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Robert M. Twiss

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ROBERT M. TWISS*

The Massachusetts Appeals Court has actively interpreted zoning and urban planning law during the past three years. These decisions have produced significant developments in zoning and planning law through the applications of the law to a variety of factual scenarios. The appellate courts have reversed board and lower court decisions on relatively minor distinctions from prior cases.

During the past three years, the Massachusetts Supreme Judicial Court (SJC) handed down published decisions involving what constitutes a "public use" of property taken by eminent domain,[1] lack of standing claimed by an abutter,[2] the definition of educational institutions under the Dover Amendment,[3] the Sub-Division Control

* Robert M. Twiss is a retired judge of the Superior Court of California, retired judge of the U.S. Army Trial Judiciary, retired Assistant United States Attorney, and a former adjunct professor at several law schools. He is a former United States Attorney for the Eastern District of California. He is a member of the Bar in Massachusetts and California. He also is a member of the American Planning Association and of the Massachusetts Chapter of the APA. The opinions expressed herein are those of the author alone, and do not represent the views of any federal, state, or local government, department or agency, or independent board, committee, or commission.

1. Town of Sudbury v. Mass. Bay Transp. Auth., 152 N.E. 3d 1101 (Mass. 2020).

2. Murchison v. Zoning Bd. of Appeals, 149 N.E. 3d 334 (Mass. 2020).

3. McLean Hosp. Corp. v. Zoning Bd. of Appeals, 131 N.E.3d 240 (Mass. 2019) (set forth at section 3 of chapter 40A of the Massachusetts General Laws, the "Dover Amendment" exempts, from local zoning laws, those uses of land and structures that are for educational purposes).

Act,[4] *applicability of variances rather than a special permit,*[5] *dredging of sand adjacent to breakwaters,*[6] *affordable housing,*[7] *and preemption of local zoning authority by the Commonwealth.*[8]

INTRODUCTION

The Massachusetts Zoning Act authorizes individual cities and towns to pass zoning bylaws, and describes the limits of that authority and the manner in which it may be exercised.[9] The Zoning Act allows the towns to regulate the maximum and minimum dimensions of structures and lots allowed in certain zoned areas. It also allows towns to regulate the uses to which land in a given area may be put.[10]

These decisions collectively make clear that local municipalities are enabled under the Massachusetts Constitution and the Home Rule Amendment to exercise their power to enact local zoning ordinances. The courts will give great deference to the interpretation of those local zoning bylaws by the local board so long as they are not based upon untenable legal grounds or are unreasonable, whimsical, capricious, or arbitrary.

The cases also make clear that so long as the statutes and ordinances are clear and unambiguous, the codes mean what they say. If the codes are not clear and unambiguous, then they must be interpreted in a reasonable and common-sense manner, taken in the context of the entire statute. Standing and compliance with the deadlines for filing in the trial courts and giving notice to the town or city clerk are jurisdictional, and a failure to establish compliance is fatal to the legal action.

All of these cases are "fact-driven." None of these decisions announce landmark changes in the law, but there are very significant *results* from the *applications* of that law to differing sets of facts. It is clear that relatively minor, and often overlooked, distinctions in facts from one case to another might cause two cases involving the same legal principle to have opposite results.

I. MASSACHUSETTS SUPREME JUDICIAL COURT

The "themes" running through the zoning and planning decisions of

4. RCA Dev., Inc. v. Zoning Bd. of Appeals, 121 N.E. 3d 1117 (Mass. 2019).

5. Bellalta v. Zoning Bd. of Appeals, 116 N.E. 3d 17 (Mass. 2019).

6. Miramar Park Ass'n, Inc. v. Town of Dennis, 105 N.E. 3d 241 (Mass. 2018).

7. 135 Wells Ave., LLC v. Hous. Appeals Comm., 84 N.E. 3d 1257 (Mass. 2017).

8. Roma, III, Ltd. v. Bd. of Appeals, 88 N.E. 3d 269 (Mass. 2018).

9. *See* MASS. GEN. LAWS ch. 40A, §§ 1–17 (2021).

10. *See* Am. Towers LLC v. Town of Shrewsbury, No. 17-10642-FDS, 2018 WL 3104105 (D. Mass. June 22, 2018).

the SJC are that: the statutes mean what the statutes say; that the statutes and bylaws must be interpreted reasonably and in context; and that zoning and planning decisions inherently are fact-driven. The SJC took up the issue of what constitutes a "public use" of land in *Town of Sudbury v. Massachusetts Bay Transportation Authority*.[11] "Under [the common-law doctrine of 'prior public use'], public lands acquired for one public use may not be diverted to another inconsistent public use unless the subsequent use is authorized by plain and explicit legislation."[12]

The Massachusetts Bay Transportation Authority (MBTA) acquired several miles of "right of way" and intended to extend and operate mass transportation.[13] The MBTA then sought to transfer an easement to an electric company to install electrical lines underneath the right of way.[14] Under the doctrine of prior public use, a party opposing the use must establish "(1) a subsequent public use; (2) previous devotion of the property to only 'one public use'; (3) an inconsistent subsequent use; and (4) a lack of legislative authorization."[15]

The court held that the electric company was a private entity rather than a public entity and that the electric company's proposed use of the MBTA right of way was not a "public use."[16] Therefore, the doctrine of prior public use did not preclude the MBTA from entering into an option agreement for an easement to place electrical lines underneath the right of way.[17] The court declined to extend the doctrine of prior public use to a private entity.[18]

The SJC took up the presumption of standing enjoyed by an abutting party in *Murchison v. Zoning Board of Appeals of Sherborn*.[19] In *Murchison*, a landowner proposed to build a single-family residence on his three-acre parcel of land.[20] The parcel met the local zoning requirements in terms of minimum lot size and setback from the public

11. Town of Sudbury v. Mass. Bay Transp. Auth., 152 N.E. 3d 1101, 1103 (Mass. 2020).

12. *Id.* (citing Robbins v. Dep't of Pub. Works, 244 N.E. 2d 577, 579 (Mass. 1969)). *See also* Town of Brookline v. Metro. Dist. Comm'n, 258 N.E. 2d 284, 286 (Mass. 1970); Sacco v. Dep't of Pub. Works, 227 N.E. 2d 478, 479–80 (Mass. 1967).

13. *Sudbury*, 152 N.E. 3d at 1104–106.

14. *Id.*

15. *Id.* at 1109 (citing Smith v. City of Westfield, 82 N.E. 3d 390, 399–401 (Mass. 2017)).

16. *Id.* at 1111–14

17. *Id.* at 1111.

18. *Id.* at 1113–14

19. Murchison v. Zoning Bd. of Appeals, 149 N.E. 3d 334 (Mass. 2020). All the facts discussed herein are taken from the SJC's published decision.

20. *Id.* at 337–39.

street.[21] The lot is irregularly shaped and was, allegedly, narrower than the width dimension specified in the zoning bylaw.[22]

The neighbor across the street objected to the issuance of the building permit, alleging that the construction would violate the lot width bylaw, improperly increase the density of the neighborhood, and diminish the value of his property.[23] The zoning board of appeals upheld the building permit over the objection of the abutting neighbor, who appealed the board decision to the land court.[24] The land court upheld the zoning board of appeals; finding that the abutter had no standing because the landowner had successfully rebutted the abutter's presumption of standing.[25]

The appeals court subsequently reversed the land court decision.[26] The appeals court held that the abutter's claim was sufficient to establish standing.[27] "[Massachusetts] General Laws c. 40A. § 17, allows any 'person aggrieved by a decision of the board of appeals' to challenge that decision in the land court. 'A 'person aggrieved' is one who 'suffers some impingement of his legal rights.'"[28] Abutters and persons across the street have a rebuttable presumption of standing pursuant to section 11 of chapter 40A of the Massachusetts General Laws.[29]

The appeals court determined that the proposed construction would violate the local bylaw's requirement of lot width and, therefore, cause a higher level of housing density than anticipated under the bylaw.[30] Having reached that conclusion, the appeals court found that Murchison had standing to contest the issuance of the building permit.[31] "A plaintiff can . . . 'establish standing based on the impairment of an interest protected by [a town's] zoning by law.' . . . Sherborn's zoning bylaws contain dimensional requirements that protect neighbors from

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* at 338.

25. *Id.* at 338; *see generally* Murchison v. Zoning Bd. Of Appeals (*Murchison Appeal*), 132 N.E. 3d 1081, 1084–85 (Mass. App. Ct. 2019).

26. *Murchison Appeal*, at 1088.

27. *Id.* at 1088 (the abutter claimed that a violation of the lot width bylaw would improperly increase the density of housing in the neighborhood).

28. *Id.* at 1084.

29. *Id.* at 1084–85; *see* MASS. GEN. LAWS ch. 40A, § 11 (2021) ("Parties in interest" as used in this chapter shall mean the petitioner, abutters, owners of land directly opposite on any public or private street or way, and abutters to the abutters within three hundred feet of the property line of the petitioner as they appear on the most recent applicable tax list . . . .).

30. *Murchison Appeal*, at 1085–86.

31. *Id.* at 1086.

overcrowding. The minimum lot width requirement at issue here is a prime example."[32]

The SJC, agreeing with the land court's findings of fact and law regarding standing, reversed the appeals court decision.[33] The SJC noted that

> while the plaintiffs have presumptive standing, the presumption may be rebutted by a showing that, as a matter of law, the plaintiffs' "claims of aggrievement are not within the interests protected by the applicable zoning scheme." While "density, traffic, parking availability, [and] noise" have been denoted "typical" interests protected by G.L. c. 40A and zoning bylaws, there is nothing to demonstrate that the purpose of Sherborn's dimensional lot width zoning requirement is to control density or overcrowding generally, or to protect an abutter's interests in particular.[34]

The abutter in *Murchison* testified that the proposed construction would reduce the value of his house.[35] The abutter was not an expert witness and had an obvious bias or prejudice based upon his claim of reduction in value of his property.[36] The landowner rebutted with an expert witness who testified that construction of the defendants' home would not diminish plaintiff's property value.[37] "Rather, it was her opinion that a single-family residence is the 'best and highest use' of [the lot], and that such a residence, accompanied by landscaping, would improve the lot compared with its current condition as a vacant cleared lot."[38]

The abutter did not present any expert testimony to rebut the defense expert and did not present any evidence to "establish that the minimum lot width bylaw was intended to protect the value of [plaintiff's] property."[39] The court found that the abutter did not have standing because he had not established that he was "aggrieved" within the meaning of chapter 40A of the Massachusetts General Laws.[40] The trial judge also resolved competing proffers of evidence with regard to whether construction would damage the abutter's property with excessive water runoff, finding that

32. *Id.* at 1086 (alteration in original).
33. Murchison v. Zoning Bd. of Appeals, 149 N.E. 3d 334, 342 (Mass. 2020).
34. *Id.* at 339–40 (alteration in original) (citations omitted).
35. *Id.* at 341.
36. *Id.* at 341.
37. *Id.* at 341.
38. *Id.*
39. *Id.* at 342.
40. *Id.* at 337.

the abutter's evidence was insufficient to establish standing based upon harm due to runoff.[41]

The bottom line for which *Murchison* stands is that it is not enough to simply allege a violation of some provision of the local zoning bylaw in order to establish standing.[42]

> [M]erely alleg[ing] a zoning violation . . . cannot be sufficient in itself to confer standing . . . . Standing as an "aggrieved" person requires evidence of an injury particular to the plaintiffs, as opposed to the neighborhood in general, the injury must be causally related to violation of the zoning laws, and it must be more than de minimus.[43]

Murchison reminds us that a trial judge sitting without a jury has the opportunity to see, hear, and evaluate the weight of the evidence and credibility of the witnesses.[44] The trial court did so in *Murchison*, and the SJC upheld those findings.[45]

In *The McLean Hospital Corp. v. Zoning Board of Appeals of Lincoln*,[46] the court held that a residential program was an educational institution within the meaning of the Dover Amendment.[47] The court reasoned that the program, while unconventional, "[was] designed to instill fundamental life, social, and emotional skills in adolescent males who are deficient in these skills, who experience severe emotional dysregulation, and who have been unable to succeed in a traditional academic setting."[48] As a result, the program's pedagogical functions and goals allowed McLean Hospital to be relieved from the zoning regulations as an educational institute.[49]

As part of their residential program, the McLean Hospital intended "to develop a residential life skills program for fifteen to twenty-one year old males who exhibit extreme 'emotional dysregulation.' The program would allow these adolescents to develop the emotional and social skills

41. *Id.*

42. *Id.* at 340.

43. *Id.*

44. *See generally* Murchison v. Zoning Bd. of Appeals, 149 N.E. 3d 334 (Mass. 2020).

45. *See generally id.*

46. McLean Hosp. Corp. v. Town of Lincoln, 131 N.E. 3d 240 (Mass. 2019). All the facts discussed herein are taken from the SJC's published decision.

47. *Id.* at 244; *see* MASS. GEN. LAWS ch. 40A, § 3 (2021) (known as the Dover Amendment, this section provides in relevant part that "[n]o zoning ordinance or by-law shall . . . prohibit, regulate or restrict the use of land or structures for . . . educational purposes on land owned or leased by . . . a nonprofit educational corporation").

48. *Id.* at 244.

49. *Id.* at 250–51.

necessary to return to their communities to lead useful, productive lives."[50] The school's curriculum would utilize several recognized professional psychological counseling programs.[51] Despite this, the zoning board of appeals determined that the facility was to be operated as a "medical or therapeutic, as opposed to educational" facility.[52]

The land court upheld the zoning board of appeals.[53] McLean subsequently appealed and the SJC allowed for a direct appellate review.[54] On review, the SJC re-affirmed its

> two-pronged test to determine whether a proposed use falls within the protections of the Dover Amendment. First, the use must have as its "bona fide goal something that can reasonably be described as 'educationally significant.'" Second, the educationally significant goal must be the "'primary or dominant' purpose for which the land or structures will be used."[55]

After an in-depth analysis of the educational aspects of the proposed program at McLean, the court concluded that "[a]lthough 'emotional or psychiatric programs may determine the character of the . . . proposed facility,' they certainly 'do not mark the facility as 'medical' or render it any less educational.'"[56] The court ultimately held that "the proposed facility and its skills-based curriculum fall well within the 'broad and comprehensive' meaning of 'educational purposes' under the Dover Amendment."[57]

In *RCA Development, Inc. v. Zoning Board of Appeals of Brockton*, the court undertook a discussion of the Subdivision Control Act.[58] Under section 81O of the Act, "[n]o person shall make a subdivision of any land in any city or town in which the subdivision control law is in effect unless he has first submitted to the planning board of such city or town for its approval of a plan of such proposed subdivision."[59] "Generally,

50. *Id.* at 243.

51. *Id.* at 245, 248.

52. *Id.* at 243–44.

53. *Id.* at 244.

54. *Id.*

55. *Id.* at 246 (citations omitted) (quoting Regis Coll. v. Town of Weston, 968 N.E. 2d 347 (Mass. 2012); Whitinsville Ret. Soc'y, Inc. v. Town of Northbridge, 477 N.E. 3d 407, 410 (Mass. 1985).

56. *Id.* at 248.

57. *Id.* at 244.

58. RCA Dev., Inc. v. Zoning Bd. of Appeals, 121 N.E.3d 1117 (Mass. 2019).

59. MASS. GEN. LAWS ch. 41, § 81O (2021); *see also RCA Dev., Inc.*, 121 N.E. 3d at 1119–20.

'subdivision' means the division of a tract of land into two or more lots."[60]

In 1964, the owner of a lot designated as "lot 46" transferred the northern half of his lot to the owner of the lot to the immediate north, and the southern half of his lot to the owner of the lot to the immediate south (lot 47).[61] The transfer was not submitted to the municipal planning board for approval.[62]

In 2016, a subsequent owner of the southern half of lot 46 and of lot 47 applied for a permit to build a residence on the southern half of lot 46.[63] The building inspector denied the permit and the zoning board of appeals upheld the denial.[64] Critical to the denial of the building permit was whether the 1964 transfer of the southern half of lot 46 was a "subdivision" within the meaning of the Subdivision Control Act.[65] If it were, then the permit was properly denied.[66] If it were not a "subdivision," then it would be error to deny the permit.[67]

There is an exception to the definition of "subdivision" in section 81L of chapter 41 of the Massachusetts General Laws, which provides that a division of land is not a subdivision within the meaning of the Subdivision Control Act if the lot so divided has frontage on a "public way" in the amount of frontage and depth as required under the municipal zoning ordinance.[68] The land court reversed the zoning board of appeals, finding that the 1964 transfer of the two halves of lot 46 was not a "subdivision" within the meaning of the Subdivision Control Act.[69] The land court found that the southern half of lot 46 was of adequate size and depth, and had adequate frontage on a public way, as of the date of transfer in 1946.[70]

The SJC agreed with the land court, finding that the 1964 transfer was not a "subdivision" within the meaning of the Subdivision Control Act, and no submission to the planning board was necessary.[71] The

60. MASS. GEN. LAWS ch. 41, § 81L (2021).

61. *RCA Dev., Inc.*, 121 N.E. 3d at 1118.

62. *Id.* at 1118–19.

63. *Id.*

64. *Id.*

65. *Id.*; *see generally* MASS. GEN. LAWS ch. 41, § 81L (2021).

66. *RCA Dev., Inc.*, 121 N.E. 3d at 1119.

67. *Id.* at 1119.

68. *See id.* at 1120.

69. *RCA Dev., Inc.*, 121 N.E. 3d at 1120; *see also* MASS. GEN. LAWS ch. 41, § 81L (2021).

70. *RCA Dev., Inc.*, 121 N.E. 3d at 1120.

71. *Id.* at 1120.

municipality also argued that the landowner was required to submit an application for endorsement as "Approval Not Required" (ANR), under section 81P of the Act.[72] The land court found, and the SJC agreed, that an application for an ANR endorsement was permissive, and not mandatory.[73] The bottom line of the SJC's decision was simply that the statute means what the statute says: "where the language of a statute is plain and unambiguous, it is conclusive as to legislative intent."[74]

One of the more confusing matters of zoning and planning law is the distinction between when one needs a special permit, and when one needs a variance, or if one needs both. This issue frequently arises in the context of section 6 of chapter 40A of the Massachusetts General Laws, which deals with changes, modifications, or alterations to buildings and/or lots which have become nonconforming due to a subsequent amendment to the zoning code.[75] Section 6 provides, in relevant part,

> [A] zoning ordinance or by-law shall not apply to structures or uses lawfully in existence or lawfully begun, . . . but shall apply to any change or substantial extension of such use . . . to any reconstruction, extension or structural change of such structure and . . . to provide for its use for a substantially different purpose or for the same purpose in a substantially different manner or to a substantially greater extent except where alteration, reconstruction, extension or structural change to a single or two-family residential structure does not increase the nonconforming nature of said structure.[76]

The homeowners in *Bellalta v. Zoning Board of Appeals of Brookline* ran into a section 6 issue when they attempted to modify their roof.[77]

In *Bellalta*, the property at issue was a second story condominium in a two-family house that was considered nonconforming because the Floor Area Ratio (FAR)[78] exceeded the maximum provided in the zoning bylaw.[79] The homeowners sought to build a dormer which would add 677 square feet of floor space, thereby increasing the amount of the

72. *Id.* at 1120–21; *see generally* MASS. GEN. LAWS ch. 41, § 81P (2021).

73. *Id.* at 1121.

74. *Id.*

75. MASS. GEN. LAWS ch. 40A, § 6 (2021).

76. *Id.*

77. Bellalta v. Zoning Bd. of Appeals, 116 N.E. 3d 17 (Mass. 2019).

78. Floor Area Ratio "compares the gross floor area of the building to the area of the lot upon which it is built." *Bellalta*, 116 N.E. 3d at 21 n3 (citing INST. FOR LOC. GOV'T, Land Use and Planning: Glossary of Land Use and Planning Terms 24 (2010), https://www.ca-ilg.org/sites/main/files/file-attachments/2010_-_landuseglossary.pdf).

79. *Bellalta*, 116 N.E. 3d at 20–21.

nonconforming floor area ratio.[80]

The zoning board of appeals approved the application, entering a finding upon the record that "'the specific site is an appropriate location for such a use, structure, or condition,' and 'the use as developed will not adversely affect the neighborhood.'"[81] The homeowners neither sought nor received a variance.[82]

An abutting property owner appealed the board's decision to the land court, alleging that a variance was necessary to permit the construction because the project increased the extent of the nonconformity.[83] The abutting property owner argued that if a renovation or replacement adds new non-conformities, or substantially increases an existing non-conformity, the applicant must secure a variance for the project.[84]

Here the structure was nonconforming due to the FAR.[85] The homeowners sought to increase the amount of the nonconformity.[86] The Zoning Board and the homeowners agreed that the proposal did "increase the nonconforming nature of said structure."[87] As such, the abutting property owner argued that the language in section 6, as quoted above, strongly suggested that a variance was necessary.[88]

For single or two-family residential structures, however, section 6 provides that

> [p]re-existing nonconforming structures or uses may be extended or altered, provided, that no such extension or alteration shall be permitted unless there is a finding [by the board] that such change, extension or alteration shall not be substantially more detrimental than the existing nonconforming [structure or] use to the neighborhood.[89]

However, the *Bellalta* court observed that "[t]he language of G.L. c. 40A, § 6 has been recognized as particularly abstruse."[90]

Compare *Bellalta* in which the court looked to legislative intent because it found the language of section 6 of the Zoning Act to be anything

80. *Id.*
81. *Id.* at 21.
82. *Id.* at 22.
83. *Id.*
84. *Id.* at 23–24
85. *Id.* at 26.
86. *Id.* at 26.
87. *Id.* at 26.
88. *Id.* at 27.
89. MASS. GEN. LAWS ch. 40A, § 6 (2021).
90. *Bellalta*, 116 N.E. at 23.

but clear and ambiguous to the court not looking at legislative intent in *RCA Development* because it found the language of section 81L of the Subdivision Control Act to be clear and unambiguous.[91] The court in *Bellalta* had to determine what the Legislature intended when it amended section 6 adding the two apparently inconsistent sentences quoted above.[92]

> "As with all matters of statutory interpretation," a court construing a zoning act must "ascertain and effectuate legislative intent," as expressed in the statutory language. Where, as here, "the meaning of [the] statute is not clear from its plain language, well-established principles of statutory construction guide our interpretation." Specific provisions of a statute are to be "understood in the context of the statutory framework as a whole, which includes the preexisting common law, earlier versions of the same act, related enactments and case law, and the Constitution." A reviewing court's interpretation "must be reasonable and supported by the history of the statute." Ultimately, we must "avoid any construction of statutory language which leads to an absurd result," or that otherwise would frustrate the Legislature's intent.[93]

The court was aware that section 6 had been a part of Chapter 40A for some time, codified the pre-existing common law on the subject, and had been amended several times.[94] Normal statutory interpretation holds that the legislature is assumed to know the existing law when it amends a statute, and that it intends to adopt the prior interpretation.[95]

Here the court concluded that the Legislature intended to allow a homeowner to change, alter, or extend a nonconformity in a one or two-family house.[96] It was considered as a matter of right, so long as it would "not be substantially more detrimental than the existing nonconforming [structure or] use to the neighborhood."[97] As a result, the Court held that a variance was not necessary.[98]

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91. *Compare Bellalta*, 116 N.E. 3d at 24–26 *with RCA Dev., Inc.*, 121 N.E. 3d at 1119 n3.

92. *Bellalta*, 116 N.E. 3d at 24–26.

93. *Id.* at 24 (alteration in original) (citations omitted).

94. *Id.* at 27–28.

95. *Id.* at 28 (citing SHAMBIE SINGER, STATUTES AND STATUTORY CONSTRUCTION § 77:7 (8th ed. 2018)).

96. *Id.* at 25–26.

97. *Id.* at 20 (quoting MASS. GEN. LAWS ch. 40A, § 6 (2021)).

98. *Id.* at 28 (citing Rockwood v. Snow Inn Corp., 566 N.E. 2d 608, 610–11 (Mass. 1991)) ("single- and two-family residences are given 'special protection' with regard to their existing nonconformities"); *see also In re* Estate of Kendall, 159 N.E. 3d 1023, 1028 (Mass.

In early 2021, the SJC heard oral argument on two zoning and planning cases involving chapter 94G, Section 3 of the Massachusetts General Laws:[99] *Mederi v. City of Salem*[100] and *CommCan, Inc. v. Town of Mansfield*.[101] In *Mederi v. City of Salem*, the issue was whether the City of Salem should be compelled to enter into a Host Community Agreement (HCA) for the placement of a retail marijuana establishment within the City.[102] The SJC held that "[n]othing in [section 3] imposes a duty on a city or town to enter into an HCA with a prospective recreational marijuana establishment simply because that establishment is able to fulfill the municipality's HCA requirements."[103]

In *CommCan, Inc. v. Town of Mansfield*, the issue was whether the appellant should be allowed to convert an approved medicinal marijuana dispensary into a recreational marijuana dispensary that was otherwise blocked by the town's zoning bylaw.[104] The SJC held that CommCan was engaged in the business of selling marijuana products despite not actually selling any products.[105] As a result, the zoning restrictions established in Chapter 94G Section 3a prohibited the Town of Mansfield from preventing CommCan from converting their medicinal marijuana dispensary into a recreational marijuana dispensary.[106]

In addition to the cases summarized above, The SJC issued three noteworthy opinions in 2018. In *135 Wells Ave, LLC v. Housing Appeals Committee*, a case in which the underlying issue was construction of

2020) ("We ordinarily construe statutes to be consistent with one another, reading them as a harmonious whole 'so that effect is given to every provision in all of them.'"); Commonwealth v. Montarvo, 159 N.E. 3d 682, 684 (Mass. 2020) (citations omitted) ("Legislative intent controls our interpretation of statutes. 'To determine the Legislature's intent, we look to the words of the statute, construed by the ordinary and approved usage of the language, considered in connection with the cause of enactment, the mischief or imperfection to be remedied and the main object to be accomplished.'"); Clement v. Owens-Clement, 159 N.E. 3d 164, 172 (Mass. App. Ct. 2020) ("Although we look first to the plain language of the provision at issue to ascertain the intent of the Legislature, we consider also other sections of the statute, and examine the pertinent language in the context of the entire statute.").

99. MASS. GEN. LAWS ch. 94G, § 3 (2021).

100. Mederi v. City of Salem, 171 N.E. 3d 158 (2021).

101. CommCan v. Town of Mansfield, 173 N.E. 3d 19 (2021).

102. Mederi v. City of Salem, 171 N.E. 3d 158 (2021).

103. *Id.* at 166–67.

104. *CommCan*, 173 N.E. 3d at 22–23 (citing MASS. GEN. LAWS ch. 94G, § 3(a)(1)) (2021)).

105. *Id.* at 23–24 (the plaintiffs acquired the required licensing, executed a host community agreement with the town and procured a special permit from the town so "[i]t hardly can be said that the plaintiffs were not 'involved in' and 'occupied' by the sale of marijuana, even though the dispensary is not yet operational.").

106. *Id.* at 23–24.

affordable housing, the court again stated the basic rule of statutory interpretation.[107] "In interpreting a statute, we begin with its plain language, as the best indication of legislative intent. We interpret particular language within a statutory provision with respect to the statute as a whole."[108]

The court discussed the role and impact of federal and state preemption[109] on local zoning regulation in *Roma III, Ltd. v. Zoning Board of Appeals of Rockport*.[110] In *Roma*, a homeowner built his own personal helicopter landing area at his oceanfront home in a residential district.[111] The town issued an enforcement order instructing him to stop using his residence as a landing area, and the zoning board of appeals upheld the building inspector.[112]

The homeowner argued before the SJC that the state had preempted regulation of helicopter operations, including landing and taking off, in the Massachusetts Aeronautics codes.[113] The SJC found a distinction between flight operations, which were preempted, and permitted regulation of private aircraft landing sites, "which involves local control of land."[114] The court also relied upon the Home Rule Amendment to the Massachusetts Constitution.[115] The Home Rule Amendment provides, in relevant part, "any city of town may, by the adoption, amendment, or repeal of local ordinances or by-laws, exercise any power or function

107. 135 Wells Ave., LLC v. Hous. Appeals Comm., 84 N.E. 3d 1257 (Mass. 2017). All the facts discussed herein are taken from the SJC's published decision.

108. *Id.* at 1265 (citation omitted); *see also* RCA Dev., Inc. v. Zoning Bd. of Appeals, 121 N.E.3d 1117 (Mass. 2019).

109. The doctrine of preemption originates from the supremacy clause of the United States Constitution, which provides that

> this Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . ." "A Federal statute may preempt State law when it explicitly or by implication defines such an intent, or when a State statute actually conflicts with Federal law or stands as an obstacle to the accomplishment of Federal objectives.

Roma, III, Ltd. v. Bd. of Appeals, 88 N.E. 3d 269, 275 (Mass. 2018) (citations omitted). "State preemption analysis is similar to Federal preemption analysis in that we determine whether the Legislature intended to preclude local action, recognizing that 'the legislative intent to preclude local action must be clear.'" *Id.* at 276 (quoting Wendell v. Attorney Gen., 476 N.E. 2d 585, 589d (1985)).

110. *See generally id.*

111. *Id.* at 271.

112. *Id.*

113. *Id.* at 276; *see generally* MASS. GEN. LAWS ch. 90, §§ 35–52 (2018).

114. *Id.* at 276.

115. *Id.* at 276–77; *see also* MASS. GEN. LAWS ch 43B, § 13 (2018).

which the general court has power to confer upon it, which is not inconsistent with the constitution or laws enacted by the general court."[116]

The court did find that the Legislature had expressed an intent to foster private flying within the Commonwealth.[117] The court also found, however, that "the legislative purpose of 'fostering private flying' does not suggest a legislative intent to encourage the development of private heliports and landing areas so that persons may land their helicopters and aircraft on their own private property."[118]

> Where land use regulation has long been recognized by the Legislature to be a prerogative of local government, we will not infer that the enactment of the aeronautics code reflects a clear legislative intent to preempt all local zoning bylaws that might affect noncommercial private restricted landing areas based upon the risk of frustrating the legislative purpose of fostering private flying.
> . . . If the Legislature wishes to preempt local zoning regarding noncommercial private restricted landing areas, it must provide a clearer indication of such intent.[119]

Strictly speaking, *Miramar Park Association v. Town of Dennis*,[120] in contrast, is not a zoning or planning decision. But it is, nevertheless, relevant to planners, lawyers, and public officials in coastal communities.

In *Miramar Park*, the town dredged the mouth of a river adjacent to a breakwater in order to protect the free movement of water to and from the wetlands, the river, and Nantucket Sound.[121] The town deposited the sand which it dredged on a nearby public beach in order to enhance its dunes.[122] Property owners fronting on the river where the dredging took place claimed that the town should have used the materials to enhance the dunes on the homeowners' private beach adjacent to the river.[123]

The Wetlands Protection Act, section 40 of chapter 131 of the Massachusetts General Laws, "was created to protect wetlands from destructive intrusion, . . . and . . . governs the dredging of wetlands and lands bordering waters."[124] The Commonwealth has promulgated

116. MASS. GEN. LAWS ch. 43B, § 13 (2018); *see also Roma, III, Ltd*, 88 N.E. 3d at 274.

117. *Roma, III, Ltd*, 88 N.E. 3d at 277.

118. *Id.* at 278.

119. *Id.* at 278–79 (citations omitted).

120. Miramar Park Ass'n, Inc. v. Town of Dennis, 105 N.E. 3d 241 (Mass. 2018).

121. *Id.* at 245–49.

122. *Id.* at 247.

123. *Id.*

124. *Id.* at 244 (citation omitted).

regulations pursuant to this statute in order to protect wetlands.[125]

The SJC found that the town had not violated either the statute or the regulations, vacated the lower court injunction requiring the town to periodically nourish Miramar Beach, and reversed summary judgment which had been entered in favor of the plaintiff Miramar Beach Association.[126] The significance of the case is not the conclusion reached by the court, which largely was fact-driven, but rather the existence of the statute and regulations, and the impact upon the communities which are affected by those laws.

II. MASSACHUSETTS APPEALS COURT AND FEDERAL COURTS

The Appeals Court of Massachusetts handed down over forty zoning and planning decisions during 2019 and 2020, both published and unpublished.[127] The United States Court of Appeals for the First Circuit and the United States District Court for the District of Massachusetts handed down an additional thirteen zoning and planning related decisions.[128]

Among the issues appearing repeatedly in the recent decisions are jurisdiction and standing, timeliness in appealing the town board decision, failure to provide notice of the judicial action to the town clerk, merger of adjoining lots, misinterpretation of municipal zoning bylaws by the local board, and construction of cell phone towers.

A. *Jurisdiction*

There are four primary jurisdictional sub-issues presented in the previously discussed zoning and planning cases in the last three years. Those issues were: presence or absence of subject matter jurisdiction; standing; timeliness in filing an appeal from the zoning board of appeals or planning board decision; and failure to give timely notice of the judicial action to the city or town clerk.

1. Subject Matter Jurisdiction

Federal and state courts must have both subject matter jurisdiction

125. *See* 310 MASS. CODE REGS. §§ 10.00–10.37 (2021); *see also Miramar*, 105 N.E. 3d at 244.

126. *Miramar*, 105 N.E. 3d at 252–53.

127. Not counting Appeals Court decisions for which the SJC subsequently issued an opinion.

128. MASS. APP. CT. R. 23 (Unpublished decisions of the United States courts of appeals and United States district courts are not precedent, not binding on other courts, and may not be cited as authority, but you might find the reasoning and logic to be persuasive and useful).

and *in personam* jurisdiction over the parties in order to entertain a judicial action. Occasionally one or the other, or both, are not present and the court is not able to adjudicate the plaintiff/petitioner's claims.

The vast bulk of the zoning and planning cases decided in Massachusetts during the past three years were filed under either the Massachusetts Zoning Act, chapter 40A of the Massachusetts General Laws, or the federal Telecommunications Act, 47 U.S.C. § 332. There were a few cases under the Massachusetts Subdivision Control Act, sections 81K through 81GG of chapter 41 of the Massachusetts General Laws, and a few miscellaneous civil rights cases brought under 42 U.S.C. § 1983, or the Massachusetts Urban Redevelopment Act, chapter 121B of the Massachusetts General Laws.

2. Standing

The appeals court resolved standing questions as the primary issue in ten cases during the past three years. The appeals court found in *published* decisions that an abutter who is sufficiently far away from the locus that there was no significant injury to his property rights has no standing,[129] and that a property owner whose factual assertions were raised only in an overly conclusory manner also did not have standing.[130] In *unpublished* decisions,[131] the appeals court found that an abutter to an abutter whose property is eighty-three feet away from the locus property, cannot see the proposed property from inside of her residence, and enters her residence from a different street does not have standing,[132] and that a plaintiff whose alleged injuries are not distinguishable from those suffered by others in the neighborhood also does not have standing.[133] Standing is jurisdictional, and it can be raised *sua sponte* by the trial judge hearing the

129. Talmo v. Zoning Bd. of Appeals, 107 N.E. 3d 1188, 1194–95 (Mass. App. Ct. 2018).

130. Hickey v. Conservation Comm'n, 107 N.E. 3d 510, 513 (Mass. App. Ct. 2018).

131. Summary decisions issued by the appeals court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009)), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 23.0 or rule 1:28 issued after February 25, 2008, may be cited for its persuasive value, but, because of the limitations noted above, not as binding precedent. *See* Chace v. Curran, 881 N.E. 2d 792, 794 n.4 (Mass. App. Ct. 2008).

132. Murrow v. Emery, 93 Mass. App. Ct. 1119, 2018 WL 3402106, at *4 (July 13, 2018).

133. Ricker v. 3353 Wash. LLC, 93 Mass. App. Ct. 1121, 2018 WL 3673190, at *1 (Aug. 3, 2018), *rev. denied*, 480 Mass. 1110 (2018).

appeal from the municipal zoning board of appeals or planning board.[134]

In *Talmo v. Zoning Board of Appeals of Framingham*, the immediate abutter challenged a permit allowing a landowner to convert a barn on his property from an illegal dwelling unit to an accessory use as "additional living space for main house."[135] Years before, a prior landowner illegally converted the barn to a dwelling without the required permits.[136] The immediate abutter sought enforcement action to terminate the use of the barn as a residence.[137]

The zoning board of appeals ordered the building commissioner to take action to enforce the zoning bylaw.[138] The applicant then removed the cooking facilities from the barn and sought a permit to convert the illegal dwelling into an accessory use for the main house.[139] That application was granted, and the immediate abutter brought suit in the land court contesting the order.[140]

At trial, the court entered findings of fact: that the abutter's house was located 250 feet from the barn; that "landscaping partially obscure[d] the view;" and "that the distance between the two houses is great enough that it is virtually inconceivable that traffic, noise or light from the former barn . . . could disturb or injure [the plaintiff]."[141] The trial court found that "[a] person is ''aggrieved' if he suffers some infringement of his legal rights.' 'The injury must be more than speculative,' and also must be 'special and different from the concerns of the rest of the community.' 'Aggrievement requires a showing of more than minimal or slightly appreciable harm.'"[142]

The appeals court found that the plaintiff did not establish the necessary level of aggrievement, and therefore did not have standing to bring his challenge.[143] But, in *Murrow v. Emery*, an unpublished appeals

134. *Talmo*, 107 N.E. 3d at 1192 (citing Watros v. Greater Lynn Mental Health & Retardation Ass'n, Inc., 653 N.E. 2d 589, 59091 (Mass. 1995) and 81 Spooner Rd., LLC v. Zoning Bd. of Appeals, 954 N.E.2d 318, 326 n.12 (Mass. 2012)); *see* Braxton v. City of Boston, 138 N.E. 3d 440, 446 (Mass. App. Ct. 2019) (alterations in original) ("Because 'the issue of 'standing' is closely related to the question of whether an 'actual controversy' exists, . . . we have treated it as an issue of subject matter jurisdiction.'").

135. *Talmo*,107 N.E. 3d at 1191.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* at 1193.

142. *Id.* at 1194 (citations omitted).

143. *Id.*

court decision, the court found that an abutter to an abutter who could not see the locus property from inside of her residence and entered off a different street did not have standing to bring suit.[144]

Standing can be transitory; one who legitimately has standing at one point in the proceeding might lose standing before resolution of all issues. In *Maroney v. Planning Board of Haverhill*, the plaintiff was a builder who sought to construct a fifty-lot subdivision.[145] The city granted a special permit for a cluster development, and the planning board approved the subdivision plan.[146]

There was a condition in the special permit that the plaintiff shall construct a water pumping station for those lots for which there was not already adequate water pressure.[147] The plaintiff then began constructing those lots for which there *was* adequate water pressure.[148] Those lots were released, construction was completed, and certificates of occupancy were issued.[149]

The plaintiff then began construction on the lots for which water pressure *was not* adequate, and for which he was required to build a water pumping station, but *before* he constructed the pumping station.[150] The city building inspector issued a cease and desist order, and warned that if the plaintiff continued construction, he would be subject to daily penalties.[151] The plaintiff ceased construction pursuant to the notice.[152]

The plaintiff then sought a mandatory injunction in the superior court asking that the city be ordered to release the lots for construction, alleging that the condition of the special permit required only that he complete the pumping station before occupancy, not before construction. The city assessed a fine of $687,700, and counter-claimed for judgment in that amount. Before litigation finished in the appeals court, lenders foreclosed on the property and the plaintiff no longer owned it.

The appeals court found that by the time it ruled on his appeal, Maroney no longer had standing to contest matters pertaining to the special permit.[153] "Having lost the property to foreclosure, [plaintiff] has

144. *See* Murrow v. Emery, 93 Mass. App. Ct. 1119 (2018).

145. Maroney v. Plan. Bd., 150 N.E. 3d 11, 13 (Mass. App. Ct. 2020).

146. *Id.* at 13–14.

147. *Id.* at 13–14.

148. *Id.* at 14.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Maroney*, 150 N.E. 3d at 16.

no legal interest in obtaining the permits at issue, and this court should not adjudicate an issue where one of the purported parties no longer has a live stake."[154] The appeals court vacated the fine for two reasons.[155] First, the notice said that the plaintiff would be subject to a daily fine if he did not cease and desist, but he did cease, so he did not violate the cease-and-desist order.[156] Second, the city cannot enforce an administrative fine for a local zoning violation by counter-claiming in an equitable mandamus action.[157] The city must follow the statutorily outlined procedural remedy.[158]

Pishev v. City of Somerville involved a project pursuant to the Massachusetts Urban Redevelopment Law, sections 1 through 60 of chapter 121B of the Massachusetts General Laws.[159] The plaintiffs were a group of taxpayers in Somerville whose properties were *not* scheduled to be taken by eminent domain as part of the redevelopment project.[160] The appeals court found that the plaintiffs did not have standing to challenge the redevelopment plan.

> [Chapter] 121B "purposely creates no right of appeal from [redevelopment authority] decisions in its capacity as an urban renewal agency." . . . [O]nly landowners whose property is designated to be taken have standing to challenge the decisions of a local urban renewal agency and the approval of a [chapter] 121B urban renewal plan.[161]

Sometimes a project may fall within several different provisions of the General Laws, and a plaintiff might have standing under one provision, but not under another. Such was the case in *Montgomery v. Board of Selectmen of Nantucket*.[162] The underlying zoning issue in *Montgomery* was whether the owner of a barn, which was used as an accessory building located in an historical district, should be allowed to remove it from the premises.[163] The geographic district was within the scope of the Nantucket Historic District, a specific statutorily recognized

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.* at 16–17.

159. Pishev v. City of Somerville, 131 N.E. 3d 853, 856 (Mass. App. Ct. 2019), *rev. denied*, 483 Mass. 1106 (2019).

160. *Id.* at 857.

161. *Id.* at 860.

162. Montgomery v. Bd. of Selectmen, 120 N.E. 3d 1246, 1249 (Mass. App. Ct. 2019).

163. *Id.* at 1249.

district.[164]

The complaining parties were property owners located within the Nantucket Historic District, but were not necessarily abutters, or located across the street, or abutters of abutters located within 300 feet of the locus.[165] The proposal impacted chapters 40A and 40C of the Massachusetts General Laws,[166] and the Nantucket Historical District Act.[167] All parties used the term "person aggrieved," in defining those who had standing to contest a decision by the local board, but the term's interpretation had varied depending on which statute the plaintiff claims standing under.[168] Some of the plaintiffs did not qualify for standing under chapters 40A or 40B, but did qualify under chapter 40C and the Nantucket Historical District Act.[169] Under the Nantucket Historical District Act, all nearby property owners in the historical district and organizations dedicated to historical preservation are deemed to have standing.[170]

The appeals court further fleshed out the concept of standing in three unpublished cases during the same time frame.[171] In *Bylinski v. Building Commissioner of Douglas*, the owner of an unbuildable lot by a lake, nonetheless, built a residence without authority or permit.[172] Through various enforcement actions he was denied authority to build, ordered to demolish, appealed and lost, and continually failed to comply with the demolition order.[173]

An abutter brought an action in the land court to enforce the zoning board of appeals' and Massachusetts District Court's orders to demolish.[174] The town did not participate in the litigation.[175] The land court ordered enforcement of the demolition order, and the property owner

164. *See id.*

165. *Montgomery*, 120 N.E. 3d at 1251–54.

166. MASS. GEN. LAWS ch. 40A, §§ 13, 17; MASS. GEN. LAWS ch. 40C, § 5.

167. Nantucket Historical District Act, 1970 Mass. Acts 395.

168. *Montgomery*, 120 N.E. 3d at 1251–53.

169. *Id.* at 1252.

170. *Id.*

171. *See generally* Bylinski v. Building Comm'r, 97 Mass. App. Ct. 1113, 2020 WL 1969933 (Apr. 24, 2020); Cotton Tree Serv., Inc. v. Zoning Bd. of Appeals, 95 Mass. App. Ct. 1108, 2019 WL 1754357 (Apr. 17, 2019); Lazarek v. Bd. of Appeals, 124 N.E. 3d 161, No. 18-P-505, 2019 WL 1422251 (Mass. App. Ct. Mar. 29, 2019).

172. *Bylinkski*, 2020 WL 1969933, at *1.

173. *Id.* at *1–2.

174. *Id.*

175. *Id.*

appealed.[176] The appeals court held that the abutter did not have standing.[177] In the order dismissing the action, the appeals court stated that

> "[u]nder Massachusetts law, abutters or neighboring property owners do not have a private cause of action for direct enforcement of zoning regulations." Pursuant to § 7 of the act, "the responsibility for enforcing ordinances or by-laws lies with the municipality and is assigned by statute to the building inspector or other specified municipal officers."[178]

In *Cotton Tree Service v. Planning Board of Westhampton*, the plaintiff owned a lumber mill, and applied for a special permit to operate the mill.[179] The planning board denied the application after a hearing.[180] Cotton Tree appealed the denial to the land court, and ultimately the parties entered a settlement agreement.[181] Under the terms of the settlement agreement, the matter would be remanded to the planning board for further action, and if the board did not issue the permit, the court would independently issue the permit.[182]

On remand, the board declined to issue the permit, and Cotton Tree appealed.[183] An abutter sought to intervene in the land court action in order to oppose the permit.[184] The abutter's motion to intervene was denied because he was not an "person aggrieved," as the planning board ruled in his favor.[185] The appeals court reversed finding that by denying the abutter the right to intervene denied him the right to be heard in court.[186]

In *Lazarek v. Board of Appeals of Manchester-By-The-Sea*, the applicant owned a one hundred-foot tall, twelve-story tower which was built during World War II as a lookout tower for enemy vessels.[187] It had

176. *Id.*

177. *Id.* at *7–8.

178. *Id.* at *7 (quoting Morganelli v. Building Inspector of Canton, 388 N.E. 2d 708, 711–12 (1979)).

179. *Cotton Tree Serv., Inc.*, 2019 WL 1754357, at * 1–2.

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.* at *3–4.

187. *Lazarek*, 2019 WL 1422251, at *1–2.

been modified several times in the ensuing fifty years.[188] The plaintiff abutter opposed the most recent application for a special permit for alterations to the property.[189] The zoning board of appeals upheld the building commissioner's decision to grant the permit over the abutter's objection.[190] The abutter then appealed to the land court, which entered judgment for the abutter.[191] In the holding, the appeals court found that the alleged injuries of the abutter were long-term and not particular to the abutter.[192] The proposed alterations sought in the application had no effect on the abutter and, if it did, would be minimal, speculative, or both.[193] Therefore, abutter had not met the test of an "aggrieved person" within the meaning of the statute.[194]

3. Notice

In order to perfect an appeal from the zoning board of appeals or planning board, a party must file his or her action in the trial court within twenty days.[195] In addition, however, the plaintiff must *also* give notice of the legal proceeding to the city or town clerk within a twenty-day window following the filing of the judicial action.

> "Receipt of notice by the town clerk is a jurisdictional prerequisite for an action under G.L. c. 40A, § 17, which the courts have 'policed in the strongest way' and given 'strict enforcement.'" The purpose of notice to the town clerk is to provide "notice to interested persons that the decision of the board of appeals has been challenged and may be overturned."[196]

While the statute requires notice to the clerk in order to establish jurisdiction and notice usually is provided to the clerk by delivering a copy of the complaint, the statute does not require that the notice to the clerk be

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.* at * 3–4.

192. *Id.*

193. *Id.*

194. *Id.*

195. MASS GEN. LAWS ch. 40A, § 17 (2021) (sets out the procedural requirements for a person aggrieved by a decision of a zoning board of appeals or special permit granting authority to seek judicial review "by bringing an action within twenty days after the decision has been filed in the office of the town clerk" and further specifies that "[n]otice of the action with a copy of the complaint shall be given to such city or town clerk so as to be received within such twenty days."); *see* Hickey v. Zoning Bd. of Appeals, 103 N.E. 3d 750, 753 (Mass. App. Ct. 2018).

196. *Hickey*, 103 N.E. 3d at 753 (quoting Konover Management Corp. v. Planning Bd, 588 N.E. 2d 1365, 1367 (1992) and Pierce v. Bd. of Appeals, 343 N.E. 2d 412, 415 (1976)).

in writing. What is required is that the plaintiff give notice to the clerk, not the form of the notice.

In *Hickey v. Zoning Board of Appeals of Dennis*, the plaintiff had timely filed their action but failed to send the required notice to the town clerk.[197] The clerk's officer, however, became aware of the action within the statutory twenty-day timeframe through word of mouth within the town hall.[198] The issue revolved around whether oral notification was sufficient to satisfy the notice requirement of section 17.[199]

Instead of mailing a copy of the complaint to the town clerk, the plaintiff mailed it to "Chairman, Zoning Board of Appeals" at the town hall.[200] The town mail room routed the papers to the town planner rather than the town clerk.[201] On the twentieth day the town planner advised an assistant town clerk that the plaintiff filed suit and sent a copy to the town zoning board of appeals.[202] The town clerk personally did not receive any notice of the filing within twenty days, either in writing or orally.[203]

The appeals court found that oral notice of the filing received by an assistant town clerk from the town planner within the required time was sufficient to comply with the statutory notice requirement.[204] "[S]trict compliance with all the details of the notice provision is not required, so long as notice adequate to serve the purpose of the provision is given within the period limited."[205]

The United States district court took up a similar issue in *Holdcraft v. Town of Brookfield*, which was brought in federal court as a civil rights case.[206] In *Holdcraft*, the landowner sought a special permit to build a shed on his property, which was granted by the zoning board of appeals.[207] Twelve years later, the zoning board of appeals upheld a complaint

197. *Id.* at 751–53.

198. *Id.* at 753–54.

199. *Id.* at 753.

200. *Id.* at 752.

201. *Id.* at 754.

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.* at 753 (citing Costello v. Bd. of Appeals, 333 N.E. 2d 210, 212 (Mass. App. Ct. 1975); McLaughlin v. Rockland Zoning Bd. of Appeals, 223 N.E. 2d 521, 523 (Mass. 1967); Carr v. Bd. of Appeals, 280 N.E. 2d 199, 200201 (Mass. 1972); Garfield v. Bd. of Appeals, 247 N.E. 2d 720, 722 (Mass. 1969)).

206. Holdcraft v. Town of Brookfield, 365 F. Supp. 3d 190 (D. Mass. 2019).

207. *Id.* at 193–94.

seeking an order to demolish the shed.[208]

The landowner timely filed an appeal in the superior court. He waited until 3:45 p.m. on the twentieth day, however, to serve a copy of the complaint upon the town clerk.[209] While the town hall was open until 5:00 p.m. on that day, the town clerk's office closed at 3:00 p.m. *every day* (except one day per week not material here), and the landowner failed to meet the statutory requirement to provide notice to the town clerk within twenty days.

> Where a town clerk does not receive notice by the end of the twenty-day statutory notice period, the complaint is subject to dismissal without regard to the reason for failing to meet the deadline. Under Massachusetts law, the touchstone of the inquiry appears to be whether the town clerk had *actual notice* of the timely filing of the complaint within the appeals period, regardless of whether the complaint was actually served on the town clerk.[210]

The complaint in *Holdcraft* was dismissed for lack of jurisdiction.[211] In contrast to *Hickey*, there was no evidence in *Holdcraft* from which the trial judge could find that the town clerk had received actual notice of the complaint within twenty-day limit.[212]

There are two lessons from *Holdcraft*: The first is that "twenty days" means twenty days. Period. The Second lesson is to not play games and wait until the last possible minute to give notice to the clerk.

Some event outside the plaintiff's control or a mistake by plaintiff's attorney can prevent the plaintiff from giving timely notice. As a result, the plaintiff loses the right to have his/her claim adjudicated, whereas if the plaintiff simply gave notice immediately after filing the complaint, the claim could proceed to adjudication.

These cases taken together emphasize that jurisdiction must be proven and cannot be overlooked, ignored or assumed. If the statute requires that notice must be given to a party within a certain amount of time, the courts recognize that the legislature intended that jurisdiction is conditioned upon meeting that requirement.

C. *Merger*

There is a fairly arcane aspect of the law that is applicable to zoning

208. *Id.*

209. *Id.* at 194.

210. *Id.* at 196 (emphasis in original) (citations omitted).

211. *Id.* at 198.

212. *Id.*; *see Hickey*, 103 N.E. 3d at 754.

and planning known as "merger." The purpose of the Doctrine of Merger is to minimize the number of nonconforming lots created by subsequent zoning amendments which increase the minimum buildable lot size after a lot has been created and mapped.[213]

> By statute, owners of existing lots generally are protected against newly adopted minimum lot size requirements. However, protection offered by grandfathering[[214]] must be considered in conjunction with the doctrine of merger. That doctrine aptly has been summarized as follows: "Adjacent lots in common ownership will normally be treated as a single lot for zoning purposes so as to minimize nonconformities."[215]

The SJC set forth the rule of merger in *Sorenti v. Board of Appeals of Wellesley*[216] and *Planning Board of Norwell v. Serena*.[217] In *Serena*, a 1990 SJC case, the landowners owned a parcel of land which they proposed to subdivide into two lots, and then build a single-family home on each of the two lots, both of which would be nonconforming after the subdivision.[218] The Serenas would own one of the lots as tenants-by-the-entirety, and the second lot would be held in trust with the Serenas as the sole beneficiaries of the trust.[219]

The building inspector ruled that the landowners could build only one residence, and not two.[220] The land court, the appeals court,[221] and

213. *See generally* Kneer v. Zoning Bd. of Appeals, 107 N.E. 3d 497 (Mass. App. Ct. 2018).

214. The appeals court decided in *Comstock v. Zoning Board of Appeals of Gloucester*, not to use the term "grandfathered" from that time forward. Comstock v. Zoning Bd. of Appeals, 153 N.E. 3d 395, 400 n.11 (Mass. App. Ct. 2020).

> Providing such protection commonly is known—in the case law and otherwise—as "grandfathering." We decline to use that term, however, because we acknowledge that it has racist origins. Specifically, the phrase "grandfather clause" originally referred to provisions adopted by some States after the Civil War in an effort to disenfranchise African-American voters by requiring voters to pass literacy tests or meet other significant qualifications, while exempting from such requirements those who were descendants of men who were eligible to vote prior to 1867.

Id. (citations omitted).

215. *Kneer*, 107 N.E. 3d at 501 (quoting Preston v. Bd. of Appeals, 744 N.E.2d 1126, 1128 (2001)).

216. Sorenti v. Bd. of Appeals, 187 N.E. 2d 499 (Mass. 1963).

217. Plan. Bd. v. Serena, 550 N.E. 2d 1390 (Mass. 1990).

218. *Serena*, 550 N.E. 2d at 1391.

219. *Id.*

220. *Id.*

221. Plan. Bd. v. Serena, 542 N.E. 2d 314 (Mass. App. Ct. 1989).

the SJC agreed.[222]

> [A]ll the land in each of the Serenas' two lots was available to avoid or reduce the dimensional nonconformity of either lot viewed in isolation. . . . "[T]he condition that the nonconforming lot 'not be held in common ownership with any adjoining land' represents a statutory codification of a principle of longstanding application in the zoning context: a landowner will not be permitted to create a dimensional nonconformity if he could have used his adjoining land to avoid or diminish the nonconformity."[223]

Eighteen years later, the appeals court revisited the merger issue in *Kneer v. Zoning Board of Appeals of Norfolk*.[224] In *Kneer*, there was a lot which initially was conforming, but became unconforming when the town increased the minimum lot size.[225] A subsequent purchaser of the lot sought a permit to construct a house on the lot, arguing that section 6 of chapter 40A of the Massachusetts General Laws—as well as a municipal bylaw accomplishing the same objective—protected the lot from the subsequent zoning amendment that made the lot nonconforming.[226]

The purchaser of the lot held title in the name of the Kneer Family Revocable Trust.[227] The sole beneficiary of the Trust was Mrs. Kneer.[228] The co-trustees were Mrs. Kneer and one of her daughters.[229] The daughter owned the adjacent parcel of land at the time when the Kneer Family Revocable Trust purchased the locus property.[230] The building inspector denied the permit on the basis that adjacent lots were owned by the same owner at the time of the zoning amendment.[231] Therefore, the inspector concluded that the lot had merged for planning purposes with those adjacent lots prior to the sale of the locus to the Kneer Family Revocable Trust.[232]

The land court rejected that conclusion but, nonetheless, found that the lot nonetheless was unbuildable.[233] The court reasoned that when the

222. *Serena*, 550 N.E. 2d at 1391.

223. *Id.* (citations omitted).

224. *Kneer*, 107 N.E. 3d at 498.

225. *Id.* at 498–99.

226. *Id.* at 499; *see generally* MASS GEN. Laws ch. 40A, § 6.

227. *Kneer*, 107 N.E. 3d at 499.

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.* at 500.

232. *Id.*

233. *Id.*

Family Trust sought the building permit, the adjacent property was owned by Mrs. Kneer's daughter, and therefore the Kneer Family Revocable Trust parcel merged for planning purposes with the daughter's parcel at the time of purchase.[234] "[T]he case law recognizes that lots can be deemed to be held in common ownership . . . even if they nominally are owned by different entities."[235]

The appeals court disagreed with the land court, finding that the daughter's "powers over the parcel necessarily were subject to her fiduciary obligations."[236]

> "Even very broad discretionary powers [of a trustee] are to be exercised in accordance with fiduciary standards and with reasonable regard for usual fiduciary principles." As a trustee, [daughter's] "first duty [was] the protection of the trust estate," and she could not allow any of her own interests to interfere with those of Kneer, the trust's beneficiary.[237]

As a result, the appeals court found that there were sufficient differences between the interests of Mrs. Kneer and of her daughter.[238] As such, the parcel owned by the Kneer Family Revocable Trust should not be considered to have merged for zoning purposes with the parcel owned by her daughter.[239]

> [Daughter] was not in a position in which she lawfully could have appropriated the parcel as her own; indeed, such conduct would have amounted to an obvious breach of her fiduciary responsibilities. . . . [S]he still could not lawfully use the parcel to lessen the nonconformity of her own property with the minimum lot size requirement. It follows that [daughter's] status as cotrustee of the trust that owned the parcel did not, by itself, render the two properties as being held in common ownership.[240]

The appeals court came back to this issue approximately two years later in *Murphy v. Zoning Board of Appeals of Billerica*.[241] The court in *Murphy* reaffirmed its earlier statement that "adjacent lots will be treated as held in common ownership for zoning purposes, even if title to the lots

234. *Id.*

235. *Id.* at 502.

236. *Id.* at 504.

237. *Id.* (first and third alterations in original).

238. *Id.* at 504–05.

239. *Id.* at 505.

240. *Id.* (citation omitted).

241. *See generally* Murphy v. Bd. of Appeal, 142 N.E.3d 626 (Mass. App. Ct. 2020).

is held in nominally different form, if the same owner 'could have used [her] adjoining land to avoid or diminish the nonconformity.'"[242]

The facts in *Murphy* are distinguishable from the facts in *Kneer*. In *Murphy*, the prior owners owned two adjacent lots.[243] Both of the lots were held by husband and wife as tenants-by-the-entirety.[244] They conveyed one of the lots to the husband's revocable trust and to the wife's revocable trust, as tenants-in-common.[245] Each was the trustee of their respective trusts, for which they also were the beneficiary.[246] Husband and wife subsequently conveyed the lot which they held as tenants-by-the-entirety to Murphy, who took the position that the now-nonconforming lot qualified for protection pursuant to section 6 of chapter 40A of the Massachusetts General Laws.[247]

The appeals court disagreed, finding that husband and wife at all times prior to the transfer of one lot to Murphy had "the ability to 'use the adjoining land to avoid or diminish the nonconformity.'"[248] "[Husband and wife] as sole trustees, settlors, and life beneficiaries of their respective trusts, with retained power to revoke the trusts entirely, held complete control over both adjacent properties."[249] The two parcels had merged for zoning purposes prior to the conveyance of one of the lots to Murphy, who bought a lot which was not buildable due to the nonconformity.[250] As a result, it did not qualify for the protections of section 6 of chapter 40A of the Massachusetts General Laws.

On a related issue, the appeals court has held that the statute of limitations in which one must bring an enforcement action on a lot which may or may not have merged with an adjacent lot for zoning purposes begins to run on the date of the conveyance of the nonconforming lot to a third party, not the date of the alleged merger.[251] The doctrine of merger has the potential to create havoc with land conveyancing.

D. *Interpretation of Local Zoning Bylaws*

The Massachusetts Appeals Court took up several cases in 2018

242. *Id.* at 626.
243. *Id.* at 626–27.
244. *Id.* at 627.
245. *Id.*
246. *Id.*
247. *Id.*; *see generally* MASS. GEN. LAWS ch. 40A, § 6 (2020).
248. *Id.* at 627.
249. *Id.*
250. *Id.*
251. *See* Bruno v. Zoning Bd. of Appeals, 97 N.E. 3d. 693 (Mass. App. Ct. 2018).

through 2020, both published and unpublished, involving interpretations of local zoning bylaws by town boards. Two of these cases involved when a variance is necessary and when a project may proceed with only a special permit.

In *Comstock v. Zoning Board of Appeals of Gloucester*,[252] the appeals court more finely-tuned the variance versus special permit issue, discussed above in *Bellalta*,[253] and in the process distinguished it from its prior decision in *Deadrick v. Zoning Board of Appeals of Chatham*.[254] In *Deadrick*, the appeals court held that if the renovation of a residence either created a non-conformity or increased an existing nonconformity, then a variance would be necessary.[255] In *Comstock*, the appeals court explained that the ruling in *Deadrick* was based upon the conclusion that the local zoning ordinance would have created a nonconformity because there was no exception in the local zoning ordinance that would have allowed the deviation from the height requirement which could be authorized by a special permit.[256]

In *Comstock*, the local zoning ordinance *allowed* the zoning board of appeals to grant a special permit for construction which increased the extent of the non-conformity *so long as* the board made a finding that it would be no more detrimental to the neighborhood than the existing situation, and the board entered such a finding upon the record.

[E]ven if the extension of the eaves into the airspace of the side yard were deemed to increase the nonconforming nature of the garage, that increase still would not require a variance. Rather, as noted above, municipal zoning boards are empowered to issue special permits allowing the reconstruction of preexisting nonconforming [structures] that would increase existing nonconformities so long as they find that the reconstruction would not be substantially more detrimental to the neighborhood.[257]

The combination of *Comstock* and *Bellalta* seem to make clear that one who has a nonconforming one- or two-family residence and seeks a renovation which would create a new nonconformity or increase an existing nonconformity can do so without a variance. That is possible so long as the local zoning code provides that the zoning board of appeals

252. Comstock v. Zoning Bd. of Appeals, 153 N.E. 3d 395 (Mass. App. Ct. 2020).

253. *See supra* Part I.

254. Deadrick v. Zoning Bd. of Appeals, 11 N.E. 3d 647 (Mass. App. Ct. 2014).

255. *Id.* at 653–57.

256. *Comstock*, 153 N.E. 3d at 401.

257. *Id.* at 403 (citing Bellalta v. Zoning Bd. of Appeals, 116 N.E. 3d 17, 30 (Mass. 2019)).

can approve the application for a special permit for the condition.

The board must also enter the appropriate findings that the renovated structure, with the new or increased nonconformity, would be no more detrimental to the neighborhood than the existing structure.[258] "While 'meager' findings can sometimes be 'legally sufficient,' nonexistent ones cannot. . . . [T]he bylaws requires the board to determine, with respect to alterations to structures that increase their nonconforming nature, 'that the alteration is not substantially more detrimental to the neighborhood than the existing nonconforming structures.'"[259]

Barkan v. Zoning Board of Appeals of Truro describes a lengthy process about demolition and rebuilding of a residential structure.[260] The appeals court decision outlines how a municipality should *not* proceed to resolve disputes about destruction and reconstruction of residences.[261] "[W]hatever else can be said about the process that the town employed here, we urge municipalities not to follow it as a model."[262] Despite this contention, the legal issue in *Barkan* pertains to the statute of limitations.[263] The appeals court held that running of the statute of limitations begins at the time of the violation regardless of when the objecting party learned of the violation.[264] "We conclude that a violation is deemed to commence at least by the time that construction began, because the commencement of construction of a structure improperly authorized by a building permit placed the property owner in violation of the zoning bylaw."[265]

Size, design and placement of digital signs and billboards have become the subject of increasing interest of municipal planning boards and zoning boards of appeals. The appeals court addressed the issue of digital billboards and state preemption, as well as the interpretation of local zoning codes by the local zoning board of appeals, in *Clear Channel Outdoor, Inc. v. Zoning Board of Appeals of Salisbury*.[266]

Clear Channel and another competitor both applied for a permit to

258. *See also* Coady v. Zoning Bd. of Appeals, 94 Mass. App. Ct. 1117 (Jan. 18, 2019).

259. *Id.* at *4–5 (citations omitted).

260. *See generally* Barkan v. Zoning Bd. of Appeals, 126 N.E. 3d 1008 (Mass. App. Ct. 2019).

261. *Id.* at 1015.

262. *Id.*

263. *Id.* at 1016–19.

264. *Id.* at 1017–18; *see also* MASS. GEN. LAWS ch. 40A, § 7 (2021).

265. *Barkan*, 126 N.E. 3d at 1018.

266. Clear Channel Outdoor, Inc. v. Zoning Bd. of Appeals, 116 N.E. 3d 1219 (Mass. App. Ct. 2018).

install digital billboards in the Town of Salisbury and met all requirements for approval.[267] However, only one billboard could be installed.[268] Under the regulatory scheme for electronic digital billboards, the final licensing decision is vested in the Massachusetts Department of Transportation but requires the prior approval of the town zoning board.[269]

Two members of the board thought that the decision as to which competitor should be allowed to erect the billboard should be a local decision rather than a state decision.[270] As a result, they voted to approve the competitor's application but not Clear Channel Outdoors' application.[271] The two members testified that they chose the competitor's application because it was filed first.[272] As a result, only one application went forward to the Massachusetts Department of Transportation for approval.[273] On appeal, the town conceded that the board decision must be set aside because it rested on impermissible grounds.[274] "When a board 'injects criteria not found in the enabling act,' its decision is legally untenable."[275]

The court took up a local zoning ordinance dealing with scale of buildings in the downtown district in *Sinaiko v. Zoning Board of Appeals of Provincetown*.[276] In *Sinaiko*, Provincetown had a zoning bylaw for which the "purpose is to preserve the town's existing character of 'buildings that have relatively consistent and harmonious scale within the neighborhoods,' and to prevent the construction of 'newer buildings, where the appropriate scale has not been maintained, that have disrupted the character of the neighborhood.'"[277] A landowner could build a structure that was twenty-five percent larger than the community average as a matter of right.[278] The community average was calculated by including all of the structures within 250 feet of the locus, deleting the

267. *Id.* at 1220–21.

268. *Id.* at 1221; *see also* 700 MASS. CODE REGS. § 3.17(5)(g).

269. *Clear Channel Outdoor, Inc.*, 116 N.E. 3d at 1221; *see generally* 700 MASS. CODE REGS. § 3.06(1)(i) (2012).

270. *Clear Channel Outdoor, Inc.*, 116 N.E. 3d at 1221.

271. *Id.*

272. *Id.* at 1222–23.

273. *Id.*

274. *Id.* at 1224–25.

275. *Id.* at 1224.

276. Sinaiko v. Zoning Bd. of Appeals, 102 N.E. 3d 987 (Mass. App. Ct 2018).

277. *Id.* at 989.

278. *Id.*

biggest and smallest, and averaging the rest.[279] A landowner could build a structure larger than twenty-five percent greater than the average only with a special permit.[280]

In *Sinaiko*, there were only two buildings in the community zone, and the building commissioner deleted both from the average pursuant to the zoning bylaw.[281] Having no structures from which to calculate an average, the building commissioner concluded that there were no constraints on the proposed structure.[282] The commissioner determined that a building permit should issue for a building which would be five times larger than the average of the two buildings which were located in the 250 foot zone of the locus.[283] The zoning board of appeals upheld the building commissioner.[284]

On appeal of a board decision to the land court or superior court, "the judge . . . considers whether the decision of the board is arbitrary, capricious, whimsical, or based on a legally untenable ground. . . . [W]e extend deference to the reasonable interpretation of local zoning regulations by the officials charged with their administration and enforcement."[285]

The decisions of the building commissioner and the zoning board of appeals appear to be unreasonable on their face. The Town established a goal of harmonious scale within the neighborhood and a formula outlining how to determine if the project would be consistent and harmonious with that scale. The formula in the bylaw required an averaging of other projects in the area. By eliminating all of the existing projects in the neighborhood from the calculation, and then determining that there were no objective standards for the instant project turned the bylaw requiring harmonious scale on its head.

The appeals court found that the board's decision was unreasonable.[286] "[Z]oning board decision[s] will be overturned if 'based on a legally untenable ground or [if] it is unreasonable, whimsical,

279. *Id.* at 989–90.

280. *Id.* at 989.

281. *Id.* at 990.

282. *Id.*

283. *Id.* at 990–91.

284. *Id.* at 991.

285. Stevens v. Zoning Bd. of Appeals, 150 N.E. 3d 793, 797 (Mass. App. Ct. 2020). *See also* Fish v. Accidental Auto Body, Inc., 125 N.E. 3d 774, 781 (Mass. App. Ct. 2019) ("If the board's decision is supported by the facts found by the judge, it 'may be disturbed only if it is based on a legally untenable ground, or is unreasonable, whimsical, capricious or arbitrary.'").

286. Sinaiko v. Zoning Bd. Of Appeals, 102 N.E. 3d at 994–95.

capricious or arbitrary.'"[287] The appeals court found that the building could be constructed if the board issued as special permit, but not built as a matter of right.[288]

It is important that both the regulatory board and the trial court keep in mind which party has the burden of proof in an application for a special permit or variance, and not allow that burden to be transferred, either expressly or by implication, to the incorrect party. In *Fish v. Accidental Auto Body*, the landowner moved for a special permit to construct an auto body shop in an industrial zoning district.[289]

The trial judge found that operation would emit toxins into the air but would not harm abutters.[290] The appeals court found insufficient evidence to support the trial court's finding of no harm to the abutters.[291] The appeals court noted that trial court had, in effect, transferred the burden of proof from the applicant to the abutters who objected to the permit.[292]

In three of the unpublished decisions handed down by the appeals court in the past three years, the court decided cases involving "excavation and fill" issues.[293] In *Richardson-North Corp. v. Zoning Bd. of Appeals*, the landowner operated a farm.[294] The Zoning Act provides that a municipality may not "prohibit, unreasonably regulate, or require a special permit for the use of land for the primary purpose of commercial agriculture."[295] This also applies to "uses related to, or incidental to, the primary agricultural purpose of commercial agriculture."[296] The landowner excavated large amounts of gravel from the farm and sold it as part of his business.[297]

In 2015, the landowner entered into a contract to annually import a minimum of 200,000 tons of fill over ten years, to be deposited in the site

287. *Id.* at 992.

288. *Id.*

289. *Fish*, 125 N.E. 3d at 776.

290. *Id.* at 777.

291. *Id.*

292. *Id.* at 781–82.

293. Richardson-North Corp. v. Zoning Bd. of Appeals, 97 Mass. App. Ct. 1128, 2020 WL 3708908 (July 7, 2020); Indianhead Realty, Inc. v. Zoning Bd. of Appeals, 97 Mass. App. Ct. 1108, 2020 WL 1542104 (Apr. 1, 2020); Attleboro Sand & Gravel Corp. v. City of Attleboro, 96 Mass. App. Ct. 1112 (Dec. 11, 2019).

294. *Richardson-North*, 2020 WL 3708908, at *1.

295. MASS. GEN. LAWS ch. 40A, § 3 (2021).

296. *Richardson-North*, 2020 WL 3708908, at *3; *see* § 3.

297. *Richardson-North*, 2020 WL 3708908, at *1.

of the gravel excavation, which began in 2016.[298] In early 2017, the town's zoning enforcement investigated the property and issued a cease and desist order.[299] The landowner appealed the order to the town's zoning board of appeals which upheld the cease and desist order.[300] The board found that the receipt of fill material was not "related to, or incidental to, the primary agricultural use of land."[301] The landowner appealed to the land court, which reversed the board's decision.[302] The appeals court reversed the land court, finding that

> the judge did not identify any of the board's grounds for upholding the notice and order as unreasonable or legally untenable. Instead the judge simply found that, in his view, the filling operation was incidental to the agricultural use of the property, and therefore was lawful. By reversing the board's decision based only on his own consideration of the applicable law, the judge improperly substituted his judgment for that of the board.[303]

Richardson-North reminds us to not substitute the judgment of the trial judge on planning and zoning matters for the judgment of the Zoning Board of Appeals or the Planning Board.

In *Indianhead Realty, Inc. v. Zoning Bd. of Appeals*, the landowner operated a recreational facility and sought to substantially increase the size of the facility and the number of services provided.[304] The project would have removed approximately 475,000 cubic feet of material over two years and resulted in a "punch bowl" depression in the land.[305] The landowner would have sold the excavated material for between $655,000 and $998,000.[306]

The town zoning bylaw had a "Natural Features Conservation Requirement" that provided that removal of more than ten cubic yards of soil, gravel, or quarried rock for sale or use elsewhere required special permit unless such removal was "incidental to or required" by the matter of right construction on the same site.[307] The court found that the

298. *Id.*
299. *Id.*
300. *Id.*
301. *Id.*
302. *Id.* at *3.
303. *Id. at* *2.
304. Indianhead Realty, Inc., 2020 WL 1542104, at *1.
305. *Id.*
306. *Id.*
307. *Id.* at *2.

excavation of material was far in excess of that which was "incidental to and required" for the project which was allowed as a matter of right.[308] As a result, the excavation constituted the creation of an unlawful commercial quarry on the land, and required a special permit.[309] "[T]he terms 'incidental to and required' shall be defined as only of the amount of material reasonably necessary to allow a use to be conducted or a structure . . . to be constructed in compliance with the applicable legal requirements for such use, structure, or road."[310]

In *Attleboro Sand & Gravel Corp. v. City of Attleboro*, the landowner operated a quarry, stone processing plant and a ready-mix concrete plant.[311] The landowner sought to construct an asphalt plant on the site, which was in a newly designated Industrial Business District.[312] The town granted a special permit for the project, but the applicant sued, alleging that it could build the asphalt plant as a matter of right.[313]

The land court and the appeals court both found that the asphalt plant was not authorized as a matter of right under the zoning bylaw.[314] Both courts held that the project did not meet any of the definitions of activities allowed as a matter of right.[315] "We conclude that the land court judge correctly interpreted the ordinance to exclude asphalt production from the definitions of both 'processing and treating' raw materials and 'light manufacturing.'"[316]

Sand and gravel excavation operations are common throughout the Commonwealth. Municipal regulatory boards are in the best position to determine whether to allow such operations, where to locate such operations, and what is the reasonable scope of those operations.

Workforce and affordable housing projects are extremely important in many communities throughout the Commonwealth due to the high cost of housing in many communities and decreasing supply of housing which is affordable to those families with below median levels of income for those communities.

In *Arena v. Town of Nantucket*, the developer sought to build sixty-

308. *Id.* at *2–3.

309. *Id.* at *3–4.

310. *Id.* at *2.

311. Attleboro Sand & Gravel Corp. v. City of Attleboro, 96 Mass. App. Ct. 1112, 2019 WL 6724489 (Dec. 11, 2019).

312. *Id.* at *1.

313. *Id.*

314. *Id.* at *3.

315. *Id.* at *1–3.

316. *Id.* at *3.

four workforce housing units on two adjacent parcels of land.[317] The municipality had a zoning bylaw providing that the minimum lot size for workforce rental community was 60,000 square feet, that the maximum number of dwelling units on a single lot cannot exceed thirty-two, and that the total number of bedrooms cannot exceed fifty-seven.[318] The bylaw also provided for "aggregation of buildings" and that workforce rental community projects could be adjacent to each other.[319] The plaintiff objected to the permit, alleging that it called for twice the number of allowable housing units.[320] The planning board, land court, and appeals court all rejected the plaintiff's position.[321]

> "[A]llowing two qualifying developments to be built side by side" furthers the purpose of the bylaw and complies with the bylaw's structural requirements. Each lot is more than 60,000 square feet and they are "being developed jointly as one (1) cohesive project." The judge found that the project satisfied the unit and bedroom limitations because it comprises two adjacent communities.[322]

But in *Bernstein v. Planning Board of Wayland*, the plaintiff and the town entered into a consent decree to resolve a dispute about a mixed-use development in plaintiff's immediate vicinity.[323] Years later, the town unilaterally sought to change a material condition of the consent decree without input from the plaintiff.[324] The appeals court remanded the case to allow the plaintiff to be heard.[325]

> "[A]ltering the material terms of [a consent decree] at the behest of one party, without the consent of the other, does violence to the second party's expectations and to the very concept of judgment by consent." Thus, the burden on a party to modify a consent judgment entered against it is perhaps 'more formidable' than 'had the party litigated and lost.'[326]

317. Arena v. Town of Nantucket, 96 Mass. App. Ct. 1116, 2020 WL 116011 (Jan. 10, 2020).

318. *Id.* at *1.

319. *Id.*

320. *Id.* at *2.

321. *Id.* at *2.

322. *Id. at* *2.

323. Bernstein v. Plan. Bd., 94 Mass. App. Ct. 1114, 2018 WL 6713270 (Dec. 21, 2018).

324. *Bernstein*, 2018 WL 6713270, at *1–2.

325. *Id.* at *3.

326. *Id.* at *2 (citations omitted); *see also* Stevens v. Zoning Bd. of Appeals, 150 N.E. 3d 793, 794 (Mass. App. Ct. 2020) (an abutter is not bound by a settlement agreement between the landowner and the town in a legal action in which he did not participate).

The appeals court vacated the judgment of the land court due to a lack of evidence to support the land court's conclusion that there was no dispute of material fact in *Johnson v. Zoning Board of Appeals of Worcester*.[327] In *Johnson*, the defendant owned an ice cream shop in a residential-use-only district of the city, which made it nonconforming.[328] The defendant sought to expand the structure of the nonconforming business and also sought a variance due to insufficient parking.[329] The zoning board of appeals approved the permit and variance, and its decision was upheld by the land court in a motion for summary judgment.[330] The appeals court found an insufficient evidentiary showing to establish no dispute of material fact and reversed.[331]

In *Charkoudian v. Zoning Board of Appeals of Wilbraham*, the court considered when does a structure, that unquestionably does not exist, still exist for zoning and planning purposes.[332] In *Charkoudian*, a nonconforming family residence was destroyed by a tornado.[333] Years later a member of the family sought to reconstruct the building with certain alterations and modifications on the same site.[334] Another family member objected.[335] The zoning board of appeals denied the permit because it was not an alteration to "[a] non-conforming single-family or two-family residential structure,"[336] as the building had been destroyed several years before.[337] The land court annulled the board's decision.[338]

The appeals court reversed, finding that the land court's conclusion was unreasonable because it did not "construe[] [the bylaw provisions] in the context of the by-law as a whole, [giving it] a sensible and practical meaning within that context."[339] The landowner could have rebuilt the prior structure as a matter of right so long as there were no alterations to

327. Johnson v. Zoning Bd. of Appeals, 96 Mass. App. Ct. 1109, 2019 WL 6034797 (Nov. 14, 2019).

328. *Johnson*, 2019 WL 6034797, at *1.

329. *Id.*

330. *Id.*

331. *Id.* at *2.

332. Charkoudian v. Zoning Bd. of Appeals, 96 Mass. App. Ct. 1104, 2019 WL 4927064, at *1 (Oct. 7, 2019).

333. *Charkoudian*, 2019 WL 4927064, at *1.

334. *Id.*

335. *Id.* at *2.

336. *Id.* at *1 (quoting § 3-3-3 of the local zoning bylaw).

337. *Id.* at *2.

338. *Id.*

339. *Id.* at *3 (citing Miles-Matthias v. Zoning Bd. of Appeals, 4 N.E. 3d 309, 317 (Mass. App. Ct. 2014)).

the original design.[340] Having rebuilt the structure, the landowner then could have altered or modified it as a matter of right because it then would be an existing nonconforming one or two story residential structure as permitted by local zoning ordinances.[341]

Finality of a decision to amend or not to amend a municipal zoning bylaw provides the necessary stability for developers to initiate new projects based upon those zoning bylaws. A lack of stability in the zoning bylaws could cause developers to unnecessarily commit large amounts of money to initiate new projects only to have those projects prohibited by rapidly changing bylaws, or to avoid new projects altogether in that municipality due to instability of the zoning bylaws.

The Zoning Act provides that a city council, town council, or other legislative body can consider a rejected zoning ordinance only after two years.[342] In 2015, the Town of Barnstable proposed "to amend the town's zoning ordinance to create the [Hyannis parking overlay district], which would overlay two existing districts, a residential district and the Harbor District."[343] The proposed zoning amendment was defeated at the town council.[344] A few weeks later, the town council decided to "withdraw" the failed zoning proposal, to reconsider amending the Hyannis Parking Overly District proposal with several changes to the original proposed zoning amendment, and passed the "new" amendment to the town zoning code.[345]

The appeals court concluded that the "new" proposed amendment was "fundamentally and essentially the same" as the original proposed amendment, and the proposed amendment was in violation of section 5 of chapter 40A of the Massachusetts General Laws.[346] The appeals court upheld the order of the land court annulling the amendment to the Barnstable zoning code.[347] The decision of the appeals court upholds the legislature's determination to establish stability in municipal zoning

340. *Id.* at * 2–3.

341. *Id.* at *3–4.

342. MASS. GEN. LAWS ch. 40A, § 5 (2021) ("No proposed zoning ordinance or by-law which has been unfavorably acted upon by a city council or town meeting shall be considered by the city council or town meeting within two years after the date of such unfavorable action unless the adoption of such proposed ordinance or by-law is recommended in the final report of the planning board.").

343. Penn v. Town of Barnstable, 133 N.E. 3d 846, 848 (Mass. App. Ct. 2019), *rev. denied*, 137 N.E. 3d 1076 (Mass. 2019).

344. *Id.* at 848.

345. *Id.* at 848–49.

346. *Id.* at 851–52; see generally MASS. GEN. LAWS ch. 40A, § 5 (2021).

347. *Penn*, 133 N.E. 3d at 852.

bylaws.

In *Leonard v. Zoning Board of Appeals of Hanover*, the appeals court relied upon the wording of the local zoning ordinance and found that display racks located outside a retail store were not part of the structure.[348] Therefore, those racks were not a prior nonconforming use protected by section 6 of chapter 40A of the Massachusetts General Laws.[349] The court also found that a row of barrels placed along the property line with the adjacent business did "not 'change' or 'alter' the lot or its use."[350]

The federal courts also issued two unpublished decisions addressing the interpretation of local zoning bylaws. In *Signs for Jesus v. City of Pembroke, NH*,[351] the United States Court of Appeals for the First Circuit upheld a zoning bylaw which prohibited the use of "electronic changing signs," except in one limited district of town.[352] Even when the applicant was a religious organization raising a First Amendment freedom of speech claim, the court held that the restriction was content neutral and "narrowly tailored to serve a significant governmental interest."[353] "A speech restriction is sufficiently narrowly tailored so long as the 'regulation promotes a substantial governmental interest that would be achieved less effectively absent the regulation.'"[354] The court concluded that the town had "an interest in 'preserving the existing neighborhood characteristics and aesthetics, including the rural and natural look of Pembroke.'"[355]

In *Mannai Home LLC v. City of Fall River*, the plaintiff wanted to renovate an existing structure and open it as a group home for persons recovering from drug and alcohol abuse.[356] The city denied the request.[357] The United States District Court for the District of Massachusetts found that "[g]roups of individuals recovering from drug and alcohol abuse may be considered 'disabled' for purposes of section 3 [G.L. c. 40A, § 3]."[358]

The ordinance treats families (and religious organizations) with five

348. Leonard v. Zoning Bd. of Appeals, 135 N.E. 3d 288, 293–94 (Mass. App. Ct. 2019).

349. *Id.* at 295.

350. *Id.* at 296.

351. Signs for Jesus v. Town of Pembroke, 977 F.3d 93 (1st Cir. 2020).

352. *Id.*

353. *Id.* at 106 (quoting Ward v. Rock Against Racism, 491 U.S. 781,796 (1989)).

354. *Id.* at 106 (citations omitted).

355. *Id.* at 106.

356. Mannai Home, LLC v. City of Fall River, No. 17-CV-11915-FDS, 2019 WL 456163 (D. Mass. Feb. 5, 2019).

357. *Mannai Home, LLC*, 2019 WL 456163, at *1.

358. *Id.* at *8 (citing Brockton Fire Dep't v. St. Mary's Broad Street, LLC, 181 F. Supp. 3d 155, 157 (D. Mass. 2016)).

> or more persons differently from group residences for the disabled, which the statute does not permit. It follows that the City could not require Mannai to obtain a special permit, and that doing so would constitute "discrimination" within the meaning of the Zoning Act.[359]

The district court denied summary judgment on the zoning question to both sides.[360]

Every month throughout the Commonwealth planning boards and zoning boards of appeal meet to review and approve or deny applications for special permits, variances, development agreements, requests to modify zoning bylaws in order authorize new forms of development, etc. Every month municipal zoning boards are taking actions which involve interpretation of their own municipal zoning bylaws.

A certain number of these actions result in judicial review in the Land Court, Superior Court, or United States District Court, and/or the state and federal appellate courts. All of these cases demonstrate that the local zoning boards are best able to interpret their own zoning bylaws, and that those holdings should be and are upheld upon judicial review unless they are clearly in conflict with those bylaws, unsupported by the evidence before the board, or actions which are otherwise arbitrary and capricious.

E. *Cell Phone and Internet Tower Construction*

The United States Court of Appeals for the First Circuit and the United States District Court for the District of Massachusetts decided eight cases regarding proposals to construct cell phone towers during 2018 through 2020.[361] The Massachusetts Appeals Court published one decision on the issue during the same period.[362]

A complete and in-depth discussion of the law pertaining to cell phone tower construction is beyond the scope of this Article, but one issue warrants discussion here. Cities and towns continue to have difficulty

359. *Id.*

360. *Id.* (the court denied in part and granted in part the defendant's motion for summary judgment, but all of the zoning related issues were denied).

361. *See, e.g.*, T-Mobile Ne. LLC v. Town of Barnstable, 969 F.3d 33 (1st Cir. 2020); VWI Towers, LLC v. Town of North Andover Plan. Bd., 404 F. Supp. 3d 456 (D. Mass. 2019); Miller v. SBA Towers V, LLC, 391 F. Supp. 3d 123 (D. Mass. 2019); Varsity Wireless Invs., LLC v. Town of Hamilton, 370 F. Supp. 3d 292 (D. Mass. 2019); Indus. Towers & Wireless, LLC. v. Haddad, 109 F. Supp. 3d 284 (D. Mass. 2015); Extenet Sys., Inc. v. City of Cambridge, 481 F. Supp. 3d 41 (D. Mass. 2020); T-Mobile Ne. LLC v. Town of Barnstable, No. 19-CV-10982, 2020 WL 3270878 (D. Mass. June 17, 2020); Eco-Site, Inc. v. Town of Wilmington, No. 17-10304-MBB, 2019 WL 1332621 (D. Mass. Mar. 25, 2019); Am. Towers LLC v. Town of Shrewsbury, No.17-10642-FDS (D. Mass. June 22, 2018).

362. Cellco P'ship v. City of Peabody,157 N.E. 3d 609 (Mass. App. Ct. 2020).

navigating the intersection of the Massachusetts Zoning Act, local zoning ordinances, and the federal Telecommunications Act of 1996.[363]

All of these recent cases deal with whether the applicant demonstrated a "gap in service," whether there was any reasonable alternative to the proposed cell tower construction, and/or whether wireless service would essentially be prohibited from a denial of the permit.[364] Local boards have struggled in determining what standards to apply when acting upon cell tower construction applications.[365] Several conclusions arise from these cases.

A local board must apply the standards set forth in chapter 40A of the Massachusetts General Laws, and their local zoning bylaws, to the application.[366] The record must be clear that the board considered these standards and rested its decision solely and exclusively upon these standards.[367] If the record reflects that the local board based its decision on the federal Telecommunications Act instead of state and local zoning law, the board's decision is virtually guaranteed to be reversed and vacated, either by Massachusetts appellate courts or the federal courts, due to a failure to apply the proper law to the application.[368]

The local board should consider all of the standards set forth in the Federal Telecommunications Act, 47 U.C.C. §§ 332(c)(3) and (C)(7), in their deliberations, and ensure that the record contains sufficient evidence to establish each conclusion which the board reaches, either expressly or by inference.[369] If evidence in the record does not establish (1) that there is no gap in service, (2) that the board did consider and eliminate all alternative locations, and/or (3) that a denial of the application would not essentially prohibit wireless services, then the board's decision is virtually guaranteed to be reversed and vacated by the federal courts.[370]

The federal courts repeatedly point out that they cannot compel local boards to account for all issues under the federal Telecommunications Act, but also point out at the same time that it would be a good idea for

363. *See* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

364. *See generally* cases cited *supra* note 361; and *Cellco P'ship*, 157 N.E. 3d 609.

365. *Id.*

366. *See generally* MASS. GEN. LAWS ch. 40A.

367. *See generally* cases cited *supra* note 361; and *Cellco P'ship*, 157 N.E. 3d 609.

368. *Id.*

369. *Id.*

370. *Id.*

them to do so.[371]

Local boards retain the authority to exercise their authority under chapter 40A of the Massachusetts General Laws and local zoning ordinances.[372] In the exercise of that authority, however, local boards must ensure that they base their decisions upon the Zoning Act and local bylaws, and if they deny an application for construction of a tower the record must contain substantial evidence to establish that there is no gap in service, or that there are other alternative sites available to address the gap in service, and that the denial of a particular application does not result in the prohibition or essentially the prohibition of all wireless services.

III. MISCELLANEOUS APPEALS COURT DECISIONS

There are four decisions of the appeals court that do not fit nicely within one of the previously discussed categories but warrant some mention. In *Green v. Zoning Board of Appeals of Southborough*, the court found that the applicant had "exercised" a use variance within the one-year window contained in section 10 of chapter 40A of the Massachusetts General Laws.[373]

> "Exercise" for these purposes "means 'to bring into play: make effective in action . . . bring to bear.'" A variance need not be fully carried out for rights to be "exercised" within the meaning of [the statute]. "A 'use' variance may not require any construction or excavation, and a building permit may not be necessary to exercise such a variance. Evidence of 'use' within one year of issuance of the variance may be sufficient to exercise such a variance."[374]

The town did not issue the comprehensive permit until fifteen months after the filing of the use variance in the registry, and the applicant had not

371. *See, e.g.*, T-Mobile North East LLC v. Town of Barnstable, 969 F.3d 33 (1st Cir. 2020);VWI Towers, LLC v. Town of North Andover Plan. Bd., 404 F. Supp. 3d 456 (D. Mass. 2019); Miller v. SBA Towers V, LLC, 391 F. Supp. 3d 123 (D. Mass. 2019); Varsity Wireless Invs., LLC v. Town of Hamilton, 370 F. Supp. 3d 292 (D. Mass. 2019); Indus. Towers & Wireless, LLC. v. Haddad, 109 F. Supp. 3d 284 (D. Mass. 2015); Extenet Sys., Inc. v. City of Cambridge, 481 F. Supp. 3d 41 (D. Mass. 2020); T-Mobile Ne. LLC v. Town of Barnstable, No. 19-CV-10982, 2020 WL 3270878 (D. Mass. June 17, 2020); Eco-Site, Inc. v. Town of Wilmington, No. 17-10304-MBB, 2019 WL 1332621 (D. Mass. Mar. 25, 2019); Am. Towers LLC v. Town of Shrewsbury, No.17-10642-FDS (D. Mass. June 22, 2018). *See also* Cellco P'ship v. City of Peabody,157 N.E. 3d 609 (Mass. App. Ct. 2020).

372. *See generally* cases cited *supra* note 361; and *Cellco P'ship*, 157 N.E. 3d 609. *See also* 47 U.S.C. §§ 332(c)(3) and (c)(7).

373. Green v. Zoning Bd. of Appeals, 133 N.E. 3d 821, 823 (Mass. App. Ct. 2019).

374. *Id.* at 827 (citations omitted).

actually begun construction.[375]

In the interim, however, the builder timely pursued the comprehensive permit, and took other steps to exercise the variance:

> he engaged engineers, wetland specialists, and other professionals to redesign and modify the development plan to comply with the requirements and conditions of the use variance and that he expended more than $696,000 in that effort, as well as more than $85,000 in consulting fees on behalf of the Town. . . . [T]hey were taken—at least in part—to satisfy a condition of the use variance.[376]

This is a common-sense interpretation of the statute. It was not possible for the builder to actually commence construction within the 12-month period because of conditions outside his control, i.e., the failure of the town to issue the comprehensive permit within the 12-month window and the builder did everything within his power to exercise the variance.

Occasionally the doctrine of collateral estoppel will bar an applicant or respondent from asserting a claim in an application for a special permit or variance. In *Barry v. Planning Board of Belchertown*, the appeals court found that collateral estoppel did not apply to an application for an ANR application.[377]

The town had approved a subdivision in 1987.[378] Thirty years later, the landowner applied for an ANR endorsement for two additional lots on the same street.[379] The board and the court, however, found that the facts material to the litigation had changed and that collateral estoppel was not appropriate in this circumstance.[380] Collateral estoppel is not appropriate unless the parties are the same, or at least share a common interest, and the facts and circumstances remain essentially the same as the prior action such that there should be the same answer to the question.

"Non-Conforming uses" pertains to uses which were within the scope of the zoning bylaws when originally undertaken, but have since become in violation of the zoning bylaw simply because the zoning bylaw has changed. Generally speaking, a party is entitled to continue the use which originally was lawful but now is in violation of the updated zoning bylaw.

In an unpublished decision, *Browne v. Zoning Board of Appeals of*

375. *Id.* at 824.

376. *Id.*

377. Barry v. Plan. Bd., 134 N.E. 3d 600, 609 (Mass. App. Ct. 2020).

378. *Id.* at 603.

379. *Id.*

380. *Id.* at 608–09.

Rockport, the court found that a rebuilt structure was still entitled to the status of a nonconforming "inn" under municipal zoning bylaw despite some changes in operation.[381] The property was used as a hotel or inn for over one hundred years.[382] The use became nonconforming due to an amendment to the zoning bylaw, but was entitled to continue operation as an existing nonconformity.[383] The building had to be rebuilt due to damage, and the owner made some minor modifications in operation.[384]

> [W]e rely for guidance on the three-pronged test set out in *Powers v. Building Inspector of Barnstable*, asking: (1) whether the current use reflects the nature and purpose of the prior use; (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 than the prior use.[385]

In *Johenning v. Planning Board of Milton*, another unpublished opinion, the court held that a business for which a use permit issued to a particular operator or his family could be operated by successor members of the initial recipient's family using a corporate form.[386] The permit, however, was held by the family members personally and not by the corporation.[387]

CONCLUSION

The Massachusetts Appeals Court and Supreme Judicial Court, as well as the United States District Court for the District of Massachusetts and the United States Court of Appeals for the First Circuit resolved a very large number of cases arising from municipal planning boards and zoning boards of appeals in Massachusetts during the period 2019 and 2020. The sheer number of these cases is somewhat surprising. These cases demonstrate that there is a great deal of uncertainty about Massachusetts land use, planning and zoning laws among the municipal regulatory boards, the legal community and the planning community.

For the most part, the cases summarized above don't announce any significant new change or development of the law. What they do

381. Browne v. Zoning Bd. of Appeals, 97 Mass. App. Ct. 1109, 2020 WL 1609129 (Apr. 2, 2020).

382. *Browne*, 2020 WL 1609129, at *1.

383. *Id.*

384. *Id.*

385. *Id.* at *2.

386. Johenning v. Plan. Bd., 98 Mass. App. Ct. 1109, 2020 WL 4918025 (Aug. 21, 2020).

387. Johenning, 2020 WL 4918025, at *1.

highlight, however, is that small changes in facts from previously decided cases can significantly alter the expected outcome of new applications.

The central lessons learned from these cases is that generally speaking the statutes mean what they say. The regulatory boards must identify all of the "elements" upon which the board must make findings in order to have a factual basis to support their decisions. Those boards are generally in the best position to interpret their own zoning bylaws and that courts should not substitute their judgment on planning and zoning issues for that of the regulatory board. Both the regulatory boards and courts must act reasonably rather than arbitrarily or capriciously when rendering a decision. Finally, if the meaning of statutory language is not clear and unambiguous, then courts must identify—*and apply*—the legislative intent to arrive at a reasonable conclusion consistent with that language.

With regard to the construction of cell towers and internet communication facilities, both regulatory boards and practitioners must recognize all applicable state and federal laws. This recognition is essential to ensure that the administrative record supports whatever actions are taken by the regulatory boards. I would expect the same pattern of judicial interpretation to continue in future years.