an organization of the unit owners, which may be a corporation, trust, or association. *Id.* § 1. Section 10(a) of chapter 183A provides: "Each unit owner shall have the same percentage interest in the corporation, trust, or unincorporated association provided for in the master deed for the management and regulation of the condominium as his proportionate interest in the common areas and facilities". *Id.* § 10(a).

[2] 1981 Mass. App. Ct. Adv. Sh. 167, 415 N.E.2d 239, *vacated and remanded,* 1981 Mass.

The project involved in *Barclay* was the conversion of the Hotel Vendome in Boston's Back Bay into the city's first mixed use condominium, with both residential and commercial units for sale.[3] The declaration of trust of the unit owners' organization provided that " '[u]ntil [the developer] owns less than 12 units, there shall not be more than three Trustees and it shall be entitled to designate two such Trustees' ".[4] The effect of this provision was that the developer could appoint two-thirds of the managing body while owning less than five percent of the ownership interest.[5]

The Vendome project proceeded as contemplated by the Declaration, and the developer appointed two trustees. After the trustees approved a substantial increase in the common area charges, the unit owners voted to remove the developer's trustees, increase the number of trustees to seven, and appoint five new trustees.[6] The developer brought an action to enjoin the newly-elected trustees from assuming their duties. The trial court granted the injunction, but ruled that the developer control provision should be enforced only for a reasonable time,[7] even though it was not so limited by its terms.

The Appeals Court, with one dissent, reversed the trial court. The majority held that chapter 183A, section 10(a),[8] which specifies the interest of unit owners in the unit owners' organization, refers to voting rights, and not simply to beneficial interests in the condominium trust, as argued by the developer.[9] It further held that the provisions of section 10 were mandatory, and could not be waived.[10]

The dissenting judge agreed with the majority's first holding, that section 10(a) dealt with voting rights in the management of the condominium, but differed with the majority as to the second holding.[11] He analogized chapter 183A to enabling statutes, such as chapter 156B for business corporations, and argued that under such statutes the parties were " 'free to determine their rights with respect to each other . . . by any agreement which does not contravene public policy or run afoul of the common law' ".[12] The

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Adv. Sh. 2307, 429 N.E.2d 323.

[3] Barclay v. DeVeau, 1981 Mass. Adv. Sh. 2307, 2309, 429 N.E.2d 323, 324.

[4] *Id.* at 2308, 429 N.E.2d at 324.

[5] Barclay v. DeVeau, 1981 Mass. App. Ct. Adv. Sh. 167, 170 n.6, 415 N.E.2d 239, 241 n.6.

[6] 1981 Mass. Adv. Sh. at 2308-09, 429 N.E.2d at 324-25. The member of the existing Board of Trustees who had been elected by the unit owners remained in office, and the seventh trustee was appointed by the developer. *Id.* at 2310 n.6, 429 N.E.2d at 324 n.6.

[7] 1981 Mass. App. Ct. Adv. Sh. at 170, 415 N.E.2d at 241. *See also id.* at 179 n.5, 415 N.E.2d at 245.

[8] The provision is quoted in note 1, *supra.*

[9] 1981 Mass. App. Ct. Adv. Sh. at 170-74, 415 N.E.2d at 241-43.

[10] *Id.* at 174-75, 415 N.E.2d at 243.

[11] *Id.* at 176, 415 N.E.2d at 243 (Greaney, J., dissenting).

[12] *Id.* (quoting Wasserman v. Wasserman, 7 Mass. App. 167, 174, 386 N.E.2d 783 (1979)).

dissenter found support for this flexible approach in the legislative history of chapter 183A, which originally had contained specific provisions for voting rights, subsequently deleted in the version adopted by the Legislature. He determined that the legislative intent in enacting the statute without those provisions was to provide flexibility for the parties to tailor projects to meet their respective needs in a particular situation.[13]

The Supreme Judicial Court set aside the Appeals Court decision and remanded the action to the Superior Court. The Court first considered the legislative history of chapter 183A as discussed by the Appeals Court dissenter. The Court concluded:

> The Legislature apparently intended to leave the matter of who shall control the management of the common areas and facilities of the condominium to discretionary agreement among the unit owners and the developer ... [footnote omitted] ... To infer that "interest" means "voting interest" would be to impose a structure that the Legislature did not intend to require.[14]

The Court then discussed the concept of chapter 183A as an enabling statute, which permits parties to contract as to the details of a condominium's legal structure, in the absence of fraud or an express prohibition. It noted that while condominiums were possible at common law,[15] they did not become popular until authorized by statute. "The apparent purpose of c. 183A 'was to clarify the legal status of the condominium in light of its peculiar characteristics' ".[16] Furthermore, according to the Court, developer control provisions are not necessarily contrary to public policy. It acknowledged that "the developer and its mortgagee risk a great deal in undertaking a condominium and, to protect their large investment, may need to maintain control of the project for a specific period of time".[17] This practical view of real estate financing emphasizes the Court's position that the purpose of chapter 183A, at the time of its enactment, was to assist the development of a new form of home ownership, and not to regulate it or tightly constrain its evolution.

The opinion in *Barclay v. DeVeau* is reassuring to practitioners involved in structuring modern condominiums. As the Appeals Court dissenter pointed out:

> General Laws c. 183A is a primitive, first generation condominium statute [footnote omitted] primarily designed to govern residential condominiums. Its draftsmen probably did not anticipate phased condominiums, mixed use condominiums, commercial condominiums, or any of the other mutations which

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[13] 1981 Mass. App. Ct. Adv. Sh. at 171 n.3, 415 N.E.2d at 244 n.3.

[14] 1981 Mass. Adv. Sh. at 2312, 429 N.E.2d at 326.

[15] *Id.* at 2313, 429 N.E.2d at 326. *See* 4B R. POWELL, THE LAW OF REAL PROPERTY ¶ 633.8 (1977), and Cribett, *Condominium — Home Ownership for Megalopolis,* 61 MICH. L. REV. 1207, 1209 (1963).

[16] 1981 Mass. Adv. Sh. at 2313, 429 N.E.2d at 326 (quoting Grace v. Town of Brookline, 1979 Mass. Adv. Sh. 2257, 2268, 399 N.E.2d 1038, 1043).

[17] 1981 Mass. Adv. Sh. at 2314, 429 N.E.2d at 327.

> creative real estate lawyers have contrived. Lawyers, mortgagees, lienholders, developers, unit owners and others involved with second generation condominiums have considered c. 183A as affording a measure of flexibility with respect to the condominium's creation and development and have tailored sophisticated condominium documents to work out the equitable interests of the parties on a host of issues including management.[18]

The Supreme Judicial Court's approval of the concept of chapter 183A as an enabling statute, establishing a framework upon which new types of condominium arrangements may be structured, will actually promote the development of condominium projects by making title insurers and mortgagees more comfortable with the risks involved in new types of real estate ventures. By implication, the Court has indicated that the Massachusetts condominium statute is not to be construed as a consumer-oriented, regulatory statute; and as a result prospective unit owners should continue to read carefully the condominium documents to determine their rights before they purchase a unit.

§ 4.3. Rent Control—Evictions for Condominium Conversion. Two decisions rendered during the *Survey* year held provisions in rent control ordinances designed to minimize tenant displacement resulting from the conversion of rent-controlled apartments to condominiums to be constitutional. Both of the challenged ordinances provided increased protection to tenants and imposed greater restrictions on landlords than an eviction control by-law previously upheld by the Supreme Judicial Court.[1] In the first decision, *Flynn v. City of Cambridge,*[2] the Supreme Judicial Court considered the Cambridge rent control ordinance, which prohibited the removal of a controlled unit from the rental market without a permit from the city's Rent Control Board.[3] In *Loeterman v. Town of Brookline,*[4] the Federal District Court for Massachusetts considered a case in which the plaintiffs challenged an amendment to the Brookline rent control by-law which prohibited outright the issuance of certificates of eviction for condominium conversion (the "Ban Amendment").[5]

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[18] 1981 Mass. App. Ct. Adv. Sh. at 178, 415 N.E.2d at 245.

§ 4.3. [1] In Grace v. Town of Brookline, 1979 Mass. Adv. Sh. 2257, 399 N.E.2d 1038, the Court upheld an amendment to the Brookline rent control by-law which required a six month waiting period before a certificate of eviction could be issued for a unit converted to a condominium, with an additional six month period required in hardship cases (the "Six Plus Six Amendment"). For a discussion of *Grace,* see Schlein, *Government Regulation of Condominium Conversion,* 8 B.C. ENV. AFF. L. REV. 919, 932-37 (1980).

[2] 1981 Mass. Adv. Sh. 692, 418 N.E.2d 335.

[3] "In essence what the ordinance does is to require that any unit which is a controlled rental unit on August 10, 1979, remain part of the rental housing stock of the City of Cambridge." *Id.* at 696, 418 N.E.2d at 337.

[4] 524 F. Supp. 1325 (D. Mass. 1981).

[5] *Id.* at 1326. See note 1, *supra,* for an explanation of Brookline's previous "Six Plus Six Amendment".

In *Flynn,* Cambridge property owners brought suit seeking declaratory and injunctive relief. The trial court held for the city and the plaintiffs' appeal was granted direct review.[6] The Court considered two major issues in its opinion: (1) the power of the city to enact an ordinance forcing rental units to remain available; and (2) the constitutionality of the ordinance.

The Cambridge rent control enabling statute did not expressly grant the city the power to restrict the removal of rental housing from the market.[7] The Court therefore sought to determine if the power could be implied from the legislative grant of the authority to the city to regulate rents. The standard used in determining if the authority was implied was whether it was "necessary and incidental" to carry the express power into effect.[8] The Court concluded that the power to regulate removal met this standard with respect to rent control, and that the legislature had impliedly granted that power to the city when it enacted Cambridge's enabling statute.[9] This conclusion was partially based on statistics contained in the opinion which showed the impact of condominium conversion on the rent-controlled housing stock in Cambridge.[10] In essence, the Court found that if the power to control removals was not implied, there would be no rental units left to control and the power would be rendered worthless.[11]

Having determined that the city had the authority to enact the ordinance, the Court, then considered its constitutionality. The plaintiffs argued that the provision was a "taking" of a property right by the city which required the payment of compensation.[12] While in its previous decision upholding

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The two approaches to the problem of displaced tenants are not mutually exclusive. Cambridge's rent control enabling statute, Act of March 31, 1976, ch. 36, 1976 Mass. Acts 43, contained the equivalent of Brookline's "Ban Amendment": "[r]ecovery of possession in order to convert an apartment unit to a condominium unit shall not be a valid reason to recover possession of a controled rental unit". *Id.* § 9(a)(10), 1976 Mass. Acts at 50. Brookline has also enacted a removal permit system. By-laws of the Town of Brookline art. XXXIX.

[6] 1981 Mass. Adv. Sh. at 695-96, 418 N.E.2d at 337.

[7] *Id.* at 697, 418 N.E.2d at 338.

[8] *Id.* at 698, 418 N.E.2d at 338.

[9] *Id.*

[10] From January 1, 1977, to August 13, 1979 (the effective date of the ordinance) master deeds were filed covering 1554 residential units, of which 80.6 percent were subject to rent control. In 1979, there were 20,115 controlled rental units in Cambridge. *Id.* at 699, 418 N.E.2d at 339.

[11] The Court did not consider the power of the city to enact removal control under the Home Rule Amendment, Mass. Const. amend. art. 89, in light of its holding that the power was implied in the rent control enabling statute. 1981 Mass. Adv. Sh. at 695, 418 N.E.2d at 337. The ordinance is probably not within the city's home rule power. *See* Marshal House, Inc. v. Rent Review & Grievance Bd. of Brookline, 357 Mass. 709, 260 N.E.2d 200 (1970) (regulation of rents and evictions not within municipal home rule power).

[12] 1981 Mass. Adv. Sh. at 699, 418 N.E.2d at 339.

"No person shall ... be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const.

Brookline's "Six Plus Six Amendment",[13] the Court had simply found without elaborate discussion that the by-law was not more burdensome than rent control generally, and that rent control had long been held not to be a "taking",[14] the opinion in *Flynn* analyzed the subject in greater depth, applying factors set out by the United States Supreme Court in *Penn Central Transp. Co. v. New York City*[15] to determine if a "taking" had occurred.

The Court distinguished two classes of affected property owners in its discussion of the "taking" issue. The first class discussed was those persons who had purchased a unit after the effective date of the ordinance. The Court held that those owners had no legitimate expectation of occupying their unit because they were on notice of the ordinance. Therefore, there was no "taking" with respect to them because they never had the right to occupy their units.[16]

The second class of owners included those who had purchased their units prior to the effective date of the ordinance and had not occupied them. They were deprived of the right to possession of the unit, an incident of ownership which they had previously enjoyed. However, because substantial ownership rights remained with the owners, the government was not required to pay for the one feature of ownership deprived them:

> 'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, [the focus is] rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole.[17]

The Court isolated two factors in *Penn Central* controlling that decision: the owner's primary expectation concerning the use of the property; and whether the owner continued to receive a reasonable return on its investment.[18] As to the former factor, the Court reasoned that the condominium owners in the second class, those who purchased and rented their units prior to the ordinance, had as their primary expectation the rental of the units. They had not been deprived of this expectation. As to the latter factor, the rent control ordinance required the controlled rent to yield the landlord a fair net operating income. The Court concluded, therefore, while the value

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amend. V. The requirement of compensation for a taking of property by the government was applied to the states through the due process clause of the Fourteenth Amendment in Chicago, B. & Q. R.R. v. Chicago, 166 U.S. 226 (1897).

[13] *See* note 1, *supra.*

[14] Grace v. Town of Brookline, 1979 Mass. Adv. Sh. 2257, 2273, 399 N.E.2d 1038, 1046.

[15] 438 U.S. 104 (1978).

[16] 1981 Mass. Adv. Sh. at 699-700, 418 N.E.2d at 339.

[17] *Id.* at 700, 418 N.E.2d at 339, *quoting* Penn Central Transp. Co. v. New York City, 438 U.S. 104, 130-31 (1978).

[18] 1981 Mass. Adv. Sh. at 700, 418 N.E.2d at 339.

of the property was diminished by the ordinance, no compensable "taking" had occurred.[19]

The Federal District Court in *Loeterman* discussed only the "taking" issue, with the same result. The court treated the Loetermans as members of the first class of owners described in *Flynn* since they purchased their unit after the effective date of the by-law.[20] Consequently, the Court focused on the same factors isolated in *Penn Central,* that the owners had no legitimate expectation of occupying their unit at the time they purchased it, and that they were entitled to a fair net operating income and "other economic benefits ordinarily associated with the ownership of rental property".[21]

These two cases demonstrate the substantial control local governments may exercise over rental property with proper enabling legislation. *Flynn* further raises the possibility that a wider range of municipal powers not yet considered may be implied from an express grant of authority to control rents or otherwise provide for social welfare.

§ 4.4. Tidelands. During the *Survey* year, the Supreme Judicial Court shed some light on the present status of the title to flats[1] and submerged lands[2] in two advisory opinions to the Massachusetts Senate.[3] The Court's 1979 opinion in *Boston Waterfront Development Corporation v. Commonwealth*[4] raised substantial questions regarding title to filled submerged

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[19] *Id.*

[20] Loeterman v. Town of Brookline, 524 F. Supp. 1325, 1329 (D. Mass. 1981). However, the Loetermans had entered into a purchase and sale agreement prior to the effective date of the by-law. *Id.* A typical purchase and sale agreement might be specifically enforceable or at least require the forfeit of the deposit as liquidated damages if the buyer breached the contract. While the result would not have differed, according to *Flynn,* the Loetermans might be more properly placed in the second class, those who owned rental units prior to the effective date of the ordinance.

[21] *Id.* at 1329.

§ 4.4. [1] Flats are the area between the mean high water line on the shore and mean low water, or 100 rods from mean high water, whichever is less. Opinion of the Justices, 1981 Mass. Adv. Sh. 1361, 1368, 424 N.E.2d 1092, 1099. The maximum 100 rod width of the flats was fixed by the Ordinance of 1641-47. That ordinance has been held to have granted the owner of upland a fee simple title to the adjoining flats, subject to public rights of fowling, fishing, and navigation. Commonwealth v. Alger, 61 Mass. 53 (1851). *See* Opinion of the Justices, 365 Mass. 681, 684-86, 313 N.E.2d 561, 566 (1974).

[2] Submerged lands are lands seaward of the flats. Opinion of the Justices, 1981 Mass. Adv. Sh. 1361, 1369, 424 N.E.2d 1092, 1099. No person has special rights in such land unless it is granted by the Legislature. *Id.*; Commonwealth v. Boston Terminal Co., 185 Mass. 281, 70 N.E. 125 (1904).

[3] Opinion of the Justices, 1981 Mass. Adv. Sh. 1361, 424 N.E.2d 1092; Opinion of the Justices, 1981 Mass. Adv. Sh. 1393, 424 N.E.2d 1111. The second opinion discussed a similar bill in the state House of Representatives. This section will refer only to the Justices' opinion on the Senate bill.

[4] 378 Mass. 629, 393 N.E.2d 356 (1979), *aff'g* 6 Mass. App. 214, 374 N.E.2d 598 (1978).

land and flats in holding that the record title holder to filled submerged land granted by statute to a predecessor in title held the land in fee simple, subject to the condition subsequent that it be used for the public purpose for which it was granted.[5] Because much of the land in the city of Boston is filled, those doubts affected the title to a great deal of valuable real estate not immediately on the waterfront.

In 1980 and 1981 the Legislature considered legislation to cure the defect in title, and propounded a set of six questions to the SJC regarding their proposed solution.[6] This legislation embodied three different approaches to the problem. The first approach addressed rights which might be implied from acts of the Commonwealth or its political subdivisions. It would amend chapter 183 by inserting a new section providing:

> Section 23A. No condition, restriction or limitation on use shall be deemed to be created, or to have been created, by, or shall be implied from, any grant, license, deed [sic] special or general act or any other instrument by the commonwealth or any political subdivision, independent agency or body politic and corporate thereof or any predecessor of any of them purporting to create rights in waters of the commonwealth located within the city of Boston situated below the primitive mean high water mark or in land thereunder, whether or not such land is public or privately owned, unless such condition, restriction, or limitation is or was expressly set forth in the dispositive provisions of such instrument.[7]

The second approach sought to effect a "blanket cure" of the title to virtually all landlocked land in Boston. This land was designated by a line (the "1980 Line") drawn on a map, circling the affected area.[8] A new chapter 91A would provide that " 'any vestigial interest of the commonwealth in the title to all such tidelands are [sic] hereby eliminated' ".[9]

The third approach of the proposed legislation was for land in Boston seaward of the 1980 Line. This approach was more selective. The Secretary of the Executive Office of Environmental Affairs would be authorized to release any vestigial rights of the commonwealth in such land after a petition by the record owner of the property followed by public notice and a hearing, subject to the state Administrative Procedures Act.[10] To release the commonwealth's vestigial rights, the Secretary would be required to first

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[5] *Id.*; Opinion of the Justices, 1981 Mass. Adv. Sh. 1361, 1367, 424 N.E.2d 1092, 1098. *See* Newburyport Redev. Auth'y v. Commonwealth, 1980 Mass. App. Ct. Adv. Sh. 221, 401 N.E.2d 118.

[6] The proposed legislation and related questions had been before the Court during the 1980 legislative session. Because the session ended before the Justices responded, they declined to render an advisory opinion. Answer of the Justices, 1981 Mass. Adv. Sh. 89, 92, 415 N.E.2d 170.

[7] 1981 Mass. Adv. Sh. at 1373, 424 N.E.2d at 1101.

[8] The map is reproduced at 1981 Mass. Adv. Sh. 1388, 424 N.E.2d 1092.

[9] 1981 Mass. Adv. Sh. at 1376, 424 N.E.2d at 1103.

[10] *Id.* at 1377, 424 N.E.2d at 1103.

find that the use or proposed use of the property served a proper public purpose, and that it would not be detrimental to public navigation.[11] The Secretary would be permitted to impose conditions on the release, including payment of reasonable compensation or a requirement that the public have access to the water.[12]

After setting out the proposed legislation and before examining the specific provisions the Court, in its opinion, first addressed the premises underlying the legislation. It stated that the *Boston Waterfront* case, which had crystallized the concerns which the Legislature sought to ease, was specifically concerned with the Lewis Wharf statutes, "which did not undertake by their express terms to transfer all the Commonwealth's or the public's interest in the disputed land. . . ."[13] The Court then added, without much discussion, that the Legislature did have the power, though not exercised in the Lewis Wharf statutes, to transfer those interests.[14] There are, the Court noted, important limitations on the use of this power. The conveyance of a public asset must be for a valid public purpose, with any benefit to private parties merely incidental to the public benefit.[15] While the Legislature has the power to determine whether a particular conveyance would serve a public purpose, the justices observed that the statute under analysis contained a very broad definition of public purpose[16], and that conceivably a particular set of facts would require a court to examine and possibly overturn the legislative judgment that a primarily public purpose had been served by an application of the statute.[17]

After setting out these important general principles, the Court discussed the specific provisions of the proposed legislation. In discussing the pro-

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[11] *Id.* at 1380, 424 N.E.2d at 1105. The Court stressed the word "*proper*" public purpose. See text at notes 15-17 *infra.*

[12] *Id.*

[13] *Id.* at 1367, 424 N.E.2d at 1098.

[14] *Id. citing* Commonwealth v. Boston Terminal Co., 185 Mass. 281, 283-84, 70 N.E. 125, 126 (1904) ("[T]he sovereign power, having the absolute right to terminate the trust which is appurtenant to its ownership, can refuse to act longer as trustee and convey its property [submerged lands], so that the grantee will hold it free from the trust.")

[15] 1981 Mass. Adv. Sh. at 1371-72, 424 N.E.2d at 1101.

[16] " '[A]ny commercial, industrial, business residential [sic] conservation or other purpose for which any real estate has been, could now be, or may in the future be lawfully used pursuant to regulations or laws from time to time applicable in the city of Boston' ". *Id.* at 1372 n.4, 424 N.E.2d at 1101.

[17] *Id.* at 1372, 424 N.E.2d at 1101. The cure of a title defect which could be overturned by the court on a case by case basis surely would not have the affect of creating a marketable title. However, as discussed *infra,* see text at notes 23-24, the curing of the title to land within the 1980 Line was itself found to be a proper public purpose, no matter what the use of the land. Title to land seaward of the 1980 Line after a release of the Commonwealth's vestigial rights by the Secretary would apparently be good after the period for appeal from his determination had run.

posed chapter 183, section 23A,[18] the Court was careful to distinguish the statutory language "condition, restriction or limitation on use" from more substantial implied rights such as easements by necessity for access.[19] It agreed that generally the statute would be effective in its application to both prior and future instruments by the Commonwealth and its political subdivisions.[20] While the application of proposed section 23A to prior instruments might be a relinquishment of rights that might otherwise have been implied to remain in the Commonwealth, the Court found that the stated purpose of the legislation, that landowners have a clear indication of their title, to be of substantial public interest.[21]

The Court then considered the "blanket" release of vestigial rights provided for tidelands landward of the 1980 Line.[22] It accepted the legislative conclusion that it is in the public interest that such land be free from any claim of public trust, and concluded that the legislation could properly eliminate such rights in the designated areas.[23]

As to the third element of the legislation, the procedure whereby the Secretary could release rights in land seaward of the 1980 Line, the Court concluded that this was also permissible within certain parameters:

> While we cannot say with confidence that every "continuing right of the Commonwealth" of whatever character may properly be the subject of a proceeding under proposed § 4, we have no hesitancy in saying that a public trust interest of the character described in the *Boston Waterfront* case and the public's interest in navigation, fishing, and fowling on flats may properly be considered for release and extinguishment in such a proceeding.[24]

The Court also concluded that the procedure set out in the statute was not an impermissibly broad delegation of legislative authority because the Secretary was provided with clear standards to apply in making his determination.[25]

Two of the seven justices filed a separate opinion in which they disagreed with the view of the majority regarding submerged lands, arguing that the Commonwealth could not absolutely defeat the public's rights in submerged lands.[26] Citing *Boston Waterfront,* they asserted a grant by the

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[18] *See* text at note 7 *supra.*

[19] 1981 Mass. Adv. Sh. at 1374, 424 N.E.2d at 1102.

[20] *Id.* The Court noted that section 23A would not address the interest it had held was retained by the Legislature in the *Boston Waterfront* case. There, according to the Court, the condition subsequent was not found by implication, but "from the failure of the legislation to make a complete grant of the Commonwealth's and the public's entire interest in the property". *Id.*

[21] *Id.*

[22] See text at note 9 *supra.*

[23] 1981 Mass. Adv. Sh. at 1376-77, 424 N.E.2d at 1103.

[24] *Id.* at 178-79, 424 N.E.2d at 1104.

[25] See text at note 11, *supra.*

[26] 1981 Mass. Adv. Sh. 1361, 1389, 424 N.E.2d 1092, 1110 (Liacos & Abrams, J.J.).

Legislature of a fee simple in submerged land, whether or not presently filled, remained " 'subject to the condition subsequent that it be used for the public purpose for which it was granted' "[27], or subject "to some new public purpose approved by the Legislature".[28] The two justices found that the definition of public purpose[29] in the Senate bill was overbroad because it permitted the public purpose to be dictated by private developers. This, they concluded, was an unconstitutional delegation of the Legislature's duty to make the determination that public trust lands are conveyed for a proper public purpose, and would permit private persons to change the nature of the use without considering the public trust.[30]

An additional, related defect, according to the dissent, was the failure to provide for compliance with the "prior public use doctrine".[31] This "doctrine" provided that while the legislature may modify the use of public lands to accommodate a new public use, explicit legislation is necessary which not only states the new use, but recognizes the existing public use.[32] " 'In short, the legislation should express not merely the public will for the new use but its willingness to surrender or forego the existing use.' "[33] On the basis of those three objections, (1) that submerged lands cannot be conveyed free of the public trust, (2) the overbroad definition of public purpose in the statute, and (3) the failure to adhere to the requirements of the "prior public use doctrine", the two justices found the proposed legislation unconstitutional.[34]

The legislation considered by the Justices in their advisory opinions was not passed during the *Survey* year, and the issues raised as to the title to former tidelands remains unresolved. It is apparent that a solution will be difficult to reach. While the majority of the Supreme Judicial Court would

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[27] *Id.* at 1390, 424 N.E.2d at 1110 *quoting* Boston Waterfront Development Corp. v. Commonwealth, 378 Mass. 629, 644, 393 N.E.2d 356, 367 (1979).

[28] 1981 Mass. Adv. Sh. at 1390, 424 N.E.2d at 1110.

[29] See note 16, *supra.*

[30] 1981 Mass. Adv. Sh. at 1391, 424 N.E.2d at 1111.

[31] *Id.* at 1390, 424 N.E.2d at 1110.

[32] *Id.* at 1391-92, 424 N.E.2d at 1111.

[33] *Id. quoting* Robbins v. Department of Public Works, 355 Mass. 328, 331, 244 N.E.2d 577, 580 (1969).

[34] In a decision rendered earlier in 1981, the Federal District Court for the District of Massachusetts adopted the same position as that of the two justices who argued that title to submerged lands could not be conveyed free of the public trust. In United States v. 1.58 Acres of Land, 523 F. Supp. 120 (D. Mass. 1981), the Commonwealth objected to the eminent domain taking in fee by the United States of filled submerged land on the Boston waterfront on the grounds that it would lose its public trust rights if the land was taken because federal law permitted the land to be conveyed to a private party when the federal government no longer needed the land. *Id.* at 122. The court held that the Commonwealth's interest would be preserved: "Neither the federal government nor the state may convey land below the low water mark to private individuals free of the sovereign's jus publicum". *Id.* at 124.

permit the Commonwealth's public trust rights in submerged lands to be extinguished under certain circumstances, the Justices were careful to note the limits on the Legislature's power to abandon a public right.[35] The two dissenting Justices did not agree that such rights could be abandoned in a manner which would leave private parties free to use the land or dispose of it as they pleased.[36] At this time, the answer to the concern regarding the public interest in the use of submerged lands remains unclear.[37]

§ 4.5. Constitutionality of Common Law Tenancy by the Entirety. Massachusetts was one of three states to maintain the tenancy by the entirety in its common law form in modern times.[1] Under this form of ownership available only to married couples, the husband has an exclusive right to control, possession, and income during the couple's joint lives although both own the whole of the property.[2] Partition is not available,[3] and each co-tenant has an indefeasible right of survivorship.[4]

The Massachusetts Legislature passed a statute in 1979 which radically altered the incidents of this tenancy for conveyances after February 11, 1980.[5] The statute provided that each spouse shall have an equal right to control and manage the property, and also exempted the residence of a non-debtor spouse from execution by creditors of a debtor spouse.[6] The statute

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[35] 1981 Mass. Adv. Sh. at 1371-72, 424 N.E.2d at 1100-1101.

[36] *Id.* at 1391, 424 N.E.2d at 1111.

[37] *See* Act of December 22, 1981, c. 673, in which the Legislature sought to conform to the Justices' opinions in its release of the Commonwealth's rights in a parcel of land on the Boston waterfront.

The Department of Environmental Quality Engineering had issued two licenses pursuant to G.L. c. 91 § 14 for improvements to the property, which were planned to include a walkway for public access to Boston Harbor. Chapter 673 first recited a legislative finding that "renewal of the property and the provision of public access to the water will serve a proper public purpose by assisting the economic revival of the city of Boston and promoting the use and enjoyment of Boston Harbor by the public". *Id.* § 2.

The statute then declared the DEQE licenses irrevocable as to the area landward of the low water line, and irrevocable for land seaward of low water "as long as the walkway is maintained for public pedestrian and marine use". *Id.* § 3. In the last section of the statute, the Legislature relinquished the Commonwealth's residual rights in the land, with the same condition placed on the grant of land seaward of the low water line. *Id.* § 4.

§ 4.5. [1] West v. First Agricultural Bank, 1981 Mass. Adv. Sh. 368, 376 n.14, 419 N.E.2d 262, 267.

[2] *Id.* at 370, 419 N.E.2d at 263-64. *See generally* M. Park and D. Park, Real Estate Law and Forms, 28 Mass. Practice § 129 (2d ed. 1981) and Glendon, *Tenancy by the Entirety in Massachusetts*, 59 MASS. L.Q. 53 (1974).

[3] G.L. c. 241 § 1.

[4] 1981 Mass. Adv. Sh. at 370, 419 N.E.2d at 263-64.

[5] Act of November 13, 1979, c. 727, 1979 Mass. Acts 768, amending G.L. c. 209 § 1.

[6] *Id.* The 1979 statute also provided that both spouses were jointly and severally liable for debts incurred for necessaries furnished to either of them or to a member of their family,

was silent as to the rights of parties who took property as tenants by the entirety prior to that date.

The Supreme Judicial Court examined the common law tenancy by the entirety in light of the state Equal Rights Amendment[7] and modern notions of equal protection[8] in *West v. First Agricultural Bank.*[9] The Court found possible constitutional deficiencies in the common law estate, but declined to grant retroactive relief.

The opinion in *West* decided two cases. The first was an action by a wife to enjoin a sheriff's sale of property she owned as a tenant by the entirety with her husband for a judgment against her husband alone.[10] The second case, simplified to the relevant issues, was an action by a wife for rent against a commercial tenant of property she owned as a tenant by the entirety with her estranged husband.[11]

The plaintiff in each of these actions contended that the tenancy by the entirety was "sex-based and presented features which were offensive to the standard of the equal protection clause and (a fortiori) to that of the ERA".[12] The Court decided the case by refusing to grant retroactive relief, but did not squarely resolve the constitutional issues, preferring to simply discuss the arguments on each side.

The strongest argument against the constitutionality of tenancy by the entirety contends that the doctrine contravenes the equal protection clause of the fourteenth amendment and the state ERA since the male is granted full control over the property solely as a function of his gender, with the female holding only a right of survivorship. This has been justified only by the common law concept of the unity of the husband and wife as one person,[13] which has been generally weakened in modern times.[14] The Court in *West* acknowledged, "we have to recognize that inequalities in the incidents of the tenancy must put in some question its constitutional validity".[15]

The Court also discussed at some length the strongest argument in favor of the tenancy's validity. This position contends that a couple chooses the tenancy by the entirety from a number of options, including the joint tenan-

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rendering the exemption from execution ineffective for such debts. A 1981 bill in the House of Representatives, House Bill No. 6008, would have deleted the exemption. The bill was not passed. General Court of 1981, Legislative Record at 391 H.

[7] Mass. Const. art. 1 § 2, as amended by amend. art. CVI.

[8] *See, e.g.,* Craig v. Boren, 429 U.S. 190 (1976) and Orr v. Orr, 440 U.S. 268 (1979).

[9] 1981 Mass. Adv. Sh. 368, 419 N.E.2d 262.

[10] *Id.* at 369-71, 419 N.E.2d at 263-64.

[11] *Id.* at 371-73, 419 N.E.2d at 264-65. The second case was dismissed on technical grounds, but the Court chose to discuss the merits. *Id.* at 372-73 n.7, 419 N.E.2d at 265.

[12] *Id.* at 376, 419 N.E.2d at 267.

[13] *Id.* at 377, 419 N.E.2d at 267.

[14] *Id.*

[15] *Id.*

cy, which provides for survivorship as well as partition and equal rights among the co-tenants.[16] Relative to the issue of choice, the opinion in *West* discussed in some detail a Fifth Circuit case which struck down a Louisiana statute which had placed the exclusive right to sell and manage community property with the husband unless the husband and wife signed an antenuptial contract or recorded an appropriate instrument.[17] The Massachusetts court distinguished the effect of the tenancy by the entirety: "the Commonwealth did not create an unequal situation from which a wife had to extricate herself; such inequality as inhered in our case was brought about initially, if at all, by choice which, as we have said, need not have been artificial".[18]

After discussing the substantive constitutional issues, the Court detailed the problems involved in granting relief retroactively. The first problem for the Court was deciding what form a new judge-made tenancy by the entirety should take to conform to constitutional guarantees.[19] One possibility would be to apply the new Massachusetts statute as a matter of common law for tenancies established prior to its effective date, but the Court did not think some aspects, especially the principal residence exemption, could be appropriately carried over into common law.[20] A second problem with retroactive relief involved the effective date of the new tenancy. The Court suggested that the date of passage of the ERA could not be dispositive.[21] Finally, the Court did not want to change the status of current owners who had taken property with certain expectations surrounding the nature and legal significance of their ownership. "Retroactive alteration of the law is strongly contra-indicated when the subject is settled rules of property".[22]

The Court in *West* was confronted with a difficult issue subject to strong arguments on either side. The Court concluded, however, that since the situation had already been prospectively rectified by the Legislature and since a retroactive declaration that the doctrine was unconstitutional would visit possible hardship upon those who had taken ownership in reliance upon the tenancy by the entirety concept, the tenancies involved in the case should be allowed to stand.

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[16] *Id.* at 379-80, 419 N.E.2d at 268-69. This reasoning was used by the Federal District Court which held the Massachusetts tenancy by the entirety constitutional in D'Ercole v. D'Ercole, 407 F. Supp. 1373 (D. Mass. 1976).

[17] Kirchberg v. Feenstra, 609 F.2d 727 (5th Cir. 1979), *aff'd,* 101 S. Ct. 1195 (1981).

[18] 1981 Mass. Adv. Sh. at 382, 419 N.E.2d at 270.

[19] *Id.* at 384-85, 419 N.E.2d at 271-72. *See id.* at n.27 for a discussion of the principal types of legislative solutions adopted in foreign jurisdictions.

[20] *Id.* at 385, 419 N.E.2d at 272. See text at note 6 *supra.*

[21] *Id.* at 384, 419 N.E.2d at 271.

[22] *Id.* at 385, 419 N.E.2d at 272.

§ 4.6. Inland Wetlands Act—Eminent Domain—Constitutional Law. In *Moskow v. Commissioner of the Department of Environmental Management,*[1] the Supreme Judicial Court decided that a restriction pursuant to chapter 131, section 40A, the Inland Wetlands Act, which severely restricted the use of that property was not "the equivalent of a taking"[2] when the property restricted was a portion of a larger, unrestricted parcel.

The property in question was a large lot, 297,000 square feet of undeveloped land in Newton.[3] Approximately 55 percent of the parcel was an inland wetland, for which the Commissioner issued an order limiting the permissible uses of the land.[4] The remainder of the parcel could be used for single family dwellings, and the Court indicated that a subdivision into four or eight lots was possible.[5] On these facts, the Court reversed the trial judge's conclusion that the order was the equivalent of a "taking".[6]

The trial judge had erred, according to the Court, in looking only at the use of the restricted land, and not at the possible uses of the remainder of the parcel. "A single family house is a sufficient practical use to prevent the wetlands restrictions from constituting a taking."[7]

The Court suggested that in determining whether a specific government action constitutes a taking, the judicial inquiry must focus not on divided, discrete segments of the property, but upon rather the character of the government action and its restrictive effect upon the "parcel as a whole."[8] The Court concluded further that since the instant restrictions were reasonably related to a policy "expected to produce a widespread public benefit and applicable to all similarly situated property," the owner need not receive a reciprocal benefit in order to prevent the government action from being termed a taking.[9]

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§ 4.6. [1] 1981 Mass. Adv. Sh. 2134, 427 N.E.2d 750.

[2] The Inland Wetlands Act, G.L. c. 131, § 40A, empowers the Commissioner of Environmental Management to issue orders restricting the use of such wetlands after notice to affected parties and a public hearing. The Act permits certain persons to petition the Superior Court in equity "to determine whether such order so restricts the use of his property as to deprive him of the practical uses thereof and is therefore an unreasonable exercise of the police power because the order constitutes the equivalent of a taking without compensation". *Id.*

[3] 1981 Mass. Adv. Sh. at 2135, 427 N.E.2d at 751.

[4] The permitted uses of the restricted land included:

> a. The construction and maintenance of catwalks, wharves, boathouses, boat shelters, fences [,] duckbinds, wildlife management shelters, foot bridges, observation decks and shelters . . . .

Id. at 2136, 427 N.E.2d at 752.

[5] *Id.* at 2137-38 n.3, 427 N.E.2d at 753.

[6] *Id.* at 2139, 427 N.E.2d at 754.

[7] *Id.* at 2137, 427 N.E.2d at 753.

[8] *Id.* at 2137, 427 N.E.2d at 753 (quoting Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 130-31 (1978)).

[9] *Id.* at 2138, 427 N.E.2d at 753 (quoting Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 134 n.30 (1978)).

Since the owner did retain some use of the parcel as a whole, and since the state was not required to provide a reciprocal benefit, the order of the Commissioner of the Department of Environmental Management was upheld.[10] Not only is this case significant in the limited context of its factual setting, but it also provides an interesting addition to those court opinions which explore the limits of noncompensatory police power.[11]

§ 4.7. Lis Pendens—Constitutional Law. Massachusetts law provides that a proceeding at law or in equity which affects the title to real property or its use and occupation will affect only the parties, their successors, and persons with actual notice of the proceeding, unless a memorandum containing certain pertinent information about the suit is recorded in the registry of deeds.[1] This memorandum, known as a "lis pendens" ("pending suit")[2] is recorded without notice to the record title holder of the property and without a hearing to determine if its use is appropriate in a particular case.

The lis pendens recorded by the plaintiff is a cloud on the title to the affected land because one who acquires the title after the lis pendens is recorded takes subject to the outcome of the lawsuit described in it, which may defeat the title acquired.[3] Naturally, the recording of a lis pendens substantially restricts the ability of the owner to sell or mortgage the property.[4] A logical question is whether constitutional rights of the owner are violated by the lack of required hearing or other procedure before the plaintiff destroys, at least for a short time, the marketability of the record title.[5]

The Supreme Judicial Court ruled on this question during the *Survey* year in *Debral Realty, Inc. v. DiChiara,*[6] holding that the recording of a lis pendens did not violate the due process clause of the fourteenth amendment.

The appellants in each of the two cases[7] decided by the Court in the *Debral Realty* opinion had unsuccessfully moved to have a lis pendens dissolved on the grounds that the recording of the memorandum without notice or hearing constituted an unconstitutional deprivation of property.[8]

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[10] *Id.* at 2139, 427 N.E.2d at 754.

[11] *Compare* Turnpike Realty Co. v. Dedham, 362 Mass. 221, 284 N.E.2d 891 (1972); Lovequist v. Conservation Comm'n of Dennis, 379 Mass. 7, 393 N.E.2d 858 (1979).

§ 4.7. [1] G.L. c. 184, § 15.

[2] Debral Realty, Inc. v. DiChiara, 1981 Mass. Adv. Sh. 1140, 1141, 420 N.E.2d 343, 345.

[3] *See, e.g.,* Haven v. Adams, 90 Mass. 363, 366-67 (1864).

[4] 1981 Mass. Adv. Sh. at 1145, 420 N.E.2d at 347.

[5] The issue was raised but not decided in Vincent Realty Corp. v. Boston, 375 Mass. 775, 781, 378 N.E.2d 73 (1978).

[6] 1981 Mass. Adv. Sh. 1140, 420 N.E.2d 343.

[7] Debral Realty v. DiChiara and South Middlesex Association of Retarded Citizens v. Lane. *Id.* at n.3.

[8] In a separate opinion issued the same day, the Court reversed a Superior Court order

Their argument rested on the line of United States Supreme Court cases which have held that certain statutory prejudgment remedies violate the due process clause of the fourteenth amendment.[9] The Court, affirming the judgments of the trial courts, distinguished the Supreme Court cases on two grounds. First, the Court ruled that the deprivation of property resulting from the recording of a lis pendens is not of the same magnitude as the seizure and garnishment discussed in the Supreme Court cases. Second, the involvement of the state in the lis pendens procedure is minimal.

In assessing the deprivation of property resulting from the recording of a lis pendens, the Court observed that the notice does no more than the simple filing of a complaint at common law.[10] Prior to the statute, a purchaser of land took subject to any pending suit in which the title was litigated because all persons were deemed to have notice of the action.[11] The lis pendens was designed to *reduce* the hardship to a good faith purchaser by subjecting his interest to the outcome of the action only if the lis pendens was recorded or if he had actual knowledge of the suit.[12]

The Court also found the state involvement in the lis pendens to be substantially less than the official participation in the prejudgment remedies struck down by the Supreme Court.[13] In those schemes, one party was authorized by the state to take property possibly belonging to another without the necessity of notice or a hearing.[14] In contrast, the state's only connection with a lis pendens is permitting the memorandum to be recorded.[15] As the Court pointed out, an individual could accomplish the same result privately by publicizing his lawsuit.[16]

The opinion did not directly address the problem of the easy abuse of the lis pendens because the facts of the cases did not warrant such a discussion.[17] This remains a troubling aspect of the lis pendens. A malicious party may bring a frivolous claim or an action not affecting the title to or use of land and file a lis pendens simply to prevent its sale. There is no particular remedy to clear title aside from an early motion for dismissal, and the subsequent recording of a certificate of the disposition of the action.[18]

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granting a similar motion. McClory v. Merkert, 1981 Mass. Adv. Sh. 1149, 420 N.E.2d 349.

[9] Sniadach v. Family Fin. Corp. of Bay View, 395 U.S. 337 (1969); Fuentes v. Shevin, 407 U.S. 67 (1972); North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975).

[10] 1981 Mass. Adv. Sh. at 1142, 420 N.E.2d at 346.

[11] *Id.* at 1141, 420 N.E.2d at 345.

[12] *Id.* at 1141-42, 420 N.E.2d at 345.

[13] *Id.* at 1146-47, 420 N.E.2d at 348.

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] "[W]e are not dealing here with groundless or spurious lawsuits". *Id.* at 1147 n.12, 340 N.E.2d at 348.

[18] *Id.* at 1148 n.15, 340 N.E.2d at 348 n.15.

The opinion in *Debral Realty* may have provided a solution to the second type of abuse, suits which do not affect the title to land or its use. In a footnote the Court stated, without citation, that a court hearing a case for which a lis pendens was wrongly recorded has the power to "dissolve" the notice before the case is terminated.[19] This may be a new, common-law solution to the problem of abuse. However, conveyancers will probably await further elaboration of this procedure by the Court before relying on a dissolution of a lis pendens.[20]

[19] *Id.* at 1142 n.6, 340 N.E.2d at 346 n.6.

[20] For example, may the dissolution of a lis pendens be reviewed by interlocutory appeal? What if an amended complaint which puts the title to land in question is filed after a lis pendens is dissolved? A statutory procedure to prevent abuse of the lis pendens would provide more certainty in this area.