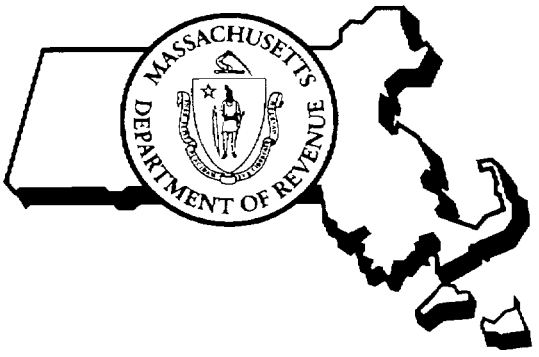
Massachusetts Department of Revenue
Division of Local Services

Current Developments in Municipal Law



2008

Court Decisions

Book 2

Navjeet K. Bal, Commissioner
Robert G. Nunes, Deputy Commissioner

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Court Decisions

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BRADSTON ASSOCIATES, LLC vs. SUFFOLK COUNTY SHERIFF'S DEPARTMENT & another. [1]

1 Sheriff of Suffolk County. We refer to the defendants collectively as the sheriff.

SJC-10139

SUPREME JUDICIAL COURT OF MASSACHUSETTS

452 Mass. 275; 2008 Mass. LEXIS 624

May 5, 2008, Argued
August 26, 2008, Decided

PRIOR HISTORY: [1]**

Suffolk. Civil action commenced in the Superior Court Department on June 4, 2002. The case was heard by Allan van Gestel, J., on motions for summary judgment. After review by the Appeals Court, the Supreme Judicial Court granted leave to obtain further appellate review.

Bradston Assocs., LLC v. Cabral, 70 Mass. App. Ct. 822, 877 N.E.2d 638, 2007 Mass. App. LEXIS 1314 (2007)

Bradston Assocs., LLC v. Cabral, 2006 Mass. Super. LEXIS 400 (Mass. Super. Ct., 2006)

COUNSEL: Christopher E. Mullady (Jeffrey S. Raphaelson with him), for the plaintiff.

Theodore J. Folkman, for the defendants.

JUDGES: Present: Marshall, C.J., Greaney, Ireland, Spina, Cowin, Cordy, & Botsford, JJ.

OPINION BY: CORDY

OPINION

[*275] CORDY, J. On further appellate review, we must decide whether the failure of the auditor of the city of Boston to certify that an adequate appropriation was available to fund a lease contract entered into between Bradston Associates, LLC (Bradston), and the sheriff of Suffolk County, which was in all other respects properly executed and funded, is a sufficient ground on which **[*276]** to invalidate the contract. We conclude that it is not and set aside summary judgment that was entered for the sheriff.

Facts. From the summary judgment record, we glean the following undisputed facts. On August 13, 2001, after a public bidding process, the sheriff entered an agreement to lease office space (lease) from Bradston. The lease required Bradston **[**2]** to make improvements to the premises prior to occupancy. Those improvements were to be completed within six months of "the signing of this Lease." Bradston was to be paid $ 325,000 for the improvements and monthly lease payments were to begin thereafter. The lease also provided that it would "become[] effective only upon execution and delivery thereof by Landlord and Tenant, and upon execution of the City of Boston Standard Contract," to which the lease was to be attached. [2]

2 The city of Boston standard contract was comprised of Form CM 11 and CM 10. Form CM 11 included the standard contract terms applicable to city and county contracts generally. Form CM 10 included information about the specific terms of the lease contract. It provided space for the signatures of Bradston, the sheriff, and the city auditor. It listed the names of the parties to the contract, and included its multi-year "not to exceed" cost, as well as identifying the budgetary source of the funding.

On August 16, 2001, shortly after the lease was signed, the then sheriff sent a written request to the mayor of Boston, along with a copy of the lease, seeking his approval as required by law. St. 1998, c. 262, § 1 (c. 262). [3] **[**3]** The sheriff also prepared a standard contract for the lease agreement. On the contract form, the total multi-year cost of the lease was listed as $ 6,838,580, and the source of the funding was identified as the State "grant-in-aid" provided annually to the sheriff for operations. In this case, the grant-in-aid funds identified were for fiscal year 2002. [4] **[*277]** Those funds were earmarked for the sheriff in a line item of the fiscal year 2002 State budget.

3 Statute 1998, c. 262, § 1 (c. 262), applies to contracts entered into by officials of Suffolk County, including the sheriff. It provides, in relevant part: "All contracts made by . . . any officer, board or official of the county of Suffolk having power to incur obligations on behalf of said county in cases where said obligations are to be paid for wholly from the treasury [of Boston],

shall, when the amount involved is $ 10,000 or more, . . . be in writing; and *no such contract shall be deemed to have been made or executed until the approval of the mayor of said city has been affixed thereto in writing and the auditor of said city has certified thereon that an appropriation is available therefor* or has cited thereon a statute under **[**4]** authority of which the contract is being executed without an appropriation" (emphasis added).

4 When the government makes multi-year contracts involving continuous expenditures, such as this one, it would be unreasonably restricted if an up-front appropriation for the entire expense was required; thus, we have read prohibitions on contracting in excess of available appropriations to require only an adequate appropriation for the current fiscal year's expenses. See *Boston Teachers Union, Local 66 v. School Comm. of Boston, 386 Mass. 197, 208, 434 N.E.2d 1258 (1982)*; *Clarke v. Fall River, 219 Mass. 580, 586, 107 N.E. 419 (1914)* (where law authorizes making of contract for performance of constantly recurring duties to run for more than one year, entire sum to be paid for several years need not be appropriated at start). The amount needed to fund the first year, including improvements, is disputed, but falls between $ 650,000 and $ 925,000. This variation is not material to the resolution of the issues in this case.

The standard contract form was sent by the sheriff to Bradston for signature. Bradston signed and returned it on August 23, 2001. The sheriff then forwarded it to the auditor for preliminary review in anticipation **[**5]** of review and approval by the mayor, and a final award by the sheriff as the contracting authority. A senior accountant in the auditor's office reviewed the contract to confirm that there was "budget authority" for the lease, and that funds would be available through the identified source (sheriff's grant-in-aid appropriation). Having confirmed these facts, she initialed the standard contract and forwarded it on to the auditor for her signature. She signed the contract on September 20, 2001. Her signature, "[a]pproved [the contract] as to the availability of appropriation . . . in the amount of $ 0.00." Approvals "in the amount of $ 0.00," were routinely done by the auditor to expedite the contracting process by enabling the contract to move to the next round of required approvals by the parties and the mayor.

Passage of the fiscal year 2002 State budget was delayed, as was the completion of the contract approval process. The budget was approved on December 1, 2001. The amount of the grant-in-aid appropriated for the sheriff in the budget was a "minimum" of $ 75.6 million. There is no dispute that this appropriation was sufficient and available to fund the first year of the contract. **[**6]** See note 4, *supra*. Three days later, on December 4, 2001, the mayor affixed his written approval to the sheriff's letter of August 16, 2001, requesting permission to award the lease to Bradston. Having secured the appropriation, the mayor's written approval of the lease, and the preliminary certification from the city auditor, the sheriff, through her chief financial officer, **[*278]** signed the contract on December 12, 2001, as the "awarding authority/official." A copy of the contract was then sent to Bradston, and the original was sent back to the city auditor for final approval.

The same senior accountant in the auditor's office who conducted the preliminary review, now finished processing the contract in accord with the standard procedures of the auditor's office. She confirmed that all of the required signatures had been obtained, and that the appropriation source had been sufficiently identified. On January 2, 2002, as she was authorized to do, she stamped the contract, "EXECUTED," and affixed her signature. At that point, the contract became a "formal document of the city," was kept on record as an "approved" contract, and was so recorded in the city's computer software system.

In the **[**7]** final processing of the contract through the auditor's office, the auditor did not change her certification from the "$ 0.00" amount, to the approved and funded contract amount. [5] The sheriff and Bradston, however, understood that the contract had been approved and proceeded accordingly. Financing for the required improvements had been obtained by Bradston and work on the improvements was in progress, subject to the sheriff's direction and oversight.

5 It is unclear whether this failure was due to inadvertence, negligence, or inadequate procedures. There was evidence that other contracts were routinely routed and approved with an appropriation availability of "$ 0.00," including another contract between the sheriff and Bradston that remains in full effect.

On February 13, 2002, the new sheriff announced cuts to her operating budget. On February 14, 2002, the sheriff sent a notice of termination of the contract to Bradston. As grounds therefor, the sheriff contended that Bradston had violated the terms of the lease when it failed to complete the "required construction" by February 13, 2002, more than six months after the lease had been signed on August 13, 2001. Bradston responded by initiating **[**8]** this law suit for breach of contract, essentially contending that the lease contemplated that the six-month period was to begin when the lease became effective, which it claims was on

December 12, 2001 (when the sheriff's chief financial officer signed the lease, after the appropriation had become available and the mayor had approved the award).

[*279] A judge in the Superior Court granted the sheriff's motion to dismiss, concluding that the lease was not ambiguous on this point and its termination by the sheriff was valid when the improvements were not completed in six months. In an unpublished memorandum and order pursuant to its *rule 1:28*, the Appeals Court reversed, concluding that the date of the "signing" intended to trigger the six-month period in the lease was uncertain in light of the various approval requirements of c. 262, including the written approval of the mayor and certification by the city auditor that an appropriation is available to fund it. *Bradston Assocs. v. Cabral, 61 Mass. App. Ct. 1116, 811 N.E.2d 524 (2004)*. The court further ruled that "extrinsic evidence of the circumstances leading to the execution of [the lease] may be considered in resolving" this uncertainty. Consequently, **[**9]** it concluded that "dismissal of the complaint was premature" and remanded the matter to the Superior Court.

Following remand, discovery was taken, and the sheriff sought summary judgment, this time on the ground that the lease had not been executed because the city auditor had not properly certified that an "appropriation is available" to fund it (or cited "the statute under the authority of which the contract [was] being executed without an appropriation") as required by c. 262. The judge granted the sheriff's motion on that ground, and the Appeals Court affirmed. *Bradston Assocs. v. Cabral, 70 Mass. App. Ct. 822, 877 N.E.2d 638 (2007)*.

Because we conclude that the contract was validly executed and binding on the parties, we reverse, order summary judgment be entered for Bradston on the question of the validity of the contract, and remand the case for further proceedings with respect to the parties' intention regarding the date when the six-month period for the completion of the improvements was to commence.

Discussion. We have stated generally that "[p]ersons dealing with a municipality must take notice of limitations . . . upon the contracting power of the municipality and are bound by them and cannot **[**10]** recover upon contracts attempted to be made in violation of them." *Marlborough v. Cybulski, Ohnemus & Assocs., 370 Mass. 157, 160, 346 N.E.2d 716 (1976)*, quoting *Duff v. Southbridge, 325 Mass. 224, 228, 90 N.E.2d 12 (1950)*; *Lawrence v. Falzarano, 380 Mass. 18, 24,* **[*280]** *402 N.E.2d 1017 (1980) (Lawrence); Adalian Bros. v. Boston, 323 Mass. 629, 631, 84 N.E.2d 35 (1949)*. However, when a contract is entered into by a proper official, and supported by budgetary authority, the government is bound like any other contracting party. Cf. *Cherokee Nation of Okla. v. Leavitt, 543 U.S. 631, 637, 642, 125 S. Ct. 1172, 161 L. Ed. 2d 66 (2005)* (where Congress appropriated sufficient unrestricted funds for contract, government could not, on grounds of "insufficient appropriations," avoid contractual promise).

In *Lawrence, supra at 25*, we explained that, although strict compliance with a statute concerning municipal contracts is preferable, it is not required in all circumstances, and should not be required when to do so would frustrate the statute's purpose. In that case, we were interpreting *G. L. c. 44, § 31C*, regarding the award of municipal construction contracts. Its wording is similar to that of c. 262, with respect to the function of the auditor, that is, such contracts are not "deemed to have **[**11]** been made" until the auditor "has certified that an appropriation in the amount of such contract is available therefor." The facts in *Lawrence* are also similar to the case here. A contract for the renovation of a hospital was executed without the requisite auditor's certification of an available appropriation. It was nonetheless executed by the appropriate city officials, and the city council appropriated $ 1,500,000 for the renovation, an amount more than adequate to fund the contract. The court concluded that, "[w]here it is unquestioned that the contract was executed by a proper city official and that a sufficient appropriation existed in fact to cover the cost of the contract . . . the contract is not necessarily invalid because it lacks on its face the certification required by *[G. L.] c. 44, § 31C*." *Id. at 25*.

The *Lawrence* court went on to explain that one of the purposes of *G. L. c. 44, § 31C*, is to "'provide contractors engaged in public construction work with a ready and reliable means of ascertaining that there is an appropriation sufficient to cover the proposed work and to protect them where the contract carries a certification that there exists a sufficient appropriation,' **[**12]** but no such appropriation exists." *Id.*, quoting *Lawrence v. Falzarano, 7 Mass. App. Ct. 591, 597, 389 N.E.2d 435 (1979)*. Accordingly, we concluded that the contractor was an intended beneficiary of the statute and that a contrary result (invalidating the contract) would allow **[*281]** the city to benefit from its omission, and would conflict with statutory intent. As in the case before us, the contract at issue in *Lawrence* had gone through the full public bidding process, the city had held it out as awarded and exacted performance under it, and the spending authority was unquestioned. [6]

6 In *Lawrence v. Falzarano, 380 Mass. 18, 24, 402 N.E.2d 1017 (1980)*, there was a complete omission of review by the auditor; here, the

contract was submitted to the auditor for review and certification both before and after it was fully approved by city officials and funded by the State grant-in-aid appropriation.

In *Lawrence,* we distinguished *Ryan v. Somerville, 328 Mass. 324, 103 N.E.2d 707 (1952)*, in which a contract was invalidated when there was no indication that an appropriation had ever been made for it, as was required under the city charter at issue in that case. [7] *Id. at 25.* The *Lawrence* court emphasized that, unlike in *Ryan v. Somerville, supra,* **[**13]** there was no question that ample appropriation existed for the contract. The court also noted that there was no indication that the city charter (under which the contract was awarded) intended to afford any protection to parties contracting with the city, as contrasted to its interpretation of *G. L. c. 44, § 31C. Id. at 25-26.*

7 In *Ryan v. Somerville, 328 Mass. 324, 325, 103 N.E.2d 707 (1952)*, a city charter stated that "[n]o contract . . . shall be awarded by the city unless and until the city auditor has certified on said contract or order that there is an unencumbered balance in the appropriation chargeable therefor sufficient to cover the cost of said labor . . . ."

In *Reynolds Bros. v. Norwood, 414 Mass. 295, 301, 609 N.E.2d 58 (1993)*, we affirmed our holding in *Lawrence,* concluding that the "legislative purpose [of *G. L. c. 44, § 31C,*] would not be served, but instead would be frustrated" by a decision that the contract in question "was invalidated by the absence of a certification" of an available appropriation for a multi-million dollar municipal airport project that had otherwise been approved and funded.

We conclude that c. 262 serves much the same purpose for contracts awarded by Suffolk County officials **[**14]** as *G. L. c. 44, § 31C*, serves for construction contracts awarded by cities and towns. Applying the reasoning of *Lawrence* leads us to the same conclusion. Where the proper (city and county) officials have approved a contract, and an adequate appropriation is available to fund it, the failure of the auditor (for no apparent reason) to certify the availability of that appropriation will not be a sufficient **[*282]** ground on which the county can seek to set aside the contract as invalid. This is particularly the case where, as here, the auditor's office processed the contract, deemed it executed, and was fully aware of the availability of the appropriation. To hold otherwise would sacrifice substance to form and perpetrate an unfairness contrary to the purpose of the statute's intent. [8]

8 See *Singarella v. Boston, 342 Mass. 385, 387, 173 N.E.2d 290 (1961)*, in which St. 1950, c. 216, § 1, an earlier version of c. 262, was interpreted. That version provided that all contracts over one thousand dollars must be in writing and "no such contract shall be deemed to have been made or executed until the approval of the mayor of said city has been affixed thereto." In that case, the mayor approved the contract prior to **[**15]** its execution, and we deemed that action sufficient to bind the city on subsequent execution of the contract. *Id.* That the signature of approval appeared merely on the letter informing him of a hospital's board of trustees' desire to award the contract (which was stapled to the contract at all times), and not on the contract, did not constitute a violation of the statute. *Id. at 387-388.* We acknowledged that, when the mayor signed the letter, he was not approving an executed contract. We concluded, however, that "[s]o long as the mayor has approved the specific contract relied upon, substantial compliance with the statute [was] sufficient," *id. at 388*, and that once the mayor approved the contract prior to its execution, it would be an idle ceremony sacrificing substance to form to require him to approve it after execution.

Our conclusion is consistent with the auditor's limited role under c. 262. Chapter 262 requires the auditor to certify that the contract is supported by budget authority. This is a ministerial, nondiscretionary verification of existing budgetary authority. Cf. *Pirrone v. Boston, 364 Mass. 403, 408 n.9, 305 N.E.2d 96 (1973)* ("No discretion or judgment is required of the city auditor **[**16]** in performing the arithmetic required by [statute]"). [9] There either is or is not an appropriation available to fund the contract. Where, as in this case, there clearly is such an appropriation, the auditor **[*283]** would not have had any basis to withhold certification. The contract is valid.

9 The auditor's role contrasts to that of the mayor. "[M]ayoral approval is not something which can be sloughed off as a mere ministerial act." *Lumarose Equip. Corp. v. Springfield, 15 Mass. App. Ct. 517, 519-520, 446 N.E.2d 1087 (1983)*, and cases cited (city purchasing agent's actions in purporting to extend lives of contracts without written approval of mayor left city in position that no contract was made or executed). The mayor's action, signing and approving a contract, is required; the mayor may withhold approval if he chooses. Cf. *Urban Transp., Inc. v. Mayor of Boston, 373 Mass. 693, 697, 369 N.E.2d 1135 (1977)*, quoting *McLean v. White,*

216 Mass. 62, 64, 102 N.E. 929 (1913) (discussing mayoral approval requirement and stating that "mayor must be able to exercise his 'practical wisdom in the administration of the affairs of the city'"). The auditor's certification, on the other hand, is a nondiscretionary verification of existing legal [**17] and budgetary authority.

The six-month period. The question when the six-month period began to run, and thus whether the termination notice was proper, was left open after the Appeals Court's reversal of the initial grant of the sheriff's motion to dismiss. It is evident from the record that there are disputed material facts as to when the six-month period began, and the case must be remanded for such determination.

Conclusion. Judgment for the sheriff is vacated and summary judgment on the validity of the contract is to be entered for Bradston. The case is remanded for further proceedings consistent with this opinion.

So ordered.

DISTRICT ATTORNEY FOR THE NORTHWESTERN DISTRICT vs. EASTERN HAMPSHIRE DIVISION OF THE DISTRICT COURT DEPARTMENT (and a consolidated case [1]).

1 District Attorney for the Hampden District vs. Springfield Division of the District Court Department.

SJC-10054

SUPREME JUDICIAL COURT OF MASSACHUSETTS

452 Mass. 199; 2008 Mass. LEXIS 574

April 9, 2008, Argued
August 18, 2008, Decided

PRIOR HISTORY: [1]**

Suffolk. Civil actions commenced in the Supreme Judicial Court for the county of Suffolk on June 11 and June 15, 2007. A motion for consolidation was heard by Spina, J., and the cases were reported by him.

COUNSEL: Judith Ellen Pietras, Assistant District Attorney (Joel B. Bard, Assistant District Attorney, with her), for District Attorney for the Northwestern District & another.

Daniel P. Sullivan (Brian T. Mulcahy with him), for Eastern Hampshire Division of the District Court Department & another.

Jane Davidson Montori, Assistant District Attorney, for District Attorney for the Hampden District, was present but did not argue.

Daniel F. Conley, District Attorney, John P. Zanini & Janis DiLoreto Noble, Assistant District Attorneys, for District Attorney for the Suffolk District & others, amici curiae, submitted a brief.

JUDGES: Present: Marshall, C.J., Greaney, Ireland, Spina, Cordy, & Botsford, JJ.

OPINION BY: BOTSFORD

OPINION

[*200] BOTSFORD, J. When a district attorney successfully moves under *G. L. c. 94C, § 47 (b)*, to forfeit money connected to an illegal drug transaction, what is the appropriate disposition of the forfeited funds? In two separate cases, a judge in the District Court answered this question by ordering that the **[**2]** money be deposited in the Commonwealth's General Fund, rather than shared between the law enforcement trust funds of the prosecuting district attorney and police department involved in each underlying criminal case. The petitioners here -- the district attorney for the northwestern district, the district attorney for the Hampden district, and the police department of the town of Hadley (collectively, petitioners) -- petitioned for relief from the judge's two orders. We agree with the petitioners that money ordered forfeited under *G. L. c. 94C, § 47*, is properly directed to the prosecuting district attorney or Attorney General and the investigating police department, as specified in *§ 47 (d)*, even when the forfeiture is sought and obtained in the District Court by means of a motion brought pursuant to *§ 47 (b)*. Accordingly, we vacate the judge's two orders. [2]

2 We acknowledge the amicus brief submitted in support of the petitioners by the district attorneys for the Suffolk, Essex, Northern, Norfolk, Berkshire, Plymouth, Cape and Islands, Middle, and Bristol districts.

1. *Background.* The petitions arise from two criminal prosecutions in the District Court, one in the Eastern Hampshire **[**3]** District Court and one in the Springfield District Court. In each case, the defendant pleaded guilty to (or admitted to facts sufficient to warrant conviction for) drug-related crimes. [3] Also in each case, the Commonwealth filed a motion in the District Court, pursuant to *G. L. c. 94C, § 47 (b)*, for forfeiture of money that had been seized from the defendant and that, the **[*201]** Commonwealth alleged, was connected to the drug transactions that were the subjects of the criminal charges. [4] Both motions were allowed (with no apparent opposition by the respective defendants), and in each case the judge ordered the forfeited monies to be distributed to the Commonwealth's General Fund.

3 The defendant in the Eastern Hampshire District Court case was charged with distribution

of a Class D substance (subsequently amended to possession with intent to distribute a Class D substance), in violation of *G. L. c. 94C, § 32C (a)*, and two unrelated civil offenses. The defendant in the Springfield District Court case was charged with possession with intent to distribute a Class D substance, in violation of *G. L. c. 94C, § 32C (a)*, and a violation of the school or park zone statute, *G. L. c. 94C, § 32J*.

4 In the **[**4]** Eastern Hampshire District Court case, the Commonwealth, through the district attorney, moved to forfeit $ 2,080; in the Springfield District Court case, the Commonwealth, through the district attorney, moved to forfeit $ 57.

General Laws c. 94C, § 47 (*§ 47*), governs the forfeiture of assets involved in or derived from violations of G. L. c. 94C, the Controlled Substances Act (Act). *Section 47(a)* provides that "[t]he following property shall be subject to forfeiture to the commonwealth and all property rights therein shall be in the commonwealth . . . ." The subsection then lists eight separate categories of such property, including controlled substances and drug-manufacturing equipment, as well as conveyances (for example, automobiles, boats, and aircraft), money, and real estate involved in or acquired as a result of illegal narcotics transactions. *G. L. c. 94C, § 47 (a) (1)-(8)*.

Section 47 (b) provides that certain categories of property subject to forfeiture under *subsection (a)* "shall, upon motion of the attorney general or district attorney, be declared forfeit by any court having jurisdiction over said property or having final jurisdiction over any related criminal proceeding **[**5]** brought under any provision of this chapter." [5] *Subsection (b)*, however, contains no description of such a forfeiture proceeding. Thus, it contains no procedural guidelines, and, more importantly, it does not specify how the property shall be disposed of, apart from directing that controlled substances declared forfeit shall be destroyed. [6]

5 The categories of property that may be the subject of a motion to forfeit under *G. L. c. 94C, § 47 (b)*, include every category listed in *§ 47 (a)*, except "conveyances" described in *§ 47 (a) (3)*.

6 *Subsection (b)* reads as follows:

> "Property subject to forfeiture under subparagraphs (1), (2), (4), (5), (6), (7) and (8) of subsection (*a*) shall, upon motion of the attorney general or district attorney, be declared forfeit by any court having jurisdiction over said property or having final jurisdiction over any related criminal proceeding brought under any provision of this chapter. Property subject to forfeiture under subparagraph (1) of subsection (*a*) shall be destroyed, regardless of the final disposition of such related criminal proceeding, if any, unless the court for good cause shown orders otherwise." *G. L. c. 94C, § 47 (b)*.

Like *§ 47 (b)*, *§ 47 (d)* **[**6]** also provides for the forfeiture of **[*202]** certain categories of property listed in *subsection (a)*, albeit fewer than *§ 47 (b)*. [7] *Subsection (d)* allows a district attorney or the Attorney General to "petition the superior court in the name of the commonwealth in the nature of a proceeding in rem to order forfeiture." *G. L. c. 94C, § 47 (d)*, first par. But unlike *subsection (b), subsection (d)* contains detailed procedural requirements, provisions for the sale of forfeited conveyances and real estate, and a mandate that "[t]he final order of the court shall provide that said moneys and the proceeds of any such sale shall be distributed equally between the prosecuting district attorney or attorney general and the city, town or state police department involved in the seizure." *§ 47 (d)*, first & second pars. *Subsection (d)* then establishes law enforcement trust funds to receive **[*203]** these monies for each prosecutorial agency and police department and describes the purposes for which they may be expended. *§ 47 (d)*, third & fourth pars.

7 Property subject to forfeiture under *§ 47 (d)* includes conveyances, money (and other things of value), and real property, as described in *§ 47 (a) (3), (5)*, and *(7)*. **[**7]** The first two paragraphs of *§ 47 (d)* read in relevant part as follows:

> "A district attorney or the attorney general may petition the superior court in the name of the commonwealth in the nature of a proceeding in rem to order forfeiture of a conveyance, real property, moneys or other things of value subject to forfeiture under the provisions of subparagraphs (3), (5), and (7) of subsection (*a*). Such petition shall be filed in the court having jurisdiction over said conveyance, real property, monies or other things of value or having final jurisdiction over any related criminal proceeding brought under any provision of this chapter. . . . In all such suits where a final order results in a forfeiture, said final order shall provide for disposition of said conveyance, real property, moneys or any other thing of value by the commonwealth or any subdivision

thereof in any manner not prohibited by law, including official use by an authorized law enforcement or other public agency, or sale at public auction or by competitive bidding. The proceeds of any such sale shall be used to pay the reasonable expenses of the forfeiture proceedings, seizure, storage, maintenance of custody, advertising, **[**8]** and notice, and the balance thereof shall be distributed as further provided in this section.

"The final order of the court shall provide that said moneys and the proceeds of any such sale shall be distributed equally between the prosecuting district attorney or attorney general and the city, town or state police department involved in the seizure. If more than one department was substantially involved in the seizure, the court having jurisdiction over the forfeiture proceeding shall distribute the fifty percent equitably among these departments."

In denying the district attorneys' respective requests to deposit the forfeited money in the law enforcement trust funds described in *§ 47 (d)*, the judge reasoned that the Superior Court alone, in an in rem proceeding brought under that subsection, had authority to direct forfeited funds to the prosecutor and police. He concluded that the District Court, which only has jurisdiction to consider a motion for forfeiture brought under *subsection (b)*, must look to *subsection (a)* to determine disposition of forfeiture proceeds. He further stated that *subsection (a)*'s declaration that enumerated property "shall be subject to forfeiture *to the* **[**9]** *commonwealth* and all property rights therein shall be *in the commonwealth"* (emphasis by judge) indicated that all forfeited money must be directed to the General Fund. [8] According to the judge, when the Legislature amended *§ 47* in 1984 to allow the prosecutor and police to retain forfeited funds, it deliberately made that financial benefit available only in a separate, procedurally enhanced in rem action so as to "make certain [that] plea discussions would not involve law enforcement agencies receiving forfeited funds as a part of a sentencing agreement" and to "avoid even the appearance of impropriety, conflict of interest or a quid pro quo of asset surrenders for favorable prosecution recommendations." He therefore ordered that the monies forfeited by motion brought under *§ 47 (b)*, as part of the criminal prosecutions in the underlying cases, be deposited in the Commonwealth's General Fund.

8 The judge also concluded that *subsection (d)*'s mention of a "final order of the court" **[**10]** that shall provide for division of proceeds between the prosecutor and the police refers only to an in rem judgment of the Superior Court as described earlier in that subsection, and not to a ruling on a motion.

The petitioners filed petitions for relief under *G. L. c. 211, § 3*, in the county court, seeking orders to have the forfeited funds distributed not to the General Fund but instead to the law enforcement trust funds of the prosecutors and police departments involved in the two cases; the petitions respectively named as respondents the Eastern Hampshire District Court and the Springfield District Court (collectively, respondents). [9] A single **[*204]** justice of this court allowed a motion of the respondents to consolidate the two petitions, and reserved and reported them to the full court.

9 The respondents concede that the issue raised by the petition is likely to recur, and they accordingly do not object to the exercise of our superintendence powers under *G. L. c. 211, § 3*.

2. *Discussion.* A survey of the relevant development of *§ 47* through legislative amendment and judicial interpretation informs our analysis of the statute.

In 1971, the Legislature enacted the Act, G. L. c. 94C, and included **[**11]** *§ 47* as part of the new statutory scheme. St. 1971, c. 1071, § 1. As originally enacted, *§ 47 (a)* provided for forfeiture of four categories of property: (1) controlled substances; (2) "materials, products and equipment . . . used . . . in manufacturing, compounding, processing, delivering, dispensing, distributing, importing or exporting" controlled substances in violation of the Act; (3) conveyances used to transport or otherwise facilitate illegal traffic in controlled substances; and (4) "books, records and research" used in violation of the Act. *Id.* Under *§ 47 (b)*, items described in categories (1), (2), and (4) of *§ 47 (a)* could be declared forfeit by any court with jurisdiction over the property or over a related criminal proceeding. *Id.* Items in category *(3) of subsection (a)* -- conveyances -- could only be declared forfeit under *§ 47 (d)*, by the Superior Court in an in rem proceeding involving procedural protections such as notice, hearing,

and an appealable final order. *Id. Subsection (d)* provided that the balance of proceeds from any sale of a forfeited conveyance, after payment of the expenses of the forfeiture proceeding and sale, "shall be deposited in the treasury of **[**12]** the commonwealth." *Id.*

Although the legislative history of the Act fails to shed definitive light on the rationale underlying this bifurcation of forfeiture procedures, it seems reasonable to infer that *subsections (b)* and *(d)* were originally formulated to fit the different characteristics of property forfeitable under each. It would make sense to enable illegal narcotics and the equipment and documentation necessary for manufacturing and distributing illegal narcotics to be declared forfeit as part of the disposition of the related criminal prosecution, in which they were likely to be used as evidence. No provision for distribution of the proceeds of such forfeitures was **[*205]** necessary, because illegal drugs were to be destroyed, and any associated equipment and documentation were not items that would likely produce revenue through sale. Forfeiture of vehicles and other conveyances, by contrast, might reasonably be considered to require the enhanced procedures outlined in *subsection (d)*, because the owner of the vehicle might in fact be someone other than the criminal defendant, and in any event, whether a vehicle was connected to the illegal drug transactions of its owner may be subject **[**13]** to legitimate dispute. [10] Additionally, *subsection (d)* specifically provided for disposition of forfeited conveyances or the proceeds of their sales because vehicles, unlike narcotics and associated equipment, had resale value for the Commonwealth.

> 10 Indeed, the Legislature indicated its concern with these very possibilities by providing, in *§ 47 (c) (1)-(3)*, for various exceptions to the forfeiture of conveyances if the owner of the vehicle was not aware of or involved in its use for transporting narcotics. *G. L. c. 94C, § 47 (c)*, inserted by St. 1971, c. 1071, § 1.

However, while this rationale may explain the original separation of forfeiture proceedings between *§ 47 (b)* and *(d)*, subsequent amendments to *§ 47* soon inserted additional categories of property to the list of items that could be forfeited under *subsection (b)*, without ever adding any dispositional provisions to *subsection (b)*. Thus, in 1977, the Legislature amended *§ 47* to add monies involved in or derived from narcotics transactions to the list of property subject to forfeiture under *subsection (a)*, St. 1977, c. 556, § 1, and added reference to such monies to *both subsection (b)* and *subsection (d)*. [11] See St. 1977, c. **[**14]** 556, §§ 2-3. Since 1977, then, *subsection (b)* has allowed for forfeiture of property (money) having undoubted value to the Commonwealth, without making specific provision for its disposition. *G. L. c. 94C, § 47 (b)*, as amended by St. 1977, c. 556, § 2. [12]

> 11 A 1977 letter from the then first assistant attorney general to the secretary and counsel for the House Committee on Ways and Means in support of the bill that became this amendment suggests that the Attorney General and the district attorneys were at that time reading the dispositional provisions in *subsection (d)* as governing *subsection (b)* forfeitures as well.
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> 12 Further expansion of the scope of *subsection (b)* took place over the following years. In 1981, the Legislature added drug paraphernalia to *subsection (a)*, St. 1981, c. 669, § 3, and the following year it made the new category forfeitable under *subsection (b)*. St. 1982, c. 650, *§ 17*. As part of the 1984 amendment (see *infra*), the Legislature added real estate used in furtherance of illegal drug activity to the list of property subject to forfeiture under *subsection (a)*. *G. L. c. 94C, § 47 (a) (6A)*, as amended through St. 1984, c. 486, § 1. However, the Legislature did not **[**15]** at that time add reference to this new category of property to either *§ 47 (b)* or *§ 47 (d)*, leaving it unclear what procedure, if any, could be invoked to declare real estate forfeit under *§ 47*. Subsequently, in 1989, the Legislature expanded the category of forfeitable monies under *subsection (a) (5)* to include real estate and other things of value purchased with proceeds traceable to an illegal narcotics transaction, St. 1989, c. 653, § 74, and added real estate to both *subsection (b)* and *subsection (d)*. *Id.* at §§ 76, 79. Also in 1989, the Legislature added property used as a container for drugs to *subsection (a)* and made this category forfeitable under *subsection (b)*. St. 1989, c. 653, §§ 75, 76. At no point in the gradual accretion of *subsection (b)*'s coverage has the Legislature added any dispositional provisions to *subsection (b)*.

The amendment primarily at issue in this case was passed in **[*206]** 1984. See St. 1984, c. 486, § 2. It deleted the sentence in *subsection (d)* providing for the balance of any forfeiture proceeds to be deposited in the treasury of the Commonwealth, and replaced it with an instruction that the proceeds should be divided equally between the prosecuting district **[**16]** attorney or Attorney General and the police department involved in the case, to be expended for law enforcement purposes. *Id.*

In 1986, this court considered a challenge to a forfeiture of money ordered pursuant to *subsection (b)* as part of the criminal proceedings on the related

indictments charging violation of the narcotics laws. *Commonwealth v. Goldman, 398 Mass. 201, 201-202, 496 N.E.2d 426 (1986)* (*Goldman*). The defendant in *Goldman* argued that forfeiture could not be effected as part of the criminal proceedings themselves, and that the Commonwealth was required to bring a separate proceeding under *subsection (d)*. *Id. at 202*. The court concluded that "the provision in *§ 47 (b)* for the forfeiture of property on order of a judge has independent significance and permits a judge to enter a judgment of forfeiture without the Commonwealth first filing a petition under *§ 47 (d)*." *Id.* However, the court also held that "[f]undamental due process considerations entitle the defendant to a hearing on the question of the connection, if any, between his illegal drug operations and the funds seized," and directed that the *subsection (b)* proceeding should adhere to the provisions of *subsection (d)* regarding burden **[**17]** of proof, conclusions of law, and issuance of a final order. *Id. at 204 & n.5*. The court thus imported some of the **[*207]** procedural protections of *subsection (d)* to account for the fact that *subsection (b)* now covered property -- cash -- in which a defendant might have a legitimate interest unrelated to illegal narcotics activity.

In *Commonwealth v. Brown, 426 Mass. 475, 688 N.E.2d 1356 (1998)* (*Brown*), this court again considered a challenge to an order forfeiting money under *subsection (b)* as part of a related criminal prosecution. [13] The court reaffirmed the holding of *Goldman, supra,* that "[a]lthough the Commonwealth initiated the proceeding by forfeiture motion filed pursuant to *G. L. c. 94C, § 47 (b)*, the applicable standards of proof are set forth in *G. L. c. 94C, § 47 (d)*." *Brown, supra at 477 n.3*. However, while the court in *Brown* agreed with the defendant that he was entitled to notice in advance of the hearing on a forfeiture motion, it declined to import the "more onerous notice requirements" of *subsection (d)*, *id. at 480 n.5*, and, characterizing the forfeiture proceeding under *subsection (b)* as itself a "civil proceeding in rem," *id. at 483*, applied instead the notice requirements applicable by **[**18]** rule to motions filed in other civil proceedings. *Id. at 480 & n.5*. What *Goldman* and *Brown* thus establish is that forfeiture proceedings brought pursuant to motions under *subsection (b) of § 47* are civil in nature and must provide certain procedural protections to the defendant, and that we look to *subsection (d)* for many, but not all, of the applicable protective procedures. [14]

> 13 The criminal prosecution at issue in *Commonwealth v. Brown, 426 Mass. 475, 688 N.E.2d 1356 (1998)* (*Brown*), took place in the Boston Municipal Court.
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> 14 The opinion in *Brown* indicates in a footnote, without comment, that the judge's order in that case distributed the forfeited $ 142 "in equal shares to the Boston police department and the office of the district attorney for Suffolk County, as provided in *G. L. c. 94C, § 47 (d)*." *Brown, 426 Mass. at 477 n.2*. The petitioners cite this footnote in arguing that distribution of the proceeds of a *subsection (b)* forfeiture according to the provisions of *subsection (d)* is approved by this court. The respondents, however, correctly point out that distribution of the proceeds was not at issue in *Brown* and that the court's recitation of the facts of that case does not necessarily indicate **[**19]** approval, and does not constitute binding precedent.

In sum, the Legislature has amended *§ 47* over time to expand what can be forfeited under *subsection (b)* without any addition of dispositional language, while at the same time changing, with great specificity, the dispositional provisions in *subsection (d)*. Meanwhile, this court's opinions have held that forfeiture can certainly **[*208]** be ordered under *subsection (b)*, independently of *subsection (d)*, but have generally not dealt with the question of disposition. It is against this background that we consider the arguments made by the parties.

The petitioners argue that because this court's decisions in *Goldman* and *Brown, supra,* have grafted the procedural provisions of *subsection (d)* (including the requirement of a "final order" deemed important by the District Court judge [see *note 8, supra*]), onto *subsection (b)* motion proceedings, we should also import the distributional provisions of *subsection (d)* to govern *subsection (b)* forfeitures. However, the court in *Brown,* in permitting more relaxed notice procedures under *subsection (b)*, explicitly declined to incorporate all of *subsection (d)*'s procedural provisions directly into *subsection (b)*. **[**20]** *Brown, 426 Mass. at 480 n.5*. Moreover, the reasons that require the importation of some *subsection (d)* procedures into *subsection (b)* -- namely, to provide due process protections in relation to assets in which a defendant in the criminal case could plausibly have a legitimate property interest -- do not justify the importation of its distributional provisions as well. How the Commonwealth disposes of such assets once they have been declared forfeit in a proper proceeding has no bearing on the rights of the former owner; the logic of *Goldman* and *Brown* does not extend to *subsection (d)*'s provisions regarding distribution of forfeited property.

However, the interpretation of the statute adopted by the judge and advanced here by the respondents is itself not convincing. As has been noted, the 1984 amendment to *§ 47* added the provision to *subsection (d)* directing that forfeited monies or the proceeds from the sale of

other forfeited property be divided between the prosecutor and the police department involved in the case. St. 1984, c. 486, § 2. The judge determined that the Legislature specifically intended to separate criminal prosecutions from related forfeiture proceedings in which the **[**21]** prosecutor stood to benefit financially in order to avoid unseemly conflict of interest issues on the part of the prosecutor. Our review of the available legislative history of this amendment reveals nothing that might serve as evidence of the intention the judge ascribed to the Legislature. Indeed, it seems equally plausible that **[*209]** the Legislature amended *subsection (d)* without amending *subsection (b)* because only *(d)* contained the provision targeted for replacement, namely, the sentence directing proceeds to the State treasury. [15] As for textual analysis, the judge's interpretation rests on the view that *subsection (a)* is the key provision and that the language "all property rights [in forfeited items] shall be in the commonwealth" indicates that forfeited property must be deposited in the General Fund. This construction misreads *subsection (a)*. Tracking, or at least analogous to, its Federal counterpart, [16] *subsection (a)* simply identifies the types of property that are subject to forfeiture; it says nothing with regard to disposition. Indeed, the interpretation urged by the judge and the respondents makes little sense, because it is difficult to see how many of the categories of **[**22]** forfeitable property listed under *subsection (a)*, such as, for example, drug-manufacturing equipment and records, or real estate, could have any relationship to the General Fund. [17]

15 The respondents also assert that apart from legislative intent, public policy dictates that a prosecutor be required to bring a separate civil action to forfeit funds seized as part of an illegal drug transaction in order to eliminate the potential for prosecutorial conflict of interest in connection with plea negotiations over disposition of criminal charges. The argument falls flat. There is nothing to prevent a prosecutor from negotiating a plea for a criminal charge based on a defendant's willingness not to contest a separate civil proceeding in the Superior Court to forfeit any monies or other property at issue. Nothing, in terms of bargaining positions or interests, would be changed by requiring the prosecutor to bring a separate proceeding in the Superior Court in order to effectuate forfeiture. The respondents' view of the situation elevates appearances over substance.

16 See *21 U.S.C. § 881 (a) (2000)*, which unlike our version contains headings, and which designates *subsection (a)* "[s]ubject property." **[**23]** See also *Commonwealth v. One 1986 Volkswagen GTI Auto., 417 Mass. 369, 373, 630 N.E.2d 270 (1994)*, and cases cited ("Because our statute tracks the Federal statute, we have looked to the Federal . . . law for guidance in interpreting our forfeiture statute").

17 We also disagree with the judge's assertion that, if *subsection (d)* did apply to the proceedings before him, he could nevertheless order the money deposited in the General Fund on the basis of the language in *subsection (d)*, first par., reading, "said final order shall provide for disposition of said conveyance, real property, moneys or any other thing of value by the commonwealth or any subdivision thereof in any manner not prohibited by law, including official use by an authorized law enforcement or other public agency, or sale at public auction or by competitive bidding." This sentence describes how forfeited items may be either used directly or converted to cash by sale. It does not render optional the subsequent provision that "the court *shall* provide that said moneys and the proceeds of any such sale shall be distributed equally between" the prosecutor and police (emphasis supplied). *G. L. c. 94C, § 47 (d)*, second par.

[*210] We are confronted, **[**24]** then, in *subsection (b)*, with a statute that over time has been amended to authorize a court to order a wide variety of property forfeited to the Commonwealth but, from the time of its original enactment, has never provided any direction as to the disposition of that property (with the exception of illegal narcotics). As already explained, it appears that the absence of any distributional provision in *subsection (b)* may be an artifact of its original use solely for forfeiture of items that were likely to have no monetary value to the Commonwealth. Likewise, the Legislature's placement of the provision directing funds to the prosecutor and police only in *subsection (d)* may reflect the fact that, because the only dispositional provisions in the statute were in *subsection (d)*, all changes to disposition have been changes to *subsection (d)*. In the absence of any indication that the Legislature intended different treatment of assets forfeited under *subsection (b)* once that subsection had been expanded to encompass items with residual value, we conclude that the Legislature intended that all assets forfeited pursuant to *§ 47* would be distributed according to the provisions outlined in *subsection (d)*. [18]

18 To the extent that it permits any surmise, the available legislative history of the 1971 Act appears to support the conclusion that the Legislature viewed the procedural and dispositional provisions in *subsection (d)* as applicable to any category of forfeitable property for which they might be necessary.

Wherever possible, "statutes should be interpreted as a whole to constitute a consistent and harmonious provision." *Kargman v. Commissioner of Revenue, 389 Mass. 784, 788, 452 N.E.2d 492 (1983)*. "[I]t is our task to construe the statute in such a way as to make it an effective piece of legislation, . . . and in that connection every phrase should be given some effect" (citations omitted). *Commonwealth v. Mercy Hosp., 364 Mass. 515, 521, 306 N.E.2d 435 (1974)*. In this case, the sensible reading, as the legislative history and this court's prior decisions seem to support, is that *subsection (d)* supplies the dispositional provisions for forfeitures under *§ 47*, regardless whether the forfeiture is effected pursuant to *subsection (d)* or *subsection (b)*. [19] The cases are remanded to the single justice to enter **[*211]** an order vacating the judge's orders directing that money forfeited under *subsection (b)* be deposited **[**25]** in the General Fund as contrary to law.

19 See *Mazzone v. Attorney Gen., 432 Mass. 515, 523, 736 N.E.2d 358 (2000)* ("*General Laws c. 94C, § 47*, currently governs the forfeiture of conveyances, real property, monies, and other things of value used in or obtained from the commission of crimes under *G. L. c. 94C[]. Section 47 (d)* specifies that all assets obtained under that section be deposited into special law enforcement trust funds to be used by district attorneys, police departments, and the Attorney General for drug enforcement, education, and rehabilitation purposes").

So ordered.

ROBERT H. LeMAITRE vs. MASSACHUSETTS TURNPIKE AUTHORITY.

No. 06-P-455.

APPEALS COURT OF MASSACHUSETTS

70 Mass. App. Ct. 634; 876 N.E.2d 888; 2007 Mass. App. LEXIS 1179; 27 I.E.R. Cas. (BNA) 830

November 16, 2006, Argued
November 5, 2007, Decided

SUBSEQUENT HISTORY: Review granted by *Lemaitre v. Mass. Turnpine Auth., 450 Mass. 1109, 2008 Mass. LEXIS 180 (Mass., Feb. 28, 2008)*

PRIOR HISTORY: [***1]
Hampshire. Civil action commenced in the Superior Court Department on April 30, 2004. The case was heard by Judd J. Carhart, J., on motions for summary judgment.

COUNSEL: Richard C. Bardi (Michael P. Judge with him) for the defendant.

Nicole B. Caprioli for the plaintiff.

JUDGES: Present: Rapoza, C.J., Laurence, & Cypher, JJ. [1]

1 The case was originally heard by a panel comprised of Chief Justice Rapoza, Justice Laurence, and Justice Cypher. Following the retirement of Justice Laurence, the case was submitted on the briefs and record to Justice Armstrong, who was substituted for Justice Laurence on the panel.

OPINION BY: RAPOZA

OPINION

[*634] [**889] RAPOZA, C.J. The defendant, the Massachusetts Turnpike Authority (authority), appeals from summary judgment entered in favor of its former employee, Robert LeMaitre, on count I of [*635] his complaint, alleging breach of his employment contract. Upon his retirement in 2002, the authority paid LeMaitre $ 25,636.76 for the 403 days of sick leave he had accrued since the beginning of his employment with the authority in 1975. In determining the amount due LeMaitre, the authority applied only the provisions of the 1996 personnel policy (which remained unchanged in 2002) to all 403 days of LeMaitre's accrued [***2] leave. LeMaitre challenged the award in Superior Court, alleging that the authority owed him additional compensation for the days of sick leave he had accrued prior to 1996, when the authority's personnel policies contained more generous provisions. [2] The judge found for LeMaitre and, on cross motions for summary judgment, awarded him the $ 82,317.56 he requested (plus interest and costs). [3] We agree with the motion judge and remand solely on the issue of damages.

2 LeMaitre did not challenge the authority's calculation of amounts owed him for sick leave accrued from 1996 until the date of his retirement.

3 The judge allowed summary judgment for the authority as to count II of LeMaitre's complaint, alleging violation of *G. L. c. 149, §§ 148* and *150* (the Wage Protection Act). LeMaitre does not appeal from that ruling, and it is thus not before us.

[**890] 1. *Facts.* The following material facts are not disputed. LeMaitre, a nonunion engineer, began his employment with the authority on February 9, 1975, and worked there until he retired on November 30, 2002. At all relevant times, the authority offered an incentive program to "encourage employees to use their sick leave credit only when absolutely [***3] necessary, and to reward employees who have unusually good attendance records." The authority had complete discretion in updating and revising the incentive program and did so on several occasions between 1975 and 1996. Its employees were informed of the terms and conditions of the policy and also of the occasional modifications through a succession of handbooks, personnel policy and procedure bulletins, and policy directives (collectively, "personnel manuals"). [4] All but the 1996 policy directive indicate that the new procedures "supersede" the previous ones. [5]

4 In 1981, 1989, and 1996, LeMaitre signed certificates of receipt acknowledging that he had read the sick leave policy and confirming "that the Authority is directing me to read and comply

with each policy," including the sick leave incentive program.

5 In the top right-hand corner of the first page of each bulletin, the authority indicated the bulletin "Number" (e.g., "F-8"), followed by the page number (e.g., "page 1 of 6"), the "Effective Date" (e.g., "12-31-79"), and the policy year it "Supersedes" (e.g., "7-2-78").

[*636] The incentive program contained two provisions that are relevant here. Under the first provision ("medical coverage **[***4]** provision" or "medical benefit"), a certain percentage of the value of an employee's accrued, unused sick leave is placed in escrow upon the employee's retirement, to be applied toward the retiree's future health insurance premiums. No further contribution for premiums is required from the retiree until that amount is exhausted. The second provision ("cash payment provision" or "cash benefit") allows employees to receive a lump sum cash payment, based on a certain percentage of accrued, unused sick leave, payable to the employee "at the time of retirement." At all relevant times, both benefits were available only to retirees with ten or more years of service, and the medical benefit required the accrual of a minimum number of days, which LeMaitre satisfied. Although the percentages varied from time to time, the calculations were to be made according to the employee's regular rate of pay at the time of retirement.

When LeMaitre was first hired in 1975, the medical benefit was calculated at twenty-five percent of a retiree's accrued, unused sick leave. At some point during 1978 or 1979, the authority increased the medical benefit to fifty percent of accrued sick leave. [6] The medical coverage **[***5]** provision remained unchanged until October 1, 1996, when the authority eliminated the medical benefit from the incentive program except for employees participating in the authority's 1996 early retirement incentive program. [7]

6 In his brief, LeMaitre acknowledges that when the judge calculated damages due on the medical benefit, he valued it at fifty percent commencing on February 9, 1975, LeMaitre's date of hire, even though the benefit then was set at only twenty-five percent. An issue arises, however, as to when the rate changed from twenty-five to fifty percent, the resolution of which cannot be made on this record. In any event, the ambiguity of the record on this point is not material to our conclusion that LeMaitre is due some amount under the medical coverage provision, notwithstanding its elimination in October, 1996. See discussion, *infra.*

7 The record on appeal does not indicate whether LeMaitre met the eligibility criteria for the authority's 1996 early retirement program. In any event, he remained with the authority until 2002.

[891]** It is undisputed, on the other hand, that the cash payment provision was in place by December 31, 1979, and was to be **[*637]** calculated at the rate of fifty **[***6]** percent of the employee's accrued, unused sick leave. [8] In 1996, at the same time the authority eliminated the medical benefit, it reduced the cash benefit to twenty percent of accrued, unused sick leave.

8 LeMaitre claimed that the cash benefit was already in place when he commenced employment with the authority in 1975. The motion judge found that the incentive program contained no cash benefit provision until December 31, 1979. However, as the damages award was not consistent with the judge's findings, the award must be corrected on remand.

The parties agree that LeMaitre had an exceptional record of attendance with the authority for close to twenty-eight years. During that entire time, LeMaitre used only 14.5 days of sick leave, often reporting for work even when the use of a sick day would have been justified. [9] Having used only one and one-half days of sick leave between 1975 and 1997, LeMaitre accumulated the majority of his sick leave during the period when the more favorable provisions of the incentive program were in effect. Nevertheless, upon his retirement in 2002, the authority compensated LeMaitre for all of his accrued, unused sick leave at the rate of twenty percent -- **[***7]** the rate provided in the cash payment provision of the 1996 incentive program, still in effect in 2002. Also in keeping with the 1996 program, LeMaitre received no payment toward his medical insurance premiums.

9 For example, on one occasion, LeMaitre had surgery to insert a steel pin in his right hand, which limited his ability to drive. He nevertheless managed to get a ride to work so he did not use any sick time. On another, he dislocated his shoulder, yet worked rather than use sick time. Additionally, so as to avoid using sick time, he scheduled medical, eye care, and dental appointments after work hours and frequently came to work despite an earache, cold, or flu symptoms.

2. *Discussion.* On appeal, the authority contends that the judge erred in relying on *O'Brien v. New England Tel. & Tel. Co., 422 Mass. 686, 664 N.E.2d 843 (1996),* in concluding that the personnel manuals constituted an

implied contract. Thus, according to the authority, LeMaitre was paid the proper amount, as he had no contractual right to payments under the earlier provisions of the incentive program, which the authority had discontinued by the time he retired. [10]

> 10 The authority also argues that LeMaitre's breach of contract **[***8]** action is barred by the relevant statute of limitations, a claim we conclude to be without merit. "The general rule is that a contract action accrues at the time the contract is breached." *Berkshire Mut. Ins. Co. v. Burbank, 422 Mass. 659, 661, 664 N.E.2d 1188 (1996). Barber v. Fox, 36 Mass. App. Ct. 525, 527, 632 N.E.2d 1246 (1994).* Here, LeMaitre alleges that a breach occurred in 2002 when he retired and the authority informed him that all of his accrued sick time would be paid in accordance with the terms of its 1996 incentive program. Therefore, under the six-year statute of limitations period provided in *G. L. c. 260, § 2*, LeMaitre's claim does not expire until 2008. Given that LeMaitre filed the present action in 2004, the case was timely brought and was well within the requisite time period.

Whether a contract exists is a question of fact. *Jackson v.* **[*638]** *Action for Boston Community Dev., Inc., 403 Mass. 8, 9, 525 N.E.2d 411 (1988)*, citing *Maynard v. Royal Worcester Corset Co., 200 Mass. 1, 4-5, 85 N.E. 877 (1908).* Summary judgment is appropriate however, where, as here, there is "in essence . . . no real dispute as to the salient facts or if only a question of law is involved." *Kourouvacilis v. General Motors Corp., 410 Mass. 706, 715-716, 575 N.E.2d 734 (1991)*, **[***9]** quoting from *Community Natl. Bank v.* **[**892]** *Dawes, 369 Mass. 550, 553, 340 N.E.2d 877 (1976).*

It is well settled in Massachusetts that the terms of a personnel manual may become an implied part of an at-will employee's employment contract, and the authority does not argue otherwise. See, e.g., *Pine River State Bank v. Mettille, 333 N.W.2d 622, 627 (Minn. 1983)* (cited approvingly in *O'Brien v. New England Tel. & Tel. Co., 422 Mass. at 693*) ("personnel handbook provisions, if they meet the requirements for formation of a unilateral contract, may become enforceable as part of the original employment contract"). See also *Jackson v. Action for Boston Community Dev., Inc., 403 Mass. at 13*, citing *Hobson v. McLean Hosp. Corp., 402 Mass. 413, 415, 522 N.E.2d 975 (1988)*; *Weber v. Community Teamwork, Inc., 434 Mass. 761, 780-781, 752 N.E.2d 700 (2001)*; *Ferguson v. Host Intl., Inc., 53 Mass. App. Ct. 96, 101-102, 757 N.E.2d 267 (2001).* The authority instead argues that any offer contained in the personnel manuals was unenforceable because the authority retained an implied right to (and did on many occasions) modify the terms of the incentive program. Consequently, the authority asserts, because the offers contained in the personnel manuals could be modified at its **[***10]** own election, LeMaitre obtained no vested right to his accrued, unused sick leave pay. In any event, the authority claims that even if LeMaitre obtained a contractual right to his accrued sick leave, LeMaitre assented to forfeiting those rights as evidenced by his continued employment with the authority after changes were announced that "superseded" previous policies.

[*639] For the reasons discussed more fully below, we conclude that in the circumstances presented here the authority's promises contained in the various versions of the incentive program were enforceable. Each constituted a legally binding offer to reward employees with certain cash and medical benefits that became irrevocable once an employee signified his acceptance. We also conclude that as soon as LeMaitre began earning and accruing sick leave after each legally binding offer was made, he indicated his acceptance of that offer; and that at the time he retired in 2002, LeMaitre met all of the conditions for payment under each separate offer, having completed ten years of service and also having accrued the minimum number of unused sick leave days called for in the medical coverage provisions. In other words, once LeMaitre **[***11]** accepted the authority's various offers by continuing to work in reliance on their specific terms, the rights he accrued thereunder could not be extinguished. Consequently, as there is no indication that LeMaitre agreed to forfeit the benefits to which he became entitled during each successive period, the authority breached its agreement by refusing to compensate LeMaitre upon retirement at the rates that applied when he earned and accrued his sick leave.

a. *The existence of an offer.* Apparently relying on *Jackson v. Action for Boston Community Dev., Inc., 403 Mass. at 14-15*, the authority claims that any offers or promises made by the express terms of the incentive program were "illusory," and thus nonbinding, solely because the authority made frequent unilateral changes to the provisions in the personnel manuals. See *Graphic Arts Finishers, Inc. v. Boston Redev. Authy., 357 Mass. 40, 43, 255 N.E.2d 793 (1970)* ("a promise that binds one to do nothing at all is illusory and cannot be consideration"), citing *Gill v. Richmond Co-op. Assn., 309 Mass. 73, 79-80, 34 N.E.2d 509 (1941).*

According to the authority, even though it was not expressly stated in the personnel manuals, LeMaitre was nevertheless **[**893]** aware that the authority **[***12]** retained the right to alter the incentive program whenever it chose. Recognizing that *O'Brien v. New England Tel. & Tel. Co., supra,* "call[ed] for the provisions of [personnel] manuals to be enforced to the

extent that they instill a reasonable belief in the employees that management will adhere to the policies therein expressed," *Ferguson v.* **[*640]** *Host Intl., Inc., 53 Mass. App. Ct. at 101-102*, the authority argues that because LeMaitre was aware of the authority's right to make unilateral changes and also knew of the changes, he could not have reasonably expected the authority to adhere to any of its promises. We disagree. The mere fact that management can make unilateral changes to a personnel manual would not, standing alone, lead an employee to conclude that rights already obtained would be altered or taken away by such changes. Rather, an employee "might as easily conclude that, given [the manual's] importance, the employer wanted to keep it up to date . . . to make certain . . . that the benefits conferred were sufficiently competitive . . . ." *Id. at 102-103*, quoting from *Woolley v. Hoffmann-La Roche, Inc., 99 N.J. 284, 299, 491 A.2d 1257*, modified on other grounds, *101 N.J. 10, 499 A.2d 515 (1985)*. See *O'Brien v. New England Tel. & Tel. Co., 422 Mass. at 692-693*.

The **[***13]** authority regularly distributed the personnel manuals, which spelled out in explicit detail the terms of each version of the incentive program in effect at different times during the course of LeMaitre's employment. LeMaitre and, presumably, other employees, were even required to sign for them. See *O'Brien v. New England Tel. & Tel. Co., supra at 694*, quoting from *Woolley v. Hoffmann-La Roche, Inc., 99 N.J. at 299* ("the manual's preparation and distribution is, to us, the most persuasive proof that it would be almost inevitable for an employee to regard it as a binding commitment, legally enforceable, concerning the terms and conditions of . . . employment"). Moreover, as to the express terms of the incentive program, the authority does not argue that they were meant only to provide guidance to its employees. See, e.g., *Jackson v. Action for Boston Community Dev., Inc., 403 Mass. at 14-15* (noting that "[t]he personnel manual's language that it is provided for 'guidance' as to the defendant's 'policies'" is some indication "that any 'offer' made by the defendant in distributing the manual was illusory"). Indeed, the authority admits the incentive program was intended to encourage employees **[***14]** to decline the use of sick time that they might otherwise be eligible to use. Additionally, the authority's explicit promises to make future cash and medical payments conditioned on employees' remaining with the authority for at least ten years was an inducement for LeMaitre **[*641]** to stay with the authority for financial reasons, "a course of action [he] . . . might not otherwise have taken." *Graphic Arts Finishers, Inc. v. Boston Redev. Authy., 357 Mass. at 43*. In the circumstances, such conduct by the authority created the reasonable expectation in its employees, including LeMaitre, that the authority would adhere to the terms of each version of the incentive program stated in the personnel manuals with respect to sick time earned and accrued during each successive period.

Moreover, had the authority intended to make no legally binding promises, it should have included in the personnel manuals "in a very prominent position . . . an appropriate statement that there is no promise of any kind by the employer contained in the manual; that regardless of what the manual says or provides, the **[**894]** employer promises nothing . . . ." *Ferguson v. Host Intl., Inc., 53 Mass. App. Ct. at 103*, quoting from **[***15]** *Woolley v. Hoffmann-La Roche, Inc., 99 N.J. at 309*. None of the materials in the record before us contains any language that comes close to satisfying this requirement.

> "It would be unfair to allow an employer to distribute a policy manual that makes the workforce believe that certain promises have been made and then to allow the employer to renege on those promises. What is sought here is basic honesty: if the employer, for whatever reason, does not want the manual to be capable of being construed by the court as a binding contract, there are simple ways to attain that goal." [11]

Ferguson, supra, quoting from *Woolley, supra.*

11 Although the authority claims that its use and placement of the single word "supersedes" in the upper right-hand corner of the first page of each bulletin accomplished this goal, we conclude otherwise. On its face, it does nothing more than announce a change from the previous bulletin. At best, the word "supersede" is ambiguous, and must be construed against the authority as the drafter. See *Electronic Data Sys. Corp. v. Attorney Gen., 440 Mass. 1020, 1021, 798 N.E.2d 273 (2003)*. Moreover, a single word buried in the top corner of one page contained in multi-page bulletins conveys **[***16]** no strong statement indicating that the authority makes "no promise of any kind" in the incentive program. Compare *Ferguson v. Host Intl., Inc., 53 Mass. App. Ct. at 99 n.5, 101, 103* (text hidden in obscure section of personnel manual providing that the employer "reserves its rights to modify, change, disregard, suspend or cancel at any time without written or verbal notice all or any part of the [manual's] contents" was "functional equivalent of fine print" and thus insufficient to make terms in manual illusory or unenforceable).

Last, even if we were to find some merit in the authority's argument concerning the inclusion of the word "supersede," the record shows that it is missing from the October 1, 1996, policy directive, which announced, for the first time since LeMaitre began his employment there, new incentive program terms that proved to be comparatively less lucrative than previous ones.

[*642] b. *LeMaitre's acceptance of the offer and accrual of benefits under the incentive program.* Having concluded that each version of the authority's incentive program constituted a new binding offer that LeMaitre could reasonably conclude was "a statement of the conditions under which [his] employment **[***17]** would continue," *O'Brien v. New England Tel. & Tel. Co., supra at 693*, we take the view, as discussed more fully below, that the authority's offer was not, as the authority urges, a mere gratuity, but rather a form of employee compensation contingent on continued employment and services rendered while the provisions were in effect. See, e.g., *Attorney Gen. v. Woburn, 317 Mass. 465, 467-468, 58 N.E.2d 746 (1945)*, and cases cited (when an offer of a bonus to an employee is made as a means "to secure continuous service from an employee, to enhance his efficiency and to augment his loyalty to his employer," it resembles more of a legally binding offer to pay a wage rather than a promise of a gift or gratuity). See also *Averell v. Newburyport, 241 Mass. 333, 335, 135 N.E. 463 (1922)* (school committee's decision to expand provision of paid sick leave to teachers was "on same footing as an increase of salary," and was regarded as "an additional incentive to superior work," "not a mere gratuity"); *Fitchburg Teachers Assn. v. School Comm. of Fitchburg, 360 Mass. 105, 106-107, 271 N.E.2d 646 (1971)* (bonus for unused sick leave not a gratuity but part of over-all bargained-for package of services and benefits).

At all relevant times, each **[***18]** version of the incentive program offered a specified future economic reward in exchange for an **[**895]** employee's good attendance. Indeed, the explicit purpose, as stated in the personnel manuals, was to "encourage employees to use their sick leave credit only when absolutely necessary, and . . . reward employees who have unusually good attendance records." Of necessity, however, good attendance requires continued employment, and implicit in the program's generous terms and ten-year service requirement is an intent to attract qualified applicants and to induce employees to remain with the **[*643]** authority over an extended period. Thus, in the circumstances here, the authority's offer to make payment at a future date is not an offer of a mere gratuity that could be retracted capriciously. Rather, it became part of LeMaitre's implied employment contract governing his over-all compensation. [12]

12 *Glynn v. Clerk of the Superior Ct. for Criminal Business in Suffolk County, 404 Mass. 1002, 533 N.E.2d 1025 (1989)*, is not to the contrary. There, unlike here, without the protection of either a statute or proof of an enforceable contract, the employee could not establish that he "had a reasonable expectation in the circumstances **[***19]** shown on the record that . . . future benefits [under a prior sick leave policy] were guaranteed." *Id. at 1003*, citing *Foley v. Springfield, 328 Mass. 59, 61, 102 N.E.2d 89 (1951)*, and *McCarthy v. Sheriff of Suffolk County, 366 Mass. 779, 782, 784, 322 N.E.2d 758 (1975)*.

We therefore agree with the motion judge that where it is undisputed that LeMaitre, in reliance on the promises of future payment for his accrued, unused sick leave, completed the requisite ten years of service, exhibited an exemplary attendance record over a career with the authority that spanned nearly three decades, and otherwise complied with the terms and conditions called for under each version of the incentive program, his performance constituted a valid acceptance of the authority's successive offers, thus meeting all the requirements for the formation of a binding unilateral contract in each instance. [13] See *O'Brien v. New England Tel. & Tel. Co., 422 Mass. at 693*, citing *Pine River State Bank v. Mettille, 333 N.W.2d at 626-627*. See also *Zampatella v. Thomson-Crooker Shoe Co., 249 Mass. 37, 39, 144 N.E. 82 (1924)* (offer of bonus on percentage of yearly wages was sufficiently definite to ripen into legally enforceable contract once the employee continued **[***20]** in the defendant's employment relying on the defendant's promise); *Attorney Gen. v. Woburn, 317 Mass. at 467* ("employee's acceptance of the offer [of a salary bonus] by performing the things called for by the offer binds the employer to pay the bonus"); *Balkin v. Frank M. Katz, Inc., 373 Mass. 419, 421-422, 367 N.E.2d 628 (1977)* (upon a showing at **[*644]** trial that employee continued employment in reliance on employer's promise of a pension, evidence would be sufficient to demonstrate that the promise was a binding obligation; employee's reliance would constitute sufficient consideration to warrant a conclusion that a contract to pay a pension had been formed); *Pine River State Bank v. Mettille, 333 N.W.2d at 629* ("[h]andbook provisions relating to such matters as bonuses, severance pay and commission rates are enforced without the need for additional, new consideration beyond the services to be performed").

13 Retirement was therefore not a condition precedent to each offer's ripening into an enforceable contract, as the authority suggests. Rather, retirement was merely the event that triggered the authority's time to perform under each legally binding agreement. Moreover, our conclusion that the authority **[***21]** failed to indicate that any policy changes were to have retroactive effect, see note 11, *supra,* also disposes of the authority's argument that LeMaitre forfeited any rights he may have had by continuing on the job after changes were made to the incentive program.

[896]** 3. *Calculation of damages on remand.* As previously noted, see note 8, *supra,* LeMaitre's damages award pursuant to the cash payment provision did not reflect the judge's findings. Additionally, both parties acknowledge on appeal that the calculation of the amount awarded to LeMaitre under the medical coverage provision was in error. See, e.g., note 6, *supra.* Consequently, the matter must be remanded for the judge's recalculation of damages.

4. *Conclusion.* As to count I, alleging breach of contract, there was no error in the denial of the authority's motion for summary judgment and the allowance of LeMaitre's motion therefor. The judgment as to count I is vacated, and the matter is remanded solely for a determination of damages owed LeMaitre consistent with this opinion. LeMaitre's request for costs is allowed. See *Mass.R.A.P. 26(a)*, as amended, 378 Mass. 925 (1979).

So ordered.

MASSACHUSETTS BAY TRANSPORTATION AUTHORITY vs. MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION & another. [1]

1 David Marquez.

SJC-09893

SUPREME JUDICIAL COURT OF MASSACHUSETTS

450 Mass. 327; 879 N.E.2d 36; 2008 Mass. LEXIS 4; 102 Fair Empl. Prac. Cas. (BNA) 649

October 4, 2007, Argued
January 4, 2008, Decided

PRIOR HISTORY: [*1]**

Suffolk. Civil action commenced in the Superior Court Department on January 20, 2004. The case was heard by Geraldine S. Hines, J., on a motion for judgment on the pleadings. The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

DISPOSITION: Judgment affirmed.

COUNSEL: Mark W. Batten for the plaintiff.

Gerald E. Katz for David Marquez.

Beverly I. Ward for Massachusetts Commission Against Discrimination.

The following submitted briefs for amici curiae: Todd R. McFarland, of Maryland, Charles M. Kester, of Arkansas, & Charles J. Eusey for General Conference of Seventh-Day Adventists.

Rebecca Pontikes & Patricia A. Washienko for Jewish Alliance for Law and Social Action & others.

Douglas Taylor, of Virginia, & John F. McMahon for Local 589 of the Amalgamated Transit Union.

Mary T. Sullivan & Donald J. Siegel for Massachusetts AFL-CIO.

JUDGES: Present: Marshall, C.J., Greaney, Ireland, Spina, Cowin, Cordy, & Botsford, JJ.

OPINION BY: CORDY

OPINION

[*328] [39]** CORDY, J. The Massachusetts Bay Transportation Authority (MBTA) appeals from a judgment of the Superior Court affirming a determination of the Massachusetts Commission Against Discrimination (MCAD) that the MBTA discriminated against a prospective employee, David **[***2]** Marquez, in violation of *G. L. c. 151B, § 4 (1A)*. [2] More specifically, the MCAD determined that the MBTA failed reasonably to accommodate Marquez's religious obligations when it refused to hire him as a part-time bus driver due to his need for time off to observe his Sabbath (Friday at sundown until Saturday at sundown). The principal **[*329]** basis for its determination was the failure of the MBTA to meet its statutory burden either to provide a reasonable accommodation for Marquez's sincerely held religious beliefs or to demonstrate that any accommodation that the MBTA could have made would have posed an "undue hardship" on its operations. This failure of proof, in turn, the MCAD concluded, was largely the product of the MBTA's failure to take any steps whatsoever to ascertain whether an accommodation was possible at the time, and evidence from MBTA employees suggesting the existence of a number of possibilities that went unexplored. We transferred the case to this court on our own motion.

2 The statute provides, in relevant part:

> "It shall be unlawful discriminatory practice for an employer to impose upon an individual as a condition of obtaining or retaining employment any terms or conditions, **[***3]** compliance with which would require such individual to violate, or forego the practice of, his creed or religion as required by that creed or religion including but not limited to the observance of any particular day . . . as a sabbath or holy day and the employer shall make reasonable accommodation to the religious needs of such

individual. No individual who has given notice . . . shall be required to remain at his place of employment during any day . . . that, as a requirement of his religion, he observes as his sabbath or other holy day, including a reasonable time prior and subsequent thereto for travel between his place of employment and his home . . . ." *G. L. c. 151B, § 4 (1A).*

In its appeal, the MBTA presents three grounds on which it claims that the MCAD decision should be reversed: (1) requiring the MBTA to give Marquez Friday evenings off would have posed an undue hardship pursuant to *G. L. c. 151B, § 4 (1A)*, or, alternatively would violate the *establishment clause of the First Amendment to the United States Constitution* [3], [4]; (2) requiring **[**40]** the MBTA to engage Marquez in an interactive process for the purpose of identifying possible accommodation would likewise pose an undue **[***4]** hardship on the MBTA; and (3) the relief granted by the MCAD exceeded its authority. We affirm the **[*330]** Superior Court judgment, but not on all the grounds relied on by the judge. [5]

3 *General Laws c. 151B, § 4 (1A)*, requires employers to make reasonable accommodation to the sincerely held religious beliefs of employees. The statute defines "[r]easonable accommodation" as "such accommodation to an employee's or prospective employee's religious observance or practice as shall not cause undue hardship in the conduct of the employer's business." The statute further provides examples of what will be considered undue hardship:

> "Undue hardship, as used herein, shall include the inability of an employer to provide services which are required by and in compliance with all federal and state laws, including regulations or tariffs promulgated or required by any regulatory agency having jurisdiction over such services or where the health or safety of the public would be unduly compromised by the absence of such employee or employees, or where the employee's presence is indispensable to the orderly transaction of business and his or her work cannot be performed by another employee of substantially similar **[***5]** qualifications during the period of absence, or where the employee's presence is needed to alleviate an emergency situation. The employer shall have the burden of proof to show undue hardship."

4 The *establishment clause of the First Amendment to the United States Constitution* reads, "Congress shall make no law respecting an establishment of religion . . . .."

5 We acknowledge the amicus briefs of the Massachusetts AFL-CIO; Local Chapter 589 of the Amalgamated Transit Union; the Jewish Alliance for Law and Social Action, the National Employment Lawyers Association, and the National Lawyers Guild; and the General Council of Seventh-Day Adventists.

1. *Facts.* The following material facts are not in dispute. Marquez is a practicing Seventh-Day Adventist, who serves as a deacon of his church in Cambridge. Consistent with the tenets of his religion, Marquez does not work on the Sabbath, which extends from sundown each Friday night to sundown each Saturday night. According to Marquez's beliefs, he could be in transit home after sunset on Friday. He could not, however, work after sunset. He spends each Friday evening at home with his family, sharing Sabbath dinner, and spends each Saturday at his **[***6]** church. Former employers accommodated his religious obligations by allowing him to work on Sunday.

In April, 1997, Marquez applied for a job with the MBTA. Throughout the application process, Marquez informed MBTA representatives that he was not able to work from sundown on Friday to sundown on Saturday. In May, Marquez passed a written examination to become a part-time streetcar operator, and on June 12, 1997, he was given a conditional offer of employment. That offer was contingent on the outcome of a criminal records check, a physical examination, and a drug screening test.

On August 7, 1997, while his background checks were ongoing, Marquez expressed an interest in applying for the position of part-time bus operator. The manager of human resources for the MBTA informed Marquez that he would need a commercial driver's license in order to become a bus operator. Shortly thereafter, Marquez obtained his commercial driver's license. By late August,

1997, he had passed the preliminary screening, testing, and interview process. His physical examination, drug screening, and criminal records check all were unproblematic, and he was cleared for hiring.

Marquez received his assignment to begin [***7] bus driver training on September 2, 1997. The training was scheduled to run from Tuesday through Saturday, which conflicted with Marquez's observation of the Sabbath. Marquez notified an MBTA human [*331] resources representative of the conflict, who told him that she would "look into the issue."

Other than that one Saturday of training, working on Saturdays did not present any problem, as part-time bus operators work Monday through Friday, for a morning rush hour shift and then an evening rush hour shift each day. Friday evenings, then, became the point of conflict between Marquez's Sabbath obligations and the requirements of his job.

In early September, 1997, the MBTA notified Marquez that it could not grant his request to refrain from working on Friday evenings because of his religious beliefs and, therefore, would not extend an offer of employment. The parties agree [**41] that but for Marquez's scheduling needs, he was qualified for the position of part-time bus operator. It is also undisputed that the MBTA never discussed with Marquez any possible accommodation.

In the wake of the MBTA's decision, Marquez suffered significant emotional distress. He felt that he was put in a position where he [***8] had to choose between his religion and his ability to work, and his choice made him question his faith. He took a hiatus from serving as a deacon in his church because he felt that he was an inadequate advocate for his religion. Marquez's relationship with his wife began to deteriorate, and he began to drink and smoke cigarettes, in violation of his religious obligations. Only after a period of one and one-half years was he able fully to reembrace his religion.

2. *Procedural history.* On September 9, 1997, Marquez filed a charge of discrimination against the MBTA with the MCAD. He alleged that the MBTA discriminated against him on the basis of his religion by refusing to accommodate his religious observance of the Sabbath, in violation of *G. L. c. 151B, § 4 (1A)*. The MCAD found probable cause to credit Marquez's allegations and certified the case for a public hearing.

A commissioner conducted a hearing on August 1 and 2, 2001. There was testimony from the manager of the human resources department at the MBTA that in 1997 the MBTA did not have a written policy regarding religious accommodation, but that the standard operating procedure was to ask for documentation supporting the request [***9] (which Marquez had provided), and to consult the legal department, the hiring department, the equal employment [*332] opportunity department, and the human resources department of the MBTA about potential accommodations. This process of consultation would include weighing factors such as the position the applicant was seeking and the impact any accommodation would have on operational needs, all of which would yield "some tangible evidence or documentation to support [the MBTA's] decision." There was, however, no evidence of any kind, written or oral, offered by the MBTA to establish that it engaged in such a process in response to the request made by Marquez.

The MBTA's chief transportation officer of bus operations testified at the MCAD hearing regarding the MBTA's methods of covering for its many scheduled and unexpected employee absences. When there are sufficient drivers, he testified, the MBTA will use its "cover" list to fill in with relief drivers for any absent ones. [6] If possible, the MBTA will also facilitate voluntary swaps among drivers to limit preventable absences. Although there was at the time a policy forbidding full-time drivers from swapping with part-time drivers, it was [***10] a "loose[ly]" enforced policy, and approximately thirty full-time drivers (who would have worked out of the same garage as Marquez) [7] worked on Sundays and not on Fridays, and would have been in a [**42] position to swap shifts with Marquez if they chose to do so. There was also testimony that, if necessary, the MBTA would pay other operators overtime to cover for an unmanned route, or even leave the vacant shift uncovered. There was no evidence that any of these methods for covering employee absences was considered by the MBTA in response to Marquez's request for accommodation.

6 The MBTA "cover" list is comprised of drivers who are assigned "to the list" rather than to a regular route. Drivers assigned "to the list," called "relief" drivers, are assigned on a short-term basis to cover shifts left vacant by drivers who have scheduled or unexpected absences because of illness, jury duty, suspension, or vacation. The chief transportation officer testified that there was no "cover" list for part-time bus drivers in the fall of 1997 because of a worker shortage. The MCAD concluded that such a system for part-time drivers was insufficiently explored as a potential accommodation for Marquez.

7 Drivers [***11] who worked out of the same garage would have been trained on and been familiar with all of the bus routes operated from that location.

After the hearing, the commissioner issued a written decision, including detailed findings of fact and conclusions of law. The [*333] commissioner found that there were a number of possible means by which Marquez's religious beliefs could have been accommodated, including coverage by relief drivers (over which management retained a measure of discretion), or through the use of overtime workers, or by leaving the Friday evening shift uncovered, or by allowing voluntary swaps between part-time and full-time drivers. Notwithstanding these possible accommodations, the MBTA offered no evidence to show that it explored any of them, but had concluded, without investigation, that an accommodation of Marquez's beliefs was not feasible. Consequently, the hearing commissioner found, the MBTA had "refused to even attempt a good faith effort to accommodate Complainant" and did not meet its burden of proving undue hardship pursuant to *G. L. c. 151B, § 4 (1A)*. The commissioner awarded Marquez $ 50,000 for emotional distress and ordered the MBTA to hire Marquez for the position [***12] for which he was qualified in 1997, if Marquez still desired to pursue it.

The MBTA appealed from the commissioner's decision to the full commission. The MBTA did not contest that Marquez was qualified to be a part-time bus operator or the commissioner's finding that, despite a loose policy to the contrary, voluntary swaps between part-time bus operators and full-time operators happened frequently. Instead, the MBTA claimed that any accommodation that would have allowed Marquez to leave his bus route early every Friday evening would have caused undue hardship. Therefore, the MBTA contended, it did not need to engage Marquez in an interactive process to ascertain his religious obligations more fully and whether they could be reasonably accommodated. Indeed, the MBTA asserted that requiring such a process would itself be an undue hardship.

The full commission affirmed the commissioner's findings and order of relief, similarly concluding that the MBTA had not sufficiently demonstrated that accommodating Marquez's religious beliefs would cause it an undue hardship. The MCAD also went further, interpreting the reasonable accommodation language of *G. L. c. 151B, § 4 (1A)*, to require that an [***13] employer engage in an interactive process with its employee once the employer is notified of an employee's conflicting religious obligation, and concluding that the MBTA's failure to engage in [*334] such a process with Marquez was itself a separate violation of the statute. As the MCAD found, "the reasonable accommodation language . . . give[s] rise to a concomitant obligation on the part of an employer to engage in a meaningful dialogue with an employee in order to investigate fully whether a particular accommodation can be made." The MCAD affirmed the relief granted by the commissioner and awarded $ 53,550 in attorney's fees to Marquez.

Pursuant to *G. L. c. 30A, § 14*, the MBTA appealed from the MCAD's decision to the Superior Court. A Superior Court judge affirmed the decision of the MCAD, concluding that the MBTA had failed to demonstrate that the possibility of reasonably accommodating Marquez was foreclosed. Modes of accommodation, [**43] the judge observed, such as voluntary swaps and the use of relief drivers, may have been available to accommodate Marquez, and the MBTA failed to show that those options would have constituted an undue hardship. The judge noted that no MBTA official consulted [***14] with union officials regarding any possible accommodations (shift selections and swaps), and no employees were consulted regarding their willingness to swap shifts with Marquez. Additionally, the judge found that the payment of overtime to an employee to cover Marquez's Friday evening shift would not impose an undue hardship on the MBTA, but that requiring the MBTA to leave a shift uncovered as an accommodation to Marquez's schedule would impose such a hardship. The judge found ample evidence to support the MCAD's finding that the MBTA should have conducted an interactive individualized inquiry seeking to accommodate Marquez, and that such an inquiry is required unless a reasonable accommodation clearly is impossible, which was not the case here. Last, the judge found that the relief ordered by the MCAD, including the award of attorney's fees, was within the commission's discretion.

3. *Discussion.* We will affirm a decision and order of the MCAD unless its findings and conclusions are unsupported by substantial evidence or are based on error of law. See *G. L. c. 151B, § 6*; *G. L. c. 30A, § 14 (7)*; *School Comm. of Brockton v. Massachusetts Comm'n Against Discrimination, 423 Mass. 7, 11, 666 N.E.2d 468 (1996)*; [***15] *New York & Mass. Motor Serv., Inc. v. Massachusetts* [*335] *Comm'n Against Discrimination, 401 Mass. 566, 572, 517 N.E.2d 1270 (1988)*.

We begin by noting that the commissioner's findings (adopted by MCAD) that Marquez established a prima facie case of religious discrimination in violation of *G. L. c. 151B, § 4 (1A)*, [8] and that the MBTA failed to take any steps to accommodate him or even to investigate whether any of a number of potential accommodations was possible without incurring undue hardship, are amply supported in the record. [9]

8 Under *G. L. c. 151B, § 4 (1A)*, a complainant must demonstrate that an employer required an

employee to violate a religious practice required by the employee's sincerely held belief as a condition of employment, and that the employee provided the employer with at least ten days' notice of the employee's scheduling needs. *New York & Mass. Motor Serv., Inc. v. Massachusetts Comm'n Against Discrimination, 401 Mass. 566, 575-576 (1988)*; *Cloutier v. Costco Wholesale Corp., 390 F.3d 126, 138 (1st Cir. 2004)*, cert. denied, *545 U.S. 1131, 125 S. Ct. 2940, 162 L. Ed. 2d 873 (2005)*. As discussed at length, see part 3, *infra*, the burden then rests with the employer to demonstrate that the employee was reasonably accommodated, **[***16]** or that reasonable accommodation would have posed an undue hardship. See *G. L. c. 151B, § 4 (1A)*; *New York & Mass. Motor Serv., Inc. v. Massachusetts Comm'n Against Discrimination, supra; Cloutier v. Costco Wholesale Corp., supra.*

9 For example, when Marquez inquired through interrogatories whether the possibility of facilitating swaps between drivers had been explored, the MBTA flatly replied, "No," without further elaboration. Similarly, although the MBTA now contends that its managerial discretion on shift assignments and swaps was cabined by its collective bargaining agreement with the union, the MBTA answered, "No," when Marquez inquired whether the MBTA had consulted with the union regarding possible accommodation.

We now turn to the MBTA's two central assertions of error. First, the MBTA asserts that the MCAD's conclusion that it failed to prove that any possible accommodation would have been undue hardship was incorrect as a matter of law. Second, the MBTA asserts that any accommodation of Marquez would have imposed more **[**44]** than a de minimis cost on it in violation of the *establishment clause.*

In applying *G. L. c. 151B, § 4 (1A)*, the MCAD and the Superior Court judge properly looked **[***17]** to the familiar three-part inquiry that is applied when religious discrimination is alleged. *New York & Mass. Motor Serv., Inc. v. Massachusetts Comm'n Against Discrimination, supra at 575-576.* [10] Initially, the employee bears the burden of proving that the employer required **[*336]** him to violate a religious practice compelled by his sincerely held belief. *Id.* See *Cloutier v. Costco Wholesale Corp., 390 F.3d 126, 137 (1st Cir. 2004)*, cert. denied, *545 U.S. 1131, 125 S. Ct. 2940, 162 L. Ed. 2d 873 (2005)* (applying same analysis in context of amended statute). The employee must also demonstrate that he provided his employer with the required advance notice of his religious obligation (ten days). *G. L. c. 151B, § 4 (1A)*. Once the employee establishes these prerequisites, the burden shifts to the employer either to accommodate the complainant or "to prove that accommodation of the complainant's religious obligations would impose on the employer an undue hardship as defined by the statute." *New York & Mass. Motor Serv., Inc. v. Massachusetts Comm'n Against Discrimination, supra at 576.* In determining whether this burden has been met, the MCAD must focus on the particular nature and operations of the employer's business. *Id.* Additionally, **[***18]** the MCAD must inquire "whether the employer could have exercised its managerial discretion in such a way that the employee's religious obligations could have been reasonably accommodated." *Id.*

10 This three-step analysis was set forth in *New York & Mass. Motor Serv., Inc. v. Massachusetts Comm'n Against Discrimination, supra at 575-576*, which was decided in 1988. The Massachusetts antidiscrimination statute was revised in 1997, in the wake of this court's holding in *Pielech v. Massasoit Greyhound, Inc., 423 Mass. 534, 668 N.E.2d 1298 (1996)*, cert. denied, *520 U.S. 1131, 117 S. Ct. 1280, 137 L. Ed. 2d 356 (1977).*

That revision changed the scope of those protected by *G. L. c. 151B, § 4 (1A)*, but not the extent of the protection it afforded. Claims of religious discrimination by an employee continue to be evaluated under the same three-part inquiry. **[**45]** *Cloutier v. Costco Wholesale Corp., supra.*

The burden here, then, is on the MBTA to demonstrate that any possible accommodation of Marquez's religious beliefs would have constituted an undue hardship in the context of its operations. An employer's mere contention that it could not reasonably accommodate an employee is insufficient, *G. L. c. 151B, § 4 (1A)*; *New York & Mass. Motor Serv., Inc. v. Massachusetts Comm'n Against Discrimination, supra*, **[***19]** as is its mere speculation. See *Brown v. General Motors Corp., 601 F.2d 956, 960 (8th Cir. 1979)* (under parallel protections of *Title VII of Civil Rights Act of 1964*, "employer stands on weak ground when advancing hypothetical hardships in a factual vacuum").

The statute offers four express examples of undue hardship. **[*337]** *G. L. c. 151B, § 4 (1A)*. The term includes the "inability of an employer to provide services which are required by . . . federal and state laws." If the employee's absence would "unduly compromise[]" public health or safety, then accommodation is unreasonable. Similarly, an employer is not required to accommodate the absence of an irreplaceable employee

"where [that] employee's presence is indispensable to the orderly transaction of business." Last, if the employee's presence is "needed to alleviate an emergency situation," his absence will be considered undue hardship. The list of examples is not exhaustive. *Cloutier v. Costco Wholesale Corp., supra at 138.* Rather, it illustrates the types of accommodation that constitute excessive interference with an employer's business affairs under the statute. *Id.*

The term "undue hardship" is the same term used in Title VII of the **[***20]** Civil Rights Act of 1964 regarding Federal protections from religious discrimination. *42 U.S.C. §§ 2000e(j), 2000e-2(a)(1) (2006).* The United States Supreme Court has interpreted the inclusion of the "undue hardship" provision in Title VII to mean that an employer may not be required to bear more than a de minimis cost to accommodate the religious beliefs of an employee. *Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84, 97 S. Ct. 2264, 53 L. Ed. 2d 113 (1977).* [11] Although the Massachusetts undue hardship standard in *G. L. c. 151* is "notably different" and allows for slightly broader religious protection, the two share substantial common ground. *Pielech v. Massasoit Greyhound, Inc., 441 Mass. 188, 196, 804 N.E.2d 894 (2004)* (comparing scope of Title VII **[*338]** and *G. L. c. 151B, § 4 [1A]*). In that vein, we consider Federal case law construing Title VII in interpreting *G. L. c. 151B, § 4 (1A).* See, e.g., *Wheatley v. American Tel. & Tel. Co., 418 Mass. 394, 397, 636 N.E.2d 265 (1994)* ("It is our practice to apply Federal case law construing the Federal anti-discrimination statutes in interpreting *G. L. c. 151B*").

11 The United States Supreme Court did not hold that its reading of the undue hardship provision of Title VII in *Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84-85, 97 S. Ct. 2264, 53 L. Ed. 2d 113 (1977),* **[***21]** was constitutionally required. Its holding was a matter of statutory interpretation. *Id. at 85* ("In the absence of clear statutory language or legislative history to the contrary, we will not readily construe the statute to require an employer to discriminate against some employees in order to enable others to observe their Sabbath"). See *Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60, 67, 107 S. Ct. 367, 93 L. Ed. 2d 305 (1986)* (Court's statutory interpretation of Title VII in its *Hardison* decision).

The Court did, however, suggest that certain accommodations could run afoul of the *establishment clause.* For example, the Court held that "to require TWA to bear [more than de minimis] additional costs when no such costs are incurred to give other employees the days off that they want would involve unequal treatment of employees on the basis of their religion." *Trans World Airlines, Inc. v. Hardison, supra at 84.* The Court ultimately concluded that such disparate treatment was not what Title VII contemplated.

With State and Federal precedents in mind, we agree with the Superior Court judge that the MBTA cannot be forced to accommodate Marquez by leaving his shift uncovered. That decision must be left to the MBTA, and the **[***22]** statute does not require otherwise. *G. L. c. 151B, § 4 (1A)* ("Undue hardship, as used herein, shall include . . . where the employee's presence is indispensable to the orderly transaction of business and his or her work cannot be performed by another employee of substantially similar qualifications during the period of absence"). We also agree with the MBTA that it need not accommodate Marquez by paying a replacement operator overtime to cover his shift each week, see *Trans World Airlines, Inc. v. Hardison, supra at 84* (Title VII does not require employer to pay premium wages to cover for absent employee because that accommodation is unreasonable and constitutes undue burden), and that *G. L. c. 151B, § 4 (1A),* cannot be read to require employees to swap shifts involuntarily. See *id.* (Title VII does not so require). However, at the MCAD hearing, the MBTA failed to demonstrate that these were the only methods of accommodation available. We therefore turn to the question of voluntary shift swaps as a means of accommodation.

The MBTA now asserts that its voluntary swap policy could not have guaranteed **[**46]** Marquez a weekly accommodation, ultimately because that policy prevented part-time operators **[***23]** from swapping shifts with full-time operators. Yet, the evidence was that this policy was not official, and that such swaps were frequently allowed. As this court held in *New York & Mass. Motor Serv., Inc. v. Massachusetts Comm'n Against Discrimination, supra at 578,* an employer cannot meet its burden pursuant to *G. L. c. 151B, § 4 (1A),* by casting a selectively enforced swap policy as a roadblock to accommodation. In that case, the employer purported to enforce a one-man-off vacation policy, but the evidence was that the policy was applied selectively. *Id.* **[*339]** *at 571-572.* When the employee requested time off to observe his holy days, the employer contended that such an accommodation was not possible, because of its seniority system and its one-man-off vacation policy. *Id. at 578.* This court concluded that because that policy was selectively enforced, the employer could have exercised its managerial discretion with de minimis cost and effort to accommodate the complainant. *Id. at 578.* Similarly, here the swap policy was "loose" and subject to frequent exception, and the

MBTA failed to demonstrate that it could not have exercised its managerial discretion to allow Marquez to swap with full-time **[***24]** drivers without incurring more than de minimis cost. Moreover, where the MBTA failed even to explore this possible accommodation, its claim of undue hardship rests, unpersuasively, in a factual vacuum [12]

12 The MBTA attempts to distinguish *New York & Mass. Motor Serv., Inc. v. Massachusetts Comm'n Against Discrimination, supra at 578*, by contending that because MBTA employees are unionized, it lacks such managerial discretion.

The MBTA asserts that its collective bargaining agreement with Local 589 of the Amalgamated Transit Union (Local 589) established an inflexible seniority system for the assignment of shifts. The MBTA contends that this system, in turn, limited the MBTA's managerial discretion, which prevented it from being able to accommodate Marquez. Yet, as the amicus briefs of both Local 589 and the Massachusetts AFL-CIO point out, there were no seniority provisions in the collective bargaining agreement that would have prevented the MBTA from taking Marquez's Sabbath observance into account when scheduling in 1997. The record includes articles of agreement between Local 589 and the MBTA signed on March 27, 1997, which do not include seniority provisions. It also includes a **[***25]** memorandum of understanding between the parties, signed on March 10, 2000. That memorandum does address the details of selecting work by seniority, but it is unclear when the parties contractually agreed to that system. According to Local 589, the work selection language was unenforceable until specific implementation language was signed in March, 2001. Any confusion on this point is the product of the MBTA's failure to investigate possible accommodations pursuant to *G. L. c. 151B, § 4 (1A)*. Had the MBTA consulted with union representatives in 1997, which it admittedly did not, the issue whether the collective bargaining agreement precluded various possible accommodations for Marquez likely would have been addressed and resolved.

In the absence of evidence demonstrating a contractual bar to voluntary employee swaps, or other interference with employer operations, requiring an employer to facilitate such swaps as a means of accommodating the religious observances of its employees will not be considered undue hardship. *General Laws c. 151B, § 4 (1A)*, **[*340]** clearly contemplates that employers will help employees shuffle shifts to allow observance of their Sabbath. Indeed, the only specific religious **[***26]** observance mentioned by the statute is the observance of the Sabbath, *G. L. c. 151B, § 4 (1A)*, [13] **[**47]** and voluntary shifts swaps are one of the most straightforward, and least costly, ways to ensure compliance with the statute's requirements. See *Beadle v. Hillsborough County Sheriff's Dep't, 29 F.3d 589, 593 (11th Cir. 1994)*, cert. denied, *514 U.S. 1128, 115 S. Ct. 2001, 131 L. Ed. 2d 1002 (1995)* (employer reasonably accommodated employee under Title VII by providing him with employee roster sheet that included all coworkers' schedules, and allowing him to advertise his need for shift swaps during daily roll calls and on department bulletin board). While it is possible, as the MBTA contends, that voluntary swap arrangements covering Marquez's shift every Friday evening were unlikely, had the MBTA actually investigated the possibility, its assertions would carry substantially more weight. *Brown v. General Motors Corp., 601 F.2d 956, 961 (8th Cir. 1979)*. The MBTA's blanket assertion that Marquez's demand for relief from the Friday evening shift were unreasonable is an insufficient substitute for that investigation. The MBTA failed to prove that the use of voluntary swaps to accommodate Marquez would impose an undue burden **[***27]** on its operations. [14]

13 The statute provides, in relevant part: "It shall be unlawful . . . for an employer to impose upon an individual as a condition of obtaining or retaining employment any terms or conditions, compliance with which would require such individual to violate, or forego the practice of, his creed or religion . . . including but not limited to *the observance of any particular day or days or any portion thereof as a sabbath or holy day . . .*" (emphasis added).

14 Pursuant to *G. L. c. 151B, § 4 (1A)*, like under Title VII, an employee's absolute refusal to work on the Sabbath, without more, does not preclude accommodation. *EEOC v. Ithaca Indus., 849 F.2d 116, 118 (4th. Cir)*, cert. denied, *488 U.S. 924, 109 S. Ct. 306, 102 L. Ed. 2d 325 (1988)* (Title VII "clearly anticipates that some employees will absolutely refuse to work on their Sabbath and that this firmly held religious belief requires some offer of accommodation by employers").

Because the MBTA failed to present evidence that it took any steps to accommodate, or even to investigate possible accommodations for Marquez, we need not address its claim that requiring an employer to incur more than de minimis cost to accommodate an employee violates the *establishment clause*. **[***28]** See **[*341]** *New York & Mass. Motor Serv., Inc. v. Massachusetts*

Comm'n Against Discrimination, supra at 577-579 (when employer has not demonstrated de minimis cost, this court need not consider whether imposition of more significant cost would violate *establishment clause*). [15]

> 15 The MBTA relies heavily on *Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84-85, 97 S. Ct. 2264, 53 L. Ed. 2d 113 (1977)*, in arguing that it cannot be obligated to incur more than a de minimis cost in accommodating Marquez. It is instructive to compare the accommodations attempted by the employer in that case with the lack of effort by the MBTA in the present one. *Id. at 77*. There, Trans World Airlines held several meetings with the employee in which it attempted to find a solution to the employee's problems. *Id.* The airline authorized a union steward to search for an employee who would swap shifts. *Id.* Finally, the airline attempted, without success, to find the employee another job with the company that would not conflict with his religious obligations. *Id.* The Supreme Court, therefore, held that Trans World Airlines had done "all that could reasonably be expected" within the bounds of its collective bargaining agreement. *Id.* The MBTA, by contrast, **[***29]** failed to demonstrate that it took any steps even to attempt to accommodate Marquez's religious obligations. As the hearing commissioner found, it is clear that the MBTA "refused to even attempt a good faith effort . . . or to assist [Marquez] in achieving his accommodation." That is plainly insufficient under *G. L. c. 151B, § 4 (1A)*, as it would be under its Federal counterpart. See, e.g., *EEOC v. Arlington Transit Mix, Inc., 957 F.2d 219, 222 (6th Cir. 1991)* (employer had obligation under Title VII to investigate voluntary shift swap before terminating employee).

Finally, the MBTA contends that requiring either an investigative or interactive **[**48]** process in this case would itself be an undue hardship. Such a reading of *G. L. c. 151B, § 4 (1A)*, would eviscerate religious protection in the workplace. If merely looking into an accommodation, or consulting with an employee about his requested accommodation, were to be considered too great an interference with an employer's business conduct, then employers would effectively be relieved of all obligation under *G. L. c. 151B, § 4 (1A). General Laws c. 151B, § 9*, mandates that "[t]his chapter shall be construed liberally for the accomplishment **[***30]** of its purposes . . . ." To read the statute as the MBTA urges would eviscerate this statutory objective.

We do not agree with the MCAD, however, that an employer's failure to engage in the interactive process is, in and of itself, a violation of *G. L. c. 151B, § 4 (1A)*, irrespective of whether a reasonable accommodation is possible. [16] Although the MCAD generally has the primary responsibility to determine the scope **[*342]** of *G. L. c. 151B, § 4 (1A)*, we note that the plain language of the statute requires only "reasonable accommodation." *G. L. c. 151B, § 4 (1A)*. See *Stonehill College v. Massachusetts Comm'n Against Discrimination, 441 Mass. 549, 563, 576, 808 N.E.2d 205 (2004)* (noting court's general deference to MCAD in determining scope of *G. L. c. 151B*, but also holding that commission's presumption of emotional distress damages in retaliation firings was improper). If an employer can demonstrate, for example, that a certain accommodation imposes an undue hardship, it would not be reasonable to require an interactive process each time that accommodation is sought.

> 16 The MCAD drew an analogy to handicap discrimination cases, which do require an employer to engage in the interactive process once an employee **[***31]** requests an accommodation, to require that same obligation in religious accommodation cases. See, e.g., *Ocean Spray Cranberries, Inc. v. Massachusetts Comm'n Against Discrimination, 441 Mass. 632, 648-649, 808 N.E.2d 257 (2004)*; MCAD Guidelines: Employment Discrimination on the Basis of Handicap § VII.B (1998) ("Once an employer is on notice that a qualified handicapped employee requires accommodation to perform the essential functions of his/her job, the employer should initiate an informal interactive process with the qualified individual in need of accommodation. This process should identify the precise limitation resulting from the handicap and potential reasonable accommodations that could overcome those limitations").

We therefore do not require an interactive process without exception. There is no obligation to undertake an interactive process if an employer can conclusively demonstrate that all conceivable accommodations would impose an undue hardship on the course of its business. See *Weber v. Roadway Express, Inc., 199 F.3d 270, 275 (5th Cir. 2000)*; *EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 615 (9th Cir. 1988)*, cert. denied, *489 U.S. 1077, 109 S. Ct. 1527, 103 L. Ed. 2d 832 (1989)* (employer is not required to engage in **[***32]** fruitless dialogue if it is absolutely clear no accommodation could be made without undue hardship). Such a demonstration, however, will often be difficult to make without the employer's having engaged in an interactive process with the employee and having made a good faith effort to explore the options that come out of such a process. The

MBTA has amply demonstrated this point in the case before us.

For this reason, we have encouraged an interactive process in other settings under *G. L. c. 151B*, even where we have declined to interpret a specific provision to make it mandatory. [17] For **[*343]** example, in the **[**49]** housing context (where landlords are required to make reasonable accommodations for handicapped tenants), we have not required landlords to engage in an interactive process in order to determine what a reasonable accommodation might be, *Andover Hous. Auth. v. Shkolnik, 443 Mass. 300, 308, 820 N.E.2d 815 (2005)*, [18] but have encouraged landlords to do so because "such a process is the optimal way for a landlord and tenant to explore the scope of the tenant's alleged handicap as well as the availability and feasibility of various accommodations." *Id. at 308-309*. That process is also the optimal way for an **[***33]** employer to meet its burden reasonably to accommodate the sincerely held beliefs of an employee or, alternatively, to show that the employee cannot be accommodated without undue hardship.

17 When a qualified handicapped employee requests accommodation pursuant to *G. L. c. 151B, § 4 (16)*, we have concluded that his employer is obligated to participate in the interactive process of determining one. *Ocean Spray Cranberries, Inc. v. Massachusetts Comm'n Against Discrimination, supra at 648-649*; *Russell v. Cooley Dickinson Hosp., Inc., 437 Mass. 443, 457, 772 N.E.2d 1054 (2002)*. With respect to handicap discrimination in the workplace, the MCAD guidelines provide that, once notified of an employee's handicap, the employer "should" engage in an interactive process to determine the "precise limitation resulting from the handicap" and "potential reasonable accommodations that could overcome those limitations." MCAD Guidelines: Employment Discrimination on the Basis of Handicap § VII.B (1998). "The guidelines represent the MCAD's interpretation of *G. L. c. 151B*, and are entitled to substantial deference, even though they do not carry the force of law." *Dahill v. Police Dep't of Boston, 434 Mass. 233, 239, 748 N.E.2d 956 (2001)*. **[***34]** The MCAD regulation addressing employment discrimination on the basis of religion do not include reference to an interactive process. *804 Code Mass. Regs. § 3.01(7)* (1995).

18 The MCAD regulation on housing accommodation for handicapped individuals does not reference an interactive process. *804 Code Mass. Regs. § 2.03* (1993).

4. *Relief.* The MBTA contends that the MCAD exceeded its discretion by ordering the MBTA to hire Marquez to the position for which he was qualified in 1997, and was required to limit its relief in this regard to requiring the MBTA to investigate whether an accommodation at the present time was possible without imposing an undue burden on its operations. We disagree.

When the MCAD finds an unlawful practice, it may "take such affirmative action, including but not limited to, *hiring,* reinstatement or upgrading of employees . . . as, in the judgment of the [MCAD], will effectuate the purposes of [*G. L. c. 151B*]" (emphasis added). *G. L. c. 151B, § 5*. See *New York* **[*344]** *& Mass. Motor Serv., Inc. v. Massachusetts Comm'n Against Discrimination, supra at 581-582 n.14* (formulation of damage awards under *G. L. c. 151B, § 5*, is within MCAD's discretion). Cf. *Stonehill College v. Massachusetts Comm'n Against Discrimination, supra at 570-576* **[***35]** (discussing MCAD's broad remedial powers, but holding that when those powers are used to award emotional damages, damages must be proved rather than assumed). MCAD decisions are subject to review pursuant to the standards set forth in *G. L. c. 30A, § 14 (7)*, and thus cannot be arbitrary, capricious, or against the weight of the evidence. The MCAD reasonably concluded that, five years after the alleged discrimination, the appropriate remedy was requiring the MBTA to hire Marquez rather than simply engage in an interactive and investigative process in an attempt to accommodate him. The MCAD may have logically concluded that the five-year litigation process sufficiently investigated the extent of Marquez's religious obligations, and the possible avenues of accommodation.

5. *Conclusion.* In sum, we affirm the judgment of the Superior Court affirming **[**50]** the MCAD's findings of fact and the relief granted. While the MCAD erred when it concluded that the MBTA had violated *G. L. c. 151B, § 4 (1A)*, by not engaging in an interactive process when Marquez sought a religious accommodation, the Superior Court judge correctly concluded that the MBTA made an insufficient showing of undue hardship.

Judgment **[***36]** *affirmed.*

KEVIN McCREA & others [1] vs. MICHAEL F. FLAHERTY & another. [2]

1 Shirley Kressel and Kathleen Devine.
2 City Council of Boston.

No. 07-P-224.

APPEALS COURT OF MASSACHUSETTS

71 Mass. App. Ct. 637; 885 N.E.2d 836; 2008 Mass. App. LEXIS 470

December 6, 2007, Argued
May 1, 2008, Decided

SUBSEQUENT HISTORY: As Corrected June 26, 2008.

PRIOR HISTORY: [*1]**

Suffolk. Civil action commenced in the Superior Court Department on May 6, 2005. The case was heard by Nancy Staffier-Holtz, J., on a motion for summary judgment.

COUNSEL: Rory FitzPatrick (William G. Potter with him) for the defendants.

Kathleen Devine, Pro se.

Shirley Kressel, Pro se, was present but did not argue.

JUDGES: Present: Cohen, Kafker, Grainger, JJ.

OPINION BY: GRAINGER

OPINION

[*638] [838]** GRAINGER, J. The city council of Boston (council) finds itself, not for the first time, on the losing end of a determination that it has improperly excluded the public from its deliberations. Specifically, the defendants, Michael Flaherty in his capacity as president of the council and the council itself, appeal the grant of summary judgment in favor of the plaintiffs, three residents of Boston who complained of multiple violations of the open meeting law, *G. L. c. 39, §§ 23A-23C*.

Background. The complaint, amended for reasons not germane here, alleged repeated violations of the open meeting law from 2003 through 2005. The plaintiffs asserted that on at least ten separate occasions the defendants met to discuss public issues falling within the council's supervision, control, jurisdiction or advisory power as set forth in *§ 23A* of the statute, **[***2]** but without providing public notice or public access to the meetings as required by *§ 23B*. [3] The plaintiffs alleged that six private meetings were held in violation of the statute between June 3, **[*639]** 2003, and the end of 2004 to deliberate on the subject of extending Boston's urban renewal plans as administered by the Boston Redevelopment Authority (BRA). Further, they alleged that on January 20, 2005, the council held a meeting to discuss a tularemia [4] outbreak at the Boston University biolaboratory, again excluding the public from its discussion of a matter of public import in violation of the open meeting law. Finally, the plaintiffs alleged that three more BRA-related meetings, on January 13, February 17, and March 24, 2005, violated **[**839]** the statute. In addition to their request for invalidation of the council's vote on December 15, 2004, approving the extension of the BRA urban renewal plans, see note 3, *supra*, the plaintiffs sought injunctive relief directing the council to comply with the statute, and their costs for bringing the action.

3 The complaint alleged that meetings in violation of the open meeting law occurred on the following dates: June 3, 2003; June 19, 2003; August 14, 2003; **[***3]** September 23, 2004; October 21, 2004; November 18, 2004; January 13, 2005; January 20, 2005; February 17, 2005; and March 24, 2005. Some of these meeting dates are listed in the body of the complaint while others are incorporated by attachments to the complaint.

In addition, the plaintiffs sought to invalidate a vote taken by the council at a public meeting on December 15, 2004, on the ground that the subject matter of the vote was discussed and decisions were made at the earlier meetings held in violation of the statute. The defendants filed a motion to dismiss, which a judge of the Superior Court granted in part, dismissing the plaintiffs' request for invalidation of the vote taken at the December 15 meeting, because the plaintiffs did not file their action within the twenty-one day time period mandated by *G. L. c. 39, § 23B*. The

plaintiffs have not appealed from that ruling. The legality of the December 15 meeting, however, remains an issue on appeal: the defendants appeal from the determination of a second judge on summary judgment that this meeting failed to cure any prior violations of the open meeting law, and that the December 15 meeting itself violated the statute. See discussion, **[***4]** *infra*, part 1(a).

4 Tularemia is an illness caused by the bacterium Francisella tularensis. *Allen v. Boston Redev. Authy., 450 Mass. 242, 252 n.18, 877 N.E.2d 904 (2007).*

At issue in this appeal is the ruling on the defendants' motion for summary judgment. The motion was premised on two theories: (1) that the meeting held on December 15, 2004 (see note 3, *supra*), was properly noticed and thus "cured" any prior lack of compliance in the previous six meetings, and (2) that the four meetings held after that date were not subject to the open meeting requirement, either because there was no quorum present, because they did not concern any matter over which the council had "supervision, control, jurisdiction or advisory power," or because, in the case of the three meetings concerning urban renewal, they were scheduled by the director of the BRA rather than by the council, and thus were not a "corporal convening . . . of a governmental body." *G. L. c. 39, § 23A*, inserted by St. 1975, c. 303, § 3.

The motion judge denied the defendants' motion and, moreover, rendered summary judgment for the plaintiffs. See Mass.R.Civ.P. 56(c), as amended, 436 Mass. 1404 (2002). The judge declared that the council had violated **[***5]** the statute on eleven occasions, [5] and imposed a fine of $ 1,000 for each violation. The judge further issued an injunction stating: "The Boston City **[*640]** Council and any committee thereof shall comply with the requirements of the Open Meeting Law, *G. L. c. 39, Section 23B* in the future. This shall include compliance with the requirements relating to executive session . . . ."

5 The eleven violations consisted of the ten occasions listed in note 3, *supra*, and the one additional meeting on December 15, 2004.

The defendants appeal. We refer to additional facts and the parties' affidavits as they become pertinent to the issues.

Discussion. We begin with the familiar principle that "[t]he standard of review of a grant of summary judgment is whether, viewing the evidence in the light most favorable to the nonmoving party, all material facts have been established and the moving party is entitled to a judgment as a matter of law." *Augat, Inc. v. Liberty Mut. Ins. Co., 410 Mass. 117, 120, 571 N.E.2d 357 (1991).* See *Mass.R.Civ.P. 56(c).* "[The reviewing court] may consider any ground supporting the judgment." *Augat, Inc., supra at 120.* Our review of the judge's legal conclusions is de novo. *Maffei v. Roman Catholic Archbishop of Boston, 449 Mass. 235, 243, 867 N.E.2d 300 (2007),* **[***6]** cert. denied, *128 S. Ct. 907, 169 L. Ed. 2d 729 (2008).*

The defendants have raised issues and asserted arguments based on the language of, and interaction between, specific provisions of the statute. It is therefore necessary to consider the purpose of the law, and the manner in which the Legislature has chosen to carry out that purpose. We begin with the presumption of public access to the workings of government: "All meetings of a governmental body shall be open to the public." *G. L. c. 39, § 23B*, first par., as appearing in St. 1976, c. 397, § 6. The requirement of public access requires a meaningful opportunity, created in advance, for public presence: "[N]otice of every meeting of any governmental body shall be filed with the clerk of the city . . . in which the body acts, and the **[**840]** notice or a copy thereof shall, at least forty-eight hours . . . prior to such meeting, be publicly posted in the office of such clerk or on the principal official bulletin board of such city." *G. L. c. 39, § 23B*, sixth par.

The Legislature has recognized that not everything done by public officials and employees can or should occur in a public meeting. Public officials confer routinely on administrative and logistical matters, **[***7]** and meet on occasion for purposes unrelated to their public function. Furthermore, disclosure of certain matters is **[*641]** not always in the public interest. [6] Therefore, the Legislature has created exceptions to the presumption of access. These are found in the executive session provisions of *§ 23B* and in *§ 23A*'s definitions of statutory terms.

6 Examples are the prospective purchase of property by a public body where disclosure can drive up the price, and adverse personnel decisions involving privacy rights of government employees. See *G. L. c. 39, § 23B*, fourth par.

In order for a "meeting" to occur there must be "a corporal convening and deliberation" by a governmental body. *G. L. c. 39, § 23A.* "Deliberation," in turn, requires a "verbal exchange between a quorum of members of a governmental body attempting to arrive at a decision on any public business within its jurisdiction." *Ibid.* Thus, gatherings unconnected to the consideration of public business and small groups of officials that do not meet the minimum number required to conduct public business are exempted. These exceptions, which are generally crafted to avoid "unduly hamper[ing]" public

officials in performing their duties, *Ghiglione v. School Comm. of Southbridge, 376 Mass. 70, 72, 378 N.E.2d 984 (1978)*; **[***8]** see *G. L. c. 39, § 23B*, fourth par., are construed narrowly in keeping with the law's overriding purpose, and we decline to imply further exceptions. See *District Attorney for the Plymouth Dist. v. Selectmen of Middleborough, 395 Mass. 629, 632-633, 481 N.E.2d 1128 (1985)*.

Moreover, the statute provides for public access to the decision-making process when it is in a formative stage, several steps removed from the eventual result. Thus the "verbal exchange" requirement of *§ 23A* has been found to be satisfied by a session in which the body "gather[s] information to aid it in arriving at a decision." *Gerstein v. Superintendent Search Screening Comm., 405 Mass. 465, 470, 541 N.E.2d 984 (1989)* (where screening committee was charged with recommending candidates, interviews consisting of "questions asked by the committee members, supplemented by the candidates' answers, conveyed information about the candidates to the committee members present" and thus constituted "verbal exchange"). See *District Attorney for the Plymouth Dist. v. Selectmen of Middleborough, 395 Mass. at 634 n.6* (consultation of board with its attorney regarding proposed contract was "meeting"). In sum, courts will generally construe the provisions of open **[***9]** meeting laws liberally to reflect their purpose **[*642]** of "eliminat[ing] much of the secrecy surrounding the deliberations and discussions on which public policy is based." *Ghiglione v. School Comm. of Southbridge, 376 Mass. at 72*. See *General Elec. Co. v. Department of Envtl. Protection, 429 Mass. 798, 806 n.9, 711 N.E.2d 589 (1999)*.

With this background in mind, we examine the issues as they arise in connection with each meeting, or group of meetings.

1. *The BRA meetings.* (a) *Did the meeting of December 15, 2004, "cure" the previous meetings?* Relying principally on *Benevolent & Protective Order of* **[**841]** *Elks, Lodge No. 65 v. City Council of Lawrence, 403 Mass. 563, 531 N.E.2d 1254 (1988)*, the defendants argued that the December 15, 2004, meeting, at which the council voted in favor of the BRA proposal, "cured" the previous violations of which the plaintiffs have complained. In *Elks*, the Supreme Judicial Court concluded that two properly noticed public meetings, which followed violations that may have occurred when the president of the city council privately conversed with other city council members, "made unnecessary an order [pursuant to *§ 23B*], requested three months later, requiring that the meetings be open." *Id. at 566*. Later **[***10]** case law has further recognized that violations of the open meeting law may be cured by subsequent "independent deliberative action" taken in a full meeting. *Pearson v. Selectmen of Longmeadow, 49 Mass. App. Ct. 119, 125, 726 N.E.2d 980 (2000)*. See *Allen v. Selectmen of Belmont, 58 Mass. App. Ct. 715, 718, 720, 792 N.E.2d 1000 (2003)*. Such independent deliberative action "help[s] to accomplish the purpose of the open meeting law." *Benevolent & Protective Order of Elks, Lodge No. 65 v. Planning Bd. of Lawrence, 403 Mass. 531, 558, 531 N.E.2d 1233 (1988)*. See *Pearson, supra at 125 n.9*. However, where the subsequent meeting is "merely a ceremonial acceptance" or "a perfunctory ratification of secret decisions," it plainly does not help to accomplish the purpose of the open meeting law, and will not operate as a cure. *Id. at 125*, quoting from *Tolar v. School Bd. of Liberty County, 398 So. 2d 427, 429 (Fla. 1981)*.

Although the defendants rely upon the *Elks* line of cases, they submitted scant evidence bearing on the nature of the December 15 meeting. The plaintiffs, on the other hand, have submitted evidence that the order ultimately voted on during the December 15 meeting was not circulated to all of the councillors before that **[*643]** day and **[***11]** that the version ultimately approved was substantially different from what had been discussed at earlier meetings. [7] Specifically, the plaintiffs submitted evidence that a vote was not previously planned or scheduled for that meeting, and that aside from a brief opportunity to pose factual questions to the BRA director, there was no chance to conduct deliberations during the course of the public meeting. As the plaintiffs' transcript of the meeting reflects, [8] councillor Kelly, chair of the council's planning and economic development committee, introduced the order by making candid references to deliberations that did not include the public: "The last ten days, maybe two weeks, has been a very time-consuming period to address the urban renewal matter before the body. Today was probably the most interesting day in my political career. I think we have reached an agreement." He also thanked "all of the councillors for their input" and described their previous discussions. It is not disputed that these earlier **[**842]** discussions, including some that occurred that day, were private, and that the agreement presented at the meeting was the result. Once councillor Kelly finished describing the agreement, **[***12]** other councillors objected, complaining that the order "is very different to what was submitted" and arguing that a vote should not be taken. Flaherty then briefly recessed the council meeting for a "committee of the whole" hearing, stating, "It is now five minutes before 6:00 P.M. This committee hearing will begin and will conclude at 6:15." The purpose of the committee of the whole session was "for councillors who have any unanswered questions for the [BRA]" to ask those questions. A brief question and answer period was permitted by Flaherty, who "said he would not allow a wide-ranging debate [and] wished to keep a tight hold on the **[*644]** time spent in this questioning." [9] Councillors

then stood up, asked questions, and explained their positions, often referring to the difficult discussions and deliberations that occurred in previous meetings not open to the public. In addition to the above, the plaintiffs submitted affidavits that suggested that the councillors met privately during the course of the meeting. The particulars of any such alleged private meeting are not recited. [10] However, it is undisputed from affidavits submitted by the plaintiffs that an ongoing recess of three hours **[***13]** was taken during which some councillors remained in the council chambers, but an undetermined number gathered in back offices. Although the public meeting was scheduled to begin at 11:30 A.M., the plaintiffs' affidavits indicate that the council did not reconvene after the three-hour "recess" until sometime after 5:00 P.M. [11] At some time after 6:45 P.M., the council voted to approve an order providing for an extension of the urban renewal plan submitted by the BRA.

7 On October 26, 2004, the mayor transmitted to the council a proposed order concerning "Urban Renewal Plan extension and the Council's role in Plan modification." Members of the council were advised a day or two before their December 15 meeting that "there would be a set of meetings to discuss the pending Urban Renewal legislation, and offering two or three times for different groups of Councilors to meet." At the December 15 meeting, the council was presented with a substitute order. The substitute order was substantially different from the order originally submitted on October 26.

8 The plaintiffs transcribed the council's videotape of the December 15 meeting. The transcript was before the motion judge and was made part **[***14]** of the record on appeal through the filing of a supplemental appendix.

9 The statements ascribed to Flaherty are contained in the transcript and in councillor Turner's affidavit. While the statements are hearsay to the extent they are offered to prove what actually occurred at the meeting (albeit admissible as an admission of a party-opponent), the motion judge had discretion to consider them where there was neither objection nor motion to strike. See *Madsen v. Erwin, 395 Mass. 715, 721, 481 N.E.2d 1160 (1985)*. There has also been no objection to their consideration on appeal.

10 The plaintiffs complain with some justification, despite their failure to submit any affidavits pursuant to *Mass.R.Civ.P. 56(f)*, 365 Mass. 825 (1974), that they are at a distinct disadvantage in proffering evidence about meetings from which they were excluded. We note however that the defendants are assigned the burden to prove compliance with the statute. See *G. L. c. 39, § 23B*, eleventh par. (at hearing on complaint that the statute was violated, "the burden shall be on the respondent to show by a preponderance of the evidence that the action complained of" was in compliance with the statute).

11 Rule 6 of the council's rules **[***15]** states that at any time during a meeting the presiding officer may "declare a recess for not more than twenty minutes." (Only the 2005 rules of the council appear in the record. No suggestion has been made that the rules differed in 2004.)

This evidence demonstrates that the judge correctly denied the defendants' motion for summary judgment on the cure issue and also supports the grant of summary judgment to the plaintiffs on that issue. The submissions present no genuine dispute on the facts; the only remaining question is whether the facts as presented could lead a fact finder to determine that there was "independent deliberative action" on December 15 sufficient to effect a cure. See *Pearson v. Selectmen of Longmeadow, 49 Mass.* **[*645]** *App. Ct. at 125*. On this record we conclude that such a determination is not supportable. The only hint of any deliberation is found in the evidence that councillors were permitted, briefly, to ask **[**843]** questions of the BRA and explain their votes on the order. In contrast to the evidence of an extended period of two years during which the BRA issue was scheduled for discussion on multiple occasions, [12] the parties' submissions reveal a maximum of twenty minutes **[***16]** of public discussion on a proposal that had not previously been presented. Accordingly, a fact finder would properly conclude that the public had no opportunity to understand how or why the alternative versions that were rejected led, through deliberation, to the version that was approved. As noted above and in further contrast to the requirement of "independent deliberative action" in order to effect a cure, *Pearson, supra at 125*, Flaherty kept a "tight hold on the time spent in . . . questioning." This scenario fails to meet the legal test for a cure of prior violations of the law.

12 For example, the December 15 transcript contains the following statements by BRA director Maloney: "In our conversations with councillors . . . we have been talking about this renewal for the last eighteen or so months . . . . We have both at a hearing here and at the Boston Redevelopment Authority reviewed each of the individual renewal plans . . . ." (In the latter statement, Maloney appears to refer to a hearing held in November, 2004. At oral argument, the

defendants expressly waived any reliance on the November hearing as a cure for prior violations.)

In addition to granting summary judgment to the **[***17]** plaintiffs on the curative properties the defendants claimed for the December 15 meeting, the judge found that this meeting was, itself, a violation of the statute. On this record, we are unable to conclude that there was either compliance or noncompliance; it is open to a factual determination whether *§ 23B*'s requirement of "a notice of every meeting" was satisfied here by a notice of an 11:30 A.M. meeting, when a vote on an unannounced topic was taken at approximately 7:00 P.M., after any member of the public seeking to attend and still present had additionally endured a three-hour "recess" without any indication when it would end, or whether anything might transpire thereafter. Similarly, it remains to be determined whether a violation of the statute's provisions as to executive sessions occurred, both as to notice and **[*646]** as to the limited purposes for which an executive session may be held. See *G. L. c. 39, § 23B*, excerpted in the margin. [13]

13 *General Laws c. 39, § 23B*, third par., provides:

> "No executive session shall be held until the governmental body has first convened in an open session for which notice has been given, a majority of the members have voted to go into executive **[***18]** session and the vote of each member is recorded on a roll call vote and entered into the minutes, the presiding officer has cited the purpose for an executive session, and the presiding officer has stated before the executive session if the governmental body will reconvene after the executive session."

Section 23B, fourth par., lists nine specific reasons for calling an executive session, and provides that "[e]xecutive sessions may be held only for [those] purposes."

(b) *Did any of the previous meetings violate the open meeting law?* Having determined that the meeting of December 15, 2004, did not effect a cure, the judge went on to consider whether the previous meetings had in fact violated the open meeting law, and granted summary judgment to the plaintiffs on this issue as well. We note that no party moved for summary judgment on this issue; the defendants limited their summary judgment motion to the cure issue with respect to all meetings held prior to December 15, 2004, presumably holding in reserve the argument that nothing transpiring before that date required a cure, while the plaintiffs limited their submissions to opposing the **[**844]** defendants' motion for summary judgment. We agree **[***19]** with the defendants' assertion that the judge's consideration of summary judgment on the propriety of the preceding meetings required an opportunity for the parties to submit affidavits and related materials.

The principles of *Gamache v. Mayor of N. Adams, 17 Mass. App. Ct. 291, 294-296, 458 N.E.2d 334 (1983)*, are controlling. In *Gamache*, the plaintiff filed a motion for partial summary judgment and, much like the moving party in this case, came to grief. The judge granted full summary judgment for the nonmoving party, thereby reaching additional issues not raised by the moving party, as occurred here. We determined that the parties "should have been given the right to file affidavits on the questions not raised by the plaintiff's motion for partial summary judgment." *Id. at 296*. While the defendants here moved for full, rather than partial, summary judgment, we conclude that the judge **[*647]** made a similar misstep; it is immaterial that issues remained in this case not because a motion for partial summary judgment was filed as in *Gamache*, but because the defendants' motion for full summary judgment was premised on a theory which, if successful, would have rendered moot the remaining issues. Accordingly, **[***20]** we remand the matter to provide the parties an opportunity, should they desire to pursue summary judgment, to submit affidavits and supporting material in support of their respective positions on whether the meetings in 2003 and 2004 violated the open meeting law.

(c) *Did the meetings of January 13, February 17, and March 24, 2005, violate the open meeting law?* The record shows that all councillors were invited to the meetings of January 13, February 17, and March 24, 2005. The defendants' motion for summary judgment was based on the assertion that the subject matter of these meetings fell outside the council's jurisdiction and therefore outside the statute's ambit. [14] Rejecting this argument (now abandoned by the defendants on appeal), the judge was correct to deny the defendants' motion for summary judgment with respect to these meetings.

14 The defendants also argued that these meetings were scheduled by the BRA director, rather than the council president, and thus did not come within the definition of "[m]eeting" in *§ 23A*. The motion judge rejected this argument, observing that it was unsupported by legal argument and finding that it "elevate[d] form

over substance." We agree. The **[***21]** statute does not expressly limit its applicability to meetings formally initiated by the council president. See, e.g., *G. L. c. 39, § 23A* (defining "[m]eeting" as "any corporal convening and deliberation of a governmental body . . . "). Nor is "corporal convening" defined in the statute. We decline to read into the statute an exception for meetings not convened by the chair or head of the particular governmental body. Compare *G. L. c. 39, § 23B*, fifth par. (chance or social meetings may not be used "in circumvention of the spirit or requirements of this section to discuss or act upon a matter . . ."). See generally *General Elec. Co. v. Department of Envtl. Protection, 429 Mass. at 806 n.9*, quoting from Cella, Administrative Law and Practice § 1186, at 592 n.16 (1986) ("the general provision[s] of . . . the Open Meetings Law are to be broadly and liberally construed in order to effectuate the legislative purpose of openness").

We conclude however that the grant of summary judgment to the plaintiffs here suffered from the same defect discussed in part (b), above, in connection with the 2003-2004 meetings, and enunciated in *Gamache v. Mayor of N. Adams, supra.* The defendants' motion was **[***22]** silent in other respects on whether **[*648]** compliance was actually achieved or whether other factors rendered compliance unnecessary. While the defendants have abandoned the jurisdictional **[**845]** argument on appeal, they allude to other arguments they may seek to advance in the trial court, e.g., that, in their view, while there were "verbal exchanges" and "discussions," there were no "deliberations," no decisions made, and no attempt to reach decisions at these meetings. See *G. L. c. 39, § 23A*. While we express no view on the merits of these arguments, we conclude that, as in *Gamache*, there was here "an inadequate basis upon which to enter summary judgment" in favor of the plaintiffs. *Gamache, 17 Mass. App. Ct. at 296.*

(d) *The "rotating quorum" argument.* To provide guidance on remand, we address the defendants' assertion at oral argument that a system of rotating participation in the consideration of an issue is a legitimate device to avoid the requirement of *G. L. c. 39, § 23B*, second par., that "[n]o quorum of a governmental body shall meet in private for the purpose of deciding on or deliberating toward a decision on any matter . . . ." On several occasions [15] the council allegedly posted a guard **[***23]** from the BRA at the door of a private meeting room to maintain a careful headcount and ensure that only a minority of councillors, albeit a rotating minority, were physically in each others' presence at any one moment, despite the fact that the council had been previously ordered to abandon this practice by a judge of the Superior Court. Shannon *vs.* Boston City Council, Suffolk Superior Court, No. 87-5397 (Feb. 28, 1989). Moreover, the council agreed to submit to the continuing jurisdiction of the Superior Court with respect to that order. [16]

15 While the evidence is unclear whether or to what extent this device was used at the council sessions with the BRA on or prior to December 15, 2004, affidavits in the record contain hearsay, properly considered in the absence of any objection, asserting such intentional use at meetings with the BRA held in 2005. See *Madsen v. Erwin, 395 Mass. at 721.*

16 We advance no opinion, given the passage of time, whether a complaint for contempt may not lie on this basis.

Notwithstanding, the defendants argue that the definitions of "meeting" and "deliberation" operate in tandem to permit their actions. As noted above, "[m]eeting" is defined as "any corporal **[***24]** convening and deliberation of a governmental body," *G. L. c. 39, § 23A*, and "[d]eliberation," in turn, is defined as "a **[*649]** verbal exchange between a quorum [17] of members of a governmental body attempting to arrive at a decision on any public business within its jurisdiction." *Ibid.* From these provisions the defendants argue that a rotating system that permits, de facto, deliberation between seven or more members for the purpose of arriving, in private, at a decision on public business within the council's jurisdiction is legally permissible so long as no more than six members are allowed in the same room at the same time.

17 It is undisputed that seven council members constitute a quorum. We also note that on February 5, 2003, councillor Arroyo introduced a proposed order concerning the extension of the BRA's urban renewal plans, which was referred to the council's committee on planning and economic development. It appears from the record that the committee was composed of five members at the time.

We reject this strained interpretation of statutory language, asserted for the sole purpose of defeating the fundamental purpose of the law. "It is essential to a democratic form of government **[***25]** that the public have broad access to the decisions made by its elected officials and to the way in which the decisions are reached." *Foudy v. Amherst-Pelham Regional Sch. Comm., 402 Mass. 179, 184, 521 N.E.2d* **[**846]** *391 (1988).* We reiterate, see note 14, *supra*, that "the general provision[s] of . . . the Open Meetings Law are to be broadly and liberally construed in order to effectuate the legislative purpose of openness." *General Elec. Co. v.*

Department of Envtl. Protection, 429 Mass. at 806 n.9, quoting from Cella, Administrative Law and Practice § 1186, at 592 n.16 (1986). See *Adamowicz v. Ipswich, 395 Mass. 757, 760, 481 N.E.2d 1368 (1985)*, quoting from *Lexington v. Bedford, 378 Mass. 562, 570, 393 N.E.2d 321 (1979)* (a construction that would defeat legislative purpose will not be adopted "if the statutory language 'is fairly susceptible to a construction that would lead to a logical and sensible result'").

We note that the Attorney General has also rejected this evasive strategy. See Office of the Attorney General, Open Meeting Law Guidelines, at 26. The Attorney General is charged with enforcement of the open meeting law as it applies to State government bodies, see *G. L. c. 30A, § 11A 1/2*, and hence is entitled to interpretive deference. **[***26]** See *Smith v. Winter Place LLC, 447 Mass. 363, 367-368, 851 N.E.2d 417 (2006)*; *Falmouth v. Civil Serv. Commn., 447 Mass. 814, 821, 857 N.E.2d 1052 (2006)*.

[*650] 2. *Was the Boston University biolaboratory tularemia meeting of January 20, 2005, a violation of the open meeting law?* On January 20, 2005, the council convened a "councillors only" meeting with a representative of Boston University (university) after having been advised by representatives of the Boston University Medical Center that a number of its researchers were exposed in the prior year to tularemia. As was the case in connection with the BRA closed meetings, not all of the councillors were of the view that the public could legally be excluded. [18]

> 18 At least one councillor raised the issue whether this closed meeting violated the requirements of the open meeting law.

The meeting dealt specifically with public health issues; in particular, according to councillor Hennigan's affidavit, she raised the question whether the tularemia outbreak at the university's medical laboratory might be indicative of the university's inability safely to operate a biolaboratory in a densely populated area. [19], [20] The defendants point to the fact that, notwithstanding the invitation **[***27]** to all councillors, their affidavits list only five members of the council who attended this meeting. Relying on *Pearson v. Selectmen of Longmeadow, 49 Mass. App. Ct. at 124*, they argue, in effect, that because, as events here transpired, there was no quorum, there was therefore no "deliberation," and hence no "meeting" to which the law applies.

> 19 The university was seeking, and still seeks, to operate a biolaboratory in Boston's South End. See *Allen v. Boston Redev. Authy., 450 Mass. 242, 877 N.E.2d 904 (2007)*.

> 20 On appeal, the defendants prudently appear to have abandoned their assertion below that this is an area over which the council does not exercise "supervision, control, jurisdiction or advisory power." *G. L. c. 39, § 23A*.

The motion judge concluded that the presence of a quorum is irrelevant if all councillors have been invited to a meeting. We agree. It is undisputed that the council scheduled a meeting for all councillors to consider information to help them decide a matter within their jurisdiction. This required the council to file a notice "with the clerk of the city or town in which the body acts." *G. L. c. 39, § 23B*, sixth par. As we have observed, the notice requirement contained in **[***28]** the statute is an essential attribute of the law; it is manifestly **[**847]** pointless to conduct a meeting to which the law requires public access if no member of the public is aware that the meeting is taking place. The statute directs that "[e]xcept in an emergency, a notice of every meeting **[*651]** of any governmental body *shall be filed . . . at least forty-eight hours . . . prior to such meeting*" (emphasis added). *Ibid.* This language puts the notice requirement in prospective terms. Moreover, we construe this provision in light of the statute as a whole. *Section 23B*, fifth par., provides that "[n]o chance meeting or social meeting shall be used in circumvention of the spirit or requirements of this section to discuss or act upon a matter over which the governmental body has supervision, control, jurisdiction or advisory power."

In sum, the council failed to file a notice of a meeting to which all councillors were invited to "gather[] information to aid [them] in arriving at a decision" on a subject -- the safety implications of the proposed biolaboratory siting -- within the council's jurisdiction. See *Gerstein v. Superintendent Search Screening Comm., 405 Mass. at 470*. The fact that, by chance, **[***29]** less than a quorum of councillors actually attended did not excuse the failure of notice. [21] We note that the Suffolk County District Attorney's office issued a notice to Flaherty on March 21, 2005, stating in plain terms that the January 20, 2005, meeting was in violation of the open meeting law and recommending that "any meeting to which all City Councilors are invited should be posted pursuant to the [statute]."

> 21 Rule 2 of the council's 2005 rules states that "[i]f at any time any meeting is called to order, or if during a meeting, a roll call shows less than a quorum, the presiding officer shall call a recess of not more than ten minutes, after which time, if a quorum is not present, the meeting may be adjourned by the presiding officer." (The 2005 rules were adopted February 2, 2005. No suggestion has been made that the rules in effect

on January 20, 2005, were different. See note 11, *supra*.)

The record thus demonstrates that the meeting of January 20, 2005, was a violation of the open meeting law. The judge was correct in denying summary judgment to the defendants on this issue. Additionally, the undisputed affidavit of councillor Hennigan described above and proffered by the **[***30]** plaintiffs provides some evidence that a discussion, and thus a "meeting" as defined in *§ 23A*, in which she briefly participated, was intended. Thus, even viewing the facts in a light most favorable to the defendants, they failed to provide any evidence that could satisfy their burden to prove compliance with the statute, and the judge was correct in granting summary judgment to the plaintiffs.

[*652] *Conclusion.* We affirm the denial of the defendants' motion for summary judgment and the grant of summary judgment to the plaintiffs as to the January 20, 2005, violation, and the failure of the December 15, 2004, meeting to "cure" any earlier violations. We also affirm the denial of the defendants' motion for summary judgment as to the alleged violations of January 13, February 17, and March 24, 2005. In all other respects the judgment and orders entered on March 27, 2006, and November 21, 2006, are vacated and the matter is remanded for further proceedings consistent with this opinion. [22], [23]

22 The defendants have not challenged the breadth of the injunctive order issued by the judge. For purposes of guidance on remand, we note that the statute authorizes the issuance of an "appropriate order" **[***31]** requiring the defendants to "carry out *such provisions* at future meetings" (emphasis added). *G. L. c. 39, § 23B*, eleventh par. This refers specifically to those provisions of the open meeting law which are found to have been violated. *Ibid.*

23 The plaintiffs' request for damages and costs pursuant to *Mass.R.A.P. 25*, as appearing in 376 Mass. 949 (1979), is denied.

So ordered.

NEW HABITAT, INC. vs. TAX COLLECTOR OF CAMBRIDGE (and two companion cases [1]).

1 Three actions involving the same parties were consolidated in the Superior Court.

SJC-10033

SUPREME JUDICIAL COURT OF MASSACHUSETTS

451 Mass. 729*; *889 N.E.2d 414*; *2008 Mass. LEXIS 418

May 6, 2008, Argued
July 3, 2008, Decided

PRIOR HISTORY: [*1]**

Middlesex. Civil actions commenced in the Superior Court Department on July 23, 2004; July 26, 2005; and June 29, 2006. After consolidation, the case was heard by Sandra L. Hamlin, J., on motions for summary judgment. The Supreme Judicial Court granted an application for direct appellate review.

COUNSEL: Christine Vargas Polmey for the plaintiff.

Elizabeth A. Lashway for the defendant.

Anthony M. Ambriano, for Board of Assessors of Boston & others, amici curiae, submitted a brief.

JUDGES: Present: Marshall, C.J., Greaney, Ireland, Spina, Cowin, Cordy, & Botsford, JJ.

OPINION BY: SPINA

OPINION

[417]** **[*730]** SPINA, J. The plaintiff, New Habitat, Inc. (New Habitat), seeks to recover the taxes that it has paid on its real property. It claims that this property is exempt from taxes under *G. L. c. 59, § 5*, Third, as property of a "literary, benevolent, charitable or scientific institution." A judge in the Superior Court concluded that New Habitat was not entitled to a tax exemption under that statute and dismissed on summary judgment New Habitat's claims for recovery of taxes paid. New Habitat appealed. We granted its application for direct appellate review. We now vacate the order granting summary judgment in favor of the tax collector and order **[***2]** entry of summary judgment in favor of New Habitat. [2]

2 We acknowledge the amicus brief submitted by the board of assessors of Boston, the board of assessors of Brookline, the board of assessors of Cambridge, the board of assessors of Newton, and the Massachusetts Association of Assessing Officers.

Background. New Habitat is a nonprofit organization whose stated mission is to provide long-term housing for persons with acquired brain injury and to promote the well-being of its residents by providing them with, among other things, educational programs, personal assistance programs, and programs to improve their physical and psychological health. New Habitat's staff provides its residents with care and support on its property at 225 Brattle Street in Cambridge, the property for which New Habitat paid the taxes that it now seeks to recover. At maximum capacity, this property can accommodate four residents. Since New Habitat began providing residential services, there have been three applicants for admission. New Habitat accepted them all. Currently, only two residents remain. [3]

3 New Habitat submitted uncontroverted evidence that the Massachusetts Statewide head injury program recommends that **[***3]** a residence for brain injury survivors have between two and six residents.

To be qualified as a resident at New Habitat, an applicant must have an acquired brain injury, have a physical examination to determine whether he is in an acceptable state of health, maintain his own health insurance, and provide information on his financial ability to pay New Habitat's fees and expenses. Monthly fees currently range from about $ 17,000 to $ 18,000 per month. Until **[*731]** recently, residents were required to pay a $ 150,000 entrance fee, an amount that was refundable without interest at the termination of the contract or on the resident's death. All fees and revenue derived from the property are expended solely for the successful operation of the residence.

New Habitat received demands for payment of property taxes for the fiscal years 2004, 2005, and 2006

from the tax collector of Cambridge. New Habitat made timely payments of these taxes and timely commenced proceedings in the Superior Court to recover its real estate tax payments. [4] The parties filed cross motions for summary judgment, and the judge granted the tax collector's motion. New Habitat appealed.

4 New Habitat timely sought to recover its **[***4]** taxes pursuant to *G. L. c. 60, § 98*. See *New England Legal Found. v. Boston, 423 Mass. 602, 607, 670 N.E.2d 152 (1996)*. An alternative remedy was available through the Appellate Tax Board under *G. L. c. 59, § 65*. See *Harvard Community Health Plan, Inc. v. Assessors of Cambridge, 384 Mass. 536, 536, 427 N.E.2d 1159 & n.1 (1981)*.

[418]** *Discussion.* "The standard of review of a grant of summary judgment is whether, viewing the evidence in the light most favorable to the nonmoving party, all material facts have been established and the moving party is entitled to a judgment as a matter of law." *Augat, Inc. v. Liberty Mut. Ins. Co., 410 Mass. 117, 120, 571 N.E.2d 357 (1991)*. See *Mass. R. Civ. P. 56 (c)*, as amended, *436 Mass. 1404 (2002)*. The taxpayer has the burden of establishing entitlement to a charitable exemption under *G. L. c. 59, § 5*, Third. *Western Mass. Lifecare Corp. v. Assessors of Springfield, 434 Mass. 96, 101, 747 N.E.2d 97 (2001)*. "Exemption from taxation is to be strictly construed and must be made to appear clearly before it can be allowed." *Springfield Young Men's Christian Ass'n v. Assessors of Springfield, 284 Mass. 1, 5, 187 N.E. 104 (1933)*.

New Habitat contends that it is a charitable organization within the scope of *G. L. c. 59, § 5*, Third, and that **[***5]** it therefore is entitled to a charitable exemption from its real estate taxes. The tax collector, on the other hand, contends that New Habitat's substantial fees so limit its class of potential beneficiaries that New Habitat does not qualify for a charitable exemption under *G. L. c. 59, § 5*, Third.

General Laws c. 59, § 5, Third, provides that real estate owned by a "charitable organization and occupied by it or its **[*732]** officers for the purposes for which it is organized" is exempt from taxation. A charitable organization is "a literary, benevolent, charitable or scientific institution or temperance society incorporated in the commonwealth." *Id.* "[T]he dominant purpose of its work is for the public good and the work done for its members is but the means adopted for this purpose." *Massachusetts Med. Soc'y v. Assessors of Boston, 340 Mass. 327, 332, 164 N.E.2d 325 (1960)*. For purposes of the local property tax exemption, the term "charity" includes more than almsgiving and assistance to the needy. *New England Legal Found. v. Boston, 423 Mass. 602, 609, 670 N.E.2d 152 (1996)*. "A charity, in the legal sense, may be more fully defined as a gift to be applied consistently with existing laws, for the benefit of an indefinite **[***6]** number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works or otherwise lessening the burdens of government." *Boston Symphony Orchestra, Inc. v. Assessors of Boston, 294 Mass. 248, 254-255, 1 N.E.2d 6 (1936)*, quoting *Jackson v. Phillips, 96 Mass. 539, 14 Allen 539, 556 (1867)*. These activities characterize the traditional objects and methods of charity but do not encompass all the areas now considered to be charitable for the purposes of the real estate tax exemption. *Boston Chamber of Commerce v. Assessors of Boston, 315 Mass. 712, 717, 54 N.E.2d 199 (1944)*.

To determine whether an organization is charitable, the court weighs a number of nondeterminative factors. These factors include, but are not limited to, whether the organization provides low-cost or free services to those unable to pay, see *New England Legal Found. v. Boston, supra at 610*; whether it charges fees for its services and how much those fees are, see *Assessors of Boston v. Garland Sch. of Home Making, 296 Mass. 378, 390, 6 N.E.2d 374 (1937)*; whether it offers **[***7]** its services to a large or "fluid" group of beneficiaries and how large and fluid that group is, see *New England Legal Found. v. Boston, supra at 612*; *Cummington Sch. of the Arts, Inc. v. Assessors of Cummington, 373 Mass. 597, 601, 369 N.E.2d 457 (1977)*; **[**419]** whether the organization provides its services to those from all segments of society and from all walks of life, see *Harvard Community Health Plan, Inc. v. Assessors of Cambridge, 384 Mass. 536, 544, 427 N.E.2d 1159 (1981)*; and whether the **[*733]** organization limits its services to those who fulfil certain qualifications and how those limitations help advance the organization's charitable purposes, see *Western Mass. Lifecare Corp. v. Assessors of Springfield, supra at 103-104*; *Boston Symphony Orchestra, Inc. v. Assessors of Boston, supra at 256*.

The significance of these factors depends in no small part on the dominant purposes and methods of the organization. The closer an organization's dominant purposes and methods are to traditionally charitable purposes and methods, the less significant these factors will be in our determination of the organization's charitable status under *G. L. c. 59, § 5*, Third. See *Boston Chamber of Commerce v. Assessors of Boston, supra at 718*. **[***8]** The farther an organization's dominant purposes and methods are from traditionally charitable purposes and methods, the more significant these factors will be. See *id.* ("the more remote the objects and methods become from the traditionally recognized

objects and methods the more care must be taken to preserve sound principles and to avoid unwarranted exemptions from the burdens of government"); *Institute of Gas Tech. v. Department of Revenue, 289 Ill. App. 3d 779, 787-788, 683 N.E.2d 484, 225 Ill. Dec. 316 (1997)* (court considers "the remoteness of the nature of [organization's projects] from traditional notions of charities" in determining organization's tax exempt status).

Consistent with these principles, we consider the charging of fees to be more significant the farther the organization's dominant purposes and methods are from traditionally charitable ones. See *Western Mass. Lifecare Corp. v. Assessors of Springfield, supra at 104-106* (organization was not charitable where it charged fees and did not have traditionally charitable purposes and methods); *Boston Symphony Orchestra, Inc. v. Assessors of Boston, supra at 256* (same). On the other hand, we consider the charging of fees to be less significant the closer **[***9]** the organization's dominant purposes and methods are to traditionally charitable ones. See *Assessors of Boston v. Garland Sch. of Home Making, supra at 389, 390* (organization was charitable where it charged fees and had traditionally charitable purposes and methods); *Carpenter v. Young Men's Christian Ass'n, 324 Mass. 365, 368, 369, 86 N.E.2d 634 (1949)* (same). See also *Butterworth v. Keeler, 219 N.Y. 446, 219 N.Y. (N.Y.S.) 446, 114 N.E. 803 (1916)* ("What controls is not the receipt of income, but its purpose"). But see *Under the Rainbow Child Care Ctr., Inc. v.* **[*734]** *County of Goodhue, 741 N.W.2d 880, 887 (Minn. 2007)*. In weighing this factor, we consider whether the organization's charging of fees helps to advance the organization's charitable purpose. See *Boston Symphony Orchestra, Inc. v. Assessors of Boston, supra at 255-256*. See also *Butterworth v. Keeler, supra*.

In the present case, New Habitat has purposes and methods close to traditionally charitable ones. [5] New Habitat tends **[**420]** to the injured. It seeks to relieve them of the hardships and constraints that afflict those with acquired brain injury. More specifically, New Habitat provides long-term housing for persons with acquired brain injury and provides its residents with personal **[***10]** assistance programs, educational programs, and programs to improve their physical and psychological health. There is also undisputed evidence that New Habitat's residents cannot live independently or care for themselves and that they need twenty-four hour support each day. In light of these facts, we conclude that New Habitat's dominant purposes and methods are traditionally charitable. See *Boston Symphony Orchestra, Inc. v. Assessors of Boston, supra at 254-255* (providing relief from suffering and constraint are charitable purposes). See also *McDonald v. Massachusetts Gen. Hosp., 120 Mass. 432, 435 (1876)* ("administering to the comfort of the sick" helped to establish organization as public charity); *H-C Health Servs., Inc. v. Assessors of S. Hadley, 42 Mass. App. Ct. 596, 599, 678 N.E.2d 1339 (1997)* (providing residence and care to elderly and infirm helped to establish organization as charitable).

> 5 New Habitat is incorporated in the Commonwealth as a not-for-profit corporation and has been granted tax exempt status under *§ 501(c)(3) of the Internal Revenue Code*; its officers and members of its board of directors receive no remuneration for their work; and the organization has no stockholders and **[***11]** pays no dividends. See *G. L. c. 59, § 5*, Third (*a*) (charitable organization cannot divide income or profits among stockholders); *New England Legal Found. v. Boston, 423 Mass. 602, 610, 670 N.E.2d 152 & n.8 (1996)* (organization's charter and treatment under Federal and State tax schemes is nondeterminative indicator of charitable purpose).

Because New Habitat's dominant purposes and methods are traditionally charitable, the fact that the organization charges fees for its services plays a less significant role in our determination of its charitable status. In *Assessors of Boston v. Garland Sch. of Home Making, 296 Mass. 378, 389, 390, 6 N.E.2d 374 (1937)*, where an organization's purposes and methods were traditionally charitable, **[*735]** we explicitly held that the organization may charge substantial, reasonable fees for its services. That is, the charging of those fees did not limit the organization's beneficiaries so as to render it uncharitable, especially where that organization had traditionally charitable purposes and methods. *Id.*

The same reasoning applies in the present case. New Habitat charges substantial fees for its services, but the tax collector does not contend that those fees are unreasonable for the services **[***12]** provided, and the parties agree that all fees and revenue derived from the property are expended solely for the successful operation of the residence. The fees thus help to advance the organization's charitable purpose. Furthermore, even though the charging of a fee is a factor we consider in our assessment of an organization's charitable status, we do not here weigh these fees as heavily as we otherwise might because New Habitat's dominant purposes and methods are traditionally charitable. Consequently, in line with the *Garland Sch.* case, we hold that the charging of these fees does not render New Habitat not charitable under *G. L. c. 59, § 5*, Third. The judge erred where she found otherwise. [6]

> 6 The judge also found that New Habitat is not a charitable organization in part because of its "selection criteria." She is not entirely clear how

these criteria undermine New Habitat's charitable status. Presumably, she finds fault with the fact that New Habitat requires applicants to provide financial information so that New Habitat can determine the applicant's ability to pay New Habitat's substantial fees. It would be an odd result, however, if New Habitat could charge fees without losing [***13] its charitable status but could not have some mechanism to determine beforehand whether its applicants could afford those fees. Requiring such financial information from its applicants enables New Habitat to run its organization more efficiently and to advance its charitable purposes more effectively. Consequently, New Habitat could request financial information from its applicants without jeopardizing its claim for charitable status.

[**421] Previous cases contain language suggesting that the charging of a substantial fee, in itself, might render an organization not charitable under *G. L. c. 59, § 5*, Third. To the extent that those cases can be read to support such a proposition, we decline to follow them. It should be noted, however, that the results in those cases are fully in line with the result reached here and with the principles articulated in this decision.

For example, in *Western Mass. Lifecare Corp. v. Assessors of Springfield, supra at 104-105*, we held that an organization was not charitable for purposes of *G. L. c. 59, § 5*, Third, where it [*736] charged a large fee for its services. However, that organization's dominant purposes and methods were not particularly close to the purposes [***14] and methods traditionally considered charitable. That is, it provided "luxury" residences for its residents, the vast majority of whom were well-off and relatively healthy. *Id. at 105-106.*

Similarly, in *Boston Symphony Orchestra, Inc. v. Assessors of Boston, supra at 256*, the court held that an organization was not charitable for purposes of the real estate tax exemption where the organization charged a fee for its concerts. However, the court expressed doubt whether the dominant purpose of the organization was traditionally charitable and reasoned that its concerts may have been geared more to entertain than to educate. *Id.*

In those two cases, where it was doubtful that the organizations' dominant purposes and methods were traditionally charitable, a court properly would weigh the organization's fees more heavily than it would in the present case. As a result, the judge in the Superior Court did not properly deny New Habitat charitable status on account of its fees, but could properly deny those other organizations charitable status partly on account of their fees. The results in those cases are entirely consistent with the principles set forth in this decision.

The tax collector argues [***15] that New Habitat's small number of beneficiaries also weighs against our granting the organization charitable status. The number of an organization's beneficiaries is another one of the nondeterminative factors that we weigh in determining the charitable status of an organization. *New England Legal Found. v. Boston, 423 Mass. 602, 612, 670 N.E.2d 152 (1996)*. We consider the number of an organization's beneficiaries in a manner similar to the way in which we consider its charging of fees. See *Boston Chamber of Commerce v. Assessors of Boston, 315 Mass. 712, 718, 54 N.E.2d 199 (1944)*. That is, we consider the number of an organization's beneficiaries to be more significant the farther the organization's dominant purposes and methods are from traditionally charitable purposes and methods. See *id. at 716, 719* (organization not charitable where it had large number of beneficiaries but did not have traditionally charitable purposes and methods). On the other hand, we consider the number of its beneficiaries to be less significant the closer its dominant purposes and methods are to [*737] traditionally charitable. See *Assessors of Dover v. Dominican Fathers Province of St. Joseph, 334 Mass. 530, 539, 137 N.E.2d 225 (1956)* (organization charitable [***16] where it had small number of beneficiaries but had traditionally charitable purposes and methods). In weighing this factor, we consider whether [**422] the number of an organization's beneficiaries helps to advance the organization's charitable purpose. See *New England Legal Found. v. Boston, supra* ("at any given moment an organization may serve only a relatively small number of persons" but nevertheless remain charitable organization). [7]

7 A large or fluid number of beneficiaries will often, although not always, help advance an organization's charitable purpose. See *New England Legal Found. v. Boston, supra at 612.* But see *Assessors of Dover v. Dominican Fathers Province of St. Joseph, 334 Mass. 530, 539, 137 N.E.2d 225 (1956)* (charitable organization had small number of beneficiaries).

In the present case, New Habitat has purposes and methods close to traditionally charitable ones. Therefore, the fact that it has a relatively small number of beneficiaries plays a less significant role in our determination of its charitable status. Furthermore, New Habitat presented evidence suggesting that its limited numbers helped to advance its charitable purposes. That is, it presented undisputed evidence that the Statewide [***17] head injury program recommended that residences for brain-injured individuals should house between two and six individuals. The number of New Habitat's beneficiaries falls within this recommended number. Given these facts, we conclude that its limited

numbers did not render New Habitat not charitable under *G. L. c. 59, § 5*, Third.

The tax collector argues, in addition, that New Habitat does not relieve a governmental burden and that New Habitat therefore does not qualify for a charitable exemption under *G. L. c. 59, § 5*, Third. More specifically, the tax collector contends that New Habitat is not entitled to charitable status because its residents could afford an alternative living situation before they became dependent on the State for residence and care.

The fact that the persons benefited by an organization happen to be wealthy, even wealthy enough to seek alternatives before relying on State aid, does not necessarily affect the charitable nature of that institution. See *Western Mass. Lifecare Corp. v.* **[*738]** *Assessors of Springfield, supra at 104* ("An organization does not necessarily have to serve the poor or the needy in order to qualify for the charitable exemption"). For example, a **[***18]** school will not fail to qualify for charitable status merely because its students can afford to attend another private school before they become dependent on the State for education. See *Assessors of Boston v. Garland Sch. of Home Making, 296 Mass. 378, 389, 390, 6 N.E.2d 374 (1937)* (school charging substantial tuition fees held to be charitable). Similarly, New Habitat will not fail to qualify for charitable status merely because its residents have the means to live elsewhere before they become dependent on the State for care.

In essence, the tax collector urges us to adopt a test for charitable status whereby the charitable status of an organization depends on the wealth of its beneficiaries and the existence of sufficient alternative organizations that can perform the functions of the organization in question. This test, however, is not consistent with the results reached in our previous cases. See *id. at 389, 390.* See also *Western Mass. Lifecare Corp. v. Assessors of Springfield, supra at 104.* In addition, it would set an exceedingly difficult standard to apply as it would require the court to delve into the personal finances of individual beneficiaries, determine the existence of comparable **[***19]** alternative organizations, and compare the quality and services of those organizations with **[**423]** the organization in question. We decline to adopt such a test.

New Habitat also contends that the judge erred where she concluded that New Habitat's exemption from Federal taxation was a sufficient remedy. It is not entirely clear how the judge factored New Habitat's Federal tax-exempt status into her final decision. In any event, an organization's treatment as a charity under Federal tax law is an indicator, although not a dispositive one, of an organization's charitable nature for the purposes of tax exemption under *G. L. c. 59, § 5*, Third. *New England Legal Found. v. Boston, supra at 610 &* n.8 (organization's treatment under Federal tax law is indicator of charitable status under *G. L. c. 59, § 5*, Third). But see *Western Mass. Lifecare Corp. v. Assessors of Springfield, supra at 97, 106* (organization classified under *§ 501[c][3] of Internal Revenue Code* held to be not charitable under *G. L. c. 59, § 5*, Third). The fact that an organization **[*739]** has been granted tax-exempt status under Federal law is not grounds to deny it tax-exempt status under *G. L. c. 59, § 5*. The judge erred to the extent that **[***20]** she concluded otherwise.

Conclusion. For the reasons stated above, we conclude that New Habitat is a charitable organization under *G. L. c. 59, § 5*, Third, and is entitled to a tax exemption on its real property. We vacate the judge's order allowing the tax collector's motion for summary judgment. We remand the case and direct that an order granting New Habitat's motion for summary judgment be entered.

So ordered.

PATRIOT RESORTS CORPORATION vs. REGISTER OF DEEDS FOR THE COUNTY OF BERKSHIRE, NORTHERN DISTRICT & others. [1]

1 Secretary of the Commonwealth, and Treasurer of the Commonwealth.

No. 06-P-725

APPEALS COURT OF MASSACHUSETTS

71 Mass. App. Ct. 114; 879 N.E.2d 716; 2008 Mass. App. LEXIS 72

September 18, 2007, Argued
January 28, 2008, Decided

SUBSEQUENT HISTORY: As Corrected June 2, 2008.

PRIOR HISTORY: [*1]**

Berkshire. Civil action commenced in the Superior Court Department on August 16, 2002. The case was heard by Mary-Lou Rup, J., on motions for summary judgment.

COUNSEL: Stanley E. Parese, for the plaintiff.

James J. Arguin, Assistant Attorney General, for the defendants.

JUDGES: Present: Berry, Green, & Vuono, JJ. BERRY, J. (dissenting).

OPINION BY: GREEN

OPINION

[*114] **[**717]** GREEN, J. At issue is the proper interpretation of *G. L. c. 262, § 38*, which specifies the fees for recording documents with a registry of deeds. [2] The plaintiff, Patriot Resorts Corporation (Patriot), assigned a number of mortgage interests to a single assignee, under a single instrument of assignment. The defendant register of deeds (register) assessed recording fees based on the **[*115]** number of mortgages assigned. Patriot, contending that the fee should instead have been based on the single instrument of assignment, sought declaratory relief in the Superior Court. A judge of the Superior Court agreed with the register's position, and Patriot appealed. We reverse.

2 A related question concerns the application of *G. L. c. 44B, § 8*, which imposes a surcharge on recording fees, as part of the Community Preservation Act.

Background. Patriot develops and sells so-called time **[***2]** share estates in resort properties. See generally *G. L. c. 183B, §§ 1 et seq.* Incident to its sales of time share estates, Patriot often accepts payment of a portion of the purchase price by extending a loan to the purchaser; in those transactions the loan is represented by a note, and secured by a mortgage executed in Patriot's favor. After recording a number of such purchase money mortgages, Patriot typically assigns the mortgage interests (and associated notes) to an institutional lender as collateral security for credit extended by such a lender to Patriot.

The fees for recording documents with the register of deeds are set by statute. As in effect at the times relevant to the present case, [3] *G. L. c. 262, § 38*, as amended **[**718]** through St. 1985, c. 515, provided, in pertinent part, as follows:

> "The fees of registers of deeds, except as otherwise provided, to be paid when the instrument is left for recording, filing or deposit shall be as follows: For entering and recording any paper, certifying the same on the original, and indexing it and for all other duties pertaining thereto, ten dollars for the first four pages. The fee for recording a deed or conveyance shall be twenty-five dollars **[***3]** for the first four pages. The fee for recording a mortgage shall be twenty dollars for the first four pages. If the deed, conveyance, mortgage or other paper contains more than four pages, the rate shall be one dollar for each page after the first four pages.
>
> . . .
>
> "For entering any additional marginal reference or references **[*116]** when

required, one dollar for each reference." [4], [5]

3 By St. 2003, c. 4, § 51, the Legislature rewrote the section, substantially increasing the base fees for recording various types of documents, and eliminating, inter alia, the separate charges for additional pages and additional marginal references.

4 A marginal reference is a written reference entered in the margin of an earlier recorded, related document that refers the reviewer to the book and page of the newly-recorded document.

5 We have omitted from the quoted language the second, third, and fourth paragraphs of the statute (which do not bear on the question presented) as well as the sixth paragraph (which added a cross reference to the surcharge imposed under the Community Preservation Act).

In addition to the basic recording fees, *G. L. c. 44B, § 8*, inserted by St. 2000, c. 267, § 1, **[***4]** imposes a surcharge, as follows:

"(a) The fees of the registers of deeds, except as otherwise provided, to be paid when the instrument is left for recording, filing or deposit shall be subject to a surcharge of $ 20. The fees for so recording, filing or depositing a municipal lien certificate shall be subject to a surcharge of $ 10. The surcharges shall be imposed for the purposes of community preservation. No surcharge shall apply to a declaration of homestead under chapter 188. No surcharge shall apply to the fees charged for additional pages, photostatic copies, abstract cards, additional square feet for the filing and recording of plans or for additional or required marginal references." [6], [7]

6 A somewhat different fee schedule applies to instruments affecting land registered under *G. L. c. 185*. See *G. L. c. 262, § 39*; *G. L. c. 44B, § 8(b)*.

7 A second surcharge (of five dollars per instrument) is imposed by *G. L. c. 9, § 26*, to be applied toward modernization of registries of deeds. However, that surcharge became effective on March 15, 2003, and hence did not apply at the time of the recording that gave rise to this action.

On July 17, 2002, Patriot presented to the register for recording **[***5]** an instrument of assignment (assignment) assigning to Liberty Bank a collateral security interest in 169 mortgages that had been granted to Patriot by various time share estate purchasers. The assignment instrument was eight pages in length, including two pages setting forth its substantive terms, a page containing a notarial acknowledgment, and a five-page schedule describing the various mortgages it assigned. The register imposed a total fee (including Community Preservation Act surcharge) of $ 5,074 for recording the assignment. The register assessed the fee based on his treatment of the assignment as **[*117]** constituting 169 separate assignments, with a separate recording fee of $ 10, and a separate surcharge of $ 20, imposed on each. [8]

8 The register assessed an additional $ 4, at $ 1 per page for each page of the assignment that exceeded the initial four pages.

[719]** By complaint filed in the Superior Court on August 16, 2002, Patriot sought a declaration that the fee imposed by the register exceeded the proper fee by $ 4,872. [9] The parties filed cross motions for summary judgment; after hearing, a judge of the Superior Court allowed the register's motion, and denied Patriot's. Patriot filed **[***6]** a timely notice of appeal from the resulting judgment.

9 According to Patriot's complaint, the register should have imposed a total fee of $ 202, comprised of one recording fee of $ 10, and one surcharge of $ 20, on the assignment, an additional $ 4 on each of the pages of the assignment that exceeded four, and an additional $ 168 for each marginal reference necessitated by the assignment in excess of the first such notation.

Discussion. "We interpret a statute according to the intent of the Legislature. *Commonwealth v. Galvin, 388 Mass. 326, 328, 446 N.E.2d 391 (1983)*. '[T]he primary source of insight into the intent of the Legislature is the language of the statute,' *International Fid. Ins. Co. v. Wilson, 387 Mass. 841, 853, 443 N.E.2d 1308 (1983)*, and that is our starting point. *Simon v. State Examiners of Electricians, 395 Mass. 238, 242, 479 N.E.2d 649 (1985)*. Statutory language should be given effect consistent with its plain meaning. Where, as here, that language is clear and unambiguous, it is conclusive as to the intent of the Legislature. *Commonwealth v. Clerk-Magistrate of the W. Roxbury Div. of the Dist. Court*

Dep't, 439 Mass. 352, 355-356, 787 N.E.2d 1032 (2003)." Commissioner of Correction v. Superior Ct. Dept. of the Trial Ct., 446 Mass. 123, 124, 842 N.E.2d 926 (2006).

Patriot **[***7]** contends, quite correctly in our view, that the assignment was a single "paper," within the meaning of that term in *G. L. c. 262, § 38*, and a single "instrument," within the meaning of that term in *G. L. c. 44B, § 8*. Accordingly, the charges for its recording should have included a basic recording fee of $ 10, a Community Preservation Act surcharge of $ 20, an additional $ 4 for the number of pages by which the assignment exceeded four pages, and an additional $ 168 for the number of additional marginal references the assignment necessitated. [10]

10 Each mortgage assigned would receive a marginal reference noting the book and page of the assignment. See note 4, *supra*.

[*118] In opposition, the register first observes that a court should "not adopt a literal construction of a statute if the consequences of such construction are absurd or unreasonable," *Bates v. Director of the Office of Campaign & Political Fin., 436 Mass. 144, 165, 763 N.E.2d 6 (2002)*, quoting from *Attorney Gen. v. School Comm. of Essex, 387 Mass. 326, 336, 439 N.E.2d 770 (1982)*, particularly where a literal construction "would defeat the aim and object of the legislation." *Lexington v. Bedford, 378 Mass. 562, 570, 393 N.E.2d 321 (1979)*. The register asserts that the purpose **[***8]** of the recording fees statute is to provide revenues to cover the costs involved in recording documents presented to the register, and that the Legislature accordingly must have intended that the fees imposed for recording particular documents bear a reasonable relationship to the amount of work involved in recording the document. The argument is flawed at two levels. First, accepting for the sake of argument the premise that the fee must correspond in some measure to the amount of work involved in recording a particular document, the statute, as then in effect, by its plain terms attempted to address the concern by increasing the fee for the number of pages in the document, and the number of marginal references necessitated by the document. Particularly where, as here, **[**720]** the additional effort associated with recording a document lies principally in the number of marginal references required incident to the recording of an instrument, we see no material disparity between the apparent purpose of the statute and application of the statute in accordance with its terms. [11]

11 The register contends that much more additional work is required to index the assignment in accordance with the dictates **[***9]** of *G. L. c. 36, § 25*, asserting that a separate index entry must record the name of each of the various borrowers on each assigned mortgage. The statute does not so require. Under *G. L. c. 36, § 25*, the register is required to maintain a grantor and grantee index, identifying as to each recorded instrument the (i) date of reception; (ii) grantor(s); (iii) grantee(s); (iv) book; (v) page; and (vi) town where the land lies. Under an instrument assigning a mortgage, the "grantor" is the assignor of the mortgagee's interest in the mortgage, and the "grantee" is the assignee of that interest. The mortgagor's (or borrower's) interest in the property covered by the mortgage is unaffected by the assignment. The need to trace ownership of the mortgage interest (for, among other purposes, assuring authority to execute a discharge of the mortgage upon its satisfaction) is achieved by means of the marginal references on the mortgage and any assignments thereof.

Second, the specified recording fees do not strictly correspond **[*119]** to the amount of work associated with recording an instrument in any event. The recording of an assignment of mortgage involves no more work than the recording of a mortgage **[***10]** itself, yet under the statute as then in effect, the specified fee for recording an assignment of mortgage was ten dollars, while the fee for recording a mortgage was twenty dollars. [12] We also observe that recording fees collected by the register are not retained by the register but are paid into the General Fund, pursuant to *G. L. c. 29, § 2*. Accordingly, additional recording fees collected are not available to the register to cover any additional expenses he may incur in performing his required duties in any one or more particular transactions. [13]

12 Under the fee schedule currently in effect, see note 3, *supra*, the fee for recording an assignment of mortgage has increased to $ 50, while the fee for recording a mortgage has increased to $ 150. We also note that the fact that the Legislature chose in the most recent amendment to eliminate separate charges for additional pages and marginal references weighs against the register's assertion that the Legislature must have intended for fees to correspond to the work involved in recording a particular document.

13 Surcharges collected under *G. L. c. 44B, § 8*, are paid into the Community Preservation Fund established under *G. L. c. 44B, § 7*. **[***11]** Surcharges collected under *G. L. c. 9, § 31*, from March 15, 2003, through June 30, 2008, see note 7, *supra*, are paid into the Registers Technological Fund established under *G. L. c. 29,*

§ 2JJJ; from and after July 1, 2008, such surcharges are to be forwarded to the General Fund.

The register also reminds us that a court must give substantial deference to the reasonable interpretation of a statute adopted by the administrative agency charged with its enforcement. See *Commerce Ins. Co. v. Commissioner of Ins., 447 Mass. 478, 481, 852 N.E.2d 1061 (2006)*. However, the principle is "'one of deference, not abdication,'" and we will not hesitate to overrule an agency interpretation that is unreasonable or arbitrary. *Moot v. Department of Envtl. Protection, 448 Mass. 340, 346, 861 N.E.2d 410 (2007)*, quoting from *Boston Preservation Alliance, Inc. v. Secretary of Envtl. Affairs, 396 Mass. 489, 498, 487 N.E.2d 197 (1986)*.

The record includes the affidavit of Richard P. Howe, Jr., the incumbent register of deeds for the northern Middlesex district and a former president of the Massachusetts Registers and Assistant Registers of Deeds Association. In his affidavit, **[**721]** Howe uses the term "multiple document" to describe a document (which, according **[***12]** to Howe, includes the assignment involved in **[*120]** the present case) that combines "two or more separate functions or transactions together into a single document." Howe further explains that, due to the additional work associated with recording and indexing a document that effects multiple transactions, "it is standard practice for the registries throughout the Commonwealth to assess, pursuant to *G. L. c. 262, § 38*, a separate recording fee that accurately reflects the work associated with the multiple transactions or functions within the document." However, though the registers' desire to assess fees in proportion to the work involved in recording is perhaps understandable, neither the Howe affidavit, nor the register's brief on appeal, makes any attempt to ground the registers' practice in the fee schedule prescribed by the statute. [14] In construing the statute it is of course the directive of the Legislature, rather than the practice of the registers, with which we are principally concerned.

14 The register's argument gains no force from Technical Information Release 00-12, addressing Community Presentation Act Surcharges, issued by the Department of Revenue, which provides that "[i]f **[***13]** multiple recording fees are charged for one document, e.g., the registry charges three recording fees for an instrument assigning three mortgages, a surcharge is due on each separate fee collected." The technical information release does not furnish any interpretive authority for the registers' practice of imposing multiple recording fees on such documents, but simply clarifies that the Community Preservation Act surcharge is to be imposed whenever a separate recording fee is collected.

We return to the point of beginning: an examination of the words of the statute. Black's Law Dictionary 1142 (8th ed. 2004) defines "paper" as "[a]ny written or printed document or instrument." As we have observed, *G. L. c. 262, § 38*, as then in effect, imposed a recording fee of $ 10 on any "paper," while imposing higher fees on any "deed or conveyance" or any "mortgage." [15] The statute accordingly treats a "paper" as an object comparable to a "deed" or a "mortgage" for purposes of assessment of a recording fee, albeit in a different class for purposes of determining the amount of the fee. Chapter 36 of the General Laws, which generally describes the duties of the registers concerning the recordation **[***14]** of documents, consistently refers to assignments as "instruments." See, e.g., *G. L. c. 36, §§ 20, 21, & 23*. Moreover, the opening sentence of *G. L. c. 262, § 38*, **[*121]** uses the term "instrument" to refer collectively to the materials that may be left for recording, including any "paper," "deed," or "mortgage." *General Laws c. 44B, § 8*, similarly employs the term "instrument" to refer to documents presented for recording, on which a recording fee is assessed.

15 The differential persists in the current version of the statute, albeit in different amounts.

Contrary to the register's characterization of the assignment as comprising multiple assignments, it is a single instrument of assignment, from a single assignor to a single assignee. [16] That it conveys a number of separate assets does not alter its character as a single instrument of conveyance any more than would occur in the case of a deed which conveys a number of discrete parcels of land, or a collateral assignment of leases conveyed incident to the financing of a large shopping center.

16 The dissent, without explanation, similarly characterizes the assignment as comprising multiple mortgage assignments, rather than as a single assignment **[***15]** of multiple mortgage interests. See *post* at .

There are any number of conceivable methods for the assessment of recording fees on instruments presented to a registry **[**722]** of deeds for recording. The Legislature has adjusted both the manner and amount of such fees through various amendments to the statute since its first enactment in 1795. If the register believes that current conveyancing practice warrants a further refinement of the formula for assessing fees on one or more classes of documents, he is free to suggest to the Legislature an amendment to the statute. However,

under the statute as in effect at the time of the transaction involved in the present case, the fees imposed by the register exceeded the fees authorized by the statute.

The judgment of the Superior Court is reversed. The case is remanded to the Superior Court for further proceedings consistent with this opinion, to determine the amount of excess fees collected by the register from Patriot. [17]

17 In a supplemental complaint filed in the Superior Court, Patriot has identified several other assignment instruments on which it claims it was overcharged, based on the same statutory interpretation by the register.

So ordered.

DISSENT BY: BERRY

DISSENT

BERRY, **[***16]** J. (dissenting). The central issue in this case turns on **[*122]** whether the word "paper" in *G. L. c. 262, § 38*, [1], [2] encompasses the assignment of a mortgage as a separate legal instrument **[*123]** **[**723]** memorializing the transfer of a land interest, despite the fact that multiple such mortgage assignments are simultaneously presented to a registry of deeds not in the more traditional form of hard copy mortgage assignment instruments (with separate document by document descriptions of particular mortgage assignments), but instead are presented to the registry in a form in which the mortgage assignment instruments are compressed in a computerized spreadsheet (with only cell upon cell listings of the particular mortgage assignments).

1 For ease of reference in this dissent, and to provide the context in which the term "paper" appears in *G. L. c. 262, § 38*, I repeat the pertinent part of the statute, which also appears in the majority opinion.

> "The fees of registers of deeds, except as otherwise provided, to be paid when the instrument is left for recording, filing or deposit shall be as follows: *For entering and recording any paper, certifying the same on the original, and indexing it and for all other duties* **[***17]** *pertaining thereto*, ten dollars for the first four pages. The fee for recording a deed or conveyance shall be twenty-five dollars for the first four pages. The fee for recording a mortgage shall be twenty dollars for the first four pages. If the deed, conveyance, mortgage or other paper contains more than four pages, the rate shall be one dollar for each page after the first four pages.
>
> . . .
>
> "For entering any additional marginal reference or references when required, one dollar for each reference."

(Emphasis added.) *G. L. c. 262, § 38*, as amended through St. 1985, c. 515. See also *G. L. c. 44B, § 8*, quoted in the majority opinion, which imposes a surcharge pursuant to the Community Preservation Act.

2 As the majority opinion notes, by St. 2003, c. 4, § 51, the Legislature rewrote *G. L. c. 262, § 38*, substantially increasing the base fees for recording various types of documents, and eliminating, the staircased fees for supplemental pages and marginal references. As so amended, *G. L. c. 262, § 38*, provides as follows:

> "The fees of the registers of deeds, except as otherwise provided, to be paid when the instrument is left for recording, filing or deposit shall be as follows:
>
> *For entering* **[***18]** *and recording any paper, certifying the same on the original, and indexing it and for all other duties pertaining thereto*, $ 50;
>
> "For recording a declaration of trust, $ 200;
>
> "For recording a deed or conveyance, $ 100;
>
> "For recording a mortgage, $ 150;
>
> "For recording a declaration of homestead, $ 30;
>
> "For recording and filing a plan, $ 50 per sheet; and
>
> "For all copies of documents, whether copied out of books or generated electronically, $ 1 per

page, and all coin operated copy machines shall be $ .50 per page.

"The fees of the registers of deeds, except as otherwise provided, to be paid when the instrument is left for recording, filing or deposit, shall be subject to a surcharge under section 8 of chapter 44B."

As is obvious from a comparison of the prior version of *G. L. c. 262, § 38*, at issue in this case (because all the recording events preceded the 2003 amendment), and the 2003 amendment to *G. L. c. 262, § 38*, notwithstanding the amendment, the issue of what is a "paper" subject to the enumerated fees remains.

The argument advanced by the plaintiff, Patriot Resorts Corp. (Patriot), and accepted by the majority, is that there was but one paper filed -- the covering document affixed to **[***19]** the computer spread sheet. According to Patriot's theory, the 169 mortgage assignments listed in spreadsheet cells were merely an appendage, with no recording fee significance under the statutes. On this point, Patriot contends, and the majority accepts, that somehow the cover document "bundled" everything, so that only $ 202 was due in recording fees and surcharges under *G. L. c. 262, § 38*, as then in effect, and *G. L. c. 44B, § 8*. In contrast, the registry of deeds charged Patriot a total fee of $ 5,074 for recording and processing the 160 assignments of mortgage.

I reject the construction advanced by Patriot. Simply because Patriot devised a computer model that produced a spreadsheet containing all of the assignments to a single assignee as a "virtual" filing of multiple mortgage assignments and presented this to the registry of deeds, instead of tendering to the registry hard copy pages of paper instruments memorializing each of the mortgage assignments does not, in law, change the nature of the subject land transactions as instruments, that is "papers" of independent legal significance transferring rights in land and to be recorded as "papers" spread upon the public land title **[***20]** system in our registries of deed under *G. L. c. 262, § 38*.

[*124] Nor does submission of a computer-generated spreadsheet, in fact, change the nature, or amount, of necessary work by the registry staff incident to the indexing, cross-referencing, and recording of the assignment of multiple mortgages. Indeed, as shall be further described herein, the summary judgment record establishes that, irrespective of which way the assignments of mortgage were presented to the registry of deeds -- either by hard copy paper instruments, or in a compressed multitransaction computer-generated paper spreadsheet -- the same amount of administrative work by registry personnel is required. To use the words appearing in *G. L. c. 262, § 38*, the same registry work and same "duties pertain[]" to indexing and cross-referencing of mortgage title references, to achieve the final recording of the multiple mortgage assignments in the indexes and land books of the registry. The recovery of revenues arising out of the work of the registries of deeds is precisely the reason that *G. L. c. 262, § 38*, was enacted. As was stated in the 1971 emergency preamble to an amendment to this recording fee statute, the purpose is to "provide **[***21]** forthwith for increased revenue for the commonwealth and the various counties by increasing certain fees and charges of the . . . registers of deeds." St. 1971, c. 880.

For these reasons, I believe each singular assignment of a mortgage -- albeit purportedly "bundled" in a covering document or documents, or, as in this case, "bundled" and compressed in the computer-generated cells of a spreadsheet document -- constitutes a "paper" subject to the recordation and surcharge fees imposed by **[**724]** *G. L. c. 262, § 38*, and *G. L. c. 44B, § 8*. Therefore, I respectfully dissent.

1. *Procedural and summary judgment record background.* According to the summary judgment record, this case involves three sets of papers transferring rights in land, (a) 169 "Time-Share Estate Warranty Deeds," (b) 169 mortgages, and (c) 169 assignments of the aforesaid mortgages. On July 17, 2002, Patriot presented the registry with 169 separate instruments or "papers" for each of the warranty and mortgage deeds in classes (a) and (b), thereby filing 238 "papers" subject to the *G. L. c. 262, § 38*, recording fees. For the mortgage assignments, however, Patriot devised a different filing format. Patriot presented **[*125]** only a covering **[***22]** document of two pages, bearing the caption "Patriot Resorts Corporation Collateral Assignment of Mortgages to Liberty Bank," to which was attached a five-page spreadsheet. The attached spreadsheet listed the 169 assignments of mortgage in descending cells, and, then, across the pages in nine horizontal cells listed information about the mortgage assignments, including, but not limited to, the mortgagor's name, the unit purchased by each warranty deed and the amount of the mortgage financed and to be assigned. The covering two-page document, after setting forth generic legal language for a mortgage assignment, then goes on to state that the mortgage assignments set forth in the affixed cells of the spreadsheet are "incorporated herein by reference."

Capturing the work entailed and the duties undertaken by the registry of deeds to record the 169 mortgage assignments submitted in Patriot's computer

cell chart, the Superior Court judge issued a thoughtful and comprehensive memorandum of analysis and distillation of the summary judgment record. With respect to the mortgage assignments, the judge wrote in pertinent part as follows:

> "Upon receipt, Registry personnel entered the assignment into **[***23]** the recording cash register, thereby assigning the document a recording time and date, book, page, and document number. Registry personnel then manually imprinted each page of the document by use of a book and page stamping machine. The corresponding book and page number of each of the 169 mortgage deeds was typed onto the Schedule "A" of the assignment [filed by Patriot]. . . .
>
> "Registry personnel next extracted the data from the assignment and manually entered into the Registry's computer database the following information for each assignment: assignor (Patriot), assignee (Liberty Bank), mortgagor (each of the 169 individuals), property address or unit number for each of the 169 mortgaged properties, and the book and page number of each of the 169 mortgages. This process required 169 separate entries for each of the 169 mortgages. The defendants assert that the process requires great accuracy and caution and, as a result, is time-consuming. . . .
>
> **[*126]** "Next, Registry personnel proofread all the information entered into the computer database. Following proofreading, each of the 169 mortgages was marginally referenced by stamping the language "See Assignment Page Page " and then hand **[***24]** writing the specific assignment book number and page for each of the 169 mortgages. Registry personnel then sent the assignment to the scanning/filming department where a photographic image of the assignment was taken and stored in the database for public viewing. The pages were printed from the scanned images and then manually compared with their original counterparts to insure accuracy. **[**725]** Finally, Registry personnel microfilmed the assignment for document preservation purposes." [3]

3 Following the issuance of the Superior Court judge's decision, an error was discovered in the processing of the 169 mortgages when first presented to the registry by Patriot. The error related to the indexing of the names of the assignor, assignee, and individual property owner(s), all of which were not correctly entered by the registry staff, for all of the 169 mortgage assignments. Although it was believed that the borrowers' names for each of the mortgage assignments was entered into the computer database, the computer in fact only accepted ninety-nine names. Additionally, Patriot had included only one of the borrowers' names for each assignment even though many of the assigned mortgages involved more **[***25]** than one borrower. The registry contacted Patriot, which did not object to omissions in the index as long as book and page numbers were entered onto Schedule A and the copy of the mortgages appearing in the registry books contained a reference to the assignment. Evidently, the registry agreed to this practice, because many names were not in the database. After the error was corrected, a supplemental affidavit was filed with this court by joint motion. According to the register's amended and supplemental affidavit, the error was corrected as follows: "[T]he Registry corrected the index and entered the information concerning each property owner/borrower and the property's address into the computer index so that every assignment is separately indexed. This process has been completed for all transactions filed by Patriot and included in this action."

The original error does not affect the above description taken from the Superior Court judge's memorandum, nor does it affect the analysis set forth herein. This is because with the corrected indexing (which is the standard indexing practice, and which by inadvertence was not done in the original processing) all of the work described above **[***26]** in the Superior Court judge's description was done, yielding the recording fees imposed by the registry for the assignment of mortgages, which fees are the subject of this appeal.

According to the affidavit of Richard P. Howe, Jr., [4] when a **[*127]** document is submitted to a registry which combines two or more land transactions, the

registry refers to the filing as a "multiple document." The Patriot spreadsheet is a quintessential virtual model of this kind of a multiple document, with embedded multiple transactions. Such a multiple transaction document requires the registry staff to unwind -- to use the majority's term, to un-bundle -- the transactions, so that each separate land transaction listed in the multiple transaction document must be separately processed, indexed, cross-referenced and recorded. These registry duties, in effect, multiply (here exponentially by 169 times) the work that must be performed by the registry staff for a single paper instrument. Given the extra work entailed, Howe states that "[i]t is standard practice for the registries throughout the Commonwealth to assess, pursuant to *G. L. c. 262, § 38*, a separate recording fee that accurately reflects the work associated **[***27]** with the multiple transactions or functions within a document." To this end, both Howe and the defendant register aver in their affidavits that the fees charged Patriot by the Northern Berkshire registry under *G. L. c. 262, § 38*, and *G. L. c. 44B, § 8*, were standard fees for multiple transaction imposed generally by the registries in the Commonwealth. [5] (The two registers' interpretation and application of *G. L. c. 262, § 38*, on the fees to be imposed were endorsed in an affidavit by the director of the division of the registry of deeds within the Secretary of State's office consistent with that office's interpretation of the statute.)

> 4 Howe is the register of deeds for the Middlesex North Registry of Deeds and a past president of the Massachusetts Registers and Assistant Registers of Deeds Association.
>
> 5 The registers also cited the Department of Revenue's Technical Information Release, TIR 00-12.

Here *G. L. 262, § 38*, appears to embody the purpose of cost recovery by the phrase **[**726]** "for all other duties pertaining thereto." The catalog of "other duties" or additional work imposed by the Patriot filing, as found by the trial judge, appears to be voluminous and to approximate 168 times **[***28]** the amount of work required for a single filing far more closely than it resembles a single filing with merely 168 incremental "marginal references" which the majority suggests would yield a registry fees of only $ 1.00 per marginal reference. See *ante* at . [6] Instead, I believe the word "fee" in *§ 38* should be deemed to carry its **[*128]** usual meaning and purpose, i.e., that the government is entitled to a reasonably proportionate recovery of the genuine cost of the work or duties required by the service requested by the payor. See *Robinson v. Secretary of Admin., 12 Mass. App. Ct. 441, 445-448, 425 N.E.2d 772 (1981)* (the character of a governmental fee is in the recovery of reasonable costs of the governmental service rendered to the fee payor and the entitlement of the government to such revenues). Thus, I read *§ 38* as authorizing the registry to recover the cost of the filing of 169 "papers" of assignments which reflect the genuinely proportionate increase of work and duties imposed on the registry by the Patriot filing. Here, the Patriot consolidated filing increased the duties or work of the registry, and generated a proportionately greater benefit for the payor in that Patriot achieves (without **[***29]** paying therefor) the benefit of 169 mortgage assignments, and not merely one, not withstanding that the Patriot filing imposes a disproportionately greater burden, and reaps a disproportionately greater benefit, than a single submission of just one "paper."

> 6 There are two problems at least with this reliance as marginal references in the majority. First, a marginal reference is not a recorded land instrument. Second, the fees for marginal references disappear in the 2003 amendment to the statute. See note 3 in majority and note 2 in dissent.

2. *Principles of statutory construction.* Given the Legislature's clear message and expression of intent the purpose underlying *G. L. c. 262, § 38*, is to "recover revenue for the Commonwealth and the various counties by increasing certain fees and charges of the . . . Registers of Deeds," St. 1971, c. 880, I would look to the following principle of statutory construction. "The general and familiar rule is that a statute must be interpreted according to the intent of the Legislature ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or **[***30]** imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated." *Phillips v. Pembroke Real Estate, Inc., 443 Mass, 110, 114, 819 N.E.2d 579 (2004)*, quoting from *Industrial Fin. Corp. v. State Tax Commn., 367 Mass. 360, 364, 326 N.E.2d 1 (1975)*.

The majority, however, cites differing principles of statutory construction to support its interpretation of *G. L. c. 262, § 8*, including, the majority writes, that "'[s]tatutory language should **[*129]** be given effect consistent with its plain meaning.'. . . Where, as here, that language is clear and unambiguous, it is conclusive as to the intent of the Legislature." *Commonwealth v. Clerk-Magistrate of the W. Roxbury Div. of the Dist. Ct. Dept., 439 Mass. 352, 355-356, 787 N.E.2d 1032 (2003)*, quoting from *Sullivan v. Brookline, 435 Mass. 353, 360, 758 N.E.2d 110 (2001)*. Therefore, contrary to the majority, I do not see this canon of statutory construction as pertinent because I do not think that a "plain meaning"

on the face of *§ 8*, nor is the **[**727]** term "paper" in *§ 8*, "clear and unambiguous."

In any event, I rely on the principle that, "[w]hen rules of statutory construction produce conflicting results, we must discern, as closely as possible, what the **[***31]** Legislature intended. See *Helvering v. Stockholms Enskilda Bank, 293 U.S. 84, 89, 55 S. Ct. 50, 79 L. Ed. 211, 1934-2 C.B. 299 (1934)* (canons of statutory construction apply to ascertain meaning of statute, but if one canon does not effectuate purpose of statute as whole, it yields to "the wider view in order that the will of the legislature shall not fail"); *Commonwealth v. Russ R., 433 Mass. 515, 521, 744 N.E.2d 39 (2001)*. See also *Commonwealth v. Dale D., 431 Mass. 757, 760-761, 730 N.E.2d 278 (2000)*, and cases cited. Here the legislative intent for fee collection under *G. L. c 262, § 38*, to recover revenues for the duties undertaken by the registries of deeds is beyond question.

3. *Conclusion.* To interpret *G. L. c. 262, § 38*, as Patriot submits (and the majority accepts), would be in direct conflict with the legislative intent of recovering costs and revenue associated with recording transactions transferring interests in land and affecting the chain of title as set forth in the books and records of the Commonwealth's registries of deeds. [7] Furthermore, such a reading would allow parties, like Patriot, to record multiple mortgage assignments for the cost of recording one, and would thereby reduce the revenue collection which was the legislative intent of **[***32]** the law.

7 The same revenue reduction, notwithstanding additional recordation work, would also affect *G. L. c. 44B, § 8*. Such surcharges are directed to cities and towns "for the purposes of community preservation" under *G. L. c. 44B, § 8*.

For these reasons, I would affirm the entry of summary judgment for the defendants.

KENNETH C. PELONZI & another [1] vs. RETIREMENT BOARD OF BEVERLY & another. [2]

1 Public Employee Retirement Administration Commission (PERAC), intervener.
2 Contributory Retirement Appeal Board (CRAB), intervener.

SJC-10098

SUPREME JUDICIAL COURT OF MASSACHUSETTS

451 Mass. 475; 886 N.E.2d 707; 2008 Mass. LEXIS 342

April 8, 2008, Argued
May 21, 2008, Decided

PRIOR HISTORY: [***1]

Essex. Civil action commenced in the Superior Court Department on June 23, 2003. The case was heard by Patrick J. Riley, J., on motions for judgment on the pleadings. The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

COUNSEL: Michael Sacco for the defendant.

James J. Arguin, Assistant Attorney General, for the intervener.

John M. Collins for Kenneth C. Pelonzi.

Judith A. Corrigan (Barbara J. Phillips with her) for Public Employee Retirement Administration Commission.

JUDGES: Present: Marshall, C.J., Greaney, Ireland, Spina, Cowin, Cordy, & Botsford, JJ.

OPINION BY: GREANEY

OPINION

[*476] [**708] GREANEY, J. This case requires us to decide whether personal use of an automobile, furnished by the city of Beverly (city) to the plaintiff during his tenure as the city's commissioner of public safety and chief of the fire department, qualifies as "[r]egular compensation," as that term is defined by *G. L. c. 32, § 1*, for purposes of calculating the retirement allowance to which the plaintiff is entitled. The Beverly retirement board (board) concluded that the plaintiff's personal use of the automobile did not so qualify. The plaintiff commenced an action in the Superior Court against the board, seeking [***2] declaratory and injunctive relief. Considering the parties' cross motions for judgment on the pleadings, a judge in the Superior Court disagreed with the conclusion arrived at by the board and ordered that judgment enter (1) declaring that the board shall forthwith include the personal use value of the automobile in calculating the plaintiff's monthly retirement pension; and (2) directing the board to pay the plaintiff all amounts wrongly withheld, from December 1, 2002, to the present, plus interest. The board appealed, and we transferred the case here on our own motion. We now vacate the judgment.

1. There is no dispute as to the relevant facts. On July 30, 1997, the plaintiff entered into a contract with the city to serve as the city's commissioner of public safety, while retaining his former position as chief of the city's fire department. The contract stated, in relevant part:

> "The City shall provide a vehicle for use by the Commissioner and pay for all attendant operating and maintenance expenses and insurance. Said vehicle is to be used by the Commissioner in connection with the performance of his duties as Commissioner and for his professional growth and development. It may [***3] be used by the Commissioner for personal reasons, since the Commissioner is 'on-call' in the event of emergency. The Commissioner will be responsible for any retirement contributions resulting from the availability and use of such vehicle."

The plaintiff served as the city's commissioner of public safety for approximately five years. He retired at the age of fifty-seven, on September 13, 2002, after thirty-two years of creditable [*477] service as a public employee. His application to receive a superannuation retirement allowance was calculated pursuant to *G. L. c. 32, § 5 (2)*

(a), [3] in conformance with written guidelines **[**709]** issued by the public employee retirement administration commission (PERAC), which has directed that "regular compensation" should include the value of a public employee's authorized personal use of an employer-supplied automobile. [4] The application was approved by the board, and the plaintiff began receiving monthly retirement benefits of $ 6,835.87. [5] In November, 2002, relying on newly released decisions by the Contributory Retirement Appeal Board (CRAB) deciding the same issue in similar cases, the board determined that the personal use value of an employer-supplied vehicle **[***4]** should not be included as "regular compensation" and, accordingly, notified the plaintiff **[*478]** by letter that his monthly retirement benefits would be diminished by $ 327.07, that portion of his pension based on the value of his personal use of the automobile.

3 *Section 5 (2) (a) of G. L. c. 32* sets forth the basic formula for computing a member's superannuation retirement allowance, which is a factor of three components: (1) the member's age at retirement; (2) the number of years of service; and (3) the average annual rate of "regular compensation received by such member[] during any period of three consecutive years of creditable service" or during the "last three years of creditable service preceding retirement," whichever is greater.

4 On January 5, 2001, PERAC issued a memorandum that instructed retirement boards to consider "the value of IRS-defined personal use of an employer-supplied motor vehicle as regular compensation." The memorandum also stated that "[p]ursuant to [F]ederal and [S]tate law, an employee's use of an employer-provided vehicle for commuting or personal use is fringe benefit income. As such, the value of that commuting and personal use must be included on an employee's **[***5]** W2 tax form." The memorandum issued by PERAC also instructed that certain vehicles, such as marked police or fire vehicles, were exempt from the Internal Revenue Service (IRS) fringe benefit rules and, as such, the personal use of those vehicles was not subject to taxation. The memorandum advised retirement boards that, in keeping with the IRS rules, the personal use of exempt vehicles could not be considered regular compensation. In a subsequent memorandum, PERAC clarified that it would "allow the value of personal use of an exempt vehicle to be regular compensation" in certain circumstances.

5 It appears undisputed that the plaintiff has paid retirement deductions, for the relevant period, on the value of his personal use of the automobile, but the record is unclear as to when the payment, or payments, occurred. The tax status of the value of the use of the automobile is also unclear in the record, but see note 4, *supra*. Neither of these considerations matters. The payment of retirement deductions on the value of the personal use of the automobile, or the tax status of that use, is not determinative of whether the use falls within the definition of "[r]egular compensation," *G. L. c. 32, § 1*, **[***6]** for purposes of calculating an applicant's retirement benefit. See *Bulger v. Contributory Retirement Appeal Bd., 447 Mass. 651, 659-660, 856 N.E.2d 799 (2006)*, and cases cited.

The plaintiff sought an administrative appeal from the board's decision, pursuant to *G. L. c. 32, § 16*, but was informed by CRAB that a hearing on his appeal would not take place for approximately eleven or twelve months. The plaintiff then filed a complaint in the Superior Court seeking declaratory and injunctive relief against the board. [6] PERAC moved to intervene as a plaintiff, and CRAB moved to intervene as a defendant. As has been stated, a judge in the Superior Court concluded that the board had erred, allowed the plaintiff's motion for judgment on the pleadings, and denied the board's cross motion. [7] The only dispute before us is one of statutory interpretation: whether the term "regular compensation," as defined by the Legislature in *G. L. c. 32, § 1*, encompasses the value of the plaintiff's personal use of the automobile supplied by **[**710]** the city during his years of employment as commissioner. [8]

6 The plaintiff subsequently learned that the division of administrative law appeals would not schedule a hearing on his appeal **[***7]** until after the resolution of similar cases already pending in the Superior Court.

7 The judgment entered in the Superior Court is fully described in the first paragraph of this opinion.

8 PERAC and CRAB both point out that we should grant substantial deference to an agency's reasonable interpretation of a statute within its charge, and accord due weight to the expertise, technical competence, and specialized knowledge of the agency, as well as the discretionary authority conferred on it. See *Protective Life Ins. Co. v. Sullivan, 425 Mass. 615, 618-619, 682 N.E.2d 624 (1997)*; *Flint v. Commissioner of Pub. Welfare, 412 Mass. 416, 420, 589 N.E.2d 1224 (1992)*. See also *Brackett v. Civil Serv. Comm'n, 447 Mass. 233, 241-242, 850 N.E.2d 533 (2006)*, and cases cited. Each entity, not surprisingly, contends that its authority to determine what is allowable as "regular compensation" is firmly

established, and therefore, this court should defer to its position on the issue. While we give weight to the experience of both PERAC and CRAB, here they offer conflicting interpretations. Ultimately, the issue is one of statutory interpretation, which presents a question of law for the court. See *Plymouth v. Civil Serv. Comm'n, 426 Mass. 1, 5, 686 N.E.2d 188 (1997)*; **[***8]** *Boston Police Superior Officers Fed'n v. Labor Relations Comm'n, 410 Mass. 890, 892, 575 N.E.2d 1131 (1991)*; *Raytheon Co. v. Director of the Div. of Employment Sec., 364 Mass. 593, 595, 307 N.E.2d 330 (1974)*. We are required to overturn agency decisions that are inconsistent with *G. L. c. 32, § 1*. See *Plymouth v. Civil Serv. Comm'n, supra*.

2. We first look to the language of the statute. See *Leary v. Contributory Retirement Appeal Bd., 421 Mass. 344, 345-346, 657 N.E.2d 224 (1995)*. See also *Simon v. State Examiners of Electricians, 395 Mass. 238, 242,* **[*479]** *479 N.E.2d 649 (1985)*. *General Laws c. 32, § 1*, provides, in relevant part:

> "'Regular compensation' . . . shall mean the salary, wages or other compensation in whatever form, lawfully determined for the individual service of the employee by the employing authority, not including bonus, overtime, severance pay for any and all unused sick leave, early retirement incentives, or any other payments made as a result of giving notice of retirement . . . ."

This language is "straightforward and unambiguous." *Bulger v. Contributory Retirement Appeal Bd., 447 Mass. 651, 658, 856 N.E.2d 799 (2006)*. The term "[r]egular compensation" broadly denotes ordinary, recurrent, or repeated payments not inflated by any "extraordinary ad **[***9]** hoc" amounts such as bonuses or overtime pay. *Id.*, quoting *Bower v. Contributory Retirement Appeal Bd., 393 Mass. 427, 429, 471 N.E.2d 1296 (1984)*. See *Boston Ass'n of Sch. Adm'rs & Supervisors v. Boston Retirement Bd., 383 Mass. 336, 340-341, 419 N.E.2d 277 (1981)*. Thus, in the *Bulger* case, we determined that monthly housing allowance payments were "recurrent," "regular," and "ordinary" remuneration for the services of William M. Bulger as the president of the University of Massachusetts. *Bulger v. Contributory Retirement Appeal Bd., supra*. In addition, the language "salary, wages or other compensation in whatever form," demonstrates "a legislative intent to include the many distinct ways in which individuals are paid for their services." *Id.*, citing *Hallett v. Contributory Retirement Appeal Bd., 431 Mass. 66, 69, 725 N.E.2d 222 (2000)*. We made clear in the *Bulger* case that, as wages have a meaning apart from salary, so "other compensation in whatever form" must be understood to encompass all other forms of recurring payments for an employee's services, so long as the payments comport with the other requirements of *§ 1*. See *Bulger v. Contributory Retirement Appeal Bd., supra*, citing *Hallett v. Contributory Retirement Appeal Bd., supra at 68-69*. **[***10]**

The *Bulger* case was decided after the judge made his decision. Guided by what was said in the same cases cited by the *Bulger* court, however, the judge recognized, **[**711]** correctly, that the personal use value of the city-supplied automobile would qualify as a **[*480]** "regular" benefit, in the sense that it was recurring and not incurred as a bonus or in lieu of payment for special services. The judge was incorrect, however, to conclude that the benefit was "compensation . . . for the individual service" of the plaintiff. *G. L. c. 32, § 1*. "Unless it is a technical term, 'words and phrases [in a statute] shall be construed according to [their] common and approved usage.'" *Hallett v. Contributory Retirement Appeal Bd., supra at 68*, quoting *G. L. c. 4, § 6, Third*. See *State Bd. of Retirement v. Boston Retirement Bd., 391 Mass. 92, 94, 460 N.E.2d 194 (1984)* ("we need not look beyond the words of the statute where the language is plain and unambiguous"). Compensation, in the context of *§ 1*, can only be understood to mean payment for services rendered to an employer.

Here, the plaintiff's employment agreement with the city expressly required that he be "on-call" for emergency response at all times. Notwithstanding **[***11]** contrary assertions in the plaintiff's brief, it appears that the city contemplated the automobile as a tool, or piece of equipment, that would enable the plaintiff to perform his job more effectively. Although the characterization in an employment agreement does not determine, as matter of law, whether a job benefit falls within the scope of "regular compensation," see *Boston Ass'n of Sch. Adm'rs & Supervisors v. Boston Retirement Bd., supra at 341*, the language of a particular employment agreement may be relevant, as in these circumstances, to demonstrate mutual expectations of an employer and employee. We conclude that the automobile was not intended to compensate the plaintiff for his service to the city as commissioner, but rather given to him to use in connection with his professional duties, with authorization to use it "for personal reasons, since the [plaintiff] is 'on-call' in the event of emergency."

The housing allowance payments at issue in the *Bulger* case share no common attributes with the plaintiff's personal use of the city-supplied automobile.

As fully explained in the *Bulger* decision, the housing allowance payments were never intended to be used for housing. The **[***12]** university trustees "were fully aware that Bulger would continue to live in his home in the [S]outh Boston section of Boston throughout his tenure as president of the university. According to the chairperson of the **[*481]** trustees who was responsible for negotiating Bulger's compensation package in 1998, the trustees felt at that time that Bulger had done an outstanding job as university president and considered Bulger's acceptance of a housing allowance as an important enhancement of his compensation package that would motivate his interest in the presidency for an additional five-year term. In view of these circumstances, treating the housing allowance as anything other than 'other compensation in whatever form' would render that term in the statute meaningless." *Bulger v. Contributory Retirement Appeal Bd., supra at 658-659.* To import our conclusion in the *Bulger* decision to the facts of this case would be contrary to our reasoning in the *Bulger* decision, as well as to the plain language of *G. L. c. 32.*

The *Bulger* court recognized that "other compensation in whatever form" ordinarily denotes "recurring *payments* for an employee's services" (emphasis added). *Id. at 658.* See *Boston Ass'n of Sch. Adm'rs & Supervisors v. Boston Retirement Bd., supra at 341* **[***13]** ("'salary, wages or compensation in whatever form' . . . takes its color of meaning from 'salary' and 'wages'"). Indeed, **[**712]** the only noncash form of regular compensation expressly identified by the Legislature in *§ 1* is "evaluated maintenance [in the form of full or partial boarding and housing] as provided for in *[G. L. c. 32, § 22 (1) (c)]*." [9] See *G. L. c. 32, § 22 (1) (b)-(c)* (directing disbursing officer to withhold employee's retirement deductions from regular cash payments). The Legislature did not include any similarly explicit directions for the treatment of the noncash benefit associated with an employee's personal use of an employer-supplied automobile. See *Protective Life Ins. Co. v. Sullivan, 425 Mass. 615, 620, 682 N.E.2d 624 (1997)*, quoting *LaBranche v. A.J. Lane & Co., 404 Mass. 725, 729, 537 N.E.2d 119 (1989)* ("[t]he fact that the Legislature specified one exception . . . strengthens the inference that no other exception was intended"). See also *Collatos v. Boston Retirement Bd., 396 Mass. 684, 687, 488 N.E.2d 401 (1986)* ("statutory expression of one thing is an implied exclusion of other things omitted from the statute"). **[*482]** We conclude that the plaintiff's personal use of the city-supplied automobile during his tenure **[***14]** as the city's commissioner of public safety and fire chief may not be included as "regular compensation" in the calculation of his retirement allowance.

9 Consistent with the statute, regulations implemented by PERAC likewise identify only one form of noncash regular compensation, namely, "non-cash maintenance allowances in the form of full or partial boarding and housing, as provided in *[G. L.] c. 32, § 22 (1) (c)*." *840 Code Mass. Regs. § 15.03 (1) (d)(2)* (2006).

The Legislature has carefully set out what may be included in the calculation of a public employee's retirement allowance. Although *§ 1*'s definition of "[r]egular compensation" may be broad, there is nothing in the entire statutory scheme that would indicate a legislative intent to include an employer-supplied automobile that is required by the fundamental nature of an employee's job. Employers routinely supply employees with other noncash job related accessories and benefits (e.g., cellular telephones, personal computers, facsimile machines, parking spaces) to enable their employees to perform their jobs more efficiently, and may authorize the personal use of these benefits as a matter of convenience. See *Boston Ass'n of Sch. Adm'rs & Supervisors v. Boston Retirement Bd., 383 Mass. 336, 341, 419 N.E.2d 277 (1981)* **[***15]** (definition of regular compensation intended to "safeguard against . . . adventitious payments to employees which could place untoward, massive, continuing burdens on the retirement systems"). Our decision will ensure "a minimum level of predictability in computing pension payments made out of the retirement system." *Zelesky v. Commissioner of the Div. of Pub. Employee Retirement Admin., 30 Mass. App. Ct. 106, 109, 565 N.E.2d 1246 (1991).*

3. The orders entered in the Superior Court allowing the plaintiff's motion for judgment on the pleadings, and denying the board's cross motion for judgment on the pleadings, are vacated. The judgment entered in the Superior Court declaring that the board shall include the personal use value of an employer-supplied vehicle in calculating the plaintiff's pension, and directing the board to pay the plaintiff all previously suspended amounts, plus interest, is vacated. A new judgment is to enter declaring that the value of the personal use of the plaintiff's automobile is not includable as part of his "regular compensation" under *G. L. c. 32, § 1.* [10]

10 The original judgment entered in the Superior Court included an order denying the plaintiff's request for attorney's **[***16]** fees and costs. That order is not part of this appeal.

So ordered.

Land Court

County: **PLYMOUTH,ss.**
Case No: **MISCELLANEOUS CASE NO. 311622 (GHP)**
Date: **July 15, 2008**
Parties: **TOWN OF PEMBROKE, Plaintiff, v. JOHN J. GUMMERUS and INGRID LOWERY, As Trustees of The Hill/Gummerus Farm Nominee Trust, Defendants.**
Decision Type: **DECISION**

Introduction.

The defendants in this action, Ingrid Lowery and John J. Gummerus, are trustees and equal beneficiaries of Hill/Gummerus Farm Nominee Trust ("Trust"). The Trust owns the property located on Valley and Birch Streets in Pembroke, Massachusetts ("Property") which is in dispute in this litigation brought by the Town of Pembroke. The Town seeks judgment which will require the defendants, in exchange for payment by the Town, to transfer it title to the Property. The land at issue in this case had been classified as agricultural land under G.L. c. 61A. On April 9, 2004, Lowery entered into a Purchase and Sale agreement ("Agreement") with the trustee of Double J. Realty Trust. The Town set out to exercise its statutory first right of refusal option under G.L. c. 61A, s. 14. The

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Town acted to assume the position of the buyer under Agreement with defendant Lowery. The Town and the trustees of the Trust did not consummate the transfer of title to the Property, for reasons the parties dispute in this litigation. On July 25, 2005, the Town filed a verified complaint. Among other relief, the Town seeks judgment declaring that the Town, pursuant to G.L. c. 61A, s.14, is entitled to purchase the Property, at the same price and on the same terms set forth in the Agreement. the Trust to specifically perform the Agreement.

Procedural History.

Plaintiff filed an amended complaint August 15, 2005. There followed the answers of John Gummerus and Ingrid Lowery on September 12, 2005.

Plaintiff had moved on July 25, 2005 for a temporary restraining order, which the court (Piper, J.) denied. Plaintiff also filed a motion for preliminary injunction on July 25, 2005, requesting access to the Property, contending that access was available to the Town pursuant to the Agreement to which the Town had succeeded as buyer. The Town sought access to prepare a survey of the Property, and to conduct an appraisal of the Property's value. The court granted this motion in part and denied in part, establishing in its order limited and conditioned rights of access for the Town's benefit. A month later, on August 25, 2005, the Plaintiff filed an emergency motion to modify the preliminary injunction. The court made further interim orders allowing additional limited access.

The court scheduled a case management conference which was held on October 12, 2005.

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The parties filed cross motions for summary judgment. After hearing, the court issued an order on June 13, 2006 denying the cross-motions for summary judgment, concluding that material facts existed which required the taking of evidence to resolve.

The parties submitted their initial joint pre-trial memorandum on October 24, 2006. The parties submitted an updated joint pre-trial memorandum on

December 8, 2006 and appeared in court for a pre-trial conference December 15, 2006.

Trial took place in Boston on April 11, 2007. Court reporter Karen Smith was sworn to transcribe the evidence. Two witnesses testified, Edwin J. Thorne, the Town Administrator of Pembroke, and John J. Gummerus. Twenty-nine exhibits were introduced into evidence, most by agreement of the parties, and all as reflected in the transcript.

Defendants Lowery and Gummerus separately filed motions for required findings in their favor, which were argued and denied by the court from the bench. After trial and the receipt of the transcript, the parties were given the opportunity to file legal memoranda.

On all of the testimony, exhibits, stipulations, and other evidence properly introduced at trial or otherwise before me, and the reasonable inferences I draw therefrom, and taking into account the pleadings, and the memoranda and argument of the parties, I find the following facts and rule as follows:

Facts.

John J. Gummerus and Ingrid Lowery are, as co-trustees of the Trust, record owners of the Property in question, and each individual has a 50% beneficial interest in the Trust which holds title to the Property (as described in the deeds recorded with the

Plymouth County Registry of Deeds in Book 16928, Page 119 and Book 1760, page 596. The Property is shown as lots #2-5 on Plan F4, and as lots 5, 6, 8, 9, and 12 on Plan F5, of the Pembroke Assessors Maps). This land has been taxed under the provisions of G.L. c. 61A, s.14 from Fiscal Year 1999 to Fiscal Year 2005, inclusive.

Gummerus is Lowery's nephew. On November 6, 2003, Gummerus entered into an option agreement (the "Option") with Lowery; the Option gave Lowery the right to purchase Gummerus' beneficial interest trust for $462,500.00. The Option provides that it must be exercised by Lowery by December 31, 2005, and only after the giving of 15 days' prior written notice. The Option stated, in part: "At any time during the Option Period, you may purchase all of my beneficial interest in the Trust, being 50% of the ownership of the Trust, for a purchase price of $462,500.00. You may exercise the option at any time during the Option Period, provided that you shall give at least fifteen (15) days' written notice."

April 9, 2005, Lowery, as seller, entered into the Agreement with John Bradley, trustee Double J Realty Trust, as buyer, for the purchase and sale, at a price of $925,000.00, of the beneficial interests under the Trust which, by the two trustee defendants, is the record owner of the Property. Bradley made the initial $50,000 deposit to Lowery as seller. According to the terms of the Agreement, closing was to take place prior to December 31, 2005, and with at least 30 days' written notice from the buyer to the seller. The Agreement provided that the seller undertook to execute and deliver at the closing "all documents necessary to effectuate the resignation of John J. Gummerus and Ingrid Lowery as Trustees of the Trust and the appointment by the beneficiary of the Trust... and all other documents deemed reasonably necessary to convey the beneficial

interest in accordance with the terms and conditions of this Agreement..." In addition, under the Agreement, "seller shall use reasonable efforts to remove any defects in title, or to deliver possession as provided herein.... [I]n no event shall the Seller be required to expend more than $10,000 to give title or to make conveyance, or to deliver possession of the premises..."

On October 28, 2004, notice of intended conversion of the agricultural status of the Property was hand-delivered to the Town's Board of Selectmen, Board of Assessors, Planning Board, and Conservation Commission by Attorney David Lane on behalf of Ingrid Lowery. Also enclosed with the notice was a proposed declination of the Town's right of first refusal, which Mr. Lane invited be signed to indicate the Town's lack of interest in exercising its statutory right. The notice did not contain an address where notice might be sent if the Town instead chose to exercise its Chapter 61A option. On February 14, 2005, the Town recorded notice of its exercise of the option rights with the Plymouth County Registry of Deeds. On February 25, 2005, the Town sent, through facsimile and by certified mail, a copy of the notice of its exercise of its right and option under the statute to Lowery and Gummerus. These counterparts of the notice were directed to Attorney Lane. This notice advised that "at a duly called meeting of the Board of Selectmen of the Town of Pembroke held on February 14, 2005, it was voted to exercise the option of the Town to purchase said Premises in accordance with the G.L. c. 61A s.14, contingent upon a favorable vote appropriating the funds for the acquisition of the Premises at the next duly called Special or Annual Town Meeting."

On May 31, 2005, the Town sent the $50,000.00 deposit (the amount of the deposit required by the Agreement) to Attorney John R. Souza (who is counsel to

Lowery). This check was never negotiated by the defendants, and since has been returned to the Town. The Town scheduled a closing pursuant to the Agreement for December 28, 2005. The defendants did not attend on this date. One week prior to the scheduled closing, the Town sent a letter to counsel for Defendant Lowery listing three issues related to the closing. In this letter the Town, by its lawyers, raised three separate problems with the title to the Property which were said to require correction and attention before the Town would close: (1) an allegedly undischarged mortgage from the year 1948; (2) a bankruptcy filed in 1985 by someone named John Hill; and (3) an assertion that Julie P. Gummerus, the ex-wife of Mr. Gummerus "has an interest in the subject property" by virtue of "papers filed relative to [the] divorce." The Town advised that it required several documents, including a release, to be signed by Julie Gummerus. The Town also made the sale proceeds check which it brought to closing payable to Julie Gummerus in addition to the two trustees and beneficial owners of the Trust, Lowery and Mr. Gummerus. The defendants, who were advised of the Town's insistence on the documents its counsel drafted for Julie Gummerus' signature being signed as a condition of closing, and who were also advised that she had been added as a third payee on the sale proceeds check, wrote to the Town's lawyers that conducting the closing with these conditions still adhered to by the Town would be a "fool's errand," and that, in light of that, they would not attend.

Analysis.

1. Does Failure to Give Notice of Intended Conversion to the Town by Certified Mail Preclude the Town from Exercising its Statutory Right to Purchase the Property?

Under G.L. c. 61A, s. 14, "land which is valued, assessed and taxed on the basis of its agricultural... use... shall not be sold or converted to residential... use while so valued, assessed and taxed unless the... town in which such land is located has been notified of intent to sell for or convert to such other use...." G.L. c. 61A s. 14. (Quotations from and references to G.L. c. 61A are, unless otherwise indicated, to the version in effect at the time

relevant to this litigation, and not to the amended version which took effect March 22, 2007, see St. 2006, c. 394, s.31). Section 14 affords a town "[nor a period of one hundred twenty days subsequent to such notification... in the case of an intended sale, a first refusal option to meet a bona fide offer to purchase said land." The statute provides that "such notice of intent [of sale or conversion] shall be sent by the landowner via certified mail to the... board of selectmen of a town, to its board of assessors and to its planning board and conservation commission, if any...."

Lowery claims that the notice of intent delivered to the Town of Pembroke did not meet the requirements of this statute, and that the notice which was given was invalid, meaning that the Town never acquired any option under c. 61A to purchase the Property. Attorney David Lane delivered the notice of intended conversion to the Town by hand, rather that by the statutorily required means of certified mail. This notice also failed to include an address to which a notice of exercise of the option might be sent on behalf of the Town. Due to these deficiencies of the notice that Attorney Lane delivered to the Town, defendants claim that the Town's option to purchase never ripened.

Defendants refer the court to Billerica v. Card, 66 Mass. App. Ct. 664 (2006), in which the court held that failure to send notice by certified mail rendered the notice invalid. An owner of agriculturally-classified land, Card contended that notice he sent to

the town was valid, despite having been delivered by hand rather than certified mail. Card advanced this argument to show that the town had allowed the 120-day window for exercise of its statutory option to lapse. This position did not prevail. Card's failure to use certified mail kept the time for exercise by the municipality from commencing, and so it could seasonably exercise its option right the following year.

In contrast with the facts in Card, it is the defendants in the case now before me who claim that the notice sent to the Town was invalid, and thus could not have triggered a right of acceptance by the Town. It is not clear, given the different factual setting in Card, that its holding on this point applies directly to the case at bar. I find as a fact that the notice to the Town in this case, although hand-delivered, was successful in reaching its target and in affording actual notice to the Town of the intended sale or conversion of the Trustees' land out of agricultural use. The notice, though not sent by certified mail, told the tale it was intended (and needed) to tell, and in fact solicited a waiver of the Town's right to purchase, indicating that the notice was intended, absent such a waiver, to trigger the Town's right. The Town certainly acted in response to this notice by proceeding to exercise its right to buy the Property.

While the Town would have been able, had it failed to exercise in time, to argue, as did the municipality in Card, that the Town was entitled to notice by the statutory means, certified mail, and was not under any deadline to exercise it until it received its notice that way, the position of the parties are aligned differently in the case at bar. In this case, the notice, though hand-delivered, reached the Town and provoked its response in exercising its purchase right. Defendants should not be able, on these facts, to gain an advantage from their own disregard of the notice requirements of the statute, simply

because it will free them from the obligations of the statute. They clearly intended the notice to be effective, the Town treated it as such, and the defendants should not be able to avoid the statutory right of refusal in such a case. I note that the amendments to this statute which became effective in 2007 allow hand delivery as an approved alternative. From this I derive the

conclusion that the legislature sees no difficulty with this method of service as being adequate to serve the function of effectively giving this type of notice. In an instance where the Town accepts that the notice was sufficient, and acted upon it as if it were, the prior version of this statute does not render the notice ineffective.

2. Did the Town of Pembroke Exercise Its Option to Purchase the Property within the Statutory 120-Day Period and In the Manner Required by the Statute?

G.L. c. 61A, s. 14 allows for a 120-day period in which a municipality may invoke its right of first refusal to purchase. The initial notice of intended conversion was served upon the Town on October 28, 2004, marking the start date of the 120-day option period. Section 14 provides: "Such option may be exercised only by written notice... mailed to the landowner by certified mail at such address as may be specified in his notice of intention and recorded with the registry of deeds, within the option period." The Town recorded its notice of exercise of the option with the Plymouth County Registry of Deeds on February 14, 2005. The Town then on February 25, 2005, the last of the 120 days, sent notice of the exercise to Lowery and Gummerus, by both facsimile transmission and by certified mail, via Attorney David Lane. The statute requires registry recording of the municipality's written notice of exercise within 120 days. This was done. Section 14 also requires sending the notice of exercise by certified mail within the same 120 days. This also was done. It is not significant that the certified mail was

addressed to Attorney Lane. He had provided the triggering notice of intent, and it lacked any other address to which the municipal exercise notice was to be sent.

Despite the fact that the Town gave its notice of exercise of its c. 61A option within the prescribed time, Gummerus claims that the exercise by the Town was not valid under the statute. The Town stated in its notice that the exercise of the option was "contingent upon a favorable vote appropriating funds for the acquisition of the Premises at the next duly called Special or Annual Town Meeting." Defendant claims that such an exercise, resting on a contingency for appropriation, is not a valid exercise of the option because it is not fully binding on the Town in an unconditional way.

The question presented on this point is a close one, which the parties have not been able to illuminate for the court by citation to any controlling appellate precedent. There are, however, on this issue decisions of the trial courts, including from the Land Court, and I am persuaded, after consideration of the arguments on both sides, that I will follow the position taken by other justices of this court.

The Agreement with the original buyer, upon which the Town's right to purchase depends, did not afford him a contingency for financing or for raising the funds to be used to buy the Property. The original private buyer gave himself no "out" if, even for the best of reasons, he could not obtain a mortgage loan or otherwise come up with the purchase price. Yet, in exercising its option to purchase, the Town inserted its own contingency, which purported to free the Town from liability if, prior to the time of closing, the funds necessary to complete the acquisition were not voted for that purpose by the Town Meeting.

There can be no doubt about the Town's admirable circumspection in adding this protective provision to its notice of exercise of the option. If the required Town Meeting vote of appropriation was not secured, for any number of reasons-fiscal, political, or otherwise-the Town, without a contingency on that score, would be in the difficult position of having agreed to buy land it had insufficient funds to acquire. The legal issue is whether or not the Town, in establishing this contingency for itself, strayed too far outside the terms of the deal between the private buyer and the defendants, into which the Town was stepping, and thus did not effectively exercise its statutory right to purchase.

In this case, the evidence shows that, despite the Town's caution, the need for appropriation of municipal funds was lessened by the genuine prospect of state funding for a significant part of the purchase price. The evidence also is uncontroverted that, at the time set for performance, the Town actually did have all the money it needed to buy the Trustees' land-a check was cut in the correct amount, even though it was not delivered due to the dispute the parties had on other issues, discussed elsewhere in this decision.

On the other hand, the Trustees have objected, with some support in the governing statute, to the unilateral insertion by the Town of the funding contingency into the municipal notice of exercise of the right to purchase. The Town's statutory right was to assume the agreement that the owner of the chapter 61A land had entered into with the original private buyer. "There is no indication, however, that the Legislature intended that a municipality's `first refusal option' to purchase would encompass the right to purchase such land on different terms and conditions than set forth in the `bona fide offer.' Franklin v. Wyllie, 443 Mass. 187, 195 (2005).

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Nothing suggests that the Agreement was, in not embodying a financing contingency to protect the private buyer, less than bona fide. Nothing in the evidence shows that the defendants and their original buyer had some unwritten understanding that this buyer would be excused from performance if he could not amass the funds he needed to purchase the Property. The defendants argue that the Town was under an obligation to evaluate the risks of the Agreement before deciding that the Town wanted to be committed to its terms. The defendants say that the risk of lack of appropriation, and the consequent loss of the purchase to the landowner, was a new, material and adverse condition-one not part of the Agreement as it was struck with the private buyer. Defendants argue that this was a new term to which it was unfair to subject the Trustees, because, if the contingency had been invoked by the Town, the Trustees might well have lost their deal with the original buyer, and have had no recourse against the Town.

In considering the positions of the parties on this issue, I am guided by the reality that the statute involved here is one serving an important public purpose, that "remedial statutes such as G.L. c. 61A are to be liberally construed to effectuate their goals," and that section 14 "ordinarily... must be interpreted in a manner which will not frustrate or impair a town's right of first refusal." Franklin v. Wyllie, supra, 443 Mass. at 196. I also take into account that there is a comprehensive body of municipal law which limits the ability of a town to act--where to do so would require expenditure of local funds--without taking the requisite steps to secure a lawful appropriation of those funds. The cases considering this question--of whether or not a town may make its exercise of its purchase right contingent on securing appropriation votes--have placed heavy emphasis on the existence and importance of this related body of municipal law. These decisions of the

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trial courts conclude that chapter 61A (and similar statutory schemes) were intended by the legislature to work in harmony with the laws that limit and control a municipality's ability to act and be bound without first having secured proper appropriation.

In Meachen v. Hayden, 6 LCR 235 (1998), Justice Lombardi considered the same question I now face:

> ...[P]laintiffs insist that the purported exercise by the town was invalid because it was contingent upon votes at town meeting and at a town election. ... In the view of the plaintiffs, the town had to act decisively and definitively in order to validly exercise the first refusal option. Id., at 237-238.

The Meachen court rejected this argument, noting that

> Although the ... notice contained language plaintiffs insist made the exercise of the option contingent and thus ineffective, I disagree. Irrespective of whether the town referenced future town meeting and town election votes, those actions were required under municipal law once the selectmen exercised the first refusal option. Under G.L. c. 44, s.31, selectmen in a town have no authority to incur a liability in excess of appropriations. It was a legal requirement for the town meeting to appropriate the necessary funds to meet the terms of the ... notice, once completed.... Similarly, G.L. c. 59, s.21C, requires, when necessary, voter approval to assess taxes in excess of statutory limits. There is nothing in G.L. c. 61A which exempts a city or town from complying with other relevant statutes. Id., at 238.

Later Land Court cases have followed this view. See, eg., Douglas v. Renaud, Misc. Case No. 264961, Order Denying in Part and Granting in Part Summary Judgment (June 4, 2001)(Lombardi, J.), and Brimfield v. Caron, Misc. Case No. 331899, Preliminary Injunction (February 28, 2007)(Long, J.).

I am persuaded by the logic of these cases and follow them on this point. I conclude that the legislature certainly could have enacted chapter 61A in a way which overrode the parallel provisions of municipal law that apply generally to actions by cities and towns, and which make those actions subject to securing proper votes of

appropriation. Chapter 61A as in effect at the relevant time in the case now before me did not include any such override. One who takes advantage of the benefits of the reduced taxation of agricultural land must accept that with those benefits come the extra burden of complying with a municipality's exercise of its right to purchase, created under the same chapter of the general laws. An owner of agriculturally assessed land should be cognizant of the legal and fiscal requirements that govern how a municipality must go about raising the funds necessary to complete the purchase. Although the result is that the Town might have had a contingency which the private buyer did not have available to it under the Agreement, that did not make the Town's exercise of its purchase right ineffective. In this case, there was no attempt by the Town to take advantage of its `subject to appropriation' contingency, and all funds needed to make the purchase were, I find, obtained by the Town and available to it at the time set for closing.

I conclude that the exercise of the Town's statutory right to purchase was proper, notwithstanding the Town's the inclusion of the appropriation contingency.

3. Did the Town of Pembroke Fail to Perform Under the Agreement?

I next need to decide whether, given the actions of the Town and the defendants leading up to the established date for closing, one or the other of the parties failed to perform in a manner which constituted a material breach of the terms of the Agreement. on this point, reviewing the pertinent evidence, and deciding whether or not there was a breach of the Agreement.

After submitting its notice of exercise of the statutory right of first refusal , the Town, acting by its counsel, sent a letter to the defendants in advance of the upcoming closing. The letter indicated that the Town's title examination had uncovered three

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issues, which the Town, through its lawyers, required be resolved prior to consummation of the sale and the payment of the purchase price. Defendants urge me to decide that the Town's insistence on these points was improper and in violation of the Agreement-that defendants, as sellers under the Agreement, had no contractual responsibility to address any of the problems with the title identified by the Town's lawyers, and that the Town's insistence that the defendants do so constituted a breach by the Town of the terms of the Agreement. Said more simply, the defendants contend that the record title to the Property met the standard established by the Agreement, and that the Town should have paid the purchase price without regard to the title issues raised by Town counsel.

The Agreement required the seller(s) to deliver "good clear record and marketable title." "A good and clear record title free from all encumbrances means a title which on the record itself can be again sold as free from obvious defects, and substantial doubts." Lee v. Dattilo, 26 Mass. App. Ct. 185, 188 (1988), quoting from O'Meara v. Gleason, 246 Mass. 136, 138 (1923). The question whether a seller's title is good and clear is one of fact; if a buyer sues to show that, because of title defects, he or she need not have purchased, the burden rests on the buyer to prove that the seller's title was not good beyond a reasonable doubt and that defendant did not have a marketable title. See Cleval v. Sullivan, 258 Mass. 348, 351 (1927). "Marketable title does not mean perfect title but, rather, title free from reasonable doubt; in other words, from doubt that would cause a prudent person to hesitate before investing his money." Mucci v. Brockton Bocce Club, Inc., 19 Mass. App. Ct. 155, 159 (1985).

The Agreement further provides that the seller shall not, in any event "be required to expend more than $10,000.00 to give title or to make conveyance, or to deliver

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possession of the premises, all as herein stipulated, or make the premises conform with the provisions hereof." According to the Agreement, as entered into with the original private buyer, the seller(s) would have the option to fix all defects in the title which made it fail to meet the standard established for title in the Agreement, or, alternatively, spend no more than the $10,000 limit to remedy those defects.

The Town claimed that at the time of closing, the title to the Property failed to meet the standard called for in the Agreement because of the following issues:

i. 1948 Mortgage

The Town discovered in the back title to the Property an undischarged mortgage dated March 22, 1948. This mortgage, recorded in the Plymouth Registry of Deeds in Book 1992, Page 255, was given by former Property owners John Hill and Ida S. Hill to Cranberry Credit Corporation to secure payment of amounts due under a note, in the original principal amount of $20,000, payable within one year.

An undischarged mortgage is a title defect that may well prevent a seller from delivering good and clear record and marketable title. See Hastings v. Gav, 55 Mass. App. 157, 161 (2002). However, the provisions of G.L. c. 260 s. 33, as it was in effect at the time of the closing set by the Agreement, makes the mortgage at issue unenforceable against the title. The statute provides, with certain exceptions not here relevant, that fifty years after the recording of a mortgage "[n]o power of sale in [such a] .. mortgage of real estate shall be exercised and no entry shall be made nor possession taken nor proceeding begun for foreclosure of any such mortgage...." The mortgage pointed to by the Town as one of its asserted defects in the Property's record title had been recorded in 1948, well more than fifty years earlier, and secured a one-year note. The obvious purpose and

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effect of the statute is to clear titles of old and obsolete mortgages, without the need of obtaining a discharge. There was no way that the title to the Property which the Town would have acquired would have been affected in any real way by the 1948 mortgage, given the breadth of the curative statute that applied to it. The Town was without right when its lawyers sought a discharge of the 1948 mortgage, and treated the title to the Property as defective under the Agreement in the absence of a discharge.

ii. John Hill Bankruptcy

In their letter to the defendants, the Town also raised an issue concerning a bankruptcy filed in 1985 by John Hill in the Bankruptcy Court in Worcester. Defendants make the argument that unless the Town can show that John Hill was part of the chain of title to the Premises, this declaration of bankruptcy would not be a defect in the title to the Property. The defendants' position on this is meritorious, especially given the relatively common surname of the bankrupt, and the length of time since the bankruptcy filing. The Town submitted no further evidence on this issue during trial. I find, on all the evidence, that this bankruptcy filing did not constitute a basis for the Town to have treated the title to the Property as defective.

iii. Gummerus Divorce

The last title issue that the Town presented to the defendants has to do with Gummerus' divorce from his wife July P. Gummerus. Counsel for the Town expressed to the defendants considerable concern about the judgment of divorce nisi which entered in the Plymouth Division of the Probate and Family Court Department July 8, 2003 (and became absolute October 7, 2003). The judgment incorporated the separation agreement between the parties, which, in pertinent respects, was "to survive as an independent

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contract." The divorce agreement made extensive reference to the Property, and laid out the then pending plans of its owners, including Gummerus, to sell the land to a third party. The divorce agreement anticipated a possible sale at a price of $925,000. The divorce agreement contemplated cooperation in "the efficient and successful completion of the sale of the various parcels that constitute the so called bog property [the Property]..." The divorce agreement goes on to provide that "[F]rom the gross proceeds of any sale expenses related to the sale... will first be paid, then the net proceeds from the sale will be divided one half to the Husband's aunt and one half to the Husband....

Additionally, from the Husband's net share less any set aside for capital gains, the Wife will be entitled to receive one-third of the net after tax share with the remaining two thirds to the Husband outright free of further claim of the Wife."

On the strength of these Probate Court divorce documents, the Town's counsel treated the Property's title as not meeting the standard set in the Agreement. The Town requested that, as a condition to closing and the payment of the purchase price due under the Agreement, Julie P. Gummerus, the divorced spouse of defendant Gummerus, sign a variety of documents, including a release of rights she might have in the Property or to the proceeds of its sale, a mechanic's lien affidavit, a settlement statement, and certain IRS reporting certifications and forms. The Town prepared and proposed to deliver, in satisfaction of its obligation under the Agreement, a check for the purchase price which was payable not only to the defendants, but also to Julie Gummerus. The check the Town had ready at the time of closing included Julie Gummerus as a payee.

Other than the fact that the divorce judgment, and the divorce separation agreement which it referenced, called upon defendant Gummerus to turn over a portion

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of the net proceeds of the eventual sale of the Property to his former wife Julie, there was no other evidence at trial that showed in any way that this obligation was one which burdened the title to the Property and constituted a lien upon, or other defect in, the title the defendants were able to convey to the Town under the Agreement. The Town has not referred the court to any statute or other authoritative law which supports the conclusion that the undisputed obligation by Gummerus to pay his ex-wife a share of the net proceeds from the sale of the Property would give her a right to proceed against the Property, standing in the hands of the Town, were it to have closed the transaction under the Agreement and delivered the purchase price to Gummerus and Lowery only.

There was not here any order or judgment of the Probate Court that attached or explicitly placed a lien upon Gummerus' interest in the Property, to insure the payment obligation he undertook to his ex-wife at the time of their divorce. Neither did she receive a mortgage of the Property securing that payment. The better view is that what Julie Gummerus had, by virtue of the divorce separation agreement, was a personal obligation by her former husband to make the payments to her when the closing of the sale of the Property took place, a personal obligation then incorporated by reference in the court's judgment. Julie Gummerus' remedies were against her ex-husband personally on this score, and she could have sued him on their contract, or sought an adjudication of contempt from the Probate Court, if he did not pay her what she was due if and when he received his share of the purchase price. This is particularly so given that the payment due to Julie Gummerus is based on net proceeds, with adjustments to made for closing costs, payment of capital gains and other taxes, and other amounts. Under these circumstances, the Town was not correct in taking the position that its title to the

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Property would be subject to rights of Julie Gummerus in the event that, after closing, her former husband did not pay her her agreed share of the sale proceeds.

In light of this, the Town was wrong to have requested Julie Gummerus, who never was a record owner of the Property at any relevant time, and who never had been a party to the Agreement, to sign various documents, including an instrument of release, as a condition of turning over the purchase price. These were conditions which, given the acceptable nature of the record title to the

Property under the standard set in the Agreement, the Town could not have required. The same also is true of the insistence by the Town on making its purchase price check payable to Julie Gummerus. The defendants were right to have considered this position by the Town as contrary to the terms of the Agreement under which the parties then were operating. The Town never timely tendered payment, or came prepared to make payment, of the purchase price in the form required under the Agreement, because the Town never presented funds in any form other than the check which made payment to someone who was not an owner of the Property and was not a party to the Agreement.

It certainly is true that the position the Town, through its attorneys, took on these title issues in the period leading up to the closing show care and caution on the part of the Town and its lawyers. There are many title matters that conveyancers identify as of concern, and, in their careful nature, strive to put to rest. This effort to attend to matters raised by a title examination is a worthy one. There is no doubt that these concerns about the title were ones which, in an amicable transaction between agreeable and willing buyers and sellers, would ordinarily have been addressed fully, meticulously, and cooperatively by counsel for all involved. The case now before me, however, involves,

for somewhat obvious reasons, sellers who were not enthusiastic about being required to go forward with the sale of their land to the Town. In such a case, the task of representing a buyer becomes much more difficult. The decision about whether to accept or reject a title, or to insist on conditions to closing that address title concerns, cannot be made based on what might be the most admirable conveyancing practice. The decision needs to be made strictly according to what the legal obligations of the seller to deliver title are, under the governing agreements and the law. This is a case where the Town's position challenging the Property's title, and insistence on the signature of a non-party on various documents (and the payment of the sale proceeds to her) went beyond what the Town was entitled to insist upon under the Agreement. The Town's actions were not in accordance with the Agreement, and amounted to a material failure to perform under it.

To the extent that the Town argues that the title issues it raised prior to closing were not presented to defendants and their counsel in a hard and fast way, and that the Town was willing to relent on these issues and close in any event, the evidence does not support that defense. None of the lawyers involved in the closing transaction testified at trial. Particularly with respect to the divorce-related issues, the evidence does not convince me that the Town, which made out its payment check with Julie Gummerus as one of the three payees, communicated in a meaningful way to the defendants, prior to the time set for closing, that the Town was ready, willing, and able to go ahead and purchase under the Agreement in the manner it required-without any conditions attached to title issues the Town previously had advanced.

4. The Effect of the Option and the Structure of the Agreement as a Sale of Beneficial Interests in the Trust.

Given the conclusion I have reached, that the Town materially breached the Agreement, it is unnecessary for me to dwell on an alternative contention by the defendants-that given the manner in which the original transaction was structured, as a sale of beneficial interest in the Trust, based on the Option Gummerus gave Lowery to acquire his beneficial interest, the Town lacks the ability to obtain specific performance.

Gummerus makes the argument that he is not a full party to the purchase and sale agreement and it cannot, therefore, be enforced against him. Gummerus signed the Agreement in his capacity as "Trustee of Hill/Gummerus Farm Nominee Trust," in a limited way, signifying his assent only to the provisions of paragraphs #9 and #21. What Bradley, the original buyer, was to buy was not real property title to the Property--but rather the entire beneficial interest underlying the Trust. To accomplish this end, it was necessary for Lowery to exercise in timely fashion the Option Gummerus had given her to acquire his beneficial interest in the Trust. The evidence was the Lowery never acted to exercise the Option she held on Gummerus' beneficial interest in the Trust. These facts, Gummerus argues, make it impossible for the Town to obtain specific performance.

That question I need not decide, given that the Town's material breach of the Agreement keeps it, in any event, from obtaining enforcement of the Agreement. Suffice it to say that the entire structure of the transaction laid out by the Option and the Agreement suggests that it may have been put together that way, at least in substantial part, as a way to sidestep the municipal right to purchase under chapter 61A which Lowery and her nephew knew they would face. If the Town had not breached the

Agreement, I would have addressed this defense by concluding that, rather than frustrate the public interest in municipal exercise of the right of purchase under section fourteen, the court could remedially order the enforcement of the Agreement by requiring Gummerus to transfer his interest in the Trust to Lowery, then to be simultaneously transferred to the Town in exchange for the purchase price. The breach by the Town, however, makes this question unnecessary to address further.

Conclusion.

I find and rule that the Town failed in a material way to deliver the performance required of the buyer under the Agreement, and so breached the Agreement materially. I further find and rule that the defendants did not breach the Agreement. Accordingly, the Town is not entitled to specific performance of the Agreement, and the defendants are under no obligation to convey the Property, or any interest in it, to the Town.

Judgment accordingly.

Judge: **/s/Gordon H. Piper**
Justice

End Of Decision

STANLEY P. ROKETENETZ, JR. vs. BOARD OF ASSESSORS OF LYNNFIELD.

No. 07-P-1407.

APPEALS COURT OF MASSACHUSETTS

72 Mass. App. Ct. 907; 2008 Mass. App. LEXIS 890

August 18, 2008, Decided

DISPOSITION: [1]** Decision of the Appellate Tax Board affirmed.

COUNSEL: Brian J. Kelly, for the plaintiff.

Thomas A. Mullen, for the defendant.

OPINION

[*907] The plaintiff [1] applied for an abatement of real estate taxes assessed against his residence by the defendant board. Pursuant to *G. L. c. 59, § 61A*, the board directed him to allow the board access to the interior of his home, for the purpose of viewing its condition. The plaintiff refused, based on his contention that the board was required to obtain a warrant for such access. The board thereafter denied the plaintiff's application for an abatement, citing his refusal of the board's request. The plaintiff timely appealed the board's denial of his application to the Appellate Tax Board. The board moved to dismiss the appeal, based on the plaintiff's failure to provide the requested access. After a hearing, the Appellate Tax Board denied the board's motion to dismiss, but ordered the plaintiff to allow an inspection of his home within thirty days. The plaintiff refused, and the board again moved to dismiss the appeal, this time on the basis of the plaintiff's refusal to comply with the Appellate Tax Board's discovery order. The Appellate Tax Board allowed the motion, and **[**2]** this appeal followed.

1 Although she appeared as a plaintiff below, Harriet Roketenetz is not a party to this appeal as she did not pay a separate docket fee or seek a waiver of that fee. References in this decision to the plaintiff are to Stanley P. Roketenetz, Jr.

The authority of a board of assessors to require an applicant for an abatement to "exhibit" the property for which abatement is sought is grounded in statute. See *G. L. c. 59, § 61A*. Whatever the board's powers and rights may be, the authority of the Appellate Tax Board to issue discovery orders for the development of information material to an abatement application is clear, as is the authority of that board to dismiss an application for failure to comply with a discovery order. See *Board of Assessors of Provincetown v. Vara-Sorrentino Realty Trust, 369 Mass. 692, 694, 341 N.E.2d 649 (1976)*. See also *831 Code Mass. Regs. § 1.25* (2007) (referring to *G. L. c. 231, §§ 61-67*); *G. L. c. 231, § 64* (regarding penalties for failure to comply with a discovery order issued by the Appellate Tax Board). Furthermore, the protection of the *Fourth Amendment TO the United States Constitution* against unreasonable searches and seizures is not offended by **[**3]** a particularized discovery order issued by a quasi judicial body in a contested matter after an adjudicatory hearing, as compared to a discretionary decision made by an executive enforcement officer. See *Camara v. Municipal Ct., 387 U.S. 523, 529, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967)*. [2]

2 There is no indication in the record that the assessors imposed a palpably unreasonable tax against the plaintiff, as a subterfuge for the purpose of gaining access to the interior of his home. In any event, the interposition of the Appellate Tax Board in weighing whether to issue an order for inspection, and what sanction to impose upon violation of such an order, stands as a check against the potential for any such abuse.

Decision of the Appellate Tax Board affirmed.

Roman Catholic Archdiocese of Boston v. Town of Scituate

Opinion No.: 103236, Docket Number: 07-4500-E

SUPERIOR COURT OF MASSACHUSETTS, AT SUFFOLK

24 Mass. L. Rep. 234; 2008 Mass. Super. LEXIS 182

June 30, 2008, Decided
July 2, 2008, Filed

JUDGES: [*1] D. Lloyd Macdonald, Justice of the Superior Court.

OPINION BY: D. Lloyd Macdonald

OPINION

MEMORANDUM AND ORDER ON THE DEFENDANT'S MOTION TO DISMISS

The motion is *ALLOWED IN PART* AND *DENIED IN PART* for the reasons that follow.

Introduction

Plaintiff Roman Catholic Archdiocese of Boston ("RCAB") filed a complaint seeking declaratory judgment that the Francis X. Cabrini Parish ("the Parish") in Scituate is exempt from property taxation under *G.L.c. 59, §5, cl. 11*, even though the Parish has been "suppressed." Defendant Town of Scituate ("the Town") has moved to dismiss, arguing that this Court lacks subject matter jurisdiction because RCAB has failed to exhaust or timely pursue administrative remedies. The Town contends that, with respect to RCAB's taxes in fiscal year 2007 ("FY07"), RCAB has a pending appeal before the Appellate Tax Board ("ATB"). With respect to RCAB's taxes in fiscal year 2006 ("FY06"), the Town contends that RCAB missed the abatement filing deadline.

Background

In October 2004, the Archbishop of Boston "suppressed" the Parish, meaning that the Parish buildings are not currently part of a designated parish, although, under canon law, the buildings remain a sacred place designated for divine [*2] worship. None of the Parish buildings have been used for a non-religious purpose since being suppressed.

After suppression, the Town withheld the Parish property exemption under *G.L.c. 59, §5*. In FY06 and FY07 the Town taxed the Parish property, and RCAB paid the taxes. RCAB filed an appeal to the ATB for their FY06 taxes, but that appeal was voluntarily withdrawn after it was determined that the filing was untimely. RCAB also applied for an abatement for the FY07 taxes. The filing was timely, but the petition was denied. RCAB thereafter filed a timely appeal of the denial, and that appeal is currently pending before the ATB.

Discussion

In the tax context, the Court has the discretion to entertain an action for declaratory relief even though the plaintiff has not yet exhausted all administrative remedies. *Space Bldg. Corp. v. Comm'r of Revenue, 413 Mass. 445, 448, 597 N.E.2d 435 (1992)*; *Sydney v. Comm'r of Corps. & Taxation, 371 Mass. 289, 293, 356 N.E.2d 460 (1976)*. However, this discretion should only be applied to a "narrow set of circumstances." *Ace Prop. & Cas. Ins. Co. v. Comm'r of Revenue, 437 Mass. 241, 243, 770 N.E.2d 980 (2002)*. "Exhaustion is generally required unless the administrative remedy is 'seriously inadequate,' [*3] and exceptions to the rule occur most often when important, novel, or recurrent issues are at stake, when the decision has public significance, or when the case reduces to a question of law." *Space Bldg., 413 Mass. at 448* (quoting *Sydney, 371 Mass. at 294-95*).

The Town argues that dismissal is appropriate by analogizing to *I.S.K. Con of New England, Inc. v. Boston, 19 Mass.App.Ct. 327, 474 N.E.2d 188 (1985)*. The Appeals Court found there that the facts presented did not warrant the exercise of discretion to entertain an action for declaratory relief before administrative remedies had been exhausted. *Id. at 330-32*. The underlying issue was whether the plaintiff was "an exempt charitable or religious organization within *G.L.c. 59, §5*," and the Court held that that this was a "primarily factual" question presenting no novel, important or recurrent issues. *Id. at 331*.

RCAB argues here that there is a broader issue at play, namely, the proper interpretation of *G.L.c. 59, §5, cl. 11* to a likely recurring fact situation. The RCAB submits that "the manner in which *Clause 11* is interpreted and applied may directly impact not only numerous parishes of RCAB but all religious organizations whose properties are [*4] exempted from

taxation by that statute . . ." RCAB submits that the tax is wholly void, and that the statute should be interpreted to prohibit taxation of religious properties so long as the properties are not actively used for nonreligious purposes. RCAB contends that its case "reduces to a question of law" because the issue is one of statutory interpretation without dispute over the facts. *Space Bldg., 413 Mass. at 448*; *Sydney, 371 Mass. at 295*. The RCAB also argues that the issue presented is novel.

RCAB's FY06 taxes present a further issue. While RCAB initially filed an administrative appeal to the ATB regarding an FY06 tax abatement, RCAB voluntarily withdrew that appeal. See Defendant's Motion to Dismiss, Exhs. A, B. Thus, RCAB is seeking c. 321A relief without having pursued its administrative remedy with respect to the FY06 taxes, and after the time period for pursuing that remedy has passed.

Where a party has failed to pursue timely the normal administrative or judicial remedy, that party must show that there are "special circumstances" which justify it in going forward with its action for declaratory relief. *Doyle v. Dep't of Indus. Accidents, 50 Mass. App. Ct. 42, 47 n.6, 734 N.E.2d 1187 (2000)*; **[*5]** *Rosenfeld v. Bd. of Health of Chilmark, 27 Mass.App.Ct. 621, 624, 541 N.E.2d 375 (1999)* ("When a direct and distinct path of review is available, it is not appropriate to grant declaratory relief in the absence of special circumstances, particularly when the action seeks to circumvent the time period prescribed for a direct appeal" (internal quotation omitted)).

The Court has been unable to find precedent in the tax context construing the phrase, "special circumstances." However, outside the tax context, only truly exceptional facts have been held to rise to the level of "special circumstances." *Swansea v. Contributory Ret. Appeal Bd., 43 Mass.App.Ct. 402, 406-07, 683 N.E.2d 695 (1997)* (finding "special circumstances of public import" where the plaintiff town missed the filing deadline because the defendant board's written decision misinformed the town as to its right of appeal, with the result that the defendant board's decision, "inadequate on its face, has evaded all administrative and judicial review"); *Bd. of Appeal of Rockport v. DeCarolis, 32 Mass.App.Ct. 348, 353, 588 N.E.2d 1378 (1992)* (finding "special circumstances of public import" where the State Building Code Appeals Board and the local zoning board of appeals issued **[*6]** conflicting orders as to the lawfulness of a new structure).

However, as pointed out by the Attorney General in her filing, the requirement of "special circumstances" should not be considered to have been met by a simple showing of circumstances justifying this Court's exercise of discretion under the *Sydney* and *Space Building* cases discussed above to hear cases pursuant to G.L.c. 321A. Commonwealth's Response to Court's Order of February 20, 2008, pp. 4-5. From a policy perspective, if the identical facts could be used to satisfy both tests, then there would be no incentive for taxpayers to pursue their administrative remedies in a timely fashion.

Application to the Facts

There are no "special circumstances of public import" raised by the RCAB's FY 2006 taxes. That is because the RCAB simply missed a filing deadline. As with any other taxpayer, the RCAB is foreclosed by its lack of timeliness from administrative review. Thus, so much of the Town's motion to dismiss as applies to the FY 2006 taxes is *ALLOWED*.

As to the FY 2007 taxes, however, the RCAB timely filed for an abatement. Further, there are "important, novel [and] recurrent issues at stake." *Space Building, 413 Mass. at 448*. **[*7]** That is because of the sensitive *First Amendment* environment in which the dispute has arisen and the likelihood that the issue will recur. Although not specifically argued by the RCAB, the Court takes judicial notice of these being lean times for many religious organizations and the consequent occasion for difficult resource allocation decisions by those in authority in such organizations.

The Town also argues that the complaint fails because it was not timely brought pursuant to *G.L.c. 60, §98*, the statutory provision for an "action to recover back a tax." The Town cites the case of *New England Legal Foundation v. City of Boston, 423 Mass. 602, 608, 670 N.E.2d 152 (1996)*, for the proposition that failure of a taxpayer to comply with the statute's "90 day window" is "jurisdictional." However, a taxpayer in the RCAB's position has a choice of statutory remedies. The taxpayer may file either, as the RCAB did here, for an abatement and thereafter appeal to the ATB via *G.L.c. 59, §§64* and *65* or the taxpayer may file pursuant to *G.L.c. 60, §98*. *Norwood v. Norwood Civic Association, 340 Mass. 518, 523, 165 N.E.2d 124 (1960)*. Accordingly, with the RCAB having done the former, there is no independent ground upon which to **[*8]** assert that the RCAB is not properly before the Superior Court.

ORDER

So much of the defendant's motion to dismiss as relates to the plaintiff's claim for relief arising from its FY 2006 taxes is *ALLOWED*. So much of the defendant's motion to dismiss as relates to the plaintiff's claim for relief from its FY 2007 taxes is *DENIED*.

D. Lloyd Macdonald

Justice of the Superior Court

June 30, 2008

Jeffrey Seideman et al. v. City of Newton
Docket Number: 06-1868
SUPERIOR COURT OF MASSACHUSETTS, AT MIDDLESEX
23 Mass. L. Rep. 274; 2007 Mass. Super. LEXIS 460
September 24, 2007, Decided

JUDGES: [*1] Bruce R. Henry, Associate Justice.

OPINION BY: Bruce R. Henry

OPINION

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

This matter is a ten-taxpayer action challenging the City of Newton's appropriation of $ 765,825 of Community Preservation Act funds for projects at two parks within the City. Before the Court is the Plaintiff's Motion For Summary Judgment. For the reasons which follow, the motion is *ALLOWED.*

Facts

In evaluating a motion for summary judgment, the Court must rely on facts not in dispute as well as disputed facts viewed in the light most favorable to the non-moving party. *Beal v. Board of Selectmen of Hingham, 419 Mass. 535, 539, 646 N.E.2d 131 (1995).* The material undisputed facts as revealed by the summary judgment record are as follows.

The City of Newton (City) owns and operates the Stearns and Pellegrini Parks (Parks). Each park in question is an existing recreation land which has been used as such from the time predating the enactment of the Community Preservation Act (CPA). The Stearns Park is 3.5 acres and "contains both passive and active recreation areas, including a large open space with benches, game tables, walk ways; a basketball court; a little league baseball diamond; [*2] a tot-lot; swing sets; and two tennis courts." Def. Adm., Part II, No. 9 (Exhibit 1 at 7). The Pellegrini Park has an area of 4.5 acres and "has active recreation facilities, including soccer, softball, two tennis courts, indoor and outdoor basketball, indoor volleyball, and children's play structures." Def. Adm., Part II, No. 12 (Exhibit 1 at 7-8). Neither Park has been created or acquired with CPA funds. Def. Adm., Part VIII, Nos. 17-18 (Exhibit 1 at 26-27).

In November 2001, the voters of the City of Newton accepted §§3-7 of the CPA. The Community Preservation Act Committee ("Committee") was established pursuant to *§5* of the Act and is an instrumentality of the City of Newton. The Board of Aldermen ("Board") is an instrumentality of the City of Newton and is the legislative body pursuant to *§5* of the Act that approves the Committee's recommendations for CPA funding.

On or about February 6, 2006, the Committee recommended to the Board the appropriation of CPA funds for projects at the Parks. On or about May 15, 2006, the Board approved the allocation of $ 765,825 in CPA funding for projects at the Parks. The various elements which are included in each of the proposed projects are as [*3] admitted in the City's *Responses To Plaintiffs' First Request For Admissions*, Response No. 1, pp. 14-16 (with the exception of item cc) and Response No. 2, pp. 16-19.

Applicable Statutory Provisions

Some of the provisions of the CPA, *G.L.c. 44B* which are applicable to this matter are as follows:

> A city or town that accepts *sections 3 to 7*, inclusive, shall establish by ordinance or by-law a community preservation committee. *§5(a).*
>
> The community preservation committee shall study the needs, possibilities and resources of the city or town regarding community preservation. The committee shall consult with existing municipal boards, including the conservation commission, the historical commission, the planning board, the board of park commissioners and the housing authority, or persons acting in those capacities or performing like duties, in conducting such studies. As part of its study, the committee shall hold one or more public informational hearings on the needs, possibilities and resources of the city or town regarding community preservation possibilities and resources, notice of which shall be posted publicly and published for each of two weeks preceding a hearing in a newspaper of [*4] general circulation in the city or town. *§5(b)(1).*
>
> The community preservation committee shall make recommendations to the legislative body for the acquisition, creation and preservation of open space; for the acquisition, preservation, rehabilitation and restoration of historic resources; for the acquisition, creation and preservation of land for recreational use; for the acquisition, creation, preservation and support of community housing; and

for the rehabilitation or restoration of open space, land for recreational use and community housing that is acquired or created as provided in this section. With respect to community housing, the community preservation committee shall recommend, wherever possible, the reuse of existing buildings or construction of new buildings on previously developed sites. *§5(b)(2)*.

After receiving such recommendations from the community preservation committee, the legislative body shall then take such action and approve such appropriations from the Community Preservation Fund as set forth in *section 8*, and such additional appropriations as it deems appropriate to carry out the recommendations of the community preservation committee. *§5(d)*.

§2. Definitions

"Community **[*5]** preservation," the acquisition, creation and preservation of open space, the acquisition, creation and preservation of historic resources and the creation and preservation of community housing.

"Community preservation committee," the committee established by the legislative body of a city or town to make recommendations for community preservation, as provided in *section 5*.

"Community Preservation Fund," the municipal fund established under *section 7*.

"Legislative body," the agency of municipal government which is empowered to enact ordinances or by-laws, adopt an annual budget and other spending authorizations, loan orders, bond authorizations and other financial matters and whether styled as a city council, board of aldermen, town council, town meeting or by any other title.

"Maintenance," the upkeep of real or personal property.

"Open space," shall include, but not be limited to, land to protect existing and future well fields, aquifers and recharge areas, watershed land, agricultural land, grasslands, fields, forest land, fresh and salt water marshes and other wetlands, ocean, river, stream, lake and pond frontage, beaches, dunes and other coastal lands, lands to protect scenic vistas, **[*6]** land for wildlife or nature preserve and land for recreational use.

"Preservation," protection of personal or real property from injury, harm or destruction, but not including maintenance.

"Real property," land, buildings, appurtenant structures and fixtures attached to buildings or land, including, where applicable, real property interests.

"Recreational use," active or passive recreational use including, but not limited to, the use of land for community gardens, trails, and noncommercial youth and adult sports, and the use of land as a park, playground or athletic field. "Recreational use" shall not include horse or dog racing or the use of land for a stadium, gymnasium or similar structure.

"Rehabilitation," the remodeling, reconstruction and making of extraordinary repairs to historic resources, open spaces, lands for recreational use and community housing for the purpose of making such historic resources, open spaces, lands for recreational use and community housing functional for their intended use, including but not limited to improvements to comply with the Americans with Disabilities Act and other federal, state or local building or access codes.

Summary Judgment Standard

Summary **[*7]** judgment shall be granted where there are no genuine issues of material fact and where the moving party is entitled to judgment as a matter of law. *Mass.R.Civ.P. 56(c)*; *Cassesso v. Commissioner of Correction, 390 Mass. 419, 422, 456 N.E.2d 1123 (1983)*; *Community National Bank v. Dawes, 369 Mass. 550, 553, 340 N.E.2d 877 (1976)*. The moving party bears the burden of demonstrating affirmatively the absence of a triable issue, and that it is entitled to judgment as a matter of law. *Pederson v. Time, Inc., 404 Mass. 14, 16-17, 532 N.E.2d 1211 (1989)*. The moving

party must satisfy this burden either by submitting affirmative evidence that negates an essential element of the opposing party's case or by demonstrating that the opposing party has no reasonable expectation of proving an essential element of its case at trial. *Flesner v. Technical Communications Corp., 410 Mass. 805, 809, 575 N.E.2d 1107 (1991)*; *Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716, 575 N.E.2d 734 (1991)*. All evidence must be viewed in the light most favorable to the non-moving party. *Williams v. Hartman, 413 Mass. 398, 401, 597 N.E.2d 1024 (1992)*. Summary judgment, when appropriate, may be rendered against the moving party. *Mass.R.Civ.P. 56(c)*.

Discussion

Section 5(b)(2) of the CPA authorizes expenditures **[*8]** of CPA funds "for the acquisition, creation and preservation of open space . . . for the acquisition, creation and preservation of land for recreational use . . . and for the rehabilitation or restoration of open space, land for recreational use and community housing that is acquired or created as provided in this section." Whether the use of CPA funds is appropriate for the proposed projects at the Parks depends upon the interpretation of that section of the CPA. Statutory interpretation presents a question of law for the Court to decide. *Annese Elec. Services, Inc. v. City of Newton, 431 Mass. 763, 767, 730 N.E.2d 290 (2000)*. In interpreting the applicable provisions of the CPA, I must give effect to the Legislature's intent. *Pielech v. Massasoit Greyhound, Inc., 423 Mass. 534, 539, 668 N.E.2d 1298 (1996)*; *Callan v. Winters, 404 Mass. 198, 202, 534 N.E.2d 298 (1989)*; *Sterilite Corp. v. Continental Cas. Co., 397 Mass. 837, 839, 494 N.E.2d 1008 (1986)*. The legislative intent must be ascertained from all of a statute's words, construed by ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished. *Acting Superintendent of Bournewood Hospital v. Baker, 431 Mass. 101, 104, 725 N.E.2d 552 (2000)*; **[*9]** *Bombardieri v. Registrar of Motor Vehicles, 426 Mass. 371, 374, 688 N.E.2d 954 (1998)*.

There is no dispute that the Parks were neither acquired nor created with CPA funds. The City argues that the projects will create new uses for the Parks and open the Parks to new users. While that may be true, and laudable, I do not adopt the interpretation which the City seeks to place on the word "creation." The word "creation" refers specifically to the creation of land for recreational use. The Parks have been dedicated to recreational use for some time, which predates the passage of the CPA. The Projects do not "create" land for recreational use and I do not accept the meaning which the City attempts to place on that word.

The other purposes for which CPA funds may be used is for the preservation of land for recreational use or for the rehabilitation or restoration of land for recreational use. "Preservation" is defined very narrowly in *§2 of the CPA* as the "protection of personal or real property from injury, harm or destruction, but not including maintenance." Although the City, through the Affidavit of Ms. Bailey, attempts to characterize some of the work as preservation, it is clear that what is claimed **[*10]** is the rehabilitation and/or restoration of the Parks in keeping with their recreational purposes. "Rehabilitation" and "restoration" are separately defined in the CPA and are not included within the narrow definition of "preservation." While using CPA funds for the rehabilitation or restoration of recreational land is permitted under the CPA, it is permitted only for those recreational lands which were originally acquired or created with CPA funds. It is undisputed that the Parks were not so acquired or created in this case.

As the City's proposed use of the CPA funds does not comport with any of the authorized uses in *§5(b)(2) of the CPA*, the appropriation of the CPA funds for the projects at the Stearns and Pellegrini Parks was not appropriate and the plaintiffs are entitled to summary judgment.

ORDER

For the foregoing reasons, the plaintiffs are entitled to summary judgment declaring that:

1. The proposed projects at the Stearns and Pellegrini Parks in the City of Newton constitute rehabilitation or renovation of those parks, which were not acquired or created with Community Preservation Act (CPA) funds.

2. The use of CPA funds for those projects is not permitted by the CPA.

3. The recommendation **[*11]** of the Community Preservation Committee of the City of Newton (CPC) that CPA funds be used for the projects at the Stearns and Pellegrini Parks violated the provisions of the CPA.

4. The approval of the Board of Aldermen of the City of Newton of the recommendation of the CPC that CPA funds be used for the projects at the Stearns and Pellegrini Parks violated the provisions of the CPA.

Bruce R. Henry

Associate Justice

Dated: September 24, 2007

SOUTH STREET NOMINEE TRUST vs. BOARD OF ASSESSORS OF CARLISLE.

No. 06-P-1586.

APPEALS COURT OF MASSACHUSETTS

70 Mass. App. Ct. 853; 878 N.E.2d 931; 2007 Mass. App. LEXIS 1343

October 16, 2007, Argued
December 19, 2007, Decided

SUBSEQUENT HISTORY: Review denied by *S. St. Nominee Trust v. Bd. of Assessors, 450 Mass. 1109, 880 N.E.2d 413, 2008 Mass. LEXIS 71 (2008)*

PRIOR HISTORY: [*1]**
Suffolk. Appeal from a decision of the Appellate Tax Board.

COUNSEL: Rosemary Crowley (David J. Martel with her) for the taxpayer.

John Richard Hucksam, Jr., for board of assessors of Carlisle.

JUDGES: Present: Cowin, Katzmann, & Meade, JJ.

OPINION BY: MEADE

OPINION

[*853] [932]** MEADE, J. South Street Nominee Trust (taxpayer) appeals from a decision of the Appellate Tax Board (board) upholding the refusal of the board of assessors of the town of Carlisle (town) to abate a withdrawal tax assessed on its land pursuant to *G. L. c. 61, § 7*. On appeal, the taxpayer argues that St. 1981, c. 768, § 2, effective January 2, 1982 (section 2), which addresses the applicability of the amendments to *G. L. c. 61* set forth in St. 1981, c. 768, § 1, exempts its property from imposition of the withdrawal tax. We agree and reverse.

1. *Background.* The taxpayer owns four parcels of real estate (subject property) within the town. The town's assessment of a withdrawal tax on the subject property gave rise to this appeal. From January 1, 1978, until December 31, 2002, the subject property had been continuously classified as "forest land" **[*854]** pursuant to *G. L. c. 61*. During that time, the subject property was governed by three successive forest management plans, spanning **[***2]** the following dates: January 1, 1978, to December 31, 1982; January 1, 1983, to December 31, 1992; and January 1, 1993, to December 31, 2002. [1] By letter dated June 25, 2002, the taxpayer informed the town of its intention to withdraw the subject property from forest land classification effective January 1, 2003. [2] In response, the town assessed a withdrawal tax of $ 216,300.06 upon the subject property pursuant to *G. L. c. 61, § 7*. Based on its **[**933]** claim that *section 2* exempts its property from the withdrawal tax, the taxpayer applied to the town for an abatement of the tax, which it paid under protest. Following the town's failure to act on its application, the taxpayer filed a petition with the board seeking relief from the town's refusal to abate the tax. [3] The board's decision upholding the imposition of the withdrawal tax entered on December 13, 2004. The taxpayer appeals from that decision.

1 As defined by *G. L. c. 61, § 1*, inserted by St. 1981, c. 768, § 1, a forest management plan is "a completed copy of a form provided by the state forester executed by the owner and the state forester . . . that provides for a ten year program of forest management . . . ." Since the 1981 amendments, **[***3]** the duration of forest management plans has been ten years, an increase of five years from the previous version of the statute.

2 An owner of property that is classified and taxed as forest land cannot sell or convert the land to another use, i.e., residential, industrial, or commercial, without first notifying the city or town within which the land is located. *G. L. c. 61, § 8*, as amended by St. 1981, c. 768, § 1.

3 Pursuant to *G. L. c. 60, § 3*, an appeal may be made to the board within thirty days after the date of notice or, as occurred here, within three months of the date of the application for abatement. See *Cowls v. Assessors of Shutesbury, 34 Mass. App. Ct. 944, 613 N.E.2d 930 (1983)*.

2. *Discussion.* a. *Statutory scheme and history.* The classification and taxation of forest land has been governed by statute for over ninety years. St. 1914, c. 598. From its inception, the statute, now codified as *G. L. c. 61*, has enabled landowners to voluntarily apply for

and receive a forest land classification for eligible property devoted to the growth of forest products, thus making land so classified subject to lower property tax rates. Since the 1969 amendments to *G. L. c. 61*, St. 1969, c. 873, § 1, land so **[***4]** classified is subject to the oversight of the State forester, who monitors the use of the land to ensure the maintenance of the **[*855]** woodland vegetation in accordance with the forest land classification. *G. L. c. 61, § 2*, as amended by St. 1981, c. 768, § 1. As part of this oversight, the property must be certified as being in compliance with all forest land classification requirements at the beginning of each new forest management plan. *Ibid.* Failure to obtain such certification results in the loss of the property's forest land classification. *Ibid.*

Effective January 2, 1982, *G. L. c. 61* was substantially amended by chapter 768 of the Acts and Resolves of 1981. Relevant to our discussion, the 1981 amendment significantly increased the withdrawal tax. *G. L. c. 61, § 7*, as amended by St. 1981, c. 768, § 1. [4] The 1981 amendment also included certain provisions regarding land then currently classified under *G. L. c. 61*. *Section 2* of chapter 768 of the Acts and Resolves of 1981 provides in relevant part:

> "Section one of this act shall not apply to land classified prior to the effective date of this act until the expiration of the term of the forest management plan governing such land or until **[***5]** one year after the withdrawal of such land from classification, whichever period is longer. Notwithstanding the provisions of any laws to the contrary, the owner of such land, prior to the end of said period, may elect to remove such land from classification without imposition of a withdrawal tax or may elect to apply for classification of such land under the provisions of section one . . . ."

The precise meaning of this rather enigmatic language is the crux of the parties' dispute.

> 4 This tax is assessed upon declassification for that tax year and for each of the four immediately preceding tax years, in an amount equal to the difference between the taxes actually paid or payable on the forest land and the taxes that would have been paid or payable if the land had not been classified as forest land, plus interest. *G. L. c. 61, § 7*. Prior to 1982, this tax was limited to a maximum charge of $ 200 per acre. The 1981 amendment replaced that capped tax with an uncapped one. *Ibid.*

b. *Standard of review and rules of construction.* We will leave undisturbed the board's construction of *section 2* "unless it is 'not supported by substantial evidence or is based on an error of law.'" *Lowney v. Commissioner of Rev., 67 Mass. App. Ct. 718, 720,* **[*856]** **[**934]** *856 N.E.2d 879 (2006),* **[***6]** quoting from *M & T Charters, Inc. v. Commissioner of Rev., 404 Mass. 137, 140, 533 N.E.2d 1359 (1989)*. See *Lasell Village, Inc. v. Assessors of Newton, 67 Mass. App. Ct. 414, 420, 854 N.E.2d 119 (2006)* (the Appellate Tax Board's decision on whether property is exempt from taxation will not be reversed if it is based on substantial evidence and a correct application of the law). We also recognize the board's expertise in tax matters, which prompts us to give its decision "some deference." *Koch v. Commissioner of Rev., 416 Mass. 540, 555, 624 N.E.2d 91 (1993)*, quoting from *McCarthy v. Commissioner of Rev., 391 Mass. 630, 632, 462 N.E.2d 1357 (1984)*.

"Where the language of a statute is clear and unambiguous, it is conclusive as to legislative intent." *Commonwealth v. Mandell, 61 Mass. App. Ct. 526, 528, 811 N.E.2d 1045 (2004)*, quoting from *Pyle v. School Comm. of S. Hadley, 423 Mass. 283, 285, 667 N.E.2d 869 (1996)*. See *Okerman v. VA Software Corp., 69 Mass. App. Ct. 771, 776, 871 N.E.2d 1117 (2007)*. However, where, as here, the statutory language is not free of ambiguity, courts are bound to apply the "well-established principle that tax laws are to be strictly construed, and ambiguities in tax statutes are to be resolved in favor of the taxpayer." *Commissioner of Rev. v. Molesworth, 408 Mass. 580, 581, 562 N.E.2d 478 (1990).* **[***7]** See *Assessors of Brookline v. Prudential Ins. Co., 310 Mass. 300, 313, 38 N.E.2d 145 (1941)*, quoting from *Hemenway v. Milton, 217 Mass. 230, 233, 104 N.E. 362 (1914)* ("Tax laws 'should be construed and interpreted as far as possible so as to be susceptible of easy comprehension and not likely to become pitfalls for the unwary'"); *Lowney v. Commissioner of Rev., supra at 722*. In fact, "all doubts [are to be] resolved in favor of the taxpayer." *Commissioner of Rev. v. AMIWoodbroke, Inc., 418 Mass. 92, 94, 634 N.E.2d 114 (1994)*, quoting from *Dennis v. Commissioner of Corps. & Taxn., 340 Mass. 629, 631, 165 N.E.2d 893 (1960)*. Significantly, this court has indicated that "[t]hat principle has particular applicability, we think, to a penalty assessment." *Chirillo v. Commissioner of Rev., 25 Mass. App. Ct. 98, 103, 515 N.E.2d 601 (1987)*. In light of these important tenets, we differ with the board's construction of *section 2*.

c. *The statutory language. Section 2* does not readily lend itself to certain construction. Indeed, it is susceptible to multiple interpretations, each of which is

not wholly unreasonable, but [*857] none of which perfectly harmonizes all of the statutory language. [5] The key area of uncertainty is the duration of the period during which the statute allows [***8] a taxpayer to exercise a tax-exempt withdrawal of pre-1982 classified forest land. As defined by the first sentence of *§ 2*, this period extends until the later of two possible closing dates: the expiration of the term of the forest management plan existing at the time that the 1981 amendment became effective, or one year after the withdrawal of such land from classification. The parties agree that the first of these two possible closing dates occurred on December [**935] 31, 1982. However, with respect to the second, there is considerable dispute.

> 5 For example, *section 2* is afflicted by the apparently anomalous provision that its language allows an owner of pre-1982 classified forest land to withdraw such land from classification without imposition of a withdrawal tax provided he does so within one year after he withdraws such land from classification. However, the condition that something be done within one year of whenever it is done is no condition at all. Neither of the parties' constructions, nor any of our own, is able to fully harmonize this language with the rest of *section 2*.

The taxpayer argues that the language "until one year after the withdrawal of such land from classification" [***9] creates a right to a tax-exempt withdrawal of pre-1982 classified forest land which does not expire until exercised. The board disagreed, and interpreted the statute as permitting the taxpayer to exercise a tax-exempt withdrawal of its pre-1982 classified forest land no later than December 31, 1982, the expiration date of the taxpayer's forest management plan in existence when the 1981 amendment became effective. It held that the second sentence of *section 2* required the taxpayer to choose between exercising its right of tax-exempt withdrawal prior to or at the expiration of its existing forest management plan, or waiving that right by recertifying its forest land under a new forest management plan. [6]

> 6 In its findings of fact and report dated July 26, 2006, the board concluded that the taxpayer "could have timely withdrawn from classification before the expiration of the first Certificate. However, [the taxpayer] reclassified the subject property under the second Certificate. . . . [By so doing], the subject property was governed by [the newly-amended] *c. 61*, including the withdrawal penalty tax provision of *§ 7*."

To reach this conclusion, the board took the actual statutory language [***10] giving the taxpayer until "one year after the withdrawal of such land from classification" and added to it the condition [*858] that such withdrawal must occur prior to the expiration of the term of the forest management plan existing at the time that the 1981 amendment became effective. The board did so on the purported basis that this implied condition reconciled the two sentences of the statute with one another and with the assumed Legislative intent. As a result, the board effectively rewrote the first sentence of *section 2* to provide: "Section one of this act shall not apply to land classified prior to the effective date of this act until the expiration of the term of the forest management plan governing such land or until one year after the withdrawal of such land from classification, [provided such withdrawal occurs prior to the expiration of the term of such forest management plan], whichever is longer." We, however, are required to resist the urge to add language "to a statute that the Legislature did not put there." *Commonwealth v. Clerk-Magistrate of the W. Roxbury Div. of the Dist. Ct. Dept., 439 Mass. 352, 355, 787 N.E.2d 1032 (2003)*. See *Okerman v. VA Software Corp., 69 Mass. App. Ct. at 777-778*; [***11] *Lowney v. Commissioner of Rev., 67 Mass. App. Ct. at 722 n.7*.

We are aware of no legislative history providing guidance as to the intended duration of the tax-exempt withdrawal period created by *section 2*. That asserted by the parties is both unsupported and unpersuasive. [7] In addition, we are not persuaded that the Department of Revenue Informational Guideline (Release No. 82-209, entitled "Chapter 768 of the Acts of 1981") (guideline) lends proper support to the board's argument. The guideline summarizes the impact of the 1981 amendment on *G. L. c. 61*, and states that a withdrawal tax will not be imposed on land classified under chapter 61 prior to the effective date "if the owner elects to remove such land from classification prior to [**936] or at the expiration of the current certification period." The guideline therefore interprets the tax-exempt withdrawal period as ending upon the expiration of the forest management plan existing at the time of the 1981 amendment. As stated above, we believe that interpretation to be inconsistent with the statutory language [*859] since it fails to give any meaning to the portion of *section 2* that clearly contemplates a time period capable of extending beyond the [***12] expiration of the existing forest management plan, i.e., "or until one year after the withdrawal of such land from classification, whichever period is longer." [8] As such, we accord this interpretation no deference as it is inconsistent with the language of *section 2*. See *Boston Police Superior Officers Fedn. v. Labor Relations Commn., 410 Mass. 890, 892, 575 N.E.2d 1131 (1991)* (no deference when agency commits error of law). In fact, because we are required to construe the statute strictly against the taxing authority, and because "[t]he

right to tax must be plainly conferred by the statute . . . [, and not] implied," we decline to accept the guideline as determinative of the issue. See *McCarthy v. Commissioner of Rev., 391 Mass. at 632-633.*

7 Other than the general proposition that the forest land classification program under chapter 61 is designed to encourage the preservation and enhancement of the Commonwealth's forests through the use of property tax incentives and disincentives, we think the more specific statements of legislative intent presented by the parties to be mere conjecture.

8 In interpreting the meaning of "said period," the Department of Revenue was not at liberty to select from the various **[***13]** portions of the language employed by the Legislature. Rather, it was required, as are we, to give effect to all of the statutory language.

Furthermore, because the second sentence of *section 2* uses the word "classification" as opposed to "certification," the board's construction relies upon the premise that post-1982 recertification of classified forest land pursuant to a new forest management plan constitutes "apply[ing] for classification of such land under" *G. L. c. 61.* However, chapter 61 does not use the terms interchangeably to support such a construction. "Certification" is defined by the statute as "approval of a forest management plan by the state forester." *G. L. c. 61, § 1,* inserted by St. 1981, c. 768, § 1. It is the State forester's verification that classified forest land is being managed under an approved forest management plan. Although not expressly defined by the statute, "classification" is defined by a regulation to mean "the tax status attaching by operation of law to all land qualifying under [chapter 61,] which qualification is duly certified by the State Forester." *304 Code Mass. Regs. § 8.02* (1996). It is a designation of tax status eligibility which occurs **[***14]** separately from the act of certification.

The distinction that the Legislature drew between the two is evident in the various provisions of chapter 61, which treat the terms, though interrelated, as being separate. [9] Importantly, not **[*860]** only does this language treat the two terms as being clearly distinct, but it also contemplates recertification as providing for the continuation of an existing classification status, as opposed to the commencement of a new classification status. We think this language indicative of the Legislature's intention that recertification of forest land under each successive forest management plan does not constitute application for classification of land. Rather, property already classified as forest land remains so classified unless the property owner fails to file a new certification.

9 One such provision states that "[l]and shall be removed from classification by the assessor unless, at least every ten years, the owner files with said assessor a new certification by the state forester." *G. L. c. 61, § 2,* inserted by St. 1981, c. 768, § 1. In another portion of the same section, it states that "all forest land . . . used for forest production shall be classified **[***15]** by the assessors as forest land upon written application sufficient for identification and certification by the state forester." *Ibid.* "Classification shall take effect on January first of the year following certification and taxation under this chapter . . . ." *Ibid.*

[937]** Having resolved the seemingly irreconcilable statutory language in *section 2* in favor of the taxing authority on such a basis, it is apparent that the board failed to give effect to the important principle that ambiguities in a tax statute must be resolved in the taxpayer's favor. See *Commissioner of Rev. v. Molesworth, 408 Mass. at 581.* This was error. Because of this, we reject the town's contention that the deference customarily afforded to the board's interpretation of a statutory provision should be controlling in this case. We accord no deference to a decision of the board that is based on an error of law. "It is enough to recall that, when reviewing such a decision, 'the sole question before us is whether the [board] erred as a matter of law,' *Commissioner of Rev. v. Houghton Mifflin Co., 423 Mass. 42, 43, 666 N.E.2d 491 (1996),* and that an appellate court has plenary power of de novo review of all questions of law . . . including **[***16]** questions of law involving statutory construction." *Martha's Vineyard Land Bank Commn. v. Assessors of W. Tisbury, 62 Mass. App. Ct. 25, 27 n.3, 814 N.E.2d 1147 (2004).* In these circumstances, the limited deference we owe to the board's decision is eclipsed by the appellate lenity we owe the taxpayer.

3. *Conclusion.* The board's decision upholding the town's refusal to abate the withdrawal tax on the subject property is **[*861]** reversed. The withdrawal tax paid by the taxpayer shall be reimbursed to it by the treasurer of the town with interest at the rate provided in *G. L. c. 62C, § 32. G. L. c. 61, § 7,* as amended by St. 1981, c. 768, § 1.

So ordered.

PAUL F. SILVA vs. CITY OF ATTLEBORO & others. [1]

1 The city of New Bedford and the city of Taunton.

No. 07-P-488.

APPEALS COURT OF MASSACHUSETTS

72 Mass. App. Ct. 450, 2008 Mass. App. LEXIS 905

January 18, 2008, Argued
August 27, 2008, Decided

PRIOR HISTORY: [*1]

Bristol. Civil action commenced in the Superior Court Department on April 27, 2005. The case was heard by Richard J. Chin, J., on an agreed statement of facts. *Silva v. City of Fall River, 59 Mass. App. Ct. 798, 798 N.E.2d 297, 2003 Mass. App. LEXIS 1183 (2003)*

DISPOSITION: Judgment reversed.

HEADNOTES

Funeral Director. Dead Body. Municipal Corporations, Fees. *Taxation.*

COUNSEL: Martin A. Silva for the plaintiff.

Robert S. Mangiaratti for city of Attleboro.

Steven A. Torres, City Solicitor, for city of Taunton, was present but did not argue.

Anthony A. Kamara, for city of New Bedford, was present but did not argue.

JUDGES: Present: Cypher, Brown, & Graham, JJ.

OPINION BY: CYPHER

OPINION

CYPHER, J. We are asked, again, to determine whether a monetary charge by each of the defendant cities for the issuance of a burial permit is a valid fee or an improper tax. [2] The plaintiff, Paul F. Silva, is a licensed funeral director who performs funeral services in communities generally in Bristol County. He appeals from a Superior Court judgment holding, after a bench trial, that the burial permit charge is a proper fee.

2 "Every dead body of a human being dying within the Commonwealth must be buried, entombed, or cremated within a reasonable period of time after death. *G. L. c. 114, § 43M.*" *Silva v. Fall River, 59 Mass. App. Ct. 798, 799, 798 N.E.2d 297 (2003).*

Silva previously challenged the charge exacted for a burial permit by the city of Fall [*2] River in *Silva v. Fall River, 59 Mass. App. Ct. 798, 798 N.E.2d 297 (2003).* In that case, we concluded that the "burial permit charge is better characterized as a tax than a fee because the payer of the fee derives no benefit that is not shared by the general public, proper interment is mandatory, the burial permit is mandatory, and it does not appear in the record that the funds are used to defray the cost of enforcing relevant regulations." *Silva v. Fall River, 59 Mass. App. Ct. at 807.*

In the present case, the defendant cities and Silva cured the procedural defect in *Silva v. Fall River* by providing the judge with an agreed statement of facts. The judge determined that the present case is distinguishable from the earlier case, largely because the "[three] cities incur significant costs in fulfilling their statutory duty of issuing burial permits." The judge concluded that "[b]ased on the evidence, this court finds that the plaintiff has not met his burden of proving that the burial permit charge is a tax and not a fee."

Silva contends that the burial permit charges by the defendant cities are unconstitutional taxes when analyzed according to the factors distinguishing a fee from a tax as stated in [*3] *Emerson College v. Boston, 391 Mass. 415, 424-425, 462 N.E.2d 1098 (1984).* Silva argues that the judge erred in applying those factors, ignoring factors one and two and giving undue preference to factor three. The defendant cities argue that the charge is a valid regulatory fee [3] and that factor three of the *Emerson College* test should receive particular emphasis.

3 "Fees imposed by a governmental entity tend to fall into one of two principal categories: user fees, based on the rights of the entity as proprietor of the instrumentalities used, *Opinion of the Justices, 250 Mass. 591, 597, 148 N.E. 889 (1924),* or regulatory fees (including licensing

and inspection fees), founded on the police power to regulate particular businesses or activities, *id. at 602*." *Emerson College, supra at 424*. See *Southview Co-op. Hous. Corp. v. Rent Control Bd. of Cambridge, 396 Mass. 395, 402, 486 N.E.2d 700 (1985)*; *Nuclear Metals, Inc. v. Low-Level Radioactive Waste Mgmt. Bd., 421 Mass. 196, 201-202, 656 N.E.2d 563 (1995)*.

The test for distinguishing between a tax and a fee was set forth in the case of *Emerson College, 391 Mass. at 424-425*. Legitimate fees are (1) "charged in exchange for a particular governmental service which benefits the party paying the fee in a **[*4]** manner 'not shared by other members of society'"; (2) "paid by choice, in that the party paying the fee has the option of not utilizing the governmental service and thereby avoiding the charge"; and (3) "collected not to raise revenues but to compensate the governmental entity providing the services for its expenses." *Ibid.*, quoting from *National Cable Television Ass'n v. United States, 415 U.S. 336, 341, 94 S. Ct. 1146, 39 L. Ed. 2d 370 (1974)*.

Because the only relevant difference between the instant case and *Silva v. Fall River, supra,* is the inclusion of the relationship between the charges and the cost of providing the permit, the judge correctly adopted the reasoning expressed in *Silva v. Fall River* regarding factors one and two, that the charge by the cities did not benefit Silva in a manner not shared by the general public and that the charge could not be avoided. *59 Mass. App. Ct. at 804-805*. [4] Accordingly, we focus our attention on factor three and the weight it should carry.

4 The fact that other towns do not charge for burial permits is not relevant to our discussion. *Silva v. Fall River, 59 Mass. App. Ct. at 799 n.4*. The board of health of the town where the person died must issue the permit. *G. L. c. 114, § 45*, **[*5]** as amended by St. 2004, c. 120, *§ 2*. Randall & Franklin, Municipal Law and Practice § 19.16 (5th ed. 2006). Thus, those in charge of disposing of the remains of a person who died in Attleboro, New Bedford, or Taunton must pay the charge. *Silva v. Fall River, supra at 804-805*.

1. *Charges as compensation for the governmental entity or to raise revenues.* The third factor states that a fee is a charge "collected not to raise revenues but to compensate the governmental entity providing the services for its expenses." *Emerson College, 391 Mass. at 425*. Here, the judge concluded that the cities "produced evidence to show that they incur expenses in issuing burial permits . . . [and] have further shown that the fee charged is reasonable and is used to cover these expenses." [5]

5 Attleboro charges $ 10 and issues approximately 300 burial permits per year. The total fees collected constitute less than 2/100 of one per cent of the approximately $ 2 million annual budget of the health department.

New Bedford charges $ 20, and in fiscal year 2006 issued 1,226 burial permits. Total fees collected were 1.24 per cent of the health department's budget.

Taunton charges $ 10, and in fiscal year 2005 issued **[*6]** 564 burial permits. Total fees collected were less than one percent of the fiscal year 2006 health department budget of over $ 572,000.

"A license fee may be exacted as a part of or incidental to regulations established in the exercise of the police power. Such a fee commonly is commensurate with the reasonable expenses incident to the licensing and all that can rationally be thought to be connected therewith. The amount of the fees in such connection doubtless would not be scrutinized too curiously even if some incidental revenue were obtained." *Opinion of the Justices, 250 Mass. 591, 602, 148 N.E. 889 (1924)*.

"We have long held that a municipality required by statute to participate in a scheme established by statute is entitled to 'cover reasonable expenses incident to the enforcement of the rules.' *Southview Co-op. Hous. Corp. v. Rent Control Bd. of Cambridge, 396 Mass. 395, 400, 486 N.E.2d 700 (1985)*, quoting [from] *Commonwealth v. Plaisted, 148 Mass. 375, 382, 19 N.E. 224 (1889)*." *Boston Gas Co. v. Newton, 425 Mass. 697, 706, 682 N.E.2d 1336 (1997)*.

Unlike *Silva v. Fall River,* there is ample evidence in the present case to show that the charges collected were for compensation and not for the general raising of revenue. *59 Mass. App. Ct. at 805-807*. **[*7]** The plaintiff does not argue that the amounts of the fees charged by the defendants are unreasonable, or that the amounts collected constitute excessive recovery in relation to the total budgets of their boards of health. Because we have found no authority, nor has any been suggested to us, which requires a specific accounting of the cost of processing a permit, we conclude that the fees collected in the present case, although deposited in general funds of the cities, were charged not to raise revenue, but to compensate for the expenses in issuing the permits. The judge did not err in finding that the charges were reasonable and used to cover expenses incurred in issuing burial permits.

2. *Weighing of the three factors.* Despite having found in favor of the plaintiff on two out of three of the *Emerson College* factors, the judge concluded that factor three alone was sufficient for the defendants to prevail.

See *391 Mass. at 424-425*. In making his final determination, the judge distinguished this case from *Silva v. Fall River,* where there was no evidence at all to establish that Fall River incurred expenses in issuing, processing, and regulating burial permits. *59 Mass. App. Ct. at 805-807.* **[*8]** In discussing that case, the judge asserted, "The *Silva* court explicitly stated that Fall River would have been justified in charging the ten dollar fee if it showed that it was used to cover their costs, rather than to raise general revenue. *Id. at 805*." Careful reading of that earlier case does not suggest this conclusion. In fact, the *Silva v. Fall River* court considered all three of the *Emerson College* factors in determining the burial permit charge to be a tax:

> "We think that the burial permit charge is better characterized as a tax rather than a fee because the payer of the fee derives no benefit that is not shared by the general public, proper internment is mandatory, and it does not appear in the record that the funds are used to defray the costs of enforcing the relevant regulations."

59 Mass. App. Ct. at 807.

The defendants argue that when a challenged charge is regulatory in nature, as here, emphasis in the analysis should be placed on the third *Emerson College* factor. They rely primarily on two cases decided by the Supreme Judicial Court after *Emerson College* that concerned the issue of regulatory as opposed to proprietary fees. The defendants argue that the judge was primarily **[*9]** focused on the third factor and that he disregarded the first two factors when he decided the charges were regulatory fees. We do not agree with this interpretation. Rather than minimize or disregard the first two factors, the Supreme Judicial Court found them to be satisfied in those two cases.

In the first case, *Southview Co-op. Hous. Corp. v. Rent Control Bd. of Cambridge, 396 Mass. 395, 486 N.E.2d 700 (1985)*, the court considered a regulatory fee charged by a municipal rent control board. Landlords objected to the fee, which was charged in connection with petitions for individual rent adjustments. Regarding factor one, the court found that "[t]he services for which the fees are imposed are . . . 'sufficiently particularized as to justify distribution of the costs among a limited group . . . rather than the general public.'" *Id. at 402*, quoting from *Emerson College, supra at 425*. Regarding factor two, the court ruled, "[A]lthough it is true . . . [that the landlords] must pay the fees, the fees are nevertheless imposed only on those who choose to utilize a particular governmental service." *Ibid.* Rather than de-emphasize the first two factors, the court appropriately weighed them.

In the second case, **[*10]** *Nuclear Metals, Inc. v. Low-Level Radioactive Waste Mgmt. Bd., 421 Mass. 196, 656 N.E.2d 563 (1995)*, the plaintiff objected to a regulatory fee imposed by the defendant board on businesses that produced radioactive waste. Regarding the first factor, the court held, "[T]he board's services provide a 'sufficiently particularized' benefit to the plaintiff to qualify as a valid fee. While the safe disposal of radioactive waste is a public benefit, . . . it is the plaintiff (and not the general public) which requires access to disposal facilities . . . ." *421 Mass. at 204.* Regarding the second factor, the court stated, "The plaintiff is not 'compelled' to pay the fee, even though it must pay the fee so long as it engages in manufacturing activities in the Commonwealth that produce as a byproduct low-level radioactive waste." *Id. at 205.* Again, the fee was targeted at a specific group engaged in a particular business, and the voluntariness factor was defined as merely the choice to engage in the regulated activity. *Id. at 205-206.* In both of these cases, all three factors were considered, which supported the conclusion that the charges were valid regulatory fees.

The present case is distinguishable simply **[*11]** because the defendants have satisfied only the third factor, as the judge found. We can find no support for the proposition that extra emphasis should be placed on the third factor when the challenged charge is regulatory in nature. Nor can we find any support for the idea that factor three should overrule the other two factors. We do note, however, that if the first factor applies, the second factor is of less importance. *Boston Gas Co. v. Newton, 425 Mass. at 706 n.19.*

A municipality should not be able to justify an otherwise invalid tax merely by providing an accounting of expenses. While this is one factor in the analysis, all three factors have to be considered and weighed. As discussed above, there is no question that the issuance of burial permits has a shared public benefit and that the services provided are involuntary in a way that is distinct from the typical regulatory fee. We think that the combined weight of these two factors overcomes the third factor in this case and that the burial permit charges are not regulatory fees, but rather improper taxes.

Judgment reversed.

CITY OF SOMERVILLE vs. SOMERVILLE MUNICIPAL EMPLOYEES ASSOCIATION.

SJC-10089

SUPREME JUDICIAL COURT OF MASSACHUSETTS

451 Mass. 493; 887 N.E.2d 1033; 2008 Mass. LEXIS 254; 184 L.R.R.M. 2550; 156 Lab. Cas. (CCH) P60,614

April 10, 2008, Argued
May 22, 2008, Decided

PRIOR HISTORY: [***1]

Middlesex. Civil action commenced in the Superior Court Department on July 22, 2005. The case was heard by Herman J. Smith, Jr., J., on a motion for judgment on the pleadings. After review by the Appeals Court, the Supreme Judicial Court granted leave to obtain further appellate review.

City of Somerville v. Somerville Mun. Empls. Ass'n, 69 Mass. App. Ct. 583, 870 N.E.2d 632, 2007 Mass. App. LEXIS 820 (2007)

COUNSEL: Matthew J. Buckley, Assistant City Solicitor, for the plaintiff.

James F. Lamond for the defendant.

JUDGES: Present: Marshall, C.J., Greaney, Spina, Cowin, Cordy, & Botsford, JJ.

OPINION BY: GREANEY

OPINION

[**1034] [*493] GREANEY, J. A member of the Somerville Municipal Employees Association (union) filed a grievance over the appointment, in January, 2004, by the mayor of the city of Somerville (city), of a nonunion member to the position of the city's director of veterans' services. After an evidentiary hearing, an arbitrator determined that the appointment violated the collective bargaining agreement applicable to city employees; directed the mayor to appoint the grievant to the position of director of veterans' [*494] services; and ordered the city to reimburse the grievant for lost wages and benefits, with interest compounded quarterly at twelve per cent. The city filed an application in the Superior Court seeking to vacate the arbitration award, and [***2] the union filed a counterclaim requesting that the award be affirmed. A judge in the Superior Court entered judgment on the pleadings for the union, affirming the award. The Appeals Court affirmed the judgment. *Somerville v. Somerville Municipal Employees Ass'n, 69 Mass. App. Ct. 583, 870 N.E.2d 632 (2007).* We granted the city's application for further appellate review. We conclude that the explicit legislative directive of *G. L. c. 115, § 10*, that a city's director of veterans' services "shall be appointed . . . by the mayor, with the approval of the city council," precludes the challenged appointment from being a proper subject for collective bargaining or arbitration. Accordingly, we now reverse the judgment and order that the award be vacated.

1. The relevant background is as follows. The union represents two groups of city employees: unit A and unit B. Each group has its own collective bargaining agreement with the city. The unit A agreement generally covers department heads; the unit B agreement covers so-called "rank and file" employees. The city and the union agree that the position of director of veterans' services is a unit A position and that the relevant language in both collective bargaining [***3] agreements is essentially the same. (We shall refer to the unit B collective bargaining agreement, which is the one applicable to this case, as simply the collective bargaining agreement.)

Article VII of the collective bargaining agreement sets forth procedures required for making promotions and filling vacancies. Section (h)(2) of art. VII states:

> "In the case of a vacancy in any Unit A position for which no Unit A employee is selected, Unit B employees may apply and will be considered on the basis of the qualifications established for the position. In the event that any Unit B applicants and any non-Unit B applicants meet the qualifications(s) established for the [Unit A] position, and their respective qualification(s) are substantially equal, the [Unit A] position will be filled by the senior Unit B Employee among such applicants."

[*495] In October of 2003, the city posted the position of veterans' services director, listing the requirements and necessary qualifications for the job. Among candidates who applied for the job were Paul Nelson, a unit B city employee, and Frank Senesi, an elections commissioner for the city, who is not a member of the union. Both candidates are veterans.

After **[***4]** the city's mayor hired Senesi for the job, Nelson filed a grievance with the union, claiming that the city had violated art. VII of the collective bargaining agreement in the appointment of Senesi. The dispute proceeded to arbitration, pursuant to a provision of the collective bargaining agreement providing for final and binding arbitration of disputes arising under the agreement. The question before the arbitrator was: "Did the City of Somerville **[**1035]** violate the Parties' Unit B Collective Bargaining Agreement by failing to appoint the Grievant, Paul Nelson,[1] to the position of Veterans' Services Director in or about January 2004: If so, what shall be the remedy?"

1 There were two grievants initially, but one withdrew his claim following the first day of arbitration hearings.

In a memorandum of decision and order, the arbitrator stated his opinion that one of the agreements made by the city in the collective bargaining agreement is to prefer union members over nonunion members with respect to union jobs. The arbitrator went on to reason as follows: Although the terms of the collective bargaining agreement permit the city to select a nonunion candidate for a vacant union position, the city **[***5]** must do so in a manner consistent with art. VII. When the choice for a unit A position is between a unit B and a nonunion candidate, it is the city's burden to establish, by objective evidence, that each candidate's qualifications are "head and shoulders" above those of any unit A candidates bypassed for the job. Then, should one candidate's qualifications be demonstrably superior to the other's, that candidate, whether unit B or nonunion, may be chosen. The arbitrator determined that, because the city had failed to establish that the qualifications of Senesi were demonstrably superior to Nelson's, who was also the senior candidate of the two, the city had violated art. VII (h)(2), when Senesi was appointed director of veterans' services. The award directed the city to appoint Nelson in his place.

[*496] The city sought to vacate the award, pursuant to *G. L. c. 150C, § 11 (a) (3)*, which provides that "the superior court shall vacate an award if . . . the arbitrators exceeded their powers or rendered an award requiring a person to commit an act or engage in conduct prohibited by [S]tate or [F]ederal law." The city argued that the arbitrator had no authority to rule on the appointment, because **[***6]** the mayor's authority to appoint a director of veterans' services, conferred by *G. L. c. 115, § 10*, is exclusive and nondelegable and, therefore, not subject to collective bargaining or arbitration. The union, in response, filed a counterclaim asking that the award be confirmed pursuant to *G. L. c. 150C, § 10*.

Considering the parties' cross motions on the pleadings, the judge concluded that, although the mayor's authority to appoint an individual to the position of veterans' services director is not an issue for collective bargaining, the procedure surrounding the appointment of an individual to any unit A position is an "ancillary matter" appropriate for collective bargaining, *Lynn v. Labor Relations Comm'n, 43 Mass. App. Ct. 172, 179, 681 N.E.2d 1234 (1997)*, which the city may, and did in this case, agree to arbitrate. We disagree with this conclusion and now proceed to explain why.

2. We have recognized a strong public policy favoring collective bargaining between public employers and employees over certain conditions and terms of employment. See, e.g., *School Comm. of Pittsfield v. United Educators of Pittsfield, 438 Mass. 753, 761-762, 784 N.E.2d 11 (2003)*; *Worcester v. Labor Relations Comm'n, 438 Mass. 177, 180-181, 779 N.E.2d 630 (2002)*. **[***7]** This policy is codified in the broad statutory language of *G. L. c. 150E, § 6*, providing that "[t]he employer and the exclusive representative . . . shall negotiate in good faith with respect to wages, hours, standards [of] productivity, and performance, and any other terms and conditions of employment" in keeping with **[**1036]** the objective of creating a collective bargaining agreement. *Section 7 (d)* further provides that, where there is a conflict between a statute and the parties' collective bargaining agreement, the collective bargaining agreement "shall prevail" if the statute is one that is enumerated therein. See *Chief Justice for Admin. & Mgt. of the Trial Court v. Office & Professional Employees Int'l Union, Local 6, 441 Mass. 620, 629, 807 N.E.2d 814 (2004)*. *General Laws c. 115, § 10*, **[*497]** however, is not among those statutes enumerated in *§ 7 (d)*, which the Legislature made subject to collective bargaining. The narrow circumstances for vacating an arbitrator's award under *G. L. c. 150C, § 11 (a)*, see *School Comm. of Hanover v. Hanover Teachers Ass'n, 435 Mass. 736, 740, 761 N.E.2d 918 (2002)*, reflect an (arguably) equally strong policy favoring arbitration. See *Lyons v. School Comm. of Dedham, 440 Mass. 74, 78, 794 N.E.2d 586 (2003)*; **[***8]** *School Comm. of Pittsfield v. United Educators of Pittsfield, supra at 758*. Whether an award is improper because an arbitrator exceeded his authority is determined on a case-by-case basis. See *id. at 759*, citing *Higher Educ. Coordinating Council/Roxbury Community College v. Massachusetts Teachers' Ass'n/Mass. Community College Council, 423*

Mass. 23, 31-32, 666 N.E.2d 479 (1996). "[S]tatutes not specifically enumerated in *§ 7 (d)* will prevail over contrary terms in collective bargaining agreements." *School Comm. of Natick v. Education Ass'n of Natick, 423 Mass. 34, 39, 666 N.E.2d 486 (1996)*, quoting *National Ass'n of Gov't Employees v. Commonwealth, 419 Mass. 448, 452, 646 N.E.2d 106*, cert. denied, *515 U.S. 1161, 115 S. Ct. 2615, 132 L. Ed. 2d 858 (1995).*

Our analysis begins with the presumption that the collective bargaining agreement compels the outcome directed by the award and ends with a determination whether that outcome materially conflicts with *G. L. c. 115, § 10.* See *Chief Justice for Admin. & Mgt. of the Trial Court v. Office & Professional Employees Int'l Union, Local 6, supra.* See also *Fall River v. AFSCME Council 93, Local 3177, 61 Mass. App. Ct. 404, 410-411, 810 N.E.2d 1259 (2004)*; *Leominster v. International Bhd. of Police Officers, Local 338, 33 Mass. App. Ct. 121, 124-125, 596 N.E.2d 1032 (1992)*, **[***9]** citing *Rooney v. Yarmouth, 410 Mass. 485, 493 n.4, 573 N.E.2d 969 (1991).* We have found a conflict to be material when an arbitration award usurps a discretionary power granted by the Legislature to a public authority that, by statute, cannot be delegated to another. See, e.g., *School Comm. of Natick v. Education Ass'n of Natick, supra at 39-41*; *Massachusetts Coalition of Police, Local 165 v. Northborough, 416 Mass. 252, 255-256, 620 N.E.2d 765 (1993)*; *Massachusetts Bay Transp. Auth. v. Local 589, Amalgamated Transit Union, 406 Mass. 36, 39-41, 546 N.E.2d 135 (1989).* This is such a case.

The position at issue is a creation of statute. The Legislature **[*498]** has expressly directed city mayors, in *G. L. c. 115, § 10*, as amended by St. 1972, c. 122, to establish and maintain a local department of veterans' services "for the purpose of furnishing such information, advice and assistance to veterans and their dependents . . . to enable them to procure benefits to which they are or may be entitled relative to employment, vocational or other educational opportunities, hospitalization, medical care, pensions, and other veterans' benefits." The Legislature also has specifically instructed that the director of the department, as well as any assistants **[***10]** or deputy directors, "shall be a veteran and shall be appointed in a city by the mayor, with the **[**1037]** approval of the city council." *Id.* The statutory language is unambiguous. The Legislature has established one prerequisite to eligibility for the position of director of veterans' services -- that the person be a veteran. Beyond that requirement, the authority to appoint a veteran to that position is granted to the mayor (subject to the approval of city council).

The union accepts this premise, as it must, but contends nevertheless that the statutory language reflects a legislative intent to impose only a general obligation on mayors to hire someone to deliver the legislatively specified services. The union argues that art. VII (h)(2) of the collective bargaining agreement does not require the mayor to appoint a specific candidate, but merely expresses the city's promise to give a union candidate preference over a nonunion candidate (should the two be "substantially equal"). Therefore, according to the union, art. VII (h)(2) does not "materially conflict" with the authority imposed on the mayor by *G. L. c. 115, § 10.* See, e.g., *Chief Justice for Admin. & Mgt. of the Trial Court v. Office & Professional Employees Int'l Union, Local 6, supra.* **[***11]**

We do not find this interpretation of the statute persuasive. The practical effect of following the procedures set forth in art. VII (h)(2), in this case, dictates the candidate to be appointed and, and in so doing, usurps the authority specifically conferred on a mayor by legislative directive, to appoint, with the approval of the city council, a director of veterans' services. Indeed, the union's position leaves nothing for the city council to approve. We, therefore, discern a material conflict between the specific statutory power vested in the mayor by *G. L. c. 115, § 10*, and **[*499]** the terms of the collective bargaining agreement setting forth required procedures for filling vacancies in unit A positions.

The Appeals Court has stated that, "while an underlying decision may be reserved to the exclusive prerogative of the public employer . . . the public employer may be required to arbitrate with respect to ancillary matters, such as procedures that the employer has agreed to follow prior to making the decision." *Lynn v. Labor Relations Comm'n, 43 Mass. App. Ct. 172, 179 (1997).* In question in the *Lynn* case was the authority of the city's **[***12]** fire chief to file an application for the retirement of a fire fighter, without first engaging in collective bargaining with the union, and while the fire fighter's application for an accidental disability pension was pending before the Contributory Retirement Appeal Board. See *id. at 175.* The Appeals Court carefully differentiated between the broad category of cases involving challenges to an arbitration award, in which the public employer is operating under statutory authority granting general management powers, not listed in *§ 7 (d)*, and a narrow category in which the governmental employer acts under a specific authorizing statute, also not listed in *§ 7 (d).* See *id. at 178-182.* The Appeals Court explained: "In the range of cases where the governmental employer acts pursuant to broad, general management powers, the danger is presented, as pointed out in *School Comm. of Newton v. Labor Relations Comm'n, 388 Mass. [557,] 564-566 [(1983)]*, that to recognize the statutory authority as exclusive would substantially undermine the purpose of *G. L. c. 150E, § 6*, to provide for meaningful collective

bargaining as a general rule with respect to compensation and other terms and conditions of employment. **[***13]** That danger simply is not present when the governmental employer acts pursuant to a specific, narrow statutory mandate." *Id. at 182.* The Appeals Court concluded that the fire chief's specific **[**1038]** authority to act under *G. L. c. 32, § 16 (1) (a)*, left "nothing to bargain about" and, therefore, was a matter of exclusive managerial prerogative not subject to collective bargaining. *Id. at 184.* We agree with what was said in the *Lynn* case and, moreover, find the reasoning there fully applicable to the circumstances before us. The mayor's specific authority granted by *G. L. c. 115, § 10*, leaves "nothing to bargain about" and, moreover, is undermined entirely should **[*500]** the mayor be bound to the procedures set forth in art. VII (h)(2). We cannot view the challenged decision to hire Senesi an "ancillary matter" to the mayor's appointment power. [2]

2 Examples of cases in which we concluded that management decisions made in the public sector pursuant to a general statutory authority involved ancillary matters that are subject to collective bargaining are: *Chief Justice for Admin. & Mgt. of the Trial Court v. Office & Professional Employees Int'l Union, Local 6, 441 Mass. 620, 628-629, 807 N.E.2d 814 (2004)* (Chief Justice **[***14]** may agree to follow procedures prior to making decisions under statutory authority to transfer employees); *School Comm. of Pittsfield v. United Educators of Pittsfield, 438 Mass. 753, 764, 784 N.E.2d 11 (2003)* (although principal has statutory authority to determine whom to hire, involuntary transfer of teacher to different school remained proper subject of collective bargaining); and *School Comm. of Newton v. Newton Sch. Custodians Ass'n, Local 454, 438 Mass. 739, 748-749, 784 N.E.2d 598 (2003)* (principal's agreement to consider certain criteria in making hiring decisions constituted only minimal intrusion on hiring discretion).

In summary, the phrase "shall be appointed by" confers on the mayor the exclusive authority to decide which candidate shall serve as the director of veterans' service, subject only to the approval of the city council. Article VII (h) (2), as applied to this case, impermissibly infringes on this authority. Had the Legislature intended that the choice of director of veterans' services be open to the collective bargaining process, it easily could have included *G. L. c. 115, § 10*, in the statutes enumerated in *G. L. c. 150E, § 7 (d)*. In the absence of such inclusion, the city could not agree **[***15]** to collective bargaining provisions that interfere with the specific legislative directive contained in *G. L. c. 115, § 10*. It follows that the arbitrator was without authority to direct the city to appoint Nelson to the position of director of veterans' services. See *Boston v. Boston Police Superior Officers Fed'n, 52 Mass. App. Ct. 296, 299, 753 N.E.2d 154 (2001)*, quoting *Boston v. Boston Police Patrolmen's Ass'n, 41 Mass. App. Ct. 269, 270 n.3, 669 N.E.2d 466 (1996)* ("The fact that the city agreed to arbitrate the grievance is of no legal consequence if the issue is beyond the authority of the arbitrator").

3. The judgment of the Superior Court is reversed. A new judgment shall enter vacating the arbitrator's award.

So ordered.

WB&T MORTGAGE COMPANY, INC. vs. BOARD OF ASSESSORS OF BOSTON.

SJC-09940

SUPREME JUDICIAL COURT OF MASSACHUSETTS

451 Mass. 716; 889 N.E.2d 404; 2008 Mass. LEXIS 416

March 3, 2008, Argued
July 2, 2008, Decided

PRIOR HISTORY: [***1]

Suffolk. Appeal from a decision of the Appellate Tax Board. The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

DISPOSITION: Judgment affirmed.

COUNSEL: Daniel J. Brown for the plaintiff.

Adam Cederbaum for the defendant.

Martha Coakley, Attorney General, & Kenneth W. Salinger, Assistant Attorney General, for the Commonwealth, amicus curiae, submitted a brief.

JUDGES: Present: Marshall, C.J., Greaney, Ireland, Spina, Cowin, Cordy, & Botsford, JJ.

OPINION BY: MARSHALL

OPINION

[**406] [*716] MARSHALL, C.J. For more than 300 years, "proportionable and [*717] reasonable assessments, rates and taxes" have been imposed and levied on the Commonwealth's inhabitants and residents, and the estates lying within its borders, 1691 Charter of the Province of the Massachusetts Bay. [1], [2] Among the properties now exempted by statute from those levies are those that are owned or held in trust by charitable and other organizations that serve a public purpose. See, e.g., *G. L. c. 59, § 5, Third* (appearing in similar form in Rev. St. [1836], *c. 7, § 5, Second*).

> 1 The 1691 Charter of the Province of the Massachusetts Bay, sometimes referred to as the Province Charter, authorized assessment of proportional taxation:
>
> > "[A]nd to impose and levy proportionable [***2] and reasonable assessments, rates and taxes, upon the estates and persons of all and every the proprietors and inhabitants of our said province or territory, to be issued and disposed of by warrant under the hand of the governor of our said province for the time being, with the advice and consent of the council, for our service in the necessary defence and support of our government of our said province or territory, and the protection and preservation of the inhabitants there, according to such acts as are or shall be in force within our said province; and to dispose of matters and things whereby our subjects, inhabitants of our said province, may be religiously, peaceably and civilly governed, protected and defended . . . ."
>
> The Charters and General Laws of the Colony and Province of Massachusetts Bay 18, 33 (T.B. Wait & Co. ed. 1814). See *Opinion of the Justices, 324 Mass. 724, 727-728, 85 N.E.2d 222 (1949)*.
>
> 2 See Part II, c. 1, § 1, art. 4, of the Constitution of the Commonwealth.

At issue in this case is the immediate consequence of the termination of that exemption when exempt property is sold to a nonexempt buyer. We consider the constitutionality of *G. L. c. 59, § 2C (a)*, [3] which [**407] employs, as an [***3] interim measure, a method for assessing taxes on real property purchased from a tax-exempt entity different from the method imposed on other real property [*718] pursuant to *G. L. c. 59, § 2A (a)*. [4] By a divided panel, the Appellate Tax Board (board) denied the nonexempt taxpayer's request for an abatement of that pro forma tax computed and assessed under *G. L. c. 59, § 2C*, for the portion of fiscal year

2000 that came after the property was purchased on December 17, 1999.

3 *General Laws c. 59, § 2C*, provides, in relevant part:

"[W]henever in any fiscal year . . . any entity whose real estate is exempt under clauses Third, Four, Four A, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, Twelfth and Thirteenth of section five, shall sell any real estate after January first in any year, the grantee of the real estate shall pay a pro rata amount or amounts, as hereinafter defined, to the city or town where such real estate is located in lieu of taxes that would have been due for the applicable fiscal year under this chapter if the real estate had been so owned on January first of the year of sale and, with respect to a sale between January first and June thirtieth, if the real estate had been **[***4]** so owned on January first of the year of sale and the preceding year. The pro rata amounts payable to the city or town shall be determined as follows:

"(*a*) A portion of a pro forma tax for the fiscal year in which such sale occurred allocable on a pro rata basis to the days remaining in such fiscal year from the date of sale to the end of the fiscal year; and

"(*b*) A pro forma tax for the succeeding fiscal year where the sales take place between January first and June thirtieth of any year.

"The pro forma tax shall be computed by applying the tax rate or the appropriate classified tax rate of the city or town for the fiscal year in which such sale occurs, to the sale price after crediting any exemption to which the grantee would have been entitled under this chapter if the real estate had been so owned on January first of the year of sale. . . ."

We do not consider *G. L. c. 59, § 2C (b)*, which does not apply to the transaction here at issue.

4 In general, *G. L. c. 59, § 2C*, requires that a "pro forma tax" be based on the purchase price of the real property, while *G. L. c. 59, § 2A*, requires assessment based on the property's "fair cash valuation." In addition, the relevant assessment date **[***5]** under *§ 2C* is the date of sale, rather than the January 1 preceding the relevant fiscal year, as *§ 2A* provides. *Section 2C* additionally calculates the "pro forma tax" differently, depending on the timing of the real estate transaction.

The board concluded that *§ 2C* is not unconstitutional on its face, and that the taxpayer failed to meet its burden of demonstrating that *§ 2C* was unconstitutional as applied to it, because the taxpayer failed to produce substantial evidence of the fair cash valuation of the property as of the relevant valuation date, January 1, 1999. [5] The taxpayer appealed, pursuant to *G. L. c. 58A, § 13*, arguing that the statute is both facially unconstitutional **[*719]** and unconstitutional as applied. We transferred the appeal to this court on our own motion, and now affirm the board's decision on different grounds. [6]

5 A majority of the Appellate Tax Board (board) ruled that *G. L. c. 59, § 2C (a)*, imposes a property tax and, therefore, that it must be proportional. Part II, c. 1, § 1, art. 4, of the Constitution of the Commonwealth. While noting that purchase price may not always be determinative of fair cash value, see, e.g., *Pepsi-Cola Bottling Co. v. Assessors of Boston, 397 Mass. 447, 449-450, 491 N.E.2d 1071 (1986)*, **[***6]** it held that the purchase price is, in general, "the most persuasive evidence of value," and that the board has latitude in determining whether purchase price is the best evidence as of the relevant valuation date. The board concluded that the "practical operation" of *§ 2C* does not "directly and necessarily . . . produce disproportion," *Cheshire v. County Comm'rs of Berkshire, 118 Mass. 386, 389 (1875)*, and that *§ 2C* is facially constitutional. Further, the board concluded that *§ 2C* is not unconstitutional as applied because the taxpayer did not establish that the *§ 2C* tax imposed on it was disproportionate, that is that the purchase price on which the tax was calculated exceeded the fair cash value as of January 1, 1999.

6 We acknowledge the amicus brief filed on behalf of the Commonwealth by the Attorney General in support of the board of assessors of Boston.

Background. The case was submitted to the board on a statement of agreed facts, and we briefly summarize the board's findings. *United Church of Religious Science v. Assessors of Attleboro, 372 Mass. 280, 281, 361 N.E.2d 1254 (1977)* (decision of Appellate Tax Board

final as to findings of fact). On December 17, 1999 (midway through the 2000 fiscal [***7] year), WB&T Mortgage Company, Inc. (WB&T or taxpayer), purchased two parcels of land in Boston, adjacent to property it already owned, from the Roman Catholic Archdiocese of Boston (Archdiocese) for a total sales price of $ 4,500,000. The Archdiocese, [**408] a religious organization, was not subject to real estate tax on the parcels.

For purposes of taxation, valuation of most nonexempt real and personal property is established as of the January 1 preceding the applicable fiscal year. *G. L. c. 59, §§ 2A, 18.* Sixteen months after WB&T's purchase of the property, in April, 2001, the board of assessors of Boston (city) issued tax bills to WB&T for fiscal year 2001 (July 1, 2000, to June 30, 2001), reflecting that it had assigned a "total full valuation" of $ 3,281,600 to the property as of January 1, 2000.

Thereafter, on November 21, 2001, the city issued a tax bill for fiscal year 2000 (July 1, 1999, to June 30, 2000) to WB&T pursuant to *G. L. c. 59, § 2C*, in the amount of $ 82,861.11. That amount was based on the sales price of $ 4,500,000, a tax rate of $ 34.21 per thousand and, according to the "pro forma" tax bill, a total of 197 days during fiscal year 2000 (i.e., December 17, 1999, to June [***8] 30, 2000) that WB&T owned the property. [7] [*720] WB&T paid the tax on December 20, 2001, without interest, and applied for an abatement the following day. The application was deemed denied (by operation of statute, due to the assessors' inaction) on March 21, 2002, *G. L. c. 59, § 63*, and the taxpayer filed its appeal within ninety days, on June 21, 2002. See *G. L. c. 58A, § 13.*

> 7 For fiscal year 2000, WB&T owned the property for 197 days, i.e, December 17 though June 30. The tax was calculated by applying the tax rate ($ 34.21 per thousand) to the sales price ($ 4,500,000), and multiplying the result by the ratio of days WB&T owned the property (197) to the total days in the year (366, considering the 2000 leap year).

Discussion. 1. *Preliminary considerations.* Although not disputed by the parties on appeal, a threshold issue is whether *G. L. c. 59, § 2C*, imposes a tax, rather than an excise or other governmental exaction, and must therefore satisfy the constitutional requirement of proportionality. Part II, c. 1, § 1, art. 4, of the Constitution of the Commonwealth. See *Thomson Elec. Welding Co. v. Commonwealth, 275 Mass. 426, 429, 176 N.E. 203 (1931)*; *Portland Bank v. Apthorp, 12 Mass. 252, 255-256 (1815).* [***9] While *§ 2C* uses the phrases "a pro rata amount . . . in lieu of taxes" and "pro forma tax" to describe the obligation, we determine the nature of such an assessment "by its operation rather than its specially descriptive phrase," *Emerson College v. Boston, 391 Mass. 415, 424, 462 N.E.2d 1098 (1984)*, quoting *Thomson Elec. Welding Co. v. Commonwealth, 275 Mass. 426, 429, 176 N.E. 203 (1931)*, respecting the Legislature's intent in drafting the statute. *Associated Indus. of Mass, Inc. v. Commissioner of Revenue, 378 Mass. 657, 667-668, 393 N.E.2d 812 (1979).*

The board concluded, and we agree, that the statute exacts a tax. Among other things, *G. L. c. 59, § 2C*, provides that "[s]ums received under this section . . . shall be credited to the general fund of the city or town." That the revenue obtained by operation of *§ 2C* is destined for the "general fund" rather than for a particular purpose "while not decisive, is of weight in indicating that the charge is a tax." *Emerson College v. Boston, supra at 427*, quoting P. Nichols, Taxation in Massachusetts 7 (3d ed. 1938). Further, the *§ 2C* rubric approximates the property tax that would have been due if the property had been transferred by a nonexempt grantor, and is specifically referred [***10] to as "in lieu of taxes that would have been due" if the property had been owned by a nonexempt purchaser on January 1. Finally, unlike [*721] contractually-agreed payments "in lieu of taxes," *Anderson St. Assocs. v. Boston, 442 Mass. 812, 817-818, 817 N.E.2d 759 (2004)*, there is no "voluntary [**409] act" or "privilege" for which the *§ 2C* amount is levied. *Emerson College v. Boston, supra at 428.* See *German v. Commonwealth, 410 Mass. 445, 448, 574 N.E.2d 336 (1991)*, quoting *Opinion of the Justices, 393 Mass. 1209, 1216, 471 N.E.2d 1266 (1984)* (tax is "revenue-raising exaction imposed through generally applicable rates to defray public expense").

2. *Constitutionality of G. L. c. 59, § 2C.* The preeminent issue before us is whether, by authorizing a "pro forma tax" based on purchase price and date rather than fair cash valuation as of January 1, *G. L. c. 59, § 2C*, imposes an unconstitutional disproportionate or discriminatory tax on purchasers of real property from tax-exempt entities. We start from the premise that "[a] tax measure is presumed valid and is entitled to the benefit of any constitutional doubt, and the burden of proving its invalidity falls on those who challenge the measure." *Opinion of the Justices, 425 Mass. 1201, 1203-1204, 681 N.E.2d 857 (1997),* [***11] citing *Daley v. State Tax Comm'n, 376 Mass. 861, 865, 383 N.E.2d 1140 (1978).* See *Sylvester v. Commissioner of Revenue, 445 Mass. 304, 308, 837 N.E.2d 662 (2005)*, cert. denied, *547 U.S. 1147, 126 S. Ct. 2288, 164 L. Ed. 2d 813 (2006)*; *Andover Sav. Bank v. Commissioner of Revenue, 387 Mass. 229, 235, 439 N.E.2d 282 (1982).* A statute survives such scrutiny if it "may reasonably be applied in ways that do not violate constitutional safeguards." *Route One Liquors, Inc. v. Secretary of*

Admin. & Fin., 439 Mass. 111, 117, 785 N.E.2d 1222 (2003), quoting *Opinion of the Justices, 423 Mass. 1201, 1218, 668 N.E.2d 738 (1996)*.

The board ruled that *G. L. c. 59, § 2C*, is not facially unconstitutional, but that it would be unconstitutional as applied if the purchase price on which the *§ 2C* calculation was based exceeded the "fair cash valuation," *G. L. c. 59, § 38*, the standard applied to taxation of other real property. Giving deference to the board's expertise in interpretation of the tax laws of the Commonwealth, *Northeast Petroleum Corp. v. Commissioner of Revenue, 395 Mass. 207, 213, 479 N.E.2d 163 (1985)*, citing *French v. Assessors of Boston, 383 Mass. 481, 482, 419 N.E.2d 1372 (1981)* (we defer to "expertise of the board in tax matters involving interpretation of the laws of the Commonwealth"), but applying our independent judgment as to both **[***12]** law and facts on the constitutional issues, *Opinion of the Justices, 328 Mass. 679, 686-687, 106 N.E.2d 259 (1952)*, we conclude **[*722]** that the statute is constitutional, both on its face and as applied to this taxpayer.

a. *Facial challenge.* Under the Constitution of the Commonwealth, the Legislature may "impose and levy proportional and reasonable assessments, rates, and taxes, upon all the inhabitants of, and persons resident, and estates lying, within the . . . Commonwealth." Part II, c. 1, § 1, art. 4, of the Constitution of the Commonwealth. By addressing the absence of any tax assessment on property transferred from a tax-exempt entity for the period before the established proportionate system of taxation begins, *G. L. c. 59, § 2C (a)*, is a proper exercise of that power of proportional taxation, ensuring that nonexempt properties do not benefit from an unintended tax exemption, and that disproportionate taxation is reduced generally. *C & S Wholesale Growers, Inc. v. Westfield, 436 Mass. 459, 463, 766 N.E.2d 63 (2002)*.

Among the fundamental rights afforded by the Massachusetts Declaration of Rights is the right to enjoyment of "property." *Art. 10 of the Massachusetts Declaration of Rights.* That right, however, is not **[***13]** unfettered and comes with an attendant obligation:

> **[**410]** "Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws. He is obliged, consequently, to contribute his share to the expense of this protection . . ."

Id. Building on that principle, our cases long have recognized that, just as the Commonwealth assumes the protection of the property within its borders, so too must that property be "held subject to the reciprocal obligation of meeting, in its due proportion, the expenses incident to such protection." *Boston Soc'y of Redemptorist Fathers v. Boston, 129 Mass. 178, 180 (1880)*. See *Portland Bank v. Apthorp, 12 Mass. 252, 256 (1815)* (reasonable and proportional taxation historically "seems to be intended as a contribution of the individual citizens, in proportion to the property, whether real or personal, which they are respectively worth").

Lest proportionality become mechanistic, however, the constitutional charge of proportionality is mitigated by the Legislature's discretionary power to establish reasonable exemptions from taxation. Part II, c. 1, § 1, art. 4, of the Constitution of the Commonwealth. **[*723]** **[***14]** *Assessors of Boston v. Metropolitan Life Ins. Co., 320 Mass. 559, 562, 70 N.E.2d 806 (1947)* (statutory excise tax on corporation not violative of constitutional requirement of proportionality, given that Constitution does not preclude reasonable exemptions); *Assessors of Quincy v. Cunningham Found., 305 Mass. 411, 416-418, 26 N.E.2d 335 (1940)*; *Opinion of the Justices, 211 Mass. 624, 625, 98 N.E. 611 (1912)*. While the Constitution requires property taxes to be "proportional and reasonable," Part II, c. 1, § 1, art. 4, of the Constitution of the Commonwealth, "neither this constitutional provision nor the more general provisions of art. 10 . . . precludes reasonable exemptions." *Assessors of Quincy v. Cunningham Found., supra at 416*. See *Associated Indus. of Mass., Inc. v. Commissioner of Revenue, 378 Mass. 657, 668-669, 393 N.E.2d 812 (1979)*; *Daley v. State Tax Comm'n, 376 Mass. 861, 866, 383 N.E.2d 1140 (1978)*.

The Legislature long has authorized an exemption from taxation for property "actually devoted to a public use," primarily because such property, "held and used for the benefit of the public[,] ought not to be made to share the burden of paying the public expenses." *Assessors of Quincy v. Cunningham Found., supra at 417.* [8] See *Opinion of the Justices, 220 Mass. 613, 619, 108 N.E. 570 (1915)*; **[***15]** *Oliver v. Washington Mills, 93 Mass. 268, 11 Allen 268, 275 (1865). General Laws c. 59, § 5*, for example, limits tax exempt status to real estate actually devoted to public or quasi public purposes, consistent with the concept that tax exemptions are a form of government assistance properly available for the "promotion of public interests and not the furtherance of the advantage of individuals." *Opinion of the Justices, 211 Mass. 624, 625, 98 N.E. 611 (1912)*. Such exemptions also have been authorized on the basis that charitable entities contribute to the public good in ways other than by providing financial support. See *Opinion of the Justices, 324 Mass. 724, 731-732, 85 N.E.2d 222 (1949)*; *Assessors of Quincy v Cunningham*

Found., supra at 419; *Massachusetts Gen. Hosp. v. Belmont, 233 Mass. 190, 203, 124 N.E. 21 (1919)* (exemption for charitable entities justified by view that State's obligation to minister to human and **[**411]** social needs discharged by private charity).

> 8 The actual use to which the Archdiocese put the property while it was in the Archdiocese's possession is not in the record.

When the basis on which an exemption is founded no longer exists, the exemption ceases to be reasonable and, consistent **[*724]** with its constitutional obligation **[***16]** to levy proportional taxation, the Legislature has the power to limit or terminate the exemption. *Opinions of the Justices, 365 Mass. 665, 668, 313 N.E.2d 882 (1974)*, citing *Assessors of Newton v. Pickwick Ltd., 351 Mass. 621, 623, 223 N.E.2d 388 (1967)* ("Legislature may repeal previously granted tax exemptions. Tax exemptions are a matter of legislative grace"); *Massachusetts Gen. Hosp. v. Belmont, supra at 200*. Put another way, the constitutional power to create an exemption includes the power to change or destroy that exemption, consistent also with the constitutional principle of proportionality. We construe *G. L. c. 59, § 2C*, as a reasonable method of effectuating the withdrawal, removal or termination of an exemption when the subject property is no longer owned by a tax-exempt entity or used for a tax-exempt purpose. See *Assessors of Quincy v. Cunningham Found., supra at 414-415. Opinion of the Justices, 324 Mass. 724, 733, 85 N.E.2d 222 (1949)* (exemptions valid where they do not "materially . . . impair the constitutional principle of proportional taxation of property"); *Opinion of the Justices, 261 Mass. 523, 546-547, 159 N.E. 55 (1927)* (Legislature has broad power to grant exemptions for *proper* purposes). See *Milton Hosp. & Convalescent Home v. Assessors of Milton, 360 Mass. 63, 67, 271 N.E.2d 745 (1971)* **[***17]** (rule of proportional exemption applies where there is ascertainable nonexempt use). See also *Lynn Hosp. v. Assessors of Lynn, 383 Mass. 14, 417 N.E.2d 14 (1981)*. Indeed, as was noted in *Oliver v. Washington Mills, 93 Mass. 268, 11 Allen 268, 275 (1965)*, the essential principle of proportionality permits the Legislature to require valuation of property "oftener" than the Constitution requires, to "render it certain" that taxation is equal:

> "This rule of proportion was based on the obvious and just principle that the benefit which each person derives from the government has direct relation to the amount of property which he possesses and enjoys under its sanction and protection. It was to prevent this essential principle from being violated or disregarded, and to render it certain that taxation for general purposes of government should be made equal, that it was expressly provided in the constitution that a valuation of estates within the Commonwealth should be taken anew decennially at least, and oftener if the legislature should order."

[*725] See *C & S Wholesale Grocers, Inc. v. Westfield, 436 Mass. 459, 463, 766 N.E.2d 63 (2002)* (inclusion of value of mid-year property improvements reduces incidents of owners' "use of more municipal **[***18]** services without contributing their share of municipal expenses"). Albeit on a somewhat different basis from that adopted by the board, *Ng Bros. Constr. v. Cranney, 436 Mass. 638, 639, 766 N.E.2d 864 (2002)*, we therefore conclude *G. L. c. 59, § 2C (a)*, is facially valid.

b. *Validity of valuation method.* We turn now to the question whether, if the Legislature may authorize taxation when property is transferred from a tax-exempt entity or tax-exempt purpose, *G. L. c. 59, § 2C*, that tax may be calculated, on a temporary basis, on the basis of the property's purchase price and date of sale rather than the fair cash valuation of the property as of January 1. The taxpayer argues that the different method of calculating the tax results in unconstitutionally disproportionate taxation and, therefore, **[**412]** that it is entitled to full abatement of the tax assessment pursuant to *§ 2C*. We conclude, in the circumstances of this case, that the valuation method of *§ 2C (a)* is neither unreasonable, disproportionate, nor unconstitutional. See *Springfield v. Assessors of Granville, 378 Mass. 159, 163-164, 390 N.E.2d 713 (1979)* (with respect to constitutionality of statute fixing valuation of power plant, "no showing either that the scheme **[***19]** of fixed valuation and exemption was unreasonable when enacted, or that circumstances have since rendered it unfair").

By authorizing assessors to use the purchase price to measure the fair cash value of property purchased mid-year from a tax-exempt entity, *G. L. c. 59, § 2C*, provides a reasonable method for assessing taxes on property that, prior to the sale, was exempt from real estate tax. Such property is not part of the triennial revaluation process, *G. L. c. 40, § 56*, and is not subject to preassessment information requests pursuant to *G. L. c. 59, § 38D*. [9] Using the purchase price is a reasonable method for ascertaining the "fair cash value" of property owned, in the first part of a fiscal year, by tax-exempt entities. See *Northwest Assocs. v. Assessors of Burlington, 392 Mass. 593, 594, 467 N.E.2d 176 (1984)* (fair market value **[*726]** may be estimated in several ways); *Keniston v.*

Assessors of Boston, 380 Mass. 888, 894-895, 407 N.E.2d 1275 (1980) (temporary nature of tax statute "mitigates any residual discrimination"); *First Nat'l Stores, Inc. v. Assessors of Somerville, 358 Mass. 554, 560, 265 N.E.2d 848 (1971)* ("Actual sales are, of course, very strong evidence of fair market value, for they represent what a buyer has been willing **[***20]** to pay a seller for a particular property").

9 *General Laws c. 59, § 38D*, provides in part that "[a] board of assessors may request the owner or lessee of any real property to make a written return under oath within sixty days containing such information as may reasonably be required by it to determine the actual fair cash valuation of such property."

Tax assessors are obliged, both statutorily and constitutionally, to assess all real property at its full and fair cash value. See *Assessors of Weymouth v. Curtis, 375 Mass. 493, 498-499, 378 N.E.2d 655 (1978)*; *Coomey v. Assessors of Sandwich, 367 Mass. 836, 837, 329 N.E.2d 117 (1975)*; *Opinion of the Justices, 344 Mass. 766, 768, 181 N.E.2d 793 (1962)*; *Opinion of the Justices, 332 Mass. 769, 126 N.E.2d 795 (1955)*. Nonetheless, that determination is inherently inexact. See *Sudbury v. Commissioner of Corps. & Taxation, 366 Mass. 558, 321 N.E.2d 641 (1974)*; *First Nat'l Stores, Inc. v. Assessors of Somerville, supra.* See also *Ramacorti v. Boston Redevelopment Auth., 341 Mass. 377, 170 N.E.2d 323 (1960)*; *Opinion of the Justices, 195 Mass. 607, 609, 84 N.E. 499 (1908)*. Given that mathematical precision is not required, *Bettigole v. Assessors of Springfield, 343 Mass. 223, 178 N.E.2d 10 (1961)*, and that fair market value sometimes is equated with fair cash value, *Massachusetts Gen. Hosp. v. Belmont, 233 Mass. 190, 206, 124 N.E. 21 (1919)*, **[***21]** quoting *National Bank of Commerce v. New Bedford, 175 Mass. 257, 262, 56 N.E. 288 (1900)* ("'fair cash value' . . . means the highest price that a normal purchaser, not under peculiar compulsion, will pay at that time to get that thing"), we conclude that the Legislature could permissibly determine that the actual sales price is a reasonable approximation of a property's fair cash valuation for *G. L. c. 59, § 2C*, purposes, at least in an arm's-length transaction, and absent contrary evidence. *Tennessee Gas Pipeline Co. v. Assessors of Agawam, 428 Mass. 261, 263, 700 N.E.2d* **[**413]** *818 (1998)* (purchase price is best evidence of fair cash value). *Assessors of Quincy v. Boston Gas Co., 309 Mass. 60, 63, 34 N.E.2d 623 (1941)*. See *Ramacorti v. Boston Redevelopment Auth., 341 Mass. 377, 170 N.E.2d 323 (1960)*. That value may substitute, until assessments are made in the ordinary course, for the assessors' determination of fair cash value. *C & S Wholesale Grocers, Inc. v. Westfield, 436 Mass. 459, 463, 766 N.E.2d 63 (2002)* (assessing improvements reduces disproportion). *Keniston v. Assessors of Boston, supra. Irving Usen Co. v. Assessors of Boston, 309 Mass. 544, 545, 36 N.E.2d 373 (1991)* (lease **[*727]** cannot affect taxation date). Cf. *Cheshire v. County Comm'rs of Berkshire, 118 Mass. 386, 389 (1875)* **[***22]** (while it is impossible for tax statutes to "secure exact equality or proportion," valuation methods may not be arbitrary and unequal, and their aim must be to approximate such proportion).

c. *"As applied" challenge.* The taxpayer also challenges the constitutionality of *G. L. c. 59, § 2C*, "as applied" to it or to the property. [10] As the board recognized, the taxpayer's choice to present scant evidence in the abatement proceeding is consistent with a facial challenge to the constitutionality of *G. L. c. 59, § 2C*. Assuming the taxpayer has grounds to challenge the constitutionality of *§ 2C* as applied in this case, see note 10, *supra,* that choice does not reduce a taxpayer's burden of proving that a statute "as applied" is unconstitutional. *Shoppers' World, Inc. v. Framingham, 348 Mass. 366, 377, 203 N.E.2d 811 (1965).*

10 In its amicus brief, the Attorney General suggests that a "taxpayer subject to assessment under *§ 2C* should not be permitted to claim that the statute is unconstitutional 'as applied' merely because some other valuation method would result in a different estimate of fair cash value for its property." We need not decide the issue in this case because, even assuming the taxpayer has grounds **[***23]** to challenge *G. L. c. 59, § 2C*, as applied, it failed to meet its burden of proving the claim.

In this case, there is no dispute that, for purposes of the 2001 real estate tax, the assessors valued the property as of January 1, 2000, at $ 3,281,600. The taxpayer argues that, given that it had purchased the properties only two weeks before that valuation date (on December 17, 1999) for $ 4,500,000, the purchase price is "presumably likewise substantially higher than the fair cash value on the preceding January 1, 1999." As the board noted, however, the taxpayer offered no evidence of the fair cash value as of January 1, 1999, for purposes of a fiscal year 2000 assessment. See *Coomey v. Assessors of Sandwich, 367 Mass. 836, 838, 329 N.E.2d 117 (1975)* (taxpayer bears burden of establishing existence of scheme of disproportionate assessment). Nor did it offer any other substantial evidence on which the board could make a determination of fair cash value as of January 1, 1999 (for fiscal year 2000 purposes). Indeed, the taxpayer did not provide a description of the properties, other than the bare legal description contained in the deeds, and did not offer evidence of market

conditions from which the board [***24] could determine that the fiscal year 2001 assessed value (as of January 1, 2000) or the purchase [*728] price could or should be adjusted. Finally, the taxpayer did not offer evidence concerning the sale of the properties that would suggest there were unique circumstances or some relationship between the parties that would make the purchase price weak evidence of fair cash value. See, e.g., *Pepsi-Cola Bottling Co. v. Assessors of Boston, 397 Mass. 447, 449-450, 491 N.E.2d 1071 (1986)*; *Foxboro Assocs. v. Assessors of Foxborough, 385 Mass. 679, 682-683, 433 N.E.2d 890 (1982)*.

[**414] In short, there was no basis before the board on which it could be determined that the purchase price was not an appropriate barometer of the properties' fair cash value: the taxpayer failed to make the requisite showing that the fair cash value on January 1, 1999, was different from the assessors' levy. On the record before it, the board properly concluded that the taxpayer failed to demonstrate that the tax imposed under *G. L. c. 59, § 2C*, was disproportionate. See *General Mills, Inc. v. Commissioner of Revenue, 440 Mass. 154, 161, 795 N.E.2d 552 (2003)*, cert. denied, *541 U.S. 973, 124 S. Ct. 1878, 158 L. Ed. 2d 468 (2004)* (board's findings are final); *Stilson v. Assessors of Gloucester, 385 Mass. 724, 729, 434 N.E.2d 158 (1982)* [***25] (same). Without evidence to the contrary, it is unnecessary and illogical to infer that sophisticated parties would pay more than the fair cash value at the time of the transaction, and the board properly rejected that notion.

Conclusion. A taxpayer has no constitutional right to avoid paying taxes on property it purchases during the middle of a fiscal year from a tax-exempt organization. *General Laws c. 59, § 2C (a)*, is a constitutionally valid exercise of the Legislature's power, for the affected fiscal year, to require the taxpayer to pay a proportionate tax on newly taxable property.

Judgment affirmed.