
**Massachusetts Department of Revenue
Division of Local Services**

**Current Developments
in
Municipal Law**



2012

Massachusetts and Federal Court Cases

Book 2

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MASSACHUSETTS AND FEDERAL COURT CASES

Book 2

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DANIEL ADAMS vs. CITY OF BOSTON (and two consolidated cases[FN1]).

SUPREME JUDICIAL COURT OF MASSACHUSETTS

461 Mass. 602

963 N.E.2d 694; 2012 Mass. LEXIS 128; 192 L.R.R.M. 3313

November 8, 2011, Argued

March 7, 2012, Decided

PRIOR HISTORY: Suffolk. Civil action commenced in the Supreme Judicial Court for the county of Suffolk on October 4, 2010. The case was reported by Cordy, J.

HEADNOTES

Police, Career incentive pay. Municipal Corporations, Collective bargaining, Police. Contract, Collective bargaining contract. Statute, Appropriation of money, Construction.

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Philip G. Boyle, Laurence J. Donoghue, Peter J. Mee, & Colin R. Boyle for City Solicitors and Town Counsel Association.

Philip Collins for Massachusetts Municipal Association.

JUDGES: Present: Ireland, C.J., Spina, Cordy, Botsford, Gants, Duffly, & Lenk, JJ.

OPINION BY: SPINA

OPINION

[*602] SPINA, J. In this consolidated appeal, we construe the payment obligations of municipalities participating in *G. L. c. 41, § 108L*, [*603] popularly known as the "Quinn Bill," a local option statute establishing a career incentive pay program for police officers. The statute provides that in participating municipalities, qualifying police officers "shall be granted" certain salary increases for furthering their education in the field of police work. *Id.* The statute also provides that municipalities "shall be reimbursed" by the Commonwealth for fifty per cent of payments made under the program. *Id.* The underlying cases arose when the Commonwealth, facing budgetary constraints, substantially cut § 108L reimbursements. The Commonwealth legally was permitted to do so because

§ 108L reimbursements are considered subject to appropriation by the General Court. *Milton v. Commonwealth*, 416 Mass. 471 (1993). Faced with a deficient reimbursement from the Commonwealth, the city of Boston (city) in turn informed police union leaders that it would cut payments almost in half. [FN2] The city took this action pursuant to clauses in collective bargaining agreements (CBAs) it had reached with the unions regarding the city's participation in the program. [FN3] The clauses state that, should the Commonwealth ever fail to reimburse the city its half share, the city will only owe its own half share, plus any amount actually received from the Commonwealth. The plaintiffs now contend that these clauses impermissibly conflict with the statute, which they view as requiring the city to pay one hundred per cent of benefits irrespective of reimbursement.

1 Francis Armstrong vs. City of Boston and Brian Albert vs. City of Boston.

2 The payments by the city would be calculated as follows: the city would cut payments so that it would pay "its half," and add to this the amount of reimbursement actually received from the Commonwealth. This latter amount was 8.73% of full benefits under *G. L. c. 41, § 108L*. Thus, the city reduced payments to 58.73% of full benefits.

3 The collective bargaining agreements (CBAs) were between the city and: the Boston Police Patrolmen's Association, for patrol officers; the Boston Police Superior Officers Federation, for sergeants, lieutenants, and captains; and the Boston Police Detectives Benevolent Society, which negotiated two separate agreements for detectives and superior detectives.

The plaintiff police officers, who qualify for § 108L benefits, brought three separate suits in the Superior Court seeking (1) a declaration that the CBA provisions conflict with § 108L and are thus invalid, and (2) an order that the city "make full payment." The parties jointly petitioned to consolidate the cases [*604] and transfer them to this court. *G. L. c. 211, § 4A*. A single justice in the county court granted the petition, and reserved and reported the matter without decision to the full court. We now conclude that judgments must enter for the city.

4 We acknowledge the amicus briefs submitted by the City Solicitors and Town Counsel Association; the Massachusetts Coalition of Police, IUPA, AFL-CIO, and National Association of Police Organizations, Inc.; and the Massachusetts Municipal Association.

1. Background. *Section 108L* is a local option statute, enacted in 1970, providing incentive salary increases to police officers for furthering their education in police work. Payment and reimbursement under the statute operate as follows. Municipalities first must obtain certification by the board of higher education (board) that a particular officer is eligible for a salary increase. Once certified, the municipality then pays the salary increase over the course of a fiscal year, July 1 through June 30. The municipality then files information with the board by a specified date, listing § *108L* payments made over the prior fiscal year and requesting reimbursement.

Two provisions of the current statute are at issue in this case. The first provision, which we shall call the "payment provision," was added in 1976; at the time, it served to reduce the percentage salary increases available to officers under the previous payment provision. [FN5] St. 1976, c. 480, § 9. See *Rooney v. Yarmouth*, 410 Mass. 485, 487 (1991). The payment provision lists the percentage base salary increases that officers are entitled to receive for earning various credits or degrees:

"[A]ny regular full-time police officer commencing such incentive pay program after September 1st, 1976[,] shall be granted a base salary increase of ten per cent upon attaining an associate's degree in law enforcement or sixty points earned to a baccalaureate degree in law enforcement, a twenty per cent increase upon attaining a baccalaureate degree in law enforcement, and a twenty-five per cent increase upon attaining a master's degree in law [*605] enforcement or for a degree in law" (emphasis added). *G. L. c. 41, § 108L*, as appearing in St. 1976, c. 480, § 9.

This language has remained unchanged since the provision was added in 1976.

5 The new payment provision applied to officers who began the program on September 1, 1976, or thereafter. St. 1976, c. 480, § 9. Officers who had begun the program prior to July 1, 1976, were entitled to salary increases at greater rates. *Id. Rooney v. Yarmouth*, 410 Mass. 485, 487 (1991).

The second provision at issue, which we shall call the "reimbursement provision," was included in the original statute, St. 1970, c. 835. The provision reads:

"Any city or town which accepts the provisions of this section and provides career incentive salary increases for police officers shall be reimbursed by the commonwealth for one half the cost of such payments upon certification by the board of higher education" (emphasis added). *G. L. c. 41, § 108L*.

This language appears in the paragraph before the payment provision; it has remained unchanged since 1970. [FN6]

6 Statute 1976, c. 480, § 9, rewrote § *108L*, replacing all of the text with new text, but retained the reimbursement provision verbatim.

a. The Milton case. In *Milton v. Commonwealth*, 416 Mass. 471 (1993) (Milton), this court had occasion to interpret the reimbursement provision of § *108L*. There, the issue before the court was whether the Commonwealth could be ordered to reimburse municipalities when it failed to pay its fifty per cent share. *Id. at 472*. The case arose out of the Commonwealth's failure to appropriate sufficient sums for § *108L* reimbursement for fiscal years 1988 through 1991. *Id.* The court held that the words "shall be reimbursed" do not create an absolute right to reimbursement; rather, the reimbursement provision creates only a conditional right subject to the "availability of funds appropriated [by the General Court] for the purpose." *Id. at 473*. Since our decision, therefore, municipalities and police officers have been unable to seek judicial relief against the Commonwealth for failing to reimburse § *108L* payments.

b. The collective bargaining agreements. The city accepted the provisions of § *108L* in 1998, after agreeing to do so in collective bargaining agreements with police unions. [FN7] The CBAs [*606] contain certain provisions regarding the city's participation in the program. One such provision reads: [FN8]

"If for any fiscal year the reimbursement from the Commonwealth does not fully meet its fifty per cent (50%) share of educational incentives paid pursuant to [§ *108L*], then eligible employees shall subsequently be paid educational incentives equal to 5.0%, 10.0%, or 12.5% based on the degree held and certified, plus [the amount] actually reimbursed by the Commonwealth for the prior fiscal year."

The percentages listed -- 5%, 10%, and 12.5% -- equal one-half the percentages specified in the payment provision of § 108L. The parties therefore clearly agreed that, should the Commonwealth ever fail to reimburse the city for its full half of § 108L payments, the city could subsequently cut payments in half.

7 The CBA between the city and the Boston Patrolmen's Association states in art. XVII A, § 1, that the mayor "shall transmit to the City council an order accepting the provisions of [§ 108L], and thereafter shall exert said Mayor's best efforts to procure the passage of said order"

8 The language quoted is taken from the CBA between the city and the Boston Police Detectives Benevolent Society. The language in the other CBAs does not differ in any material respect.

c. The Commonwealth's reduced § 108L reimbursements. Consistent with the statutory procedures already described, in the fall of 2009 the city timely applied to the Commonwealth for reimbursement of § 108L payments made during FY 2009. The city's payments for FY 2009 amounted to \$21,719,862. The city therefore requested reimbursement of \$10,859,931 -- half the paid sum. The Commonwealth, however, had not appropriated sufficient money for the FY 2010 budget to cover anticipated costs for § 108L reimbursements. **[FN9]** The Commonwealth only reimbursed the city \$1,896,261, equal to 8.73% of the city's total § 108L expenditures for FY 2009.

9 The budget for FY 2010 passed by the General Court only included \$10 million for reimbursing all § 108L municipalities in the Commonwealth. St. 2009, c. 27, § 2, line item 8000-0040. This was well short of the estimated \$55 million that was needed to pay the Commonwealth's half share.

On December 31, 2009, having received the Commonwealth's reimbursement, the city's director of labor relations wrote to police union leaders explaining that the city planned to reduce **[*607]** § 108L payments, effective almost immediately. **[FN10]** In accordance with the CBAs, the city reduced payments to 58.73%, consisting of the "full fifty per cent" contribution from the city, plus the 8.73% actually received from the Commonwealth. The letter informed the unions that the reductions were for a twelve-month period, but that the city would again reduce payments if the Commonwealth again failed to appropriate sufficient funds in the FY 2011 budget for § 108L reimbursements.

10 The cuts were to become effective during the first pay period after the city's receipt of the deficient reimbursement. The Commonwealth briefly delayed the cuts as a way of giving

individual officers more time to assess the impact on "their pay and their pension calculation."

The Commonwealth appropriated \$10 million in the FY 2011 budget for reimbursement of § 108L payments for FY 2010. The parties agree, however, that \$58 million is needed to reimburse all § 108L municipalities for half of those payments.

The plaintiffs in the underlying cases seek a declaration that the CBA provisions are invalid because they materially conflict with § 108L. In their view, § 108L requires municipalities to pay one hundred per cent of the salary increases specified in the payment provision. This one hundred per cent figure is not contingent on later reimbursement from the Commonwealth, which the plaintiffs view as a separate and distinct obligation. The plaintiffs argue that because the CBA provisions allow less than one hundred per cent payment, they materially conflict with the statute, and are thus invalid. See *Boston Hous. Auth. v. National Conference of Firemen & Oilers, Local 3*, 458 Mass. 155, 163-165 (2010) (BHA). In addition, § 108L is not one of the statutes listed in *G. L. c. 150E, § 7 (d)*, that yield to CBAs; therefore, the CBAs must yield to the statute and be declared invalid.

2. Discussion. In cases involving the interplay between a statute and a CBA provision, we begin by looking to the so-called "conflicts" statute, *G. L. c. 150E, § 7 (d)*. *Section 7 (d)* provides that where a CBA is contrary to certain enumerated statutes, **[FN11]** the terms of the CBA prevail over the statute. *Id.* ("If **[*608]** a [CBA] reached by the employer and the exclusive representative contains a conflict [with certain enumerated statutes] . . . the terms of the [CBA] shall prevail"). The section meshes with the strong public policy in the Commonwealth favoring collective bargaining between public employers and employees over certain conditions and terms of employment. See *Somerville v. Somerville Mun. Employees Ass'n*, 451 Mass. 493, 496 (2008).

11 The enumerated statutes, generally speaking, contain specific mandates regarding terms and conditions of employment of public employees. See *G. L. c. 150E, § 7 (d)*; *School Comm. of Newton v. Labor Relations Comm'n*, 388 Mass. 557, 566 (1983).

Conversely, however, "statutes 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 (1996) (School Comm. of Natick), quoting *National Ass'n of Gov't Employees v. Commonwealth*, 419 Mass. 448, 452 cert. denied, 515 U.S. 1161 (1995). To determine if a CBA provision is contrary to a statute not listed in § 7 (d), we ask whether the provision materially conflicts with the statute. See *Somerville v. Somerville*

Mun. Employees Ass'n, 80 Mass. App. Ct. 686, 688-689 (2011) (collecting cases). If it does, the CBA provision is invalid. See *BHA*, *supra*.

Section 108L is not one of the statutes enumerated in § 7 (d). The outcome of this case, therefore, depends on whether the CBA provisions materially conflict with § 108L. See *School Comm. of Natick*, *supra*. For reasons that follow, we conclude that they do not. The Legislature in drafting the statute intended a system of shared funding. As such, the statute in the end requires only that municipalities pay one-half the amounts listed in the payment provision, plus any amount actually received from the Commonwealth. The statute is "simply silent" as to a requirement to pay more than one-half. [FN12] See *Sellers's Case*, 452 Mass. 804, 810 (2008). In the face of this silence, municipalities are free to pay more than one-half voluntarily, and may agree to do so via collective bargaining, but the statute does not require it. See *Dedham v. Dedham Police Ass'n (Lieutenants & Sergeants)*, 46 Mass. App. Ct. 418, 420-421 (1999). In the instant cases, the city agreed in its CBAs that in the event of a deficient reimbursement from the Commonwealth, the city only [*609] owes its fifty per cent share plus the amount actually reimbursed. This language merely parrots the minimum statutory requirements. The CBAs, therefore, do not conflict with the statute and are valid.

12 We therefore reject the related argument of the plaintiffs that the CBA provisions attempted to "amend" § 108L. The CBA provisions merely parrot the baseline requirements of the statute; therefore, they could not "amend" the statute in any way.

a. Textual analysis. We begin our analysis in familiar territory: by reading the language of the statute. *Halebian v. Berv*, 457 Mass. 620, 628 (2010), quoting *Commonwealth v. Raposo*, 453 Mass. 739, 743 (2009). We do so in order to determine whether the intent of the Legislature is apparent from the language itself. See *Wheatley v. Massachusetts Insurers Insolvency Fund*, 456 Mass. 594, 601 (2010) (Wheatley). If we determine that the intent of the Legislature is unambiguously conveyed by the statutory language, we simply end our analysis and give effect to the legislative intent. See *id.*, and cases cited. In deciding whether the legislative intent is expressed unambiguously by the words used, we must take caution to give effect to all of the statute's terms, "so that no part will be inoperative or superfluous." *Connors v. Annino*, 460 Mass. 790, 796, (2011) (Connors), quoting *Wheatley*, *supra*.

As an initial matter, we think the text of the statute unambiguously conveys the intent of the Legislature that participating municipalities be required to pay fifty per cent of the amounts specified in the payment provision, plus any reimbursement actually received. [FN13] The fact that the statute is voluntary does not

relieve municipalities of this requirement. Our cases interpreting local option statutes have made clear that although such a statute is accepted voluntarily, once accepted the municipality must comply with the statute's unambiguous mandates. See, e.g., *Cambridge v. Attorney Gen.*, 410 Mass. 165, 167-168 (1991) (municipality opting to accept provisions of *G. L. c. 32B* must purchase group health insurance plans for its employees, and pay certain minimum percentage of premiums). See also *Broderick v. Mayor of Boston*, 375 Mass. 98, 103 (1978) (Broderick) (rejecting notion that city was "entrap[ped]" in voluntary statute).

13 The city does not seriously challenge this requirement. The reimbursement provision of § 108L states that municipalities that "provide[] career incentive salary increases" will be reimbursed half the cost of "such payments." The "payments" referred to are listed in § 108L's payment provision. Municipalities are thus clearly required to pay one-half the sums listed in the payment provision.

[*610] Nor have any amendments passed since 1970 altered the fifty per cent minimum requirement. Municipalities are bound by subsequent amendments to a local option statute; a "fresh acceptance" may be required only where a later amendment is "not germane" to the subject of the original statute. *Broderick*, *supra* at 102-103. The amendments to § 108L enacted since 1970 primarily have been aimed at improving the quality of classes offered under the auspices of the program. [FN14] No amendment has changed the language regarding half payment. Thus, no "fresh acceptance" is required and the municipalities are bound to fifty per cent payment. See *id.*

14 In 1975, an amendment provided that credits or degrees earned through the program must be for courses specifically leading toward a degree in law enforcement. St. 1975, c. 452, § 1. The same amendment directed the board of higher education (board) to maintain a list of approved courses leading to a degree in law enforcement. *Id.* at § 3. A 2002 amendment directed the board to establish "quality guidelines," and only to certify salary increases for credits earned at programs meeting those guidelines. St. 2002, c. 184, § 48. In 2004, an amendment established extensive procedures for educational institutions wishing to participate in the program, involving submission of an application, payment of a fee to the board, inclusion on an "approved program list," reviews and inspections by the board, and appeals of adverse determinations by the board. St. 2004, c. 149, § 93.

We next ask whether the text is equally clear regarding a legislative intent that municipalities be required to pay full benefits under § 108L. We think the

words "shall be granted" as used in the payment provision do not unambiguously convey such an intent. The statute states that certain specified salary increases "shall be granted" to qualifying police officers. But the statute further states that paying municipalities "shall be reimbursed" for one-half the payments. It could be that, as the plaintiffs contend, "shall be granted" means "shall be granted irrespective of reimbursement." But it could also be that "shall be granted" refers to a conditional obligation to pay subject to the Commonwealth reimbursing (paying) its half share. At the very least, then, the reimbursement provision muddies the textual waters as to whether the Legislature intended one hundred per cent payment. To conclude otherwise is to render the reimbursement provision a nullity, which we cannot do. See *Connors, supra*, quoting *Wheatley, supra*.

The plaintiffs argue that a recent decision of this court, [*611] *Boston Hous. Auth. v. National Conference of Firemen & Oilers, Local 3*, 458 Mass. 155 (2010), should control our analysis of the plain language here. In that case, we held that an "evergreen clause" in a CBA, stating that during any period of negotiations between the parties the CBA would remain in full force and effect, directly conflicted with *G. L. c. 150E, § 7 (a)*, stating that CBAs "shall not exceed a term of three years." *Id. at 157, 162*. We stated that the unambiguous language of the statute revealed a clear legislative intent to limit CBAs to three years. [FN15] *Id. at 162-163*. The evergreen provision, which allowed the CBA to stay in effect beyond the three-year term, was invalid because it conflicted with the statute. *Id. at 164*.

15 This reading made sense in light of certain beneficial purposes of the statute, such as allowing parties to a CBA to reassess the terms of the agreement every three years. See *Boston Hous. Auth. v. National Conference of Firemen & Oilers, Local 3*, 458 Mass. 155, 162-163 (2010). As discussed *infra*, the plaintiffs' theory here is at odds with at least one purpose of § 108L.

Unlike the statute at issue in *BHA*, the text of § 108L does not answer clearly the question posed. The statute analyzed in *BHA*, *G. L. c. 150E, § 7 (a)*, reads: "Any collective bargaining agreement reached between the employer and the exclusive representative shall not exceed a term of three years." This language, clear on its face, is not qualified by any other part of the statute. A CBA of four years would clearly conflict with the statute and be declared invalid. By contrast, the payment provision of § 108L is significantly qualified one paragraph earlier by the reimbursement provision.

b. Legislative history. Having found the text of the statute ambiguous, we next seek to discern the intent of the Legislature by turning to "the cause of [the statute's]

enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated." *Industrial Fin. Corp. v. State Tax Comm'n*, 367 Mass. 360, 364 (1975), quoting *Hanlon v. Rollins*, 286 Mass. 444, 447 (1934) (Hanlon). We employ classic rules of statutory construction to aid us in our task. See, e.g., *Halebian v. Berv*, 457 Mass. 620, 628-629 (2010). We first discuss the cause of the statute's enactment.

Although the history of the statute is sparse, at least two [*612] reasons for its enactment can be discerned. First, it is clear that the statute was intended "to improve the educational level of the police force through recruitment and the luring of, among others, college educated persons." *Palmer v. Selectmen of Marblehead*, 368 Mass. 620, 627 (1975). Second, it is equally clear that the Legislature intended to give municipalities the ability to fund incentive salary increases at twice the level they could otherwise afford, via a system of shared funding with the Commonwealth. As we have not previously had occasion to discuss this latter purpose of the statute, we now do so briefly.

Section 108L was passed during a period in the Commonwealth when there was a general concern that the police force was undereducated. [FN16] *Id. at 626 n.8*. To remedy the situation, Attorney General Robert H. Quinn and others advocated for, and in 1970 achieved, a Statewide local option statute providing salary incentives to police officers to take courses and pursue degrees. A hallmark of the original statute was that one-half the cost of incentives was to be borne by the Commonwealth. [FN17] In order to qualify for reimbursement, a participating municipality had to file certain information by September 1 of each year, at which time the board would certify both salary increases and reimbursement payments. *G. L. c. 41, § 108L*. That shared funding was a purpose of the statute is borne out by the reimbursement provision's inclusion in the original statute, and its [*613] continued, undisturbed inclusion without redaction since that time. [FN18]

16 The committee on law enforcement and the administration of justice formed by Governor John A. Volpe had reported that the "educational level of the Massachusetts policeman is among the lowest in the nation." *College-Trained Officer May Earn More Pay*, *Boston Globe*, Jan. 7, 1968, at 16. See *Palmer v. Selectmen of Marblehead*, 368 Mass. 620, 626 n.8 (1975). See generally *Fordyce v. Hanover*, 457 Mass. 248, 259-260 (2010) (using Ward Commission report as source of legislative history).

17 A newspaper article, published two days before the bill was signed by Governor Francis W. Sargent on August 28, 1970, described this new feature: "Under the terms of the bill the state would pick up half the cost of the program, with the rest being borne by the communities." *Police*

Urge Sargent to Sign Education-Aid Bill, Boston Globe, Aug. 26, 1970, at 28. We employ contemporaneous news accounts not as a source of legislative intent, but as a source of valuable context as to the public dialogue animating the statute's passage. For a useful discussion of the distinction, see *In re Jason W.*, 378 Md. 596, 607-611 (2003) (Harrell, J., concurring) (explaining proper uses of contemporary news accounts in discerning legislative intent).

18 The importance of shared funding also is reflected in the fact that before the passage of § 108L, many municipalities already had begun to offer their own salary incentives to officers for taking courses and earning degrees. See Police Urge Sargent to Sign Education-Aid Bill, Boston Globe, Aug. 26, 1970, at 28 (at time § 108L was passed, about twenty communities already provided educational incentives to police); Towns Boosting Police Professionalism, Boston Globe, Nov. 5, 1967, at 75 (describing program in Framingham). It is safe to assume that a principal advantage of § 108L was to allow these municipalities to double their existing contributions to salary incentives.

c. Statutory construction in light of legislative purpose. Having discussed the statutory objectives, we now analyze the statute to determine the interpretation that best advances those objectives. See *Hanlon*, *supra*. These cases require us to employ the maxim that "[s]eemingly contradictory provisions of a statute must be harmonized so that the enactment as a whole can effectuate the presumed intent of the Legislature." *Wilson v. Commissioner of Transitional Assistance*, 441 Mass. 846, 853(2004) (Wilson). The two "shalls" in the payment provision and reimbursement provision are engaged in a tug-of-war of sorts; our task is to reconcile the two, if possible, in the manner intended by the Legislature. See *id.*

The theory advanced by the plaintiffs -- that the payment provision requires one hundred per cent payment -- gives effect to only one provision, and to only one purpose, of the statute. Under their theory, when the Commonwealth fails to reimburse a municipality entirely, the municipality must bear one hundred per cent of the cost of the educational incentive. This may promote a better educated police force, but it ignores the reimbursement provision and the shared funding scheme. See *id.*

The plaintiffs suggest one way of reconciling the two "shalls" -- that the Legislature simply meant "shall" in two different senses. They argue that "shall" was meant to be mandatory under the payment provision, but subject to appropriation under the reimbursement provision. We reject this interpretation. As stated, we strive to interpret terms in a statute as harmoniously effectuating the intent of the Legislature. See *Wilson*,

supra ("Construing the word 'shall' in its directive sense as it appears in [both] provisos 2 and 8, . . . all the provisos work together [*614] harmoniously to effectuate the legislative purpose" [citation omitted]). "Payment" and "reimbursement" under the statute are not separate and distinct; they are the same act accomplished at different times. See *Morales's Case*, 69 Mass. App. Ct. 424, 426-428, 868 N.E.2d 648 & nn.5, 6 (2007) (terms "payment" and "reimbursement" as used in *G. L. c. 152* not separate and distinct, but rather mean "payment" and "repayment"). This reading interprets both "shalls" the same way -- contingent -- and thereby accomplishes the legislative purpose of shared funding for incentive salary increases.

Reading both the payment and reimbursement obligations as contingent also makes sense given the mechanics of police salary payments. Municipal police receive their salaries not from the Commonwealth, but from municipalities. That the Legislature would use the differing terms "payment" and "reimbursement" instead of only "payment" is understandable because the Commonwealth does not directly "pay" officers. The reimbursement scheme is simply an administratively convenient method for the Legislature to allow the Commonwealth to provide "payment" of one-half the salary increases.

We also doubt the Legislature would have employed "shall" in two opposing senses in a two-paragraph span of the same statutory section without any explicit indication of the different meanings. See 2A N.J. Singer & J.D. Shambie Singer, *Statutes and Statutory Construction* § 46:6, at 249 (7th ed. 2007) ("The same words used twice in the same act are presumed to have the same meaning"). Had the Legislature intended such a result, we would have expected it to use different words in the same provision, not the same word. See *City Bank & Trust Co. v. Board of Bank Incorporation*, 346 Mass. 29, 31 (1963) ("The distinction between 'may' and 'shall' is not lightly to be held to have been overlooked in legislation").

Finally, we reject the notion that the plaintiffs' theory is mandated by our decision in the Milton case. Under that decision, the Commonwealth cannot be ordered to reimburse municipalities for § 108L payments. *Milton*, *supra* at 472-473. It is thus possible that, if the Commonwealth appropriates no money for the purpose, a municipality could receive no reimbursement. See *id.* But our decision said nothing of the [*615] amount owed by municipalities in such a scenario. For the reasons discussed, § 108L only requires one-half payment by municipalities, plus payment of any reimbursement actually received. Because the statute is silent as to any further amount, a CBA that provides for fifty per cent payment or some greater amount does not conflict with the statute. See *Somerville v. Somerville Mun. Employees Ass'n*, 80 Mass. App. Ct. 686, 692 (2011) ("The CBA and the

statute may be read harmoniously because they are designed to address different issues").

Taking the purpose of the statute into account, we conclude that § 108L requires only that municipalities pay one-half the amounts specified in the payment provision, plus any amount actually received from the Commonwealth. Municipalities may agree to pay more,

but the statute does not require it. The cases are remanded to the county court, where the single justice is directed to issue a declaration stating that, with respect to *G. L. c. 41, § 108L*, the CBAs between the city and the various police unions are valid and enforceable.

So ordered.

CHRISTINE ARMOUR, et al., Petitioners v. CITY OF INDIANAPOLIS, INDIANA, et al.

SUPREME COURT OF THE UNITED STATES

132 S. Ct. 2073

182 L. Ed. 2d 998; 2012 U.S. LEXIS 4131; 80 U.S.L.W. 4409; 23 Fla. L. Weekly Fed. S 336

**February 29, 2012, Argued
June 4, 2012, Decided**

NOTICE: The LEXIS pagination of this document is subject to change pending release of the final published version.

PRIOR HISTORY: ON WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA. *City of Indianapolis v. Armour*, 946 N.E.2d 553, 2011 Ind. LEXIS 350 (Ind., 2011)

DISPOSITION: Affirmed.

DECISION:

City's differing treatment of real property owners who paid taxes in lump sums from those paying in installments held (1) to have rational basis; and (2) thus, not to violate equal protection under *Federal Constitution's Fourteenth Amendment*.

SUMMARY:

Procedural posture: Petitioner property owners sued respondent city alleging that the city violated the *Equal Protection Clause, U.S. Const. amend XIV*, cl. 1, in forgiving future installments of assessments in changing its project funding method, but denying refunds to the owners who prepaid the assessments. Upon the grant of a writ of certiorari, the owners appealed the judgment of the Indiana Supreme Court which found no constitutional violation.

Overview: In accordance with state law, the city formerly assessed sewer-project costs against abutting properties and allowed the owners to make a lump sum payment or pay in installments. The city subsequently changed its assessment method to include issuance of bonds, and forgave future installment payments without providing similar relief to the owners who prepaid their assessments in full. The U.S. Supreme Court held that the city had a rational basis for distinguishing between

those lot owners who had already paid their share of project costs and those who had not, and there was no equal protection violation. The city's tax classification did not involve a fundamental right or suspect classification and only required a rational basis, and the city's administrative concerns justified the distinction between the installment assessments and the prepaid assessments. Maintaining an administrative system to continue collection of installment assessments in addition to the new funding method could have proven to be complex and expensive, and providing refunds for prepaid assessments would have added additional administrative costs of processing and funding the refunds.

Outcome: The judgment finding no violation of the *Equal Protection Clause* was affirmed. 6-3 Decision; 1 Dissent.

SYLLABUS

[*2075] For decades, Indianapolis (City) funded sewer projects using *Indiana's Barrett Law*, which permitted cities to apportion a public improvement project's costs equally among all abutting lots. Under that system, a city would create an initial assessment, dividing the total estimated cost by the number of lots and making any necessary adjustments. Upon a project's completion, the city would issue a final lot-by-lot assessment. Lot owners could elect to pay the assessment in a lump sum or over time in installments.

After the City completed the Brisbane/Manning Sanitary Sewers Project, it sent affected homeowners formal notice of their payment obligations. Of the 180 affected homeowners, 38 elected to pay the lump sum. The following year, the City abandoned Barrett Law financing and adopted the Septic Tank Elimination Program (STEP), which financed projects in part through bonds, thereby lowering individual owner's

sewer-connection costs. In implementing STEP, the City's Board of Public Works enacted a resolution forgiving all assessment amounts still owed pursuant to Barrett Law financing. Homeowners who had paid the Brisbane/Manning Project lump sum received no refund, while homeowners who had elected to pay in installments were under no obligation to make further payments.

The 38 homeowners who paid the lump sum asked the City for a refund, but the City denied the request. Thirty-one of these home-owners brought suit in Indiana state court claiming, in relevant part, that the City's refusal violated the Federal *Equal Protection Clause*. The trial court granted summary judgment to the homeowners, [*2076] and the State Court of Appeals affirmed. The Indiana Supreme Court reversed, holding that the City's distinction between those who had already paid and those who had not was rationally related to its legitimate interests in reducing administrative costs, providing financial hardship relief to homeowners, transitioning from the Barrett Law system to STEP, and preserving its limited resources.

Held: The City had a rational basis for its distinction and thus did not violate the *Equal Protection Clause*. Pp. ___ - ___.

(a) The City's classification does not involve a fundamental right or suspect classification. See *Heller v. Doe*, 509 U.S. 312, 319-320. Its subject matter is local, economic, social, and commercial. See *United States v. Carolene Products Co.*, 304 U.S. 144, 152. It is a tax classification. See *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 547. And no one claims that the City has discriminated against out-of-state commerce or new residents. Cf. *Hooper v. Bernalillo County Assessor*, 472 U.S. 612. Hence, the City's distinction does not violate the *Equal Protection Clause* as long as "there is any reasonably conceivable state of facts that could provide a rational basis for the classification," *FCC v. Beach Communications, Inc.*, 508 U.S. 307, and the "burden is on the one attacking the [classification] to negative every conceivable basis which might support it," *Heller, supra*, at 320. Pp. ___ - ___.

(b) Administrative concerns can ordinarily justify a tax-related distinction, see, e.g., *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, and the City's decision to stop collecting outstanding Barrett Law debts finds rational support in the City's administrative concerns. After the City switched to the STEP system, any decision to continue Barrett Law debt collection could have proved complex and expensive. It would have meant maintaining an administrative system for years to come to collect debts arising out of 20-plus different construction projects built over the course of a decade, involving monthly payments as low as \$25 per household, with the possible need to maintain credibility by tracking down defaulting debtors and bringing legal

action. The rationality of the City's distinction draws further support from the nature of the line-drawing choices that confronted it. To have added refunds to forgiveness would have meant adding further administrative costs, namely the cost of processing refunds. And limiting refunds only to Brisbane/Manning homeowners would have led to complaints of unfairness, while expanding refunds to the apparently thousands of other Barrett Law project homeowners would have involved an even greater administrative burden. Finally, the rationality of the distinction draws support from the fact that the line that the City drew--distinguishing past payments from future obligations--is well known to the law. See, e.g., 26 U.S.C. §108(a)(1)(E). Pp. ___ - ___.

(c) Petitioners' contrary arguments are unpersuasive. Whether financial hardship is a factor supporting rationality need not be considered here, since the City's administrative concerns are sufficient to show a rational basis for its distinction. Petitioners propose other forgiveness systems that they argue are superior to the City's system, but the Constitution only requires that the line actually drawn by the City be rational. Petitioners further argue that administrative considerations alone should not justify a tax distinction lest a city justify an unfair system through [*2077] insubstantial administrative considerations. Here it was rational for the City to draw a line that avoided the administrative burden of both collecting and paying out small sums for years to come. Petitioners have not shown that the administrative concerns are too insubstantial to justify the classification. Finally, petitioners argue that precedent makes it more difficult for the City to show a rational basis, but the cases to which they refer involve discrimination based on residence or length of residence. The one exception, *Allegheny Pittsburgh Coal Co. v. Commission of Webster Cty.*, 488 U.S. 336, is distinguishable. Pp. ___ - ___.

946 N.E. 2d 553, affirmed.

COUNSEL: Mark T. Stancil argued the cause for petitioners.

Paul D. Clement argued the cause for respondents.

JUDGES: Breyer, J., delivered the opinion of the Court, in which Kennedy, Thomas, Ginsburg, Sotomayor, and Kagan, JJ., joined. Roberts, C. J., filed a dissenting opinion, in which Scalia and Alito, JJ., joined.

OPINION BY: BREYER

OPINION

Justice **Breyer** delivered the opinion of the Court.

For many years, an Indiana statute, the "Barrett Law," authorized Indiana's cities to impose upon benefited lot owners the cost of sewer improvement projects. The Law also permitted those lot owners to pay either immediately in the form of a lump sum or over time in installments. In 2005, the city of Indianapolis (City) adopted a new assessment and payment method, the "STEP" plan, and it forgave any Barrett Law installments that lot owners had not yet paid.

A group of lot owners who had already paid their entire Barrett Law assessment in a lump sum believe that the City should have provided them with equivalent refunds. And we must decide whether the City's refusal to do so unconstitutionally discriminates against them in violation of the *Equal Protection Clause, Amdt. 14, §1*. We hold that the City had a rational basis for distinguishing between those lot owners who had already paid their share of project costs and those who had not. And we conclude that there is no equal protection violation.

I

A

Beginning in 1889 *Indiana's Barrett Law* permitted cities to pay for public improvements, such as sewage projects, by "apportion[ing]" the costs of a project "equally among all abutting lands or lots." *Ind. Code §36-9-39-15(b)(3)* (2011); see *Town Council of New Harmony v. Parker*, 726 N.E.2d 1217, 1227, n. 13 (*Ind. 2000*) (project's beneficiaries pay its costs). When a city built a Barrett Law project, the city's public works board would create [*2078] an initial lot-owner assessment by "dividing the estimated total cost of the sewage works by the total number of lots." §36-9-39-16(a). It might then adjust an individual assessment downward if the lot would benefit less than would others. §36-9-39-17(b). Upon completion of the project, the board would issue a final lot-by-lot assessment.

The Law permitted lot owners to pay the assessment either in a single lump sum or over time in installment payments (with interest). The City would collect installment payments "in the same manner as other taxes." §36-9-37-6. The Law authorized 10-, 20-, or 30-year installment plans. §36-9-37-8.5(a). Until fully paid, an assessment would constitute a lien against the property, permitting the city to initiate foreclosure proceedings in case of a default. §§36-9-37-9(b), -22.

For several decades, Indianapolis used the Barrett Law system to fund sewer projects. See, e.g., *Conley v. Brummit*, 92 *Ind. App.* 620, 621, 176 N. E. 880, 881 (1931) (in banc). But in 2005, the City adopted a new system, called the Septic Tank Elimination Program (STEP), which financed projects in part through bonds, thereby lowering individual lot owners' sewer-connection costs. By that time, the City had constructed more than 40 Barrett Law projects. App. to Pet. for Cert. 5a. We are told that installment-paying lot

owners still owed money in respect to 24 of those projects. See Reply Brief for Petitioners 16-17, n. 3 (citing City's Response to Plaintiff's Brief on Damages, Record in *Cox v. Indianapolis*, No. 1:09-cv-0435 (SD Ind., Doc. 98-1 (Exh. A)). In respect to 21 of the 24, some installment payments had not yet fallen due; in respect to the other 3, those who owed money were in default. Reply Brief for Petitioners 17, n. 3.

B

This case concerns one of the 24 still-open Barrett Law projects, namely the Brisbane/Manning Sanitary Sewers Project. The Brisbane/Manning Project began in 2001. It connected about 180 homes to the City's sewage system. Construction was completed in 2003. The Indianapolis Board of Public Works held an assessment hearing in June 2004. And in July 2004 the Board sent the 180 affected homeowners a formal notice of their payment obligations.

The notice made clear that each homeowner could pay the entire assessment--\$9,278 per property--in a lump sum or in installments, which would include interest at a 3.5% annual rate. Under an installment plan, payments would amount to \$77.27 per month for 10 years; \$38.66 per month for 20 years; or \$25.77 per month for 30 years. In the event, 38 homeowners chose to pay up front; 47 chose the 10-year plan; 27 chose the 20-year plan; and 68 chose the 30-year plan. And in the first year each homeowner paid the amount due (\$9,278 up-front; \$927.80 under the 10-year plan; \$463.90 under the 20-year plan, or \$309.27 under the 30-year plan). App. to Pet. for Cert. 48a.

The next year, however, the City decided to abandon the Barrett Law method of financing. It thought that the Barrett Law's lot-by-lot payments had become too burdensome for many homeowners to pay, discouraging changes from less healthy septic tanks to healthier sewer systems. See *id.*, at 4a-5a. (For example, homes helped by the Brisbane/Manning Project, at a cost of more than \$9,000 each, were then valued at \$120,000 to \$270,000. App. 67.) The City's new STEP method of financing would charge each connecting lot owner a flat \$2,500 fee and make up the difference by floating bonds eventually [*2079] paid for by all lot owners citywide. See App. to Pet. for Cert. 5a, n. 5.

On October 31, 2005, the City enacted an ordinance implementing its decision. In December, the City's Board of Public Works enacted a further resolution, Resolution 101, which, as part of the transition, would "forgive all assessment amounts . . . established pursuant to the Barrett Law Funding for Municipal Sewer programs due and owing from the date of November 1, 2005 forward." App. 72 (emphasis added). In its preamble, the Resolution said that the Barrett Law "may present financial hardships on many middle to lower income participants who most need sanitary sewer service in lieu of failing septic systems"; it

pointed out that the City was transitioning to the new STEP method of financing; and it said that the STEP method was based upon a financial model that had "considered the current assessments being made by participants in active Barrett Law projects" as well as future projects. *Id.*, at 71-72. The upshot was that those who still owed Barrett Law assessments would not have to make further payments but those who had already paid their assessments would not receive refunds. This meant that homeowners who had paid the full \$9,278 Brisbane/ Manning Project assessment in a lump sum the preceding year would receive no refund, while homeowners who had elected to pay the assessment in installments, and had paid a total of \$ 309.27, \$463.90, or \$927.80, would be under no obligation to make further payments.

In February 2006, the 38 homeowners who had paid the full Brisbane/Manning Project assessment asked the City for a partial refund (in an amount equal to the smallest forgiven Brisbane/Manning installment debt, apparently \$8,062). The City denied the request in part because "[r]efunding payments made in your project area, or any portion of the payments, would establish a precedent of unfair and inequitable treatment to all other property owners who have also paid Barrett Law assessments . . . and while [the November 1, 2005, cutoff date] might seem arbitrary to you, it is essential for the City to establish this date and move forward with the new funding approach." *Id.*, at 50-51.

C

Thirty-one of the thirty-eight Brisbane/Manning Project lump-sum homeowners brought this lawsuit in Indiana state court seeking a refund of about \$ 8,000 each. They claimed in relevant part that the City's refusal to provide them with refunds at the same time that the City forgave the outstanding Project debts of other Brisbane/Manning homeowners violated the *Federal Constitution's Equal Protection Clause, Amdt. 14, §1*; see also Rev. Stat. § 1979, 42 U.S.C. §1983. The trial court granted summary judgment in their favor. The State Court of Appeals affirmed that judgment. 918 N.E.2d 401 (2009). But the Indiana Supreme Court reversed. 946 N.E.2d 553 (2011). In its view, the City's distinction between those who had already paid their Barrett Law assessments and those who had not was "rationally related to its legitimate interests in reducing its administrative costs, providing relief for property owners experiencing financial hardship, establishing a clear transition from [the] Barrett Law to STEP, and preserving its limited resources." App. to Pet. for Cert. 19a. We granted certiorari to consider the equal protection question. And we now affirm the Indiana Supreme Court.

II

A

As long as the City's distinction has a rational basis, that distinction does [*2080] not violate the *Equal Protection Clause*. This Court has long held that "a classification neither involving fundamental rights nor proceeding along suspect lines . . . cannot run afoul of the *Equal Protection Clause* if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Heller v. Doe*, 509 U.S. 312, 319-320 (1993); cf. *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U.S. 150, 155, 165-166 (1897). We have made clear in analogous contexts that, where "ordinary commercial transactions" are at issue, rational basis review requires deference to reasonable underlying legislative judgments. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938) (due process); see also *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (*per curiam*) (equal protection). And we have repeatedly pointed out that "[l]egislatures have especially broad latitude in creating classifications and distinctions in tax statutes." *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 547 (1983); see also *Fitzgerald v. Racing Ass'n*, 539 U.S. 103, 107-108 (2003); *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992); *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359 (1973); *Madden v. Kentucky*, 309 U.S. 83, 87-88 (1940); *Citizens' Telephone Co. of Grand Rapids v. Fuller*, 229 U.S. 322, 329 (1913).

Indianapolis' classification involves neither a "fundamental right" nor a "suspect" classification. Its subject matter is local, economic, social, and commercial. It is a tax classification. And no one here claims that Indianapolis has discriminated against out-of-state commerce or new residents. Cf. *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985); *Williams v. Vermont*, 472 U.S. 14 (1985); *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985); *Zobel v. Williams*, 457 U.S. 55(1982). Hence, this case falls directly within the scope of our precedents holding such a law constitutionally valid if "there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational." *Nordlinger, supra*, at 11 (citations omitted). And it falls within the scope of our precedents holding that there is such a plausible reason if "there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993); see also *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911).

Moreover, analogous precedent warns us that we are not to "pronounc[e]" this classification "unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of

the legislators." *Carolene Products Co.*, *supra*, at 152, 58 S. Ct. 778, 82 L. Ed. 1234 (due process claim). Further, because the classification is presumed constitutional, the "burden is on the one attacking the legislative arrangement to negative every conceivable basis which might [*2081] support it." *Heller*, *supra*, at 320, 113 S. Ct. 2637, 125 L. Ed. 2d 257 (quoting *Lehnhausen*, *supra*, at 364, 93 S. Ct. 1001, 35 L. Ed. 2d 351).

B

In our view, Indianapolis' classification has a rational basis. Ordinarily, administrative considerations can justify a tax-related distinction. See, e.g., *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 511-512 (1937) (tax exemption for businesses with fewer than eight employees rational in light of the "[a]dministrative convenience and expense" involved); see also *Lehnhausen*, *supra*, at 365, 93 S. Ct. 1001, 35 L. Ed. 2d 351 (comparing administrative cost of taxing corporations versus individuals); *Madden*, *supra*, at 90, 60 S. Ct. 406, 84 L. Ed. 590 (comparing administrative cost of taxing deposits in local banks versus those elsewhere). And the City's decision to stop collecting outstanding Barrett Law debts finds rational support in related administrative concerns.

The City had decided to switch to the STEP system. After that change, to continue Barrett Law unpaid-debt collection could have proved complex and expensive. It would have meant maintaining an administrative system that for years to come would have had to collect debts arising out of 20-plus different construction projects built over the course of a decade, involving monthly payments as low as \$25 per household, with the possible need to maintain credibility by tracking down defaulting debtors and bringing legal action. The City, for example, would have had to maintain its Barrett Law operation within the City Controller's Office, keep files on old, small, installment-plan debts, and (a City official says) possibly spend hundreds of thousands of dollars keeping computerized debt-tracking systems current. See Brief for International City/County Management Association et al. as *Amici Curiae* 13, n. 12 (citing Affidavit of Charles White P13, Record in *Cox*, Doc. No. 57-3). Unlike the collection system prior to abandonment, the City would not have added any new Barrett Law installment-plan debtors. And that fact means that it would have had to spread the fixed administrative costs of collection over an ever-declining number of debtors, thereby continuously increasing the per-debtor cost of collection.

Consistent with these facts, the Director of the City's Department of Public Works later explained that the City decided to forgive outstanding debt in part because "[t]he administrative costs to service and process remaining balances on Barrett Law accounts long past the transition to the STEP program would not benefit the taxpayers" and would defeat the purpose of

the transition. App. 76. The four other members of the City's Board of Public Works have said the same. See Affidavit of Gregory Taylor P6, Record in *Cox*, Doc. No. 57-5; Affidavit of Kipper Tew P6, *ibid.* Doc. No. 57-6; Affidavit of Susan Schalk P6, *ibid.* Doc. No. 57-7; Affidavit of Roger Brown P6, *ibid.* Doc. No. 57-8.

The rationality of the City's distinction draws further support from the nature of the line-drawing choices that confronted it. To have added refunds to forgiveness would have meant adding yet further administrative costs, namely the cost of processing refunds. At the same time, to have tried to limit the City's costs and lost revenues by limiting forgiveness (or refund) rules to Brisbane/Manning homeowners alone would have led those involved in other Barrett Law projects to have justifiably complained about unfairness. Yet to have granted refunds (as well as providing forgiveness) to all those involved in all Barrett Law projects (there were more than 40 projects) or in all open projects (there were more than 20) would have involved even greater administrative [*2082] burden. The City could not just "cut . . . checks," *post*, at ___, 182 L. Ed. 2d, at 1012 (Roberts, C. J., dissenting), without taking funding from other programs or finding additional revenue. If, instead, the City had tried to keep the amount of revenue it lost constant (a rational goal) but spread it evenly among the apparently thousands of homeowners involved in any of the Barrett Laws projects, the result would have been yet smaller individual payments, even more likely to have been too small to justify the administrative expense.

Finally, the rationality of the distinction draws support from the fact that the line that the City drew--distinguishing past payments from future obligations--is a line well known to the law. Sometimes such a line takes the form of an amnesty program, involving, say, mortgage payments, taxes, or parking tickets. E.g., 26 U.S.C. §108(a)(1)(E) (2006 ed., *Supp. IV*) (federal income tax provision allowing homeowners to omit from gross income newly forgiven home mortgage debt); *United States v. Martin*, 523 F.3d 281, 284 (CA4 2008) (tax amnesty program whereby State newly forgave penalties and liabilities if taxpayer satisfied debt); *Horn v. Chicago*, 860 F.2d 700, 704, n. 9 (CA7 1988) (city parking ticket amnesty program whereby outstanding tickets could be newly settled for a fraction of amount specified). This kind of line is consistent with the distinction that the law often makes between actions previously taken and those yet to come.

C

Petitioners' contrary arguments are not sufficient to change our conclusion. Petitioners point out that the Indiana Supreme Court also listed a different consideration, namely "financial hardship," as one of the factors supporting rationality. App. to Pet. for Cert. 19a. They refer to the City's resolution that said that the Barrett Law "may present financial hardships on many

middle to lower income participants who most need sanitary sewer service in lieu of failing septic systems." App. 71. And they argue that the tax distinction before us would not necessarily favor low-income homeowners.

We need not consider this argument, however, for the administrative considerations we have mentioned are sufficient to show a rational basis for the City's distinction. The Indiana Supreme Court wrote that the City's classification was "rationally related" in part "to its legitimate interests in reducing its administrative costs." App. to Pet. for Cert. 19a (emphasis added). The record of the City's proceedings is consistent with that determination. See App. 72 (when developing transition, the City "considered the current assessments being made by participants in active Barrett Law projects"). In any event, a legislature need not "actually articulate at any time the purpose or rationale supporting its classification." *Nordlinger*, 505 U.S. 1, at 15; see also *Fitzgerald*, 539 U.S. 103, at 108 (similar). Rather, the "burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." *Madden*, 309 U.S., at 88; see *Heller*, 509 U.S., at 320 (same); *Lehnhausen*, 410 U.S., at 364, (same); see also *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 530 (1959) (upholding state tax classification resting "upon a state of facts that reasonably can be conceived" as creating a rational distinction). Petitioners have not "negative[d]" the Indiana Supreme Court's first listed justification, namely the administrative concerns we have discussed.

[*2083] Petitioners go on to propose various other forgiveness systems that would have included refunds for at least some of those who had already paid in full. They argue that those systems are superior to the system that the City chose. We have discussed those, and other possible, systems earlier. *Supra*, at ___ - ___. Each has advantages and disadvantages. But even if petitioners have found a superior system, the Constitution does not require the City to draw the perfect line nor even to draw a line superior to some other line it might have drawn. It requires only that the line actually drawn be a rational line. And for the reasons we have set forth in Part II-B, *supra*, we believe that the line the City drew here is rational.

Petitioners further argue that administrative considerations alone should not justify a tax distinction, lest a city arbitrarily allocate taxes among a few citizens while forgiving many similarly situated citizens on the ground that it is cheaper and easier to collect taxes from a few people than from many. Brief for Petitioners 45. Petitioners are right that administrative considerations could not justify such an unfair system. But that is not because administrative considerations can *never* justify tax differences (any more than they can *always* do so). The question is whether reducing those expenses, in the

particular circumstances, provides a rational basis justifying the tax difference in question.

In this case, "in the light of the facts made known or generally assumed," *Carolene Products Co.*, 304 U.S., at 152, it is reasonable to believe that to graft a refund system onto the City's forgiveness decision could have (for example) imposed an administrative burden of both collecting and paying out small sums (say, \$25 per month) for years. As we have said, *supra*, at ___ - ___, it is rational for the City to draw a line that avoids that burden. Petitioners, who are the ones "attacking the legislative arrangement," have the burden of showing that the circumstances are otherwise, *i.e.*, that the administrative burden is too insubstantial to justify the classification. That they have not done.

Finally, petitioners point to precedent that in their view makes it more difficult than we have said for the City to show a "rational basis." With but one exception, however, the cases to which they refer involve discrimination based on residence or length of residence. *E.g.*, *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (state tax preference distinguishing between long-term and short-term resident veterans); *Williams v. Vermont*, 472 U.S. 14 (state use tax that burdened out-of-state car buyers who moved in-state); *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 8691 (state law that taxed out-of-state insurance companies at a higher rate than in-state companies); *Zobel v. Williams*, 457 U.S. 55 (state dividend distribution system that favored long-term residents). But those circumstances are not present here.

The exception consists of *Allegheny Pittsburgh Coal Co. v. Commission of Webster Cty.*, 488 U.S. 336 (1989). The Court there took into account a state constitution and related laws that required equal valuation of equally valuable property. *Id.*, at 345. It considered the constitutionality of a county tax assessor's practice (over a period of many years) of determining property values as of the time of the property's last sale; that practice meant highly unequal valuations for two identical properties that were sold years or decades apart. *Id.*, at 341. The [*2084] Court first found that the assessor's practice was not rationally related to the county's avowed purpose of assessing properties equally at true current value because of the intentional systemic discrepancies the practice created. *Id.*, at 343-344. The Court then noted that, in light of the state constitution and related laws requiring equal valuation, there could be no other rational basis for the practice. *Id.*, at 344-345. Therefore, the Court held, the assessor's discriminatory policy violated the Federal Constitution's insistence upon "equal protection of the law." *Id.*, at 346.

Petitioners argue that the City's refusal to add refunds to its forgiveness decision is similar, for it constitutes a refusal to apply "equally" an Indiana state law that says that the costs of a Barrett Law project shall

be equally "apportioned." *Ind. Code §36-9-39-15(b)(3)*. In other words, petitioners say that even if the City's decision might otherwise be related to a rational purpose, state law (as in *Allegheny*) makes this the rare case where the facts preclude any rational basis for the City's decision other than to comply with the state mandate of equality.

Allegheny, however, involved a clear state law requirement clearly and dramatically violated. Indeed, we have described *Allegheny* as "the rare case where the facts precluded" any alternative reading of state law and thus any alternative rational basis. *Nordlinger*, 505 U.S., at 16. Here, the City followed state law by apportioning the cost of its Barrett Law projects equally. State law says nothing about forgiveness, how to design a forgiveness program, or whether or when rational distinctions in doing so are permitted. To adopt petitioners' view would risk transforming ordinary violations of ordinary state tax law into violations of the Federal Constitution.

* * *

For these reasons, we conclude that the City has not violated the Federal *Equal Protection Clause*. And the Indiana Supreme Court's similar determination is affirmed.

DISSENT BY: ROBERTS

DISSENT

Chief Justice **Roberts**, with whom Justice **Scalia** and Justice **Alito** join, dissenting.

Twenty-three years ago, we released a succinct and unanimous opinion striking down a property tax scheme in West Virginia on the ground that it clearly violated the *Equal Protection Clause*. *Allegheny Pittsburgh Coal Co. v. Commission of Webster Cty.*, 488 U.S. 336 (1989). In *Allegheny Pittsburgh*, we held that a county failed to comport with equal protection requirements when it assessed property taxes primarily on the basis of purchase price, with no appropriate adjustments over time. The result was that new property owners were assessed at "roughly 8 to 35 times" the rate of those who had owned their property longer. *Id.*, at 344. We found such a "gross disparit[y]" in tax levels could not be justified in a state system that demanded that "taxation . . . be equal and uniform." *Id.*, at 338; *W. Va. Const., Art. X, §1*. The case affirmed the common-sense proposition that the *Equal Protection Clause* is violated by state action that deprives a citizen of even "rough equality in tax treatment," when state law itself specifically provides that all the affected taxpayers are in the same category for tax purposes. 488 U.S., at 343 (1989) ("The *equal protection clause* . . . protects the individual from state action which selects [*2085] him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class").

In this case, the Brisbane/Manning Sanitary Sewers Project allowed 180 property owners to have their homes hooked up to the City of Indianapolis's sewer system under the State's Barrett Law. That law requires sewer costs to "be primarily apportioned equally among all abutting lands or lots." *Ind. Code §36-9-39-15(b)(3)* (2011). In the case of Brisbane/Manning, the cost came to \$9,278 for each property owner. Some of the property owners--petitioners here--paid the full \$9,278 up front. Others elected the option of paying in installments. Shortly after hook-up, the City switched to a new financing system and decided to forgive the hook-up debts of those paying on an installment plan. The City refused, however, to refund any portion of the payments made by their identically situated neighbors who had already paid the full amount due. The result was that while petitioners each paid the City \$9,278 for their hook-ups, more than half their neighbors paid less than \$500 for the same improvement--some as little as \$309.27. Another quarter paid less than \$1,000. Petitioners thus paid between 10 and 30 times as much for their sewer hook-ups as their neighbors.

In seeking to justify this gross disparity, the City explained that it was presented with three choices: First, it could have continued to collect the installment plan payments of those who had not yet settled their debts under the old system. Second, it could have forgiven all those debts and given equivalent refunds to those who had made lump sum payments up front. Or third, it could have forgiven the future payments and not refunded payments that had already been made. The first two choices had the benefit of complying with state law, treating all of Indianapolis's citizens equally, and comporting with the Constitution. The City chose the third option.

And what did the City believe was sufficient to justify a system that would effectively charge petitioners *30 times more* than their neighbors for the *same service*--when state law promised equal treatment? Two things: the desire to avoid administrative hassle and the "fiscal[] challeng[e]" of giving back money it wanted to keep. Brief for Respondents 35-36. I cannot agree that those reasons pass constitutional muster, even under rational basis review.

The City argues that either of the other options for transitioning away from the Barrett Law would have been "immensely difficult from an administrative standpoint." *Id.*, at 36. The Court accepts this rationale, observing that "[o]rdinarily, administrative considerations can justify a tax-related distinction." *Ante*, at _____. The cases the Court cites, however, stand only for the proposition that a legislature crafting a tax scheme may take administrative concerns into consideration when creating classes of taxable entities that may be taxed differently. See, e.g., *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356 (1973) (a State may "draw lines that treat one class of individuals or

entities differently from the others"); *Madden v. Kentucky*, 309 U.S. 83, 87 (1940) (referring to the "broad discretion as to classification possessed by a legislature"); *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 510-511 (1937) (discussing permissible considerations for the legislature in establishing a tax scheme).

Here, however, Indiana's tax scheme explicitly provides that costs will "be primarily apportioned equally among all abutting lands or lots." *Ind. Code* §36-9-39-15(b)(3) [*2086] (emphasis added). The legislature has therefore decreed that all abutting landowners are within the same class. We have never before held that administrative burdens justify grossly disparate tax treatment of those the State has provided should be treated alike. Indeed, in *Allegheny Pittsburgh* the County argued that its unequal assessments were based on "[a]dministrative cost[]" concerns, to no avail. Brief for Respondent, O. T. 1988, No. 87-1303, p. 22. The reason we have rejected this argument is obvious: The *Equal Protection Clause* does not provide that no State shall "deny to any person within its jurisdiction the equal protection of the laws, unless it's too much of a bother."

Even if the Court were inclined to decide that administrative burdens alone may sometimes justify grossly disparate treatment of members of the same class, this would hardly be the case to do that. The City claims it cannot issue refunds because the process would be too difficult, requiring that it pore over records of old projects to determine which homeowners had overpaid and by how much. Brief for Respondents 36. But holding that the City must refund petitioners' overpayments would not mean that it has to refund overpayments in every Barrett Law project. The *Equal Protection Clause* is concerned with "gross" disparity in taxing. Because the Brisbane/Manning project was initiated shortly before the Barrett Law transition, the disparity between what petitioners paid in comparison to their installment plan neighbors was dramatic. Not so with respect to, for example, a project initiated 10 years earlier, because for those projects even installment plan payers will have largely satisfied their debts, resulting in far less significant disparities.

To the extent a ruling for petitioners would require issuing refunds to others who overpaid under the Barrett Law, I think the city workers are up to the task. The City has in fact already produced records showing exactly how much each lump-sum payer overpaid in every active Barrett Law Project--to the penny. Record in *Cox v. Indianapolis*, No. 1:09-cv-0435 (SD Ind.), Doc. 98-1 (Exh. A). What the city employees would need to do, therefore, is cut the checks and mail them out.

Certainly the job need not involve the complicated procedure the Court describes in an attempt to bolster its administrative convenience argument. Under the Court's view the City would apparently continue to accept

monthly payments from installment plan homeowners in order to gradually repay the money it owes to those who paid in a lump sum. *Ante*, at _____. But this approach was never dreamt of by the City itself. See Brief for Respondents 18 (setting out City's "three basic [transition] options," none of which involved the Court's gradual refund scheme).

The Court suggests that the City's administrative convenience argument is one with which the law is comfortable. The Court compares the City's decision to forgive the installment balances to the sort of parking ticket and mortgage payment amnesty programs that currently abound. *Ante*, at _____. This analogy is misplaced: Amnesty programs are designed to entice those who are unlikely ever to pay their debts to come forward and pay at least a portion of what they owe. It is not administrative convenience alone that justifies such schemes. In a sense, these schemes help remedy payment inequities by prompting those who would pay nothing to pay at least some of their fair share. [*2087] The same cannot be said of the City's system.

The Court is willing to concede that "administrative considerations could not justify . . . an unfair system" in which "a city arbitrarily allocate[s] taxes among a few citizens while forgiving many others on the ground that it is cheaper and easier to collect taxes from a few people than from many." *Ante*, at _____. Cold comfort, that. If the quoted language does not accurately describe this case, I am not sure what it would reach.

The Court wisely does not embrace the City's alternative argument that the unequal tax burden is justified because "it would have been fiscally challenging to issue refunds." Brief for Respondents 35. "Fiscally challenging" gives euphemism a bad name. The City's claim that it has already spent petitioners' money is hardly worth a response, and the City recognizes as much when it admits it could provide refunds to petitioners by "arrang[ing] for payments from non-Barrett Law sources." *Id.*, at 36. One cannot evade returning money to its rightful owner by the simple expedient of spending it. The "fiscal challenge" justification seems particularly inappropriate in this case, as the City--with an annual budget of approximately \$900 million--admits that the cost of refunding all of petitioners' money would be approximately \$300,000. Adopted 2012 Budget for the Consolidated City of Indianapolis, Marion County (Oct. 17, 2011), p. 7; Tr. of Oral Arg. 17, 58.

Equally unconvincing is the Court's attempt to distinguish *Allegheny Pittsburgh*. The Court claims that case was different because it involved "a clear state law requirement clearly and dramatically violated." *Ante*, at _____. Nothing less is at stake here. Indiana law requires that the costs of sewer projects be "apportioned equally among all abutting lands." *Ind. Code* §36-9-39-15(b)(3). The City has instead apportioned the costs of the Brisbane/ Manning project such that petitioners paid

between 10 and 30 times as much as their neighbors. Worse still, it has done so in order to avoid administrative hassle and save a bit of money. To paraphrase A Man for All Seasons: "It profits a city nothing to give up treating its citizens equally for the whole world . . . but for \$300,000?" See R. Bolt, A Man for All Seasons, act II, p. 158 (1st Vintage Int'l ed. 1990).

Our precedents do not ask for much from government in this area--only "rough equality in tax treatment." *Allegheny Pittsburgh*, 488 U.S., at 343. The Court reminds us that *Allegheny Pittsburgh* is a "rare case." *Ante*, at _____. It is and should be; we give great leeway to taxing authorities in this area, for good and

sufficient reasons. But every generation or so a case comes along when this Court needs to say enough is enough, if the *Equal Protection Clause* is to retain any force in this context. *Allegheny Pittsburgh* was such a case; so is this one. Indiana law promised neighboring homeowners that they would be treated equally when it came to paying for sewer hookups. The City then ended up charging some homeowners 30 times what it charged their neighbors for the same hook-ups. The equal protection violation is plain. I would accordingly reverse the decision of the Indiana Supreme Court, and respectfully dissent from the Court's decision to do otherwise.

THOMAS A. ATWATER vs. COMMISSIONER OF EDUCATION & another. [FN1]

SUPREME JUDICIAL COURT OF MASSACHUSETTS

460 Mass. 844

957 N.E.2d 1060; 2011 Mass. LEXIS 1000; 33 I.E.R. Cas. (BNA) 546

September 7, 2011, Argued

November 21, 2011, Decided

SUBSEQUENT HISTORY: Related proceeding at *Atwater v. Comm'r of Educ.*, 2012 U.S. Dist. LEXIS 84897 (D. Mass., June 20, 2012)

PRIOR HISTORY: Essex. Civil action commenced in the Superior Court Department on August 4, 2006. The case was heard by Maureen B. Hogan, J., on motions for summary judgment. The Supreme Judicial Court granted an application for direct appellate review.

DISPOSITION: Judgment affirmed.

HEADNOTES

School and School Committee, Termination of employment, Professional teacher status, Arbitration. Education Reform Act. Constitutional Law, Separation of powers, Education. Arbitration, School committee, Authority of arbitrator, Conduct of proceedings, Vacating award, Judicial review.

COUNSEL: Garrick F. Cole (Gerard A. Butler, Jr., with him) for the plaintiff.

Amy Spector, Assistant Attorney General, for Commissioner of Education.

Geoffrey R. Bok (Colby C. Brunt with him) for Manchester Essex Regional School District. Matthew D. Jones, for Massachusetts Teachers Association, amicus curiae, submitted a brief.

Michael J. Long, Joshua R. Coleman, & Stephen J. Finnegan, for Massachusetts Association of School Committees, Inc., & another, amici curiae, submitted a brief.

JUDGES: Present: Ireland, C.J., Spina, , Gants, Duffly, & Lenk, JJ.

OPINION BY: IRELAND

OPINION

[*845] IRELAND, C.J. The plaintiff, Thomas A. Atwater, a teacher with professional teacher status, [FN2] was dismissed by the superintendent of the Manchester Essex Regional School District (district) for multiple instances of conduct unbecoming a teacher. Atwater sought review of the dismissal by filing with the Commissioner of Education (commissioner) a petition for arbitration pursuant to *G. L. c. 71, § 42*, fourth par., as appearing in St. 1993, c. 71, § 44, the Education Reform Act of 1993 (act). After conducting several days of evidentiary hearings, the arbitrator issued a decision affirming the dismissal. Thereafter, Atwater unsuccessfully sought to vacate the award pursuant to *G. L. c. 150C, § 11*. Atwater appealed, and we granted his application for direct appellate review. Atwater argues that *G. L. c. 71, § 42*, which compels arbitration of a wrongful dismissal claim made by a public school teacher with professional teacher status, violates *art. 30 of the Massachusetts Declaration of Rights* [FN3] because it impermissibly delegates to a

private individual (an arbitrator) a judicial function and denies meaningful judicial [*846] review. Atwater also contends that, pursuant to *G. L. c. 150C, § 11*, the arbitration award should be vacated because the arbitrator acted in excess of her authority, engaged in misconduct, and exhibited bias against him. We affirm.

1 Manchester Essex Regional School District (district).

2 The term "professional teacher status" is defined in *G. L. c. 71, § 41*, and was formerly referred to as "tenure." See *School Dist. of Beverly v. Geller, 435 Mass. 223, 226 (2001)* (Geller) (Cordy, J., concurring).

3 *Article 30 of the Massachusetts Declaration of Rights* reads: "In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men."

1. Statutory framework. We begin with an overview of the relevant statutory framework, which will assist in understanding the background of the case. The act made significant changes to the structure and funding of the Commonwealth's public school system. See *Hancock v. Commissioner of Educ., 443 Mass. 428, 432 (2005)* (Marshall, C.J., concurring). The changes were enacted to ensure: "(1) that each public school classroom provides the conditions for all pupils to engage fully in learning as an inherently meaningful and enjoyable activity without threats to their sense of security or self-esteem, (2) a consistent commitment of resources sufficient to provide a high quality public education to every child, (3) a deliberate process for establishing and achieving specific educational performance goals for every child, and (4) an effective mechanism for monitoring progress toward those goals and for holding educators accountable for their achievement." *G. L. c. 69, § 1*, as appearing in St. 1993, c. 71, § 27. *G. L. c. 69, § 1A*, as appearing in St. 1993, c. 71, § 28. "To further these goals, statutory changes were made to the statute governing teacher demotions and dismissals, *G. L. c. 71, § 42*." *School Dist. of Beverly v. Geller, 435 Mass. 223, 225 n.1 (2001)* (Geller) (Cordy, J., concurring). "These changes included (1) transferring from school committees to school principals and superintendents the responsibility for dismissing teachers; (2) expanding the statutorily enumerated grounds for dismissal to include failure to satisfy teacher performance standards, and changing the catchall ground from other 'good' cause to other 'just' cause; (3) depoliticizing and streamlining the dismissal process by requiring that contested dismissals proceed directly to arbitration, where timelines for decisions and detailed statements of supporting reasons

are mandated; (4) providing for limited rather than de novo review of dismissal decisions (as confirmed or not by arbitration) in the Superior Court; and (5) requiring arbitrators specifically to take into account the best interests of students and the need for the elevation of performance standards in determining whether a [*847] school district has met its burden of proving grounds for dismissal." *Geller, supra* (Cordy, J., concurring).

More particularly, under the statute pertaining to teacher dismissals, *G. L. c. 71, § 42* (statute), a teacher with professional teacher status, such as Atwater, "shall not be dismissed except for inefficiency, incompetency, incapacity, conduct unbecoming a teacher, insubordination or failure on the part of the teacher to satisfy teacher performance standards . . . or other just cause." *G. L. c. 71, § 42*, third par. The procedure for review of a teacher dismissal decision provides:

"A teacher with professional teacher status may seek review of a dismissal decision within thirty days after receiving notice of his dismissal by filing a petition for arbitration with the commissioner. [FN4] The commissioner shall forward to the parties a list of three arbitrators provided by the American Arbitration Association [AAA]. Each person on the list shall be accredited by the National Academy of Arbitrators. The parties each shall have the right to strike one of the three arbitrators' names if they are unable to agree upon a single arbitrator amongst the three. The arbitration shall be conducted in accordance with the rules of the [AAA] to be consistent with the provisions of this section. . . . The board of education shall determine the process for selecting arbitrators for the pool. The fee for the arbitration shall be split equally between the two parties involved in the arbitration."

Id. at § 42, fourth par. Each of the parties at the arbitral hearing may be represented by counsel, present evidence, and call witnesses. *Id.* at § 42, fifth par. The school district "shall have the burden of proof." *Id.* "In determining whether the district has proven grounds for dismissal consistent with this section, [*848] the arbitrator shall consider the best interests of the pupils in the district and the need for elevation of performance standards." *Id.* Following the hearing, the arbitrator is required to issue a "detailed statement of the reasons for the decision." *Id.* at § 42, sixth par. "The arbitral decision shall be subject to judicial review as provided in [G. L. c. 150C, concerning collective bargaining agreements to arbitrate]." *Id.* "With the exception of other remedies provided by statute, the remedies

provided hereunder shall be the exclusive remedies available to teachers for wrongful termination." Id. "The rules governing this arbitration procedure shall be the rules of the [AAA] as pertains to arbitration." Id.

4 Prior to the repeal by the Education Reform Act of 1993, see St. 1993, c. 71, § 49, a dismissed teacher "within thirty days after such vote [of dismissal]" was permitted to "appeal therefrom to the superior court in the county in which the person was or is employed." *G. L. c. 71, § 43A*, as amended through St. 1988, c. 154, § 9. A Superior Court judge was required to "hear the cause de novo, review such action, and determine whether or not upon all the evidence such action was justifiable." *G. L. c. 71, § 43A*, as amended by St. 1977, c. 671. "The decision of the court shall be final, except as to matters of law." *G. L. c. 71, § 43A*, as appearing in St. 1975, c. 337.

As indicated, the scope of judicial review of the arbitrator's decision is limited by *G. L. c. 71, § 42*, which in turn relies on the standard set forth in *G. L. c. 150C*. Under *G. L. c. 150C, § 11 (a)*, a Superior Court judge "shall vacate" an arbitrator's award on a party's application if, among other enumerated grounds:

"(1) the award was procured by corruption, fraud or other undue means;

"(2) there was evident partiality by an arbitrator appointed as a neutral, or corruption in any of the arbitrators, or misconduct prejudicing the rights of any party;

"(3) the arbitrators exceeded their powers or rendered an award requiring a person to commit an act or engage in conduct prohibited by state or federal law."

"Absent proof of one of the grounds specified in *G. L. c. 150C, § 11 (a)*, a reviewing court is 'strictly bound by the arbitrator's factual findings and conclusions of law, even if they are in error.'" *School Comm. of Lowell v. Robishaw*, 456 Mass. 653, 660 (2010), quoting *School Comm. of Pittsfield v. United Educators of Pittsfield*, 438 Mass. 753, 758 (2003). We, however, have carved out an exception to the narrow scope of judicial review of arbitration awards by permitting a reviewing court to overrule an award on the ground that it conflicts with public policy. See *Geller, supra* at 237-238 (Ireland, J., concurring), and cases cited. See *Lawrence v. Falzarano*, 380 Mass. 18, 28 [*849] (1980) (arbitrator may not award relief of nature that offends public policy).

2. Background. [FN5] a. Atwater's dismissal. In February of 2005, Atwater was a teacher with

professional teacher status at Manchester Essex Regional Middle High School, where he also served as the coach of the girls' varsity basketball team. On March 10, 2005, the district's superintendent sent Atwater a letter notifying him of the superintendent's intent to dismiss Atwater from his position based on the superintendent's investigation of a reported incident that occurred at Atwater's home in February, 2005, between Atwater and a female student, whom Atwater coached. The superintendent attached various documents to the notice of intent, including the superintendent's summaries of statements made to him from the student, one of the student's friends, and a teacher, regarding the incident or the student's recollection of it; a letter placing Atwater on administrative leave; the district's harassment and sexual harassment policy; [FN6] an affidavit signed by Atwater during a meeting with the student's uncle (who is a lawyer); and a series of electronic mail messages (e-mails) from Atwater to the student between February 18 and February 25, 2005. In addition, in his letter, the superintendent offered to meet with Atwater to give him an opportunity to respond to the charges and to provide any additional information, but Atwater declined.

5 The background is primarily taken from the Superior Court judge's opinion. Some undisputed facts from the record have been included.

6 The district's sexual harassment policy prohibits "unwelcome touching of a person or clothing."

In a letter dated March 16, 2005, after "having considered all of the information available to [him], and having reviewed the documents included with the [notice of intent]," the superintendent listed nine findings of fact that constituted "conduct unbecoming a teacher," each of which he concluded represented an independent basis for dismissal. The findings were as follows:

"1. On February 23, 2005, you used your position as a coach of the basketball team to lure an individual student into [having] a sleepover at your house.

"2. On the evening of February 23, 2005, at your house [*850] you inappropriately touched the student, touching her back, reaching down her shirt, and touching her buttocks in a sexual manner as well as hugging the student in an attempt to restrain her from leaving.

"3. On February 23 and into February 24, 2005, you made numerous attempts to contact the student via e-mail, via phone and through her friends

in order to reestablish a personal relationship.

"4. On February 24, 2005, you visited the student's house twice without prior invitation and used your position as a coach and teacher to gain access to the student.

"5. You used your position as coach to have the student do personal favors for you on two occasions i.e. give you a ride from your mechanic and help you return equipment to the school.

"6. On February 25, 2005, you followed the student in your car and blocked her in at the local gas station. You approached her car window in an effort to converse with her about your personal relationship.

"7. On several occasions, you sent e-mail messages to the student from your school-assigned e-mail address, the content of which were not appropriate communications for a teacher to student or from a coach to his player.

"8. Your conduct was a manifestation of your inability to keep appropriate professional boundaries on your relationships with your students and players.

"9. Your conduct was predatory in nature and has put students in fear for their safety."

The superintendent found that Atwater's conduct was "in violation of the school district's policy on sexual harassment and as such constitute[d] conduct unbecoming a teacher and other just cause for dismissal." Based on his findings, the superintendent concluded that Atwater was "dismissed from the position of teacher . . . effective immediately."

b. The arbitration proceeding and decision. Atwater sought review of the dismissal by filing with the commissioner a petition [*851] for arbitration. After being selected in accordance with *G. L. c. 71, § 42*, fourth par., the arbitrator conducted a hearing over the course of five days between December, 2005, and March, 2006. On the third day of arbitration, February 8, 2006, after Atwater's attorney had completed his direct examination of Atwater, the district proposed a settlement offer to Atwater through his counsel, which included an offer of the district to allow Atwater and his counsel to have a private ex parte communication with the arbitrator regarding her impression of the case at the close of Atwater's testimony. The attorneys for the district, together with Atwater's counsel, then conferred

with the arbitrator. The conference was not recorded. The attorneys informed the arbitrator that they were involved in settlement discussions, which involved a proposal that she meet privately with Atwater and his attorneys and give them her view of the evidence up to that point. The two attorneys for Atwater later testified at depositions that they recalled that the arbitrator agreed that she would recuse herself if the case did not settle and either side requested (after the private meeting) that she recuse herself. In contrast, the two attorneys for the district, as well as the arbitrator, testified that the parties had agreed that the arbitrator would not have to recuse herself if the matter did not settle after the private meeting.

After the conference on how to proceed, the arbitrator met privately with Atwater and his attorneys. She informed them that, based on the evidence up to that point, she would uphold the district's decision to dismiss Atwater. She qualified her statement by informing them that, were she to hear more evidence, she might "change [her] mind."

After further negotiations with the district, Atwater rejected the settlement offer and requested a new arbitrator. The request was referred to the arbitrator, who denied it, stating that she would continue as the arbitrator as agreed on, and adding that nothing would prevent her from impartially arbitrating the matter.

On July 5, 2006, the arbitrator issued a ninety-nine page decision finding that, despite a lack of credibility as to some aspects of the student's arbitration testimony, the district had sustained its burden of proof as to all but two of the facts (fact one and fact nine) on which the superintendent based his findings that Atwater had engaged in conduct unbecoming a teacher. [*852] Significantly, the arbitrator found that "[b]ased on the evidence presented at the arbitration hearing . . . on the evening of February 23, 2005, while at his house, [Atwater] inappropriately touched [the student] in a sexual manner and . . . hugged her in an attempt to restrain her from leaving." In considering the best interests of the students in determining whether Atwater's conduct warranted dismissal, the arbitrator explained:

"Inappropriately touching a student, including reaching down her shirt and touching her buttocks in a sexual manner as well as hugging the student in an attempt to restrain her from leaving, constitutes a serious breach of a teacher's responsibility to his students. Students must be able to trust that they will be safe in the presence of their teachers and coaches. They must be able to rely on their teachers and coaches to exercise sound judgment and maintain appropriate boundaries, even when they

themselves may be unable to do so. . . .
Atwater failed to exercise sound
judgment or maintain appropriate
boundaries."

In view of the "serious nature" of Atwater's misconduct, the arbitrator concluded that dismissal was not an excessive penalty. She went on to state: "Neither do I find that it would be in the best interests of the students to have him return to the district as a teacher."

c. Atwater's application to vacate the arbitration award. Atwater filed a complaint in the Superior Court against the district and the commissioner to vacate the arbitration award pursuant to *G. L. c. 150C, § 11*. In counts I and II of his complaint, Atwater alleges that the arbitrator, acting in excess of authority and in manifest disregard of the law, conducted the arbitration hearing using an incorrect legal standard. In count III of his complaint, Atwater asserts that the arbitration award should be vacated because the arbitrator engaged in misconduct and exhibited bias, prejudicing Atwater, by her attempt to mediate a settlement at the district's request, and by her refusal to recuse herself from conducting the arbitration after such mediation was unsuccessful. [FN7]

7 Atwater also raised three Federal claims, including Federal due process claims, which he has reserved for adjudication by the United States District Court for the District of Massachusetts. Thus, these claims are not before us.

[*853] The parties filed cross motions for partial summary judgment. In his motion, Atwater asserted an additional challenge to his dismissal and to the arbitrator's decision, namely he requested a declaration that *G. L. c. 71, § 42*, is unconstitutional, both on its face and as applied to Atwater, because it impermissibly delegates judicial and government power to a private individual (an arbitrator) in violation of *art. 30*. [FN8] In a comprehensive decision, the Superior Court judge rejected all of Atwater's claims, allowed the defendants' motion for partial summary judgment, and denied Atwater's motion. The judge entered a judgment dismissing Atwater's complaint against the defendants and confirming the arbitrator's award.

8 Atwater also asserted that *G. L. c. 71, § 42*, impermissibly restricts a teacher's right of access to the courts in violation of *art. 11 of the Massachusetts Declaration of Rights*. Although he has cited to *art. 11* in his brief here, he does not develop that argument beyond mere citation. Thus, his treatment of the issue does not rise to the level of acceptable appellate argument and is deemed waived. See *Mass. R. A. P. 16(a)(4)*, as amended, 367 Mass. 921 (1975). See, e.g., *Lobisser Bldg. Corp. v. Planning Bd. of*

Bellingham, 454 Mass. 123, 134 n.15 (2009); *McClure v. Secretary of the Commonwealth*, 436 Mass. 614, 615 n.3, cert. denied, 537 U.S. 1031 (2002); *Adoption of Kimberly*, 414 Mass. 526, 536-537(1993).

3. Constitutional challenge. Atwater contends that *G. L. c. 71, § 42*, is unconstitutional on its face under the separation of powers doctrine. We note at the outset that "[a] facial challenge to the constitutional validity of a statute is the weakest form of challenge, and the one that is the least likely to succeed." *Blixt v. Blixt*, 437 Mass. 649, 652 (2002), cert. denied, 537 U.S. 1189 (2003), citing *United States v. Salerno*, 481 U.S. 739, 745 (1987). "A statute so questioned is presumed constitutional." *Blixt v. Blixt*, *supra*, citing *Landry v. Attorney Gen.*, 429 Mass. 336, 343, cert. denied, 528 U.S. 1073 (2000). "A court may interpret a statute to set forth considerations to clarify and specify, and, where necessary, to narrow, the statute's terms in order that it may be held constitutional." *Blixt v. Blixt*, *supra*, and cases cited. "The challenging party bears the burden of demonstrating 'beyond a reasonable doubt that there are no "conceivable grounds" which could support its validity.'" *Gillespie v. Northampton*, ante 148, 152-153 (2011), quoting *Leibovich v. Antonellis*, 410 Mass. 568, 576(1991).

Atwater argues that the statute violates *art. 30* because it [*854] impermissibly delegates to a private individual a judicial function and denies meaningful judicial review. "[T]he exact lines between what constitutes legislative, executive, and judicial powers have never been precisely drawn." *Paro v. Longwood Hosp.*, 373 Mass. 645, 656 (1977). "[W]e recognize that an absolute division of the three general types of functions is neither possible nor always desirable." *Opinion of the Justices*, 365 Mass. 639, 641 (1974). As correctly noted by Atwater and the commissioner, most of our cases concerning nondelegation of power involve a delegation of legislative, not judicial, power. See, e.g., *Commonwealth v. Clemmey*, 447 Mass. 121, 135 (2006); *Blue Cross of Mass., Inc. v. Commissioner of Ins.*, 397 Mass. 117, 12 (1986). Atwater, however, does not challenge the statute on the ground that it effects an unconstitutional delegation of legislative power. Instead, he maintains that the statute improperly delegates the "judicial" power "to adjudicate," which in this case involves deciding whether a teacher having professional teacher status may be dismissed. This claim lacks merit. The statute confers the dismissal decision to a principal or superintendent, not to the arbitrator. [FN9] See *G. L. c. 71, § 42*, first par. Where a teacher's right to continued employment is created by statute, and not by common law, it necessarily also falls within the Legislature's authority to specify the grounds under which a teacher may be dismissed, who makes the dismissal decision, as well as the process for review of that dismissal decision, such as arbitration followed by limited judicial review, so long as a teacher's

constitutional rights, including due process rights (which Atwater does not challenge here, see note 7, *supra*), are not violated. See *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 588, 592, (1985) (determining no encroachment on judicial powers when Congress creates "right" and decides on method for protecting it so long as review of constitutional error is not obstructed). In so doing, the Legislature is defining public policy (namely, determining that it is in the public interest to retain certain teachers in the public school system by providing some measure of job security subject to certain limitations), which is a legislative, not judicial, function. [*855] See *Geller, supra* at 248 (Cowan, J., dissenting). Thus, the legislative assignment of a teacher dismissal decision to a superintendent or principal does not amount to an impermissible delegation of judicial power. Further, the statute's provision of judicial review of the arbitrator's decision allows a court to be the final adjudicator of the dismissal dispute, thereby retaining judicial power within the judiciary.

9 The arbitrator's review is expressly limited to determining "whether the district has proven grounds for dismissal." *G. L. c. 71, § 42*, fifth par.

We agree with the Superior Court judge that, in view of Atwater's arguments and the applicable law, our focus in this case is to determine whether the challenged provisions of the statute interfere or unduly restrict a core function of the judicial branch. We have emphasized, in the context of judicial power, that "[w]hat *art. 30* forbids -- 'the essence of what cannot be tolerated' -- is legislative interference with the judiciary's core functions." *First Justice of the Bristol Div. of the Juvenile Court Dep't v. Clerk-Magistrate of the Bristol Div. of the Juvenile Court Dep't*, 438 Mass. 387, 396 (2003) (First Justice), quoting *Chief Admin. Justice of the Trial Court v. Labor Relations Comm'n*, 404 Mass. 53, 56 (1989). "Prohibited as well is legislation that attempts to restrict or diminish those judicial powers that are necessary to the court's ability to perform its core judicial functions." *First Justice, supra*, and cases cited. Included in the scope of inherent judicial authority is the traditional adjudicatory power of the court to decide cases. *Id.* at 397. In the end, "[a]n act of one branch of government does not violate *art. 30* unless the act 'unduly restrict[s]' a core function of a coordinate branch." *Commonwealth v. Gonsalves*, 432 Mass. 613, 619 (2000), S.C., 437 Mass. 1022 (2002), and 441 Mass. 1007 (2004), quoting *Opinion of the Justices*, 372 Mass. 883, 892 (1977).

We conclude that the statute's provision authorizing arbitration of a principal or superintendent's dismissal decision does not interfere with core judicial functions. The provision of professional teacher status, together with a limitation of grounds for dismissal, and provision of authority on principals and superintendents to render

dismissal decisions, as well as arbitral review of such decisions, are, as we previously stated, matters of legislative judgment. These aspects of the statute do not implicate or interfere with core judicial functions. Further, the [*856] statute's provision of judicial review of the arbitrator's decision enables a judicial function, albeit a limited one.

We reject Atwater's contention that the statute denies meaningful judicial review of such a nature as to render it unconstitutional under *art. 30*. Atwater correctly notes that the scope of judicial review in the statute is limited to that set forth in *G. L. c. 150C, § 11*. See *G. L. c. 71, § 42*, sixth par. As we have stated, where a teacher's right to continued employment is created by statute, the Legislature permissibly may require arbitration as the method of dispute resolution where a teacher is dismissed and chooses to review the dismissal decision. So too may the Legislature provide for limited judicial review of an arbitrator's decision. As noted by Justice Cordy, *Geller, supra* at 225 n.1 (Cordy, J., concurring), the changes to the dismissal process for teachers with professional teacher status reflect a legislative judgment that it was in the public interest to "depoliticiz[e] and streamlin[e] the dismissal process by requiring that contested dismissals proceed directly to arbitration, where timelines for decisions and detailed statements of supporting reasons are mandated [and to] provid[e] for limited rather than de novo review of dismissal decisions (as confirmed or not by arbitration) in the Superior Court." Contrary to Atwater's suggestion, the provision for judicial review, albeit limited, does not automatically equate with impermissible interference with a core function of the judiciary.

Atwater asserts that because the judicial review afforded under the statute does not embody a determination that the arbitrator's decision was supported by substantial evidence, as with review pursuant to *G. L. c. 30A*, and insulates from review factual errors and errors in law, the judicial review is not meaningful and therefore violates *art. 30*. While these limitations exist, the judicial review expressly authorized permits a Superior Court judge to vacate an award on grounds of (1) corruption, fraud, or other undue means; (2) an arbitrator's evident partiality, corruption, or misconduct; (3) an arbitrator's having exceeded his powers or rendered an award compelling a violation of law; (4) an arbitrator's refusal of justified postponement or to hear material evidence; and (5) the absence of an arbitration agreement when duly raised by a party. See *G. L. c. 150C, § 11 (a)*. In addition, where the source of authority to arbitrate [*857] a dismissal decision is a statute, and not an agreement, judicial review of an arbitrator's interpretation of the meaning of the authorizing statute, here *G. L. c. 71, § 42*, and the scope of his or her authority thereunder, is broader and less deferential than in cases involving judicial review of an arbitrator's decision relating to similar issues

arising out of an agreement between the parties. See *Geller, supra* at 229 (Cordy, J., concurring). Further, we may always review an arbitrator's award for a violation of public policy. See *id.* at 237-238 (Ireland, J., concurring), and cases cited. Last, where a teacher possesses a protected property interest in continued employment, the teacher's dismissal may be reviewed by a court for a claim of violation of due process or other constitutional error. See *Thomas v. Union Carbide Agric. Prods. Co., supra*; *Bielawski v. Personnel Adm'r of the Div. of Personnel Admin., 422 Mass. 459, 466, & n.15 (1996)*. In view of these provisions and safeguards, we conclude that the scope of judicial review set forth in the statute does provide for meaningful judicial review such that there is no *art. 30* violation. [FN10]

10 In support of his arguments Atwater cites to *Board of Educ. of Carlsbad Mun. Sch. v. Harrell, 118 N.M. 470 (1994)* (Harrell). In *Harrell*, a discharged superintendent challenged a New Mexico statute that mandated arbitration as the exclusive method to challenge the discharge, followed by judicial review to determine whether the arbitrator's decision "was procured by corruption, fraud, deception or collusion." *Id.* at 473-474, 475. The court concluded that the statute's limited judicial review provision did not provide meaningful judicial review of an arbitrator's decision and therefore, based on "due process, together with separation of powers considerations," was unconstitutional. *Id.* at 485. Atwater's reliance on the *Harrell* decision is misplaced. The judicial review component of the statute challenged in *Harrell* provided for significantly narrower judicial review than what is afforded by *G. L. c. 150C, § 11*, and our case law. In addition, the court's analysis took into account due process considerations which are not before us, see note 7, *supra*.

4. Challenges to the arbitration award. a. Arguments concerning counts I and II of Atwater's complaint. In counts I and II of his complaint, Atwater alleges that the arbitrator, acting in excess of authority and in manifest disregard of the law, conducted the arbitration hearing using an incorrect legal standard. He contends that the Superior Court judge therefore should have vacated the arbitration award. We disagree.

In support of his claims, Atwater parses out three sentences in a ninety-nine page decision in which the arbitrator "fram[ed]" [*858] the issue as being whether the district violated *G. L. c. 71, § 42*, in dismissing Atwater. Atwater asserts that the arbitrator's incorrect framing of the issue "resulted in the compilation of a record replete with immaterial and prejudicial evidence and the rendering of an 'award' that is insufficient." Although the issue before the arbitrator could have been framed in more expansive terms, the content of the

arbitrator's decision shows that, as implicated by the parties' arguments, she applied the correct statutory standard and properly considered, as required by the statute, whether the district (superintendent) followed the procedures called for in the statute, see *G. L. c. 71, § 42*, second par., in dismissing Atwater; and whether the district satisfied its burden of proof, *id.* at § 42, fifth par., namely, that the evidence established the charges brought against Atwater (here, conduct unbecoming a teacher). In addition, the arbitrator properly (and expressly) considered the directive in the statute to take into account, in determining whether the district proved grounds for dismissal, "the best interests of the pupils in the district and the need for elevation of performance standards." *Id.* [FN11]

11 The arbitrator interpreted *G. L. c. 71, § 42*, as Justice Cowin had, *Geller, supra* at 241 (Cowin, J., dissenting), as authorizing her to determine "both whether the grounds [for dismissal] alleged by the school district have occurred and, if so, whether such grounds warrant dismissal." This interpretation contrasts with that set forth by Justice Cordy, which suggests that "when an agreement specifically enumerates grounds for dismissal, the arbitrator does not have the authority to judge whether discharge is an excessive penalty for the violation committed." *Id.* at 232 (Cordy, J., concurring). Because the arbitrator upheld the discipline imposed by the district, we need not revisit this issue unresolved in *Geller*.

Contrary to Atwater's contention, there was no "pervasive unfairness" inherent in the arbitrator's consideration of the investigation conducted by the superintendent. During the arbitration, Atwater challenged the superintendent's investigation as flawed, fundamentally unfair, and conducted with evident partiality. The arbitrator merely addressed these assertions. The "multi-level hearsay" admitted at the arbitration hearing properly was considered by the arbitrator with respect to whether (1) the superintendent conducted a full and fair investigation; and (2) based on the information before the superintendent, his decision to impose disciplinary action against Atwater was warranted. Atwater's argument that the arbitrator unfairly misused an affidavit executed [*859] by him is belied by the record. The arbitrator did not admit this document for its truth because she "had . . . serious concerns about the manner in which it was obtained and the truthfulness of some of the statements in it." The document was admitted for a limited purpose: to show what the superintendent had relied on when deciding whether to impose discipline on Atwater. The judge properly concluded that the arbitrator did not exceed her authority or act in manifest disregard of the law.

b. Arguments concerning count III of Atwater's complaint. Atwater maintains that, as set forth in count

III of his complaint, the arbitration award should be vacated because the arbitrator engaged in misconduct and exhibited bias, prejudicing Atwater by her attempt to mediate a settlement at the district's request, and by her refusal to recuse herself from conducting the arbitration after such mediation was unsuccessful. Pursuant to *G. L. c. 150C, § 11 (a) (2)*, a Superior Court judge may vacate an arbitration award if "there was evident partiality by an arbitrator [or] corruption in any of the arbitrators, or misconduct prejudicing the rights of any party." Although Atwater asserts proper grounds under which an arbitration award may be vacated, we agree with the Superior Court judge that Atwater failed to present evidence sufficient to raise a genuine issue of material fact as to misconduct or bias on the part of the arbitrator, or as to prejudice to Atwater.

Contrary to Atwater's claim, the arbitrator did not conduct a mediation during her private meeting with Atwater and his counsel. After the parties had agreed (so that they possibly might reach a settlement), the arbitrator privately met with Atwater and his attorneys to tell them briefly her view of the case based on the evidence she had heard up to that point in time. The arbitrator made clear that she had formed a preliminary opinion that very well might change if additional evidence were presented. In addition, the arbitrator did not encourage Atwater to settle the matter or receive any information ex parte from Atwater or his attorneys. She did not thereafter provide the district with any information from the ex parte meeting. Atwater cites to no cases that such conduct amounts to mediation because it does not. "While it is better in most cases for arbitrators to be chary in expressing any opinion before they reach their ultimate [*860] conclusion . . . it does not follow that such expressions are proof of bias." *Ballantine Books, Inc. v. Capital Distrib. Co.*, 302 F.2d 17, 21 (2d Cir. 1962). Here, the arbitrator's view derived only from the evidence she had already heard and she expressly stated that she might change her mind depending on the remaining evidence in the case. There is no genuine issue as to bias. See *id.* ("It is to be expected that after a judge or an arbitrator has heard considerable testimony, he will have some view of the case. As long as that view is one which arises from the evidence and the conduct of the parties it cannot be fairly claimed that some expression of that view amounts to bias"). See also *Care & Protection of Martha*, 407 Mass. 319, 329 (1990) (for bias and prejudice to require disqualification, it must derive from extrajudicial source).

Turning to the issue of recusal, irrespective of the dispute concerning whether there was an agreement that, after the arbitrator expressed her view of the case she would recuse herself if requested by the parties, [FN12] the arbitrator made a decision not to recuse herself. Based on the record, this decision did not evidence any partiality or bias toward Atwater, constitute misconduct, or prejudice Atwater. As

discussed above, the arbitrator merely gave her view of the case based on the evidence then before her, expressly qualified by her statement that her view might change on hearing additional evidence. In these circumstances, the arbitrator's decision not to recuse herself did not reasonably call into question her impartiality or prejudice Atwater. Cf. *Haddad v. Gonzalez*, 410 Mass. 855, 862-863 (1991) (explaining that when faced with question of capacity to rule fairly, judge must first consult his own emotions and conscience, and then attempt objective appraisal whether his impartiality might reasonably be questioned). See *Demoulas v. Demoulas Super Mkts., Inc.*, 428 Mass. 543, 552 (1998) (no error in denying recusal motion for alleged misconduct "where the defendants' affidavits taken at face value were insufficient to establish a reasonable basis for questioning the judge's impartiality").

12 The "dispute" here inevitably arose because there was no record made of the parties' agreement. The better course is to make a record of any agreement that arises during the course of arbitration, particularly when the circumstances presented are, as characterized by the arbitrator, "highly unusual."

What we have stated obviates the need to address any further [*861] arguments. [FN13] The arbitrator wrote a comprehensive decision that detailed the written and testimonial evidence before her, and then used that evidence to explain her extensive credibility determinations and ultimate conclusions. That Atwater would have preferred a different result on those determinations and conclusions is not a valid basis for us to vacate the award.

13 In his brief, Atwater does not develop his "as applied" constitutional challenge to *G. L. c. 71, § 42*. Rather, in the summary of his argument he cites to various pages of his brief pertaining to his claims that the arbitrator applied the wrong statutory standard and that the proceedings conducted were pervasively unfair in support of his conclusory statement that the statute is unconstitutional as applied to him. Atwater's treatment of the issue does not rise to the level of acceptable appellate argument and is deemed waived. See *Mass. R. A. P. 16 (a) (4)*; *Lobisser Bldg. Corp. v. Planning Bd. of Bellingham*, 454 Mass. 123, 134 n.15 (2009). Nevertheless, we point out that the Superior Court judge correctly decided the issue.

For these reasons, we conclude that the Superior Court judge ruled correctly on the summary judgment motions and correctly affirmed the arbitration award.

Judgment affirmed.

BARR INCORPORATED vs. TOWN OF HOLLISTON.

SUPREME JUDICIAL COURT OF MASSACHUSETTS

462 Mass. 112
967 N.E.2d 106; 2012 Mass. LEXIS 348

January 4, 2012, Argued

May 3, 2012, Decided

PRIOR HISTORY: Middlesex. Civil action commenced in the Superior Court Department on April 16, 2008. The case was heard by Christopher J. Muse, J., on a motion for summary judgment, and was reported by him to the Appeals Court. The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court. Judgment affirmed.

HEADNOTES

Public Works, Bidding procedure. Contract, Public works, Construction contract, Bidding for contract.

COUNSEL: Michael P. Sams for the plaintiff.

David J. Doneski for the defendant.

James L. Rudolph & Robert E. Curtis, Jr., for Associated Builders and Contractors, Inc., amicus curiae, submitted a brief.

Martha Coakley, Attorney General, & Karla E. Zarbo, Assistant Attorney General, for the Attorney General & another, amici curiae, submitted a brief.

JUDGES: Present: Ireland, C.J., Spina, Cordy, Botsford, Gants, Duffly, & Lenk, JJ.

OPINION BY: LENK

OPINION

[*112] LENK, J. Contracts for the construction of public buildings estimated to cost above \$100,000 "shall be awarded to the lowest responsible and eligible general bidder." *G. L. c. 149, § 44A (2) (D)*. The question before us is whether, when an awarding authority is making a determination as to bidder responsibility, [*113] it is constrained to look only at materials compiled as part of the Department of Capital Asset Management's (DCAM's) contractor certification process. See *G. L. c. 149, § 44D*. We conclude that the competitive bidding statute places no such restriction on awarding authorities. [FN1]

1 We acknowledge the amicus brief of the Attorney General and the Inspector General on behalf of the town of Holliston (town), as well as that of Associated Builders and Contractors, Inc., on behalf of Barr Incorporated (Barr).

1. Background. We recite briefly the background facts, which are not contested in any relevant respect. In February, 2008, the town of Holliston (town) solicited bids for the construction of a new police station. The plaintiff, Barr Incorporated (Barr), submitted the lowest bid. The town, however, subsequently determined that the plaintiff was not a "responsible and eligible general bidder," *G. L. c. 149, § 44A (2) (D)*, and that the contract should instead be awarded to the next-lowest bidder, Statewide Engineering & Construction Co., Inc. (Statewide). [FN2]

2 The project is estimated to cost approximately \$4.9 million. The project is therefore exempt from the mandatory bidder prequalification procedure provided by *G. L. c. 149, § 44D 1/2*, for projects whose costs are expected to exceed \$10 million. See *Fordyce v. Hanover, 457 Mass. 248, 261, 929 N.E.2d 929 (2010)*.

In determining that Barr was not a responsible bidder, [FN3] the town first looked to information in DCAM's certification file on Barr, [FN4] and also conducted an Internet search. Finding that these materials raised cause for concern as to Barr's performance on past projects, the town administrator asked Charles Todd, a detective in the town's police department, to conduct a more thorough investigation into Barr's projects.

3 The town does not dispute that Barr is an "eligible" bidder. See note 7, *infra*.

4 The Department of Capital Asset Management (DCAM) maintains a file of evaluations submitted on each certified contractor. *G. L. c. 149, § 44D (7)*.

Todd proceeded by contacting eight municipalities that had previously retained the plaintiff as a contractor. He determined that six of them had an "overall negative" impression of Barr's work. Compiling Todd's report with information in DCAM's file, the town administrator concluded that, of the eighteen public projects awarded to Barr on which the town had information, seven had resulted in "negative experiences" for the project client. This conclusion was reported to the town committee [*114] charged with overseeing the project; in April, 2008, that committee voted to find that Barr was not a responsible bidder for purposes of *G. L. c. 149, § 44D*.

The day before the town was to award the project, Barr filed a complaint in Superior Court against the town, seeking injunctive and declaratory relief. In its complaint, Barr alleged generally that the town's investigation fell "outside the scope of what it was permitted to do pursuant to" State law. Barr alleged also that the town "acted arbitrarily and capriciously" in determining that Barr was not a responsible bidder.

Barr subsequently moved for summary judgment on its claim for declaratory relief. In denying Barr's motion, the judge noted that his decision turned solely on the narrow, and potentially dispositive, legal issue whether, in determining that Barr was not a responsible bidder, the town was constrained to consider only DCAM's file on Barr and a statutorily mandated "update statement" to that file. See *G. L. c. 149, § 44D (1) (a)*. Because the judge concluded that the statute did not constrain the town in this manner, he determined that Barr was not entitled to summary judgment in its favor. The judge specifically declined to address "whether [the town's] investigation was fair and thorough," or the ultimate issue "whether [the town's] refusal to honor Barr's low bid was arbitrary." He then allowed the parties' joint motion, pursuant to *Mass. R. Civ. P. 64 (a)*, as amended, 423 Mass. 1403 (1996), that the case be reported to the Appeals Court. We transferred the case on our own motion.

2. Discussion. A report by a judge in the Superior Court brings before us only the propriety of the ruling or order reported. *G. L. c. 231, § 111*. See *Barnes v. Metropolitan Hous. Assistance Program*, 425 Mass. 79, 84, 679 N.E.2d 545 (1997). In this case, the order at issue resolved a pure question of law: whether *G. L. c. 149, § 44D*, prevents an "awarding authority" [FN5] from conducting any independent investigation into bidder responsibility. We therefore accord "no deference to the judge's decision." *Sylvester v. Commissioner of Revenue*, 445 Mass. 304, 308, 837 N.E.2d 662 (2005). Nevertheless, we conclude, as did the judge, that an awarding authority may [*115] consider information bearing on a bidder's responsibility -- or lack thereof -- outside that contained in DCAM's records on the bidder. [FN6]

5 The term "[a]warding [a]uthority" refers generally to the State or municipal entity undertaking the building project. See *810 Code Mass. Regs. § 8.01* (2005).

6 While this issue has not been addressed by a Massachusetts appellate court, we note that the United States Court of Appeals for the First Circuit reached the same conclusion in another case involving Barr. See *Barr, Inc. vs. Northborough, U.S. Ct. App., No. 07-2058* (1st Cir. Sept. 28, 2007).

Spurred by concerns "in the press and elsewhere about corruption in the award and supervision of

[public] construction contracts," *Ward v. Peabody*, 380 Mass. 805, 806, 405 N.E.2d 973 (1980), in 1980 the Legislature enacted a wholesale reform of the Commonwealth's public bidding statutes, St. 1980, c. 579, § 55, now codified at *G. L. c. 149, §§ 44A, 44B-44D, 44E, 44F-44H* (1980 statute). Even prior to the 1980 statute, with certain exceptions, contracts for the construction of public buildings were required to "be awarded to the lowest responsible and eligible bidder." *Fordyce v. Hanover*, 457 Mass. 248, 259, 929 N.E.2d 929 & n. 13 (2010), comparing *G. L. c. 149, § 44A*, as amended through St. 1977, c. 968, with *G. L. c. 149, § 44A*, as appearing in St. 1980, c. 579, § 55. The 1980 statute retained this requirement, but provided additional guidance on the meaning of "[r]esponsible" and "[e]ligible." *G. L. c. 149, § 44A (1)*. See *Fordyce v. Hanover*, *supra* at 259-260.

To be "[r]esponsible" as defined in *G. L. c. 149, § 44A*, a bidder must "demonstrably possess[] the skill, ability and integrity necessary to faithfully perform the work called for by a particular contract, based upon a determination of competent workmanship and financial soundness in accordance with the provisions of [*G. L. c. 149, § 44D*]." [FN7] That section, in turn, requires that bidders obtain a certificate of eligibility from DCAM, which it grants based on assessments of the bidder's performance on past and current projects. *G. L. c. 149, § 44D (1) (a)*. Although the department will review assessments submitted by a contractor's prior private clients, see *810 Code Mass. Regs. § 4.06* (2005), private firms, unlike public entities, are under no obligation [*116] to report a contractor's performance to DCAM. See *G. L. c. 149, § 44D (16)*. *General Laws c. 149, § 44D (1) (a)*, requires also that bidders submit "update statement[s]" with their bids; these are self-prepared documents listing the public projects that bidders have completed since obtaining their certificate of eligibility. See *810 Code Mass. Regs. §§ 4.01, 4.04(6), 8.06* (2005).

7 An "[e]ligible" bidder is one "able to meet all requirements for bidders or offerors set forth in [*G. L. c. 149, §§ 44A-44H*], and not debarred from bidding under [*G. L. c. 149, § 44C*], or any other applicable law, and who shall certify that he is able to furnish labor that can work in harmony with all other elements of labor employed or to be employed on the work." *G. L. c. 149, § 44A*.

We have described at length the threefold function of these statutory requirements. See generally *Brasi Dev. Corp. v. Attorney Gen.*, 456 Mass. 684, 689-691, 925 N.E.2d 826 (2010), and cases cited. First, they assure a minimum level of contractor competence, one safeguarded by DCAM through its certification process. *Id.* at 690. Second, they establish DCAM as a clearinghouse of information between and "among individual awarding authorities." 8 Final Report to the General Court of the Special Commission Concerning

State and County Buildings 351 (Dec. 31, 1980) (Ward Commission Report). Third, they provide awarding authorities with "guidelines issued by an expert authority" -- that is, DCAM -- on how to determine whether a bidder can successfully complete a construction contract in a timely manner. See *Fordyce v. Hanover*, *supra* at 260. Prior to these reforms, many awarding authorities would deem almost all bidders responsible and eligible, "regardless of their competency or experience, and the selection of a contractor was based solely on price." *Id.* After enactment of the 1980 statute, however, awarding authorities were able to avail themselves "of an effective system for screening out those contractors who are unqualified." 8 Ward Commission Report, *supra* at 343.

Yet, even under the 1980 statute, the entity responsible for making a final determination of bidder responsibility remains the awarding authority, not DCAM. This principle was well established under the public bidding statute that existed prior to 1980. See *Capuano, Inc. v. School Bldg. Comm. of Wilbraham*, 330 Mass. 494, 495-496, 115 N.E.2d 491 (1953). And, under *G. L. c. 149, § 44D (6)*, it remains the awarding authority that must "determin[e] who is the lowest responsible and eligible bidder." Were this language not plain enough, the legislative history of the 1980 statute discloses that "the assumption" behind the legislation was that "awarding authorities will normally be in the best [*117] position to evaluate the qualifications of those desiring to bid on its projects." 8 Ward Commission Report, *supra* at 348.

Certainly, an awarding authority's discretion in determining whether a bidder is responsible and eligible is not unconstrained. The awarding authority may only contract with a bidder certified by DCAM. See *G. L. c. 149, § 44D*. Even in selecting among certified bidders, *G. L. c. 149, § 44D (6)*, requires that awarding authorities "shall consider the information submitted by the bidder in the update statement." DCAM regulations require further that awarding authorities "must review the [c]ontractor's certification file from DCAM." 810 *Code Mass. Regs. § 8.04(2)* (2005).

However, nothing in either the statute or DCAM's regulations expressly precludes the awarding authority from conducting an independent investigation into the past performance of potential bidders. Moreover, the statutory requirement that awarding authorities in fact read and consider information related to a bidder's performance in at least some past projects does not support the inference Barr suggests, that the Legislature wished to prevent awarding authorities from considering the bidder's performance in a wider sample of such projects, as the town did here. Nor does permitting awarding authorities to conduct independent background investigations compromise the principle that "all general contractors and subbidders [be placed] on an equal footing in the competition to gain the

contract." *John T. Callahan & Sons v. Malden*, 430 Mass. 124, 128, 713 N.E.2d 955 (1999), quoting *Interstate Eng'g Corp. v. Fitchburg*, 367 Mass. 751, 757-758, 329 N.E.2d 128 (1975).

The statutory requirement that contracts be awarded to the lowest qualified bidder is intended to "facilitate[] the elimination of favoritism and corruption as factors in the awarding of public contracts." *Id.* at 758. Barr emphasizes that, in the present case, the town administrator agreed that the town's investigation of Barr was "more extensive" than its investigation of Statewide, the next lowest bidder. The town administrator explained that he devoted greater attention to Barr because his initial inquiries revealed particular cause for concern with respect to Barr's performance. Barr, however, contends that the town's conduct demonstrates that if awarding authorities are permitted to [*118] investigate the background of contractors independently, they will perform only cursory reviews of preferred bidders while searching for flaws in disfavored firms.

We are persuaded that any such risk is adequately addressed by other aspects of the statute. [FN8] *General Laws c. 149, § 44D (6)*, requires an awarding authority to notify DCAM in the event that it "determines that the low bidder is not responsible and eligible." Should DCAM conclude that the prevailing bidder obtained its contract by fraud, collusion, corruption, or other impropriety, it may begin proceedings to decertify the offending contractor. *G. L. c. 149, § 44D (15)*. Further, disappointed bidders may file complaints with the Attorney General, who is "charged with investigating allegations of violations of the competitive bidding statute and enforcing its provisions." *Brasi Dev. Corp. v. Attorney Gen.*, *supra* at 691.

8 The office of the Inspector General is statutorily empowered to "act to prevent and detect fraud" in public contracts and to "recommend policies" in support of this mission. *G. L. c. 12A, §§ 7, 8*. We note that he and the Attorney General, as amici, support the town's interpretation of the statute.

Bidders may also challenge contract awards by filing a complaint in the Superior Court. Where an awarding authority rejects a bidder "for lack of competence," that decision should be "justified on the record" compiled by the authority. *Fred C. McClean Heating Supplies, Inc. v. Westfield Trade High Sch. Bldg. Comm.*, 345 Mass. 267, 274, 186 N.E.2d 911 (1962). Where an awarding authority decides to supplement the record before it as to one bidder but not as to another, that decision should also be justifiable on the record, as should an awarding authority's decision to deny a bidder any opportunity to respond to the results of an independent investigation. Cf. *Siemens Bldg. Techs., Inc. v. Division of Capital Asset Mgt.*, 439 Mass.

759, 765 (2003) (recognizing that conduct of awarding authority may be challenged as "illegal or arbitrary"); *Capuano, Inc. v. School Bldg. Comm. of Wilbraham*, *supra* at 496. Indeed, Barr raised just such a claim in the pending Superior Court proceedings, maintaining that the town acted "arbitrarily and capriciously" in determining that Barr was not a responsible bidder. [FN9]

9 In deciding as we do the narrow legal issue now before us, we take no view as to whether the town's investigation was appropriately conducted, a matter that has yet to be adjudicated in the Superior Court.

[*119] We note also that the potential class of plaintiffs in such an action is not necessarily limited to the low bidder on each contract; we have specifically interpreted standing requirements under the public bidding statute in a liberal manner in order to safeguard "the important role played by individual bidders in securing compliance with the bidding statutes." *Modern Continental Constr. Co. v. Lowell*, 391 Mass. 829, 836, 465 N.E.2d 1173 (1984).

In light of these overlapping protections against the arbitrary or fraudulent award of public building contracts, we are not convinced that the "equal playing field" established by *G. L. c. 149*, §§ 44A-44H, would be compromised by allowing awarding authorities to

conduct their own investigations of bidder responsibility. In any event, as noted above, the statute contains no language effecting a blanket ban on such investigations.

We are mindful also, as the Inspector General and the Attorney General point out, that the information garnered from an awarding authority's independent investigation of a bidder may at times be of equal or greater recency and relevance than the information in DCAM's certification file and the bidder's update statement. DCAM's certification file need include only a "representative sample" of a contractor's public sector projects, and will not necessarily reflect performance in any of the contractor's private sector work. *810 Code Mass. Regs. § 4.06(2)*. Accordingly, DCAM's certification file may exclude a significant portion of the work history of contractors with extensive experience, or with experience primarily in private sector construction projects. Awarding authorities should not be precluded from assembling a more complete picture of a contractor's qualifications than that available from the certification file and update statement alone.

In sum, we cannot conclude that the town exceeded its statutory authority by conducting an investigation into Barr's performance in past projects.

Judgment affirmed.

BLACK ROCK GOLF CLUB, LLC vs. BOARD OF ASSESSORS OF HINGHAM.

APPEALS COURT OF MASSACHUSETTS

81 Mass. App. Ct. 408
963 N.E.2d 767; 2012 Mass. App. LEXIS 98

March 10, 2011, Argued
March 9, 2012, Decided

PRIOR HISTORY: Suffolk. Appeal from a decision of the Appellate Tax Board.

HEADNOTES Taxation, Real estate tax: abatement, value. Value. Evidence, Value.

COUNSEL: Ellen M. Hutchinson for board of assessors of Hingham.

Robert E. Brooks for the taxpayer.

JUDGES: Present: Berry, Meade, & Sikora, JJ.

OPINION BY: SIKORA

OPINION

[*408] SIKORA, J. In this appeal we must review the valuation of the real property of a golf course country club for the purpose of municipal taxation. The owner of the real property (club or club facilities) is Black Rock Golf Club, LLC (Black Rock). The board of assessors of the town of Hingham (assessors) valued the club at \$20,000,000 for fiscal year 2006 and at \$18,600,000 for fiscal year 2007. [FN1] Those values resulted in tax bills of \$186,760 and \$169,911, respectively. In both years Black Rock filed an application for abatement. The assessors denied both applications. Black Rock appealed to the Appellate Tax Board (board). See *G. L. c. 58A*, § 7; *G. L. c. 59*, §§ 64, 65. The [*409] board concluded that the assessors had overvalued the club, and granted abatements to Black Rock for both years. The assessors have timely appealed to this court. For the following reasons, we vacate the

final decision of the board and remand the case for further proceedings.

1 The date of assessment for fiscal year 2006 was January 1, 2005; and for fiscal year 2007, it was January 1, 2006. Our subsequent references to "tax years" 2006 and 2007 mean the fiscal years in question.

Background. 1. Description of the club. The parties do not dispute the size and nature of the club's property or its membership arrangements. The real estate of the club encompasses approximately 175 acres allocated to an eighteen-hole golf course and practice areas, a four-level clubhouse, a recreation center, an outdoor pool, and five outdoor tennis courts, walkways, and parking lots. Developers completed the course during 2002 and the main buildings by close of 2003. A large-scale residential development adjoins the club. It employs the name Black Rock Condominiums but operates under separate ownership. [FN2]

2 The originators of the development contemplated joint ownership of the club property and the residential community. However, in 2004 the two developers swapped their partial ownership interests in the club and the residential property so that one took full ownership of the club and the other full ownership of the residential development. This appeal involves only the assessment of the club.

The club is a private for-profit enterprise. Only members may use its facilities. It offers three categories of membership: full membership, single golf membership, and recreational membership. A full membership provides a family with access to all of the club's resources. A single golf membership furnishes access to the golf course for one person. A recreational membership entitles the holder to use all of the nongolf facilities. The club's by-laws authorize a maximum of 325 full golf memberships and twenty-five single golf memberships.

An incoming member must pay a one-time initiation fee. The fee is partially refundable. If a member resigns, the club will pay the resignee the refundable portion of the initiation fee after three new members join the club. No interest accrues on members' and resignees' refundable amounts because the club uses those amounts to support operations. During the two tax years in question, the initiation fee for a full membership was \$125,000, of which \$90,000 was refundable. Of the club's more than 300 members, only eighty-six had paid the \$125,000 figure. Other members had paid initiation fees ranging from \$65,000 to \$115,000. Some [*410] members had not paid any initiation fee but instead had received their memberships as an incentive to purchase a condominium in the residential development.

The operation of the club generated four categories of income: (1) golf revenue comprised of membership dues, [FN3] guest fees, cart rentals, tournament fees, and initiation fees; (2) clubhouse food and beverage sales; (3) merchandise sales; and (4) miscellaneous amenities and services. [FN4]

3 Annual dues were a continuing obligation of members after payment of the one-time initiation fee.

4 The board found the club's revenues by source in the following approximate amounts:

	Tax year 2006	Tax year 2007
golf sources	\$4,608,000	\$4,885,000
food and beverage	2,000,000	2,000,000
merchandise	325,000	325,000
miscellaneous	478,100	495,000

The sources of "miscellaneous" revenue included pool and tennis fees, camps and clinics, babysitting services, and rentals.

2. Proceedings before the board. In the board proceedings, both the assessors and Black Rock submitted detailed written appraisal reports and testimony by their respective experts: for the assessors, general certified real estate appraiser Emmet T. Logue; for Black Rock, general certified real estate appraiser Jeffrey R. Dugas. The assessors submitted a valuation based on a capitalization of income methodology. Black Rock submitted its valuation on a variation of a capitalization of income analysis and on a supplemental market study of the sale prices of five golf course country clubs. [FN5]

5 Massachusetts decisional law recognizes both capitalization of income and comparable sales studies as valid methods of real estate valuation. See, e.g., *Correia v. New Bedford Redev. Auth.*, 375 Mass. 360, 362, 377 N.E.2d 909 (1978).

Capitalization of income measures the value of property on the basis of its income-earning capacity. It typically employs two components: (1) the net income of the property (gross rental income minus operating expenses); and (2) a capitalization rate percentage representing the return necessary to attract investment capital. Division of the net operating income by the capitalization rate yields the proposed value of the property. Specific appraisals or assessments may add refinements to the basic computation. See, e.g., *General Elec. Co. v. Assessors of Lynn*, 393 Mass. 591, 609-610, 472 N.E.2d 1329 (1984); *Assessors of Brookline v. Buehler*, 396 Mass. 520, 522-523, 487 N.E.2d 493 (1986).

Valuation by comparable sales data estimates the fair market value for the property

at issue from the prices paid for reasonably similar real estate in transactions within a proximate time span. *Correia v. New Bedford Redev. Authy.*, *supra*. See *Anthony's Pier Four, Inc. v. HBC Assocs.*, 411 Mass. 451, 479-481, 583 N.E.2d 806 (1991).

[*411] a. Assessors' valuation. The assessors' expert employed a direct approach to income capitalization; he estimated the income earned by Black Rock as owner and operator of the club for the tax years in question and applied a capitalization rate to it. He estimated the club's gross revenue at \$8,396,220 for 2006 and \$8,940,489 for 2007. He further estimated the club's operating expenses at \$5,781,571 for 2006 and \$6,198,741 for 2007. He subtracted the operating expenses from the gross revenue and took a three percent deduction for reserves for replacements and a four percent deduction for "entrepreneurship return." He concluded that the club produced net income to be capitalized of \$2,077,740 in 2006 and \$2,171,780 in 2007. He then applied a capitalization rate of 10.42 percent to the 2006 net income and a rate of 10.40 percent to the 2007 net income. That computation (division of the percentage into the net income) produced a valuation of \$19,900,000 (rounded slightly downward) for 2006 and \$20,900,000 for 2007.

As one element of estimated income, the assessors imputed and included interest on members' initiation fees. Appraiser Logue characterized the fees as "non-interest bearing loan[s] to the [c]lub." To place a value on the assumed benefit of the free use of the initiation amounts, he calculated and added interest income on those amounts at the rate of the ten-year United States Treasury bills as of January, 2005, and January, 2006.

b. Black Rock's valuation. In contrast, Black Rock did not simply estimate the club's net income and apply a capitalization rate. Instead, its expert estimated the fair market rental income which Black Rock could have achieved if it had chosen to lease the club to a third-party management company, a common practice in the golf club industry. To determine the rental potential of the club for the tax years 2006 and 2007, appraiser Dugas analyzed the lease terms employed by a set of eleven other club owners and third-party managers. From that survey he concluded that a fair market lease would have based rent on certain percentages of the club's revenues from golf activity, food and [*412] beverage sales, merchandise sales, and miscellaneous receipts. From his sample he projected that Black Rock could have leased the club and received annual rent equal to the sum of twenty-two percent of golf revenue, ten percent of food and beverage sales, six percent of merchandise sales, and five percent of miscellaneous revenue. He applied those percentages to the revenue streams of the club and concluded that Black Rock could have achieved rent of \$1,259,465 in

2005 and \$1,330,356 in 2006, respectively, as determinants of the disputed assessments effective as of January 1, 2005, and January 1, 2006. He calculated a capitalization rate of 10.996 percent for the first year and 10.920 percent for the second year. [FN6] The application of those rates to the estimated rental income figures resulted in rounded valuations of \$11,500,000 for the first year and \$12,200,000 for the second year.

6 Both parties' experts placed capitalization rates within the range of 10.40 percent to 10.996 percent.

Black Rock supplemented its capitalization method with a market study of proposed comparable sales. Its survey contained the data of the sales of five clubs. Four were in Massachusetts, and one in Pennsylvania. [FN7] By this method, Black Rock's expert proposed a valuation of "\$10,000,000 to \$11,000,000."

7 The Ridge Club in Sandwich sold for \$8,250,000 in August, 2007; the Turner Hill Golf Club in Ipswich sold for \$9,000,000 in April, 2007; the Sterling Country Club in Sterling sold for \$7,235,000 in December, 2005; and the Ferncroft Country Club in Middleton sold for \$13,150,000 in December, 2005. The Hartefeld National Golf Course in Avondale, Pennsylvania, sold for \$12,000,000 in April, 2007.

The indicated prices reflect minor adjustments by the expert witness for additional cash concessions made by the buyers as part of the final sales transactions.

c. Board's decision. As its main reasoning, the board adopted Black Rock's capitalization or market rental hypothesis. It referred glancingly to the comparable sales approach but did not employ it as an element of its decision. It made some slight adjustments. It increased the rental percentage for the golf revenue from twenty-two percent to twenty-five percent, and adopted the assessors' capitalization rates instead of Black Rock's. The higher rental rate for golf revenue and the reduced capitalization rate produced slightly higher valuations. After rounding, the board valued the club at \$13,390,000 as of January 1, 2006, and at \$14,090,000 as of January 1, 2007.

[*413] The board rejected the assessors' higher valuation for two main reasons. The board found the computation of imputed interest on initiation fees to be flawed because (1) that method assigned interest income to both refundable and nonrefundable portions of the fees; and (2) the assessors estimated the amount of received initiation fees on the faulty premise that all members had paid the maximum figure of \$125,000, when in fact most members had paid considerably less and some none at all. The board concluded that the assessors' "calculation of imputed interest income was

likely overstated and so inflated [the] estimates of value as to render them unreliable."

Analysis. 1. Standard of review. Municipal assessors carry "a statutory and constitutional obligation to assess all real property at full and fair cash value." *Coomey v. Assessors of Sandwich*, 367 Mass. 836, 837, 329 N.E.2d 117 (1975), citing Part II, c. 1, § 1, art. 4, of the Constitution of the Commonwealth; art. 10 of the Declaration of Rights; and *G. L. c. 59*, §§ 38, 52. A taxpayer may challenge an assessment as excessive by petition to the municipal assessors for an abatement. *G. L. c. 59*, § 59. If the assessors deny the abatement, the aggrieved taxpayer may appeal to the Appellate Tax Board. *G. L. c. 59*, §§ 64-65. The taxpayer may appeal from a final decision of the board to this court. *G. L. c. 58A*, § 13.

While *G. L. c. 58A*, § 13, as appearing in St. 1998, c. 485, § 2, authorizes only an appeal "as to matters of law," the accumulated decisions hold that the reviewing court will examine the board's adjudication for "a correct application of the law" and for a basis in "substantial evidence." *Mount Auburn Hosp. v. Assessors of Watertown*, 55 Mass. App. Ct. 611, 616, 773 N.E.2d 452 (2002). *Massachusetts Bay Lines, Inc. v. Commissioner of Rev.*, 72 Mass. App. Ct. 321, 325-326, 891 N.E.2d 692 (2008). "Substantial evidence is 'such evidence as a reasonable mind might accept as adequate to support a conclusion,' taking 'into account whatever in the record fairly detracts from its weight.'" *Assessors of Brookline v. Buehler*, 396 Mass. 520, 524, 487 N.E.2d 493 (1986), quoting from *New Boston Garden Corp. v. Assessors of Boston*, 383 Mass. 456, 466, 420 N.E.2d 298 (1981). The board's expertise is entitled to "some deference." *McCarthy v. Commissioner of Rev.*, 391 Mass. 630, 632, 462 N.E.2d 1357 (1984). *Koch v. Commissioner of Rev.*, 416 Mass. 540, 555, 624 N.E.2d 91 (1993). As [*414] appropriate, that deference will extend to "the board's judgment concerning the feasibility and fairness of alternate proposed methods of property valuation." *Massachusetts Inst. of Technology v. Assessors of Cambridge*, 422 Mass. 447, 452, 663 N.E.2d 567 (1996).

At the same time, "[a] reviewing court must set aside a finding of the board if 'the evidence points to no felt or appreciable probability of the conclusion or points to an overwhelming probability of the contrary.'" *Irving Saunders Trust v. Assessors of Boston*, 26 Mass. App. Ct. 838, 841, 533 N.E.2d 234 (1989), quoting from *New Boston Garden Corp. v. Assessors of Boston*, 383 Mass. at 466. The determination of substantial evidence has the character of a "matter of law." See *Olympia & York State St. Co. v. Assessors of Boston*, 428 Mass. 236, 240, 700 N.E.2d 533 (1998); *Information Servs., Inc. v. Commissioner of Rev.*, 48 Mass. App. Ct. 197, 198, 718 N.E.2d 1256 (1999).

2. Assessors' valuation. On appeal, the assessors have not argued directly and specifically for the adoption of their methodology and resulting valuation by a detailed criticism of the board's rejection of it. See part 2.c., supra. If they do so implicitly by their extended attack on the board's general acceptance of Black Rock's competing valuation rationale, then on the record and briefing we view the board's identification of weaknesses in the assessor's methodology as valid. The board's rejection of the assessors' methodology has the support of substantial evidence. We turn, then, to an examination of the board's general acceptance (with adjustments) of Black Rock's valuation.

3. Black Rock's market rental valuation. The assessors attack Black Rock's market rental capitalization method in two phases. First, they contend that its expert did not furnish sufficient evidence that a fair market management lease would rest on the differing percentages of multiple revenue streams for golf activity, food and beverage, merchandise, and miscellaneous sources. Second, they argue that, even if such leases were common for golf club management, Black Rock's proposed application of the criteria to its club failed because its expert was relying on noncomparable golf course facilities for his rental percentages. [FN8] For the following reasons, we agree.

8 The assessors criticize the board's reasoning for its lack of a preliminary determination of the "highest and best use" of the real estate as an evidentiary foundation for any valuation of the club's property. The board assumed that both the assessors and Black Rock began from the premise that the highest and best use of the property was "as a golf course/country club." However, the assessors' expert specifically opined "that the highest and best use of [the property] was its continued use as a private 18-hole golf course plus the existing Clubhouse, Recreation Center and associated site improvements, amenities and accessory buildings" (emphasis supplied). As our oncoming analysis indicates, the board appears to have treated public and private facilities interchangeably, even though their revenue-generating capacities require separate treatment.

[*415] First, the expert did not adequately establish that a fair market lease would calculate rent on the basis of different fixed percentages of a club's four revenue streams. He offered that extrapolation. However, none of the eleven clubs considered by Black Rock's appraiser followed the model of a management rental rate based on discrete percentages of revenues from golf, food and beverage, merchandise, and miscellaneous sales. [FN9] [*416] Five of the clubs maintained rent at fixed annual amounts; [FN10] three

at annual base figures supplemented by percentages of revenues;[FN11] two at annual base figures with alternate revenue percentage amounts;[FN12] and one at a pure percentage of particular revenues. [FN13]

9 The eleven properties consisted of the following golf course facilities, described by name, location, public or private character, and management rental terms:

Private Golf Courses

(1) The Orchards, South Hadley, Massachusetts: rental rate of flat first-year figure increased annually by fixed amounts; and

(2) Olde York Country Club, Columbus, New Jersey: rental rate of a first-year base amount increased annually in accordance with the consumer price index.

Public Golf Courses

(1) Sagamore Springs Golf Course, Lynnfield, Massachusetts: rental rate of flat first-year figure increased annually by three percent;

(2) Beverly Golf and Tennis Club, Beverly, Massachusetts: rental rate of flat first-year figure increased annually by set amounts;

(3) Franklin Park Golf Course, Dorchester, Massachusetts: rental rate of fixed annual figures;

(4) Falmouth Country Club, Falmouth, Massachusetts: rental rate of first-year base figure plus fixed amount for pro shop and food and beverage, all increased annually by three percent, and supplemented by a percentage of specified golf revenues above a set threshold;

(5) Kissena Park Golf Course, Queens, New York City: rental rate of first-year fixed figure with annual fixed increments or optional percentages of gross revenues increased at three-year intervals;

(6) Mill Pond Golf Course, Brookhaven, Long Island, New York: rental rate of an annual base amount supplemented by a percentage of all golf-related revenues;

(7) Bergen Point Golf Course, West Babylon, New York: rental rate of a percentage of the average gross green fee revenue total for the prior two years plus a percentage of the gross food and beverage sales for that period; and

(8) Fairchild Wheeler Golf Course, Fairfield, Connecticut: rental rate of a set first-year base amount with prescribed annual incremental amounts or an optional percentage

of annual golf revenues (twenty-six percent) and other revenues (five percent).

Hybrid Public-Private Course

(1) Currituck Club, Corolla, North Carolina: rental rate of a fixed annual minimum figure supplemented by percentages of gross revenues from golf, food and beverage, merchandise, and miscellaneous receipts. (The assessors maintain that the club is public, while Black Rock's expert described the club as private. It appears that the club is a hybrid of the two, but the record on appeal is unclear on this point.)

10 The Orchards, Olde York Country Club, Sagamore Springs Golf Course, Beverly Golf and Tennis Club, and Franklin Park Golf Course.

11 Falmouth Country Club, Mill Pond Golf Course, and the Currituck Club.

12 Kissena Park Golf Course and Fairchild Wheeler Golf Course.

13 Bergen Point Golf Course (discrete percentages for greens fees and food and beverage sales).

Further, if the surveyed leases did employ revenue percentages, that rental methodology would not likely apply to the Black Rock property. Of the eleven properties relied on by its appraiser, eight were public. [FN14] They generated golf revenue through daily greens fees. Their objective would be to maximize the number of rounds played. By contrast, as a private club, Black Rock would generate its main revenue from initiation fees and membership dues. [FN15] While Black Rock's appraiser treated initiation and dues revenues as golf-generated, they differ [*417] in kind from the user fees on which public courses rely for revenue. The board applied the market rental survey process to the club, but it did not explain the comparability] of the relatively fixed annual income from Black Rock's system of prescribed initiation fees and dues, on the one side, and the public course facilities' variable revenues from greens fees and user fees, on the other.

14 Only two were private. One (Currituck) was apparently a hybrid public-private facility offering memberships and nonmembership daily fee arrangements. See note 9, supra.

15 In calendar 2005 (the base period for the assessment effective on January 1, 2006), Black Rock's total gross revenue was \$7,385,681. Of that amount, the golf-related revenue (inclusive of initiation fees and membership dues) amounted to \$4,628,252, or 62.7 percent of gross revenue.

For calendar 2006 (the base period for the assessment effective on January 1, 2007), the

corresponding amounts were \$7,723,644 and \$4,970,810, or 64.4 percent.

Although the law permits the board to choose between reasonable alternative valuation methods, *Pepsi-Cola Bottling Co. v. Assessors of Boston*, 397 Mass. 447, 449, 491 N.E.2d 1071 (1986), it nonetheless requires the board to assure the reasonableness of its choice by adequate findings and reasoning intelligible to the parties and the reviewing court. That requirement inheres in the standard of review for correct application of the law to fact finding supported by substantial evidence. In this instance, the lack of comparability between the surveyed eleven properties and the club subtracts from the value of the data submitted by Black Rock so as to bring their net weight below the level of substantial evidence. *New Boston Garden Corp. v. Assessors of Boston*, 383 Mass. at 466, and cases cited. Accordingly, we must vacate the decision of the board.

Conclusion. While the assessors have effectively challenged the board's adoption of Black Rock's

methodology, they have not demonstrated the incorrectness of the board's rejection of their own income capitalization rationale. The case illustrates the difficulty of valuation of special purpose real estate. We remand it to the board for further proceedings in the nature of fact finding, reasoning, or both, in light of our analysis. [FN16] We deny Black Rock's request for the award of appellate attorney's fees; the assessors' appeal was not frivolous within the meaning of *Mass.R.A.P. 25*, as appearing in 376 Mass. 949 (1979).

16 As the board did not address Black Rock's comparable sales theory (see note 7, *supra*) in its final decision, that methodology has not played a part in our consideration of the assessors' appeal.

The decision of the Appellate Tax Board is vacated, and the case is remanded to the board for further proceedings not inconsistent with this opinion. So ordered.

BRUCE BLISS, et al., Plaintiffs v. MARK FISHER, et al., Defendants.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

842 F. Supp. 2d 400
2012 U.S. Dist. LEXIS 10989

January 31, 2012, Decided

SUBSEQUENT HISTORY: Motion denied by *Bliss v. Fisher*, 2012 U.S. Dist. LEXIS 48844 (D. Mass., Apr. 5, 2012)

PRIOR HISTORY: *Bliss v. Fisher*, 743 F. Supp. 2d 25, 2010 U.S. Dist. LEXIS 112240 (D. Mass., 2010)

COUNSEL: For Bruce Bliss, Bruce Gebhardt, Richard Shaw, Plaintiffs: Francis M. O'Boy, LEAD ATTORNEY, Law Offices of Francis M. O'Boy, Taunton, MA.

For Mark Fisher, John Rhyno, Michael Gould, John Reilly, Town of North Attleborough, Defendants: John J. Davis, LEAD ATTORNEY, Jason W. Crotty, John J. Cloherty, III, Pierce, Davis & Perritano, LLP, Boston, MA.

For James Moynihan, Defendant: Jackie A. Cowin, Joseph L. Tehan, Jr., Kopelman & Paige, PC, Boston, MA.

For Roger Ferris, Defendant: David C. Manoogian, LEAD ATTORNEY, David C. Manoogian, Attorney at Law, Attleboro, MA.

For Thomas Corrigan, Edward Vandette, North Attleborough Electric Department, Defendants: William T. Bogaert, LEAD ATTORNEY, Garrett E. Land, Wilson, Elser, Moskowitz, Edelman & Dicker LLP, Boston, MA.

For MA Office of the Inspector General, Movant: Christine A. Baily, LEAD ATTORNEY, Massachusetts Attorney General's Office, Government Bureau, Boston, MA.

JUDGES: EDWARD F. HARRINGTON, Senior United States District Judge.

OPINION

[*401] MEMORANDUM AND ORDER

HARRINGTON, S.D.J.

This matter comes before the Court on the Defendants' motions for summary judgment. The case arises from the criminal prosecution of the Plaintiffs, three former commissioners of the North Attleborough Electric Department ("NAED"), for their alleged misuse of certain municipal bond funds. The Defendants are the Town of North Attleborough, the NAED and various North Attleborough town officials, including members

of the North Attleborough Board of Selectmen, whom Plaintiffs assert facilitated a baseless criminal prosecution against them. Plaintiffs claim violations of 42 U.S.C. § 1983, *Mass. Gen. Laws ch. 12, § 111*, as well as malicious prosecution and reckless or intentional infliction of emotional distress under Massachusetts common law. For the reasons set forth below, the Court allows the Defendants' motions for summary judgment.

Background.

The parties have submitted a comprehensive record which the Court has fully reviewed. The extensive circumstances which led to the present lawsuit have been, in large part, set forth in two prior discovery rulings. See *Bliss v. Fisher*, 714 F.Supp.2d 223 [*402] (D.Mass. 2010); *Bliss v. Fisher* 743 F.Supp.2d 25 (D.Mass. 2010). To resolve the present issues before the Court, however, only a brief factual account is necessary. The following undisputed material facts are set forth with the summary judgment standard in mind, viewing the record in the light most favorable to the Plaintiffs.

Plaintiffs were commissioners of the NAED, a publically-owned utility. The day-to-day operations of the NAED are handled by a general manager, who reports to the three-member board of commissioners. At times relevant to this action, David Sweetland was the general manager of the NAED.

In 1988, the Town of North Attleborough approved a twelve million dollar bond to make capital improvements to the Town's electric service. The article authorizing the bond listed five projects for which the bond proceeds could be used. By 1996, a large portion of the bond funds remained unused and the NAED began considering projects on which those funds could be expended. In September of 1996, the Town's legal counsel wrote a letter to Sweetland, which was, in turn, forwarded to the Plaintiffs, iterating the fact that the use of the bond funds for any project not among the five listed in the article could only be authorized by a Town Meeting vote. See *Mass. Gen. Laws ch. 44, §§ 1, 7-8, 16, 20*. Sweetland also sent letters to the Plaintiffs setting forth this fact on July 12, 1996 and January 26, 1998.

In May of 1998, Sweetland presented to the Plaintiffs a memorandum outlining a telecommunications business plan that would install technologies enabling the NAED to become an Internet Service Provider (the "ISP project"). On May 21, 1998, the Plaintiffs voted unanimously to proceed with the ISP project and, between 1998 and 2004, the NAED made expenditures totaling approximately four million dollars to develop the ISP project. NAED invoices for the ISP project, approved by the Plaintiffs, were stamped with a "bond fund" notation when submitted to the Town Accountant for payment. The ISP project was not among the projects listed in the 1988 article and no

Town Meeting vote was taken that would have authorized the use of the bond funds for the ISP project.

State law makes it a crime for a town officer to knowingly direct or authorize the use of bond funds for an unauthorized purpose. See *Mass. Gen. Laws ch. 44, §§ 20, 62*. In 2004, the State's Office of the Inspector General launched an investigation into the matter and issued a report concluding that the Plaintiffs and Sweetland had violated state law. The matter was, in turn, referred to the District Attorney's office and a clerk-magistrate found probable cause to issue complaints against the Plaintiffs and Sweetland. A Massachusetts District Court judge subsequently found probable cause to deny a motion to dismiss that was filed by the Plaintiffs.

Sweetland's trial was severed from the Plaintiffs' trial and proceeded first. On the third day of Sweetland's trial, an allegedly exculpatory videotape of a 1998 public meeting of the Board of Selectmen was discovered by defense counsel. As explicated below, the Plaintiffs' present claims hinge on the significance of this videotape, namely whether it would have negated a finding of probable cause to proceed with the prosecution against the Plaintiffs. The videotape depicts Sweetland, in the presence of the Plaintiffs, telling the North Attleborough Board of Selectmen about the ISP project. The videotape contains the following exchange between Sweetland and the Board of Selectmen regarding the use of the bond funds for the ISP project:

[*403] Sweetland: We're doing two things at once: we're doing internet with dollop (phonetic) counts and we're doing the fiber optics [referring to the ISP project]. So when we put it all together, it's two here and two there. And that is the reason for the four million dollars. Also, that includes the start-up capital and to cover the first couple of years of losses for the revenue side. The business plan projected that it would be about thirty months before there was positive net income, so we had to finance that as well.

Selectman Fisher: Now, this four-million-dollar bond issue that we signed was part of a bigger bond authorization at town meeting. Correct?

Sweetland: We were authorized many, many years ago for twelve million dollars, and - -

Selectman Fisher: And this is the end of it, if I - -

Sweetland: That's correct.

As a result of the discovery of the videotape, the prosecution withdrew the complaint against Sweetland and the trial judge entered a finding of not guilty. Despite the termination of Sweetland's case, however, the prosecution against the Plaintiffs proceeded. The Plaintiffs were ultimately found not guilty after the trial judge granted a motion for a directed verdict.

The Plaintiffs filed the present action in the Massachusetts Superior Court on January 8, 2010. The matter was removed to this Court on February 12, 2010. The complaint alleges that the Defendants violated § 1983 by (1) prosecuting them in retaliation for exercising protected speech in violation of the *First Amendment*; (2) withholding exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963); and (3) maliciously prosecuting them in violation of the *Fourth* and *Fourteenth Amendments*. The complaint further claims parallel violations under the analogous provision of the Massachusetts Civil Rights Act, *Mass. Gen. Laws ch. 12 §111*, as well as common law claims for malicious prosecution and reckless or intentional infliction of emotional distress. The complaint also includes a count of municipal liability under § 1983 against the Town.

Analysis.

The Plaintiffs' malicious prosecution claims, *First Amendment* retaliatory prosecution claims, and emotional distress claims hinge on the issue of whether probable cause existed to institute criminal proceedings. Specifically, those claims are predicated on the allegation that criminal complaints would not have issued had the videotape discovered at Sweetland's trial been disclosed to the clerk-magistrate at the time of the show-cause hearing. Without necessitating any further analysis, these claims fail for the simple reason that the videotape does not, as Plaintiffs assert, negate a finding of probable cause. In fact, the videotape bolsters such a finding.

Probable cause has been defined as "such a state of facts in the mind of the defendant as would lead a person of ordinary caution and prudence to believe, or entertain an honest and strong suspicion, that the plaintiff has committed a crime." *Bednarz v. Bednarz*, 27 *Mass.App.Ct.* 668, 672, 542 *N.E.2d* 300, 302 (*Mass.App.Ct.* 1989) (quoting *Lincoln v. Shea*, 361 *Mass.* 1, 277 *N.E.2d* 699 (*Mass.* 1972)) (internal alterations omitted). The elements of the criminal violation under which the Plaintiffs were prosecuted in state court are (1) the knowing (2) direction or authorization of the use of bond funds (3) for an unauthorized purpose. See *Mass. Gen. Laws ch. 44, §§ 20, 62*.

The videotape depicts Sweetland, in the presence of the Plaintiffs, telling the Board of Selectmen about the use of the bond funds for the ISP project. Under Massachusetts [*404] law, however, the Board of

Selectmen could not have authorized the use of the bond funds for the ISP project; that authorization could only have come from a Town Meeting vote, a fact repeatedly conveyed to the Plaintiffs. Thus, the Board of Selectman's knowledge of the use of bond funds for the ISP project is immaterial to a finding of probable cause. See *Mass. Gen. Laws ch. 44, §§ 1, 7-8, 16, 20*.

More significantly, however, the videotape actually tends to establish two essential elements of the crime, namely that the bond funds were actually used for the ISP project and that Plaintiffs knew that the funds were being used for the ISP project. The videotape in those important respects supports a finding of probable cause.

Furthermore, both the magistrate and the trial judge had significant pieces of evidence before them supporting each essential element of the crime when determining that probable cause existed, including, among other things, ISP project invoices that were approved by the Plaintiffs and submitted for payment to the Town with "bond fund" notations, as well as letters addressed to the Plaintiffs, iterating the fact that the use of bond funds for any project not among the five listed in the article could only be authorized by a Town Meeting vote. The videotape supplements this evidence. The Court, therefore, holds that Plaintiffs have failed to show a lack of probable cause and that the record supports a finding of probable cause as a matter of law. See *Maier v. Town of Ayer*, 463 *F.Supp.2d* 117, 120-21 (*D.Mass.* 2006) ("[W]here the historical facts are established or undisputed, the issue [of probable cause] becomes a mixed question of law and fact suitable for determination by the court.").

The absence of probable cause is a required element of both malicious prosecution claims, *Nieves v. McSweeney*, 241 *F.3d* 46, 50 (*1st Cir.* 2001), and *First Amendment* retaliatory prosecution claims, *Hartman v. Moore*, 547 *U.S.* 250, 265-66, 126 *S. Ct.* 1695, 164 *L. Ed. 2d* 441 (2006). Since Plaintiffs here have failed to show that probable cause was lacking, those claims are dismissed.

1 Plaintiff's *First Amendment* retaliatory prosecution claims also fail because the record contains no evidence that the prosecution was instituted, as alleged in the complaint, as a retaliation for the Plaintiffs' opposition to a town charter change that would have given the Board of Selectmen control of the NAED.

Plaintiffs' emotional distress claims require, among other things, a showing "that the [Defendants'] conduct was extreme and outrageous, was beyond all possible bounds of decency and was utterly intolerable in a civilized community." *Howell v. Enter. Publ'g Co., LLC*, 455 *Mass.* 641, 920 *N.E.2d* 1, 28 (2010) (internal omissions and quotation marks omitted). Since the Plaintiffs have failed to show a lack of probable cause, the Defendants' alleged instigation of the Plaintiffs'

prosecutions cannot be considered extreme and outrages or beyond the bounds of decency. Accordingly, those claims are dismissed.

To the extent Plaintiffs claim that the alleged withholding of the videotape constitutes a violation of the rule set forth in *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), no such claim can be maintained as the Plaintiffs were made aware of the videotape prior to their trial and have made no argument or showing that any delay in its disclosure caused prejudice. *United States v. Watson*, 76 F.3d 4, 8 (1st Cir. 1996).

Finally, since Plaintiffs have not set forth evidence establishing the alleged underlying constitutional violations, their municipal liability claims likewise fail. *Nieves v. McSweeney*, 241 F.3d 46, 50 (1st Cir. 2001) (holding that a claim for municipal liability under § 1983 requires, inter alia, [*405] proof of an underlying constitutional violation).

The Defendants' Motions for Summary Judgment (Docket Nos. 52, 55 and 62) are, hereby, ALLOWED. The Case is dismissed.

SO ORDERED.

/s/ Edward F. Harrington

EDWARD F. HARRINGTON

United States Senior [**12] District Judge

ORDER OF DISMISSAL

Pursuant to the Court's Memorandum and Order of January 31, 2012, this action is hereby DISMISSED.

SO ORDERED.

/s/ Edward F. Harrington

EDWARD F. HARRINGTON

United States Senior District Judge

BRUCE BLISS, ET AL., Plaintiffs v. MARK FISHER, ET AL., Defendants.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

842 F. Supp. 2d 400
2012 U.S. Dist. LEXIS 48844

April 5, 2012, Decided

April 5, 2012, Filed

PRIOR HISTORY: *Bliss v. Fisher*, 2012 U.S. Dist. LEXIS 10989 (D. Mass., Jan. 31, 2012)

COUNSEL: For Bruce Bliss, Bruce Gebhardt, Richard Shaw, Plaintiffs: Francis M. O'Boy, LEAD ATTORNEY, Law Offices of Francis M. O'Boy, Taunton, MA.

For Mark Fisher, John Rhyno, Michael Gould, John Reilly, Town of North Attleborough, Defendants: John J. Davis, LEAD ATTORNEY, Jason W. Crotty, John J. Cloherty, III, Pierce, Davis & Perritano, LLP, Boston, MA.

For James Moynihan, Defendant: Jackie A. Cowin, Joseph L. Tehan, Jr., Kopelman & Paige, PC, Boston, MA.

For Roger Ferris, Defendant: David C. Manoogian, LEAD ATTORNEY, David C. Manoogian, Attorney at Law, Attleboro, MA.

For Thomas Corrigan, Edward Vandette, North Attleborough Electric Department, Defendants: William T. Bogaert, LEAD ATTORNEY, Garrett E. Land, Wilson, Elser, Moskowitz, Edelman & Dicker LLP, Boston, MA.

For MA Office of the Inspector General, Movant: Christine A. Baily, LEAD ATTORNEY, Massachusetts Attorney General's Office, Government Bureau, Boston, MA.

JUDGES: EDWARD F. HARRINGTON, Senior United States District Judge.

OPINION

[*405] MEMORANDUM AND ORDER

HARRINGTON, S.D.J.

This matter comes before the Court on the Plaintiffs' Motion to Alter Judgment Pursuant to *F.R.C.P. Rule 59(e)* or for Relief from Order Allowing Summary Judgment Pursuant to *Fed. R. Civ. P. Rule 60(a), 60(b), § 1, 3, 6*. On January 12, 2012, the Court held a hearing on Defendants' motions for summary judgment. The matter was taken under advisement. On January, 17, 2012, the Plaintiffs and a number of the Defendants met for a mediation and reached a tentative resolution. A settlement agreement was prepared and executed by those parties present at the mediation. The agreement contains a provision stating that: "[t]his settlement is subject [sic] the approval of the North Attleborough Board of Selectmen."

On January 26, 2012, the North Attleborough Board of Selectmen (the "Board") met to discuss approval of the settlement, but no decision was rendered at that time. On January 31, 2012, the Court issued a Memorandum and Order allowing the Defendants' motions for summary judgment and dismissing all claims (the "Order"), *Bliss v. Fisher*, No. 10-10252-EFH, 2012 U.S. Dist. LEXIS 10989, 2012 WL 273664 (D.Mass. January 31, 2012). On February 1, 2012, the Board reconvened and voted to reject the proposed settlement. Plaintiffs filed the present motion on February 27, 2012.

Plaintiffs request the Court to vacate the Order and to enforce the settlement agreement. Plaintiffs set forth a number of arguments in support of their motion. First, Plaintiffs argue that, by executing the settlement agreement, the parties had, in essence, reached a settlement before the Order was issued and that, therefore, the Order should be vacated under *Fed. R. Civ. P. 59(e)*. [FN1] The record, however, establishes that the Board never approved the settlement pursuant to the express terms of the settlement agreement. Accordingly, no final settlement was accepted by the Defendants either before or after the Order was issued. Furthermore, the record does not establish any bad faith, as alleged by the Plaintiffs, on the part of the Board in its failure to render a decision regarding the settlement on January 26, 2012 or in its postponement of further deliberations on the matter until the following week.

1 "Motion to Alter or Amend a Judgment. A motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment." *Fed. R. Civ. P. 59(e)*.

Second, Plaintiffs assert that the Order should be vacated because it would not have been issued had the Court been aware of the settlement agreement. Plaintiffs assert that the issuance of the Order on January 31, 2012 was, therefore, the result of a clerical mistake that can be remedied pursuant to *Fed. R. Civ. P. 60(a)*. [FN2] Plaintiffs are correct that, had the Court been made aware of the pending settlement negotiations, the issuance of the Order would have likely been postponed. The decision to issue the Order on January 31, 2012, however, is not a clerical mistake under *rule 60(a)* which requires that the mistake be contained "in a judgment, order, or other part of the record." The decision to issue the Order on that date is [*406] not a matter contained in the record. *Rule 60(a)* cannot, therefore, serve as the basis for the relief requested.

2 "The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice. But after an appeal has been docketed in the appellate court and while it is pending, such a

mistake may be corrected only with the appellate court's leave." *Fed. R. Civ. P. 60(a)*.

Third, Plaintiffs argue that the Order should be vacated under *Fed. R. Civ. P. 60(b)(1)* [FN3] because the Plaintiffs' attorney committed excusable neglect in failing to inform the Court of the pending settlement negotiations. Plaintiffs maintain that one of the Defendants' attorneys assured Plaintiffs' attorney that voicemail messages had been left on the court's deputy clerk's answering machine regarding the pending settlement. Plaintiffs contend that their attorney reasonably relied on those assurances. While Plaintiffs' attorney was told that voicemail messages had been left, he was also informed that the Defendants' attorney had not heard back from the deputy clerk and had not received verification that the issuance of the Order would be postponed by the Court. There is no indication in the record that the deputy clerk received the message. Plaintiffs' attorney did not himself attempt to contact the deputy clerk, file a written notice, lodge an electronic docket entry or otherwise take further steps to ensure or to verify that the Court had received the message and intended to postpone its decision. See *de la Torre v. Continental Ins. Co.*, 15 F.3d 12, 15 (1st. Cir. 1994) ("It is common sense, as well as common courtesy, to alert the judge to the ongoing negotiations and request that he or she postpone imminent deadlines before they have expired. A litigant who, like appellant, fails to take that simple step courts disaster."). Such a failure cannot serve as the basis for the relief requested under *Fed. R. Civ. P. 60(b)(1)*.

3 "On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect." *Fed. R. Civ. P. 60(b)(1)*.

Fourth, Plaintiffs assert that the Order should be vacated under *Fed. R. Civ. P. 60(b)(3)* [FN4] and (6) [FN5] and that the tentative settlement should be enforced because of an alleged misrepresentation made by the Defendants' attorney during the mediation. Plaintiffs assert that Defendants' attorney represented that the Board's approval was required by statute, but that no such statutory requirement existed. Plaintiffs request that the Court, therefore, consider the provision in the settlement agreement requiring approval by the Board to be waived. Defendant's attorney contends that he never stated that approval by the Board was required by statute. Assuming, however, that the Defendants' attorney did state that approval by the Board was required by statute, such an alleged misrepresentation is immaterial. While not required by statute, the approval of the Board was, nevertheless, required by an insurance contract between the Town and its insurer, which had a representative present at the mediation. Therefore, regardless [*407] of the source of the obligation, the

Defendants would not have executed an agreement that did not contain a term requiring Board approval. Accordingly, the alleged misrepresentation cannot serve as a basis for the relief requested. Since the provision in the settlement agreement requiring Board approval was not waived or otherwise fulfilled, there is no settlement to be enforced.

4 "On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons . . . (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party." *Fed. R. Civ. P. 60(b)(3)*.

5 "On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons . . . (6) any other reason that justifies relief." *Fed. R. Civ. P. 60(b)(6)*.

For the reasons set forth above, Plaintiffs' Motion to Alter Judgment Pursuant to *F.R.C.P. Rule 59(e)* or for Relief from Order Allowing Summary Judgment Pursuant to *Fed. R. Civ. P. Rule 60(a), 60(b), § 1, 3, 6* (Docket No. 89) is, hereby, DENIED.

SO ORDERED.

/s/ Edward F. Harrington

EDWARD F. HARRINGTON

United States Senior District Judge

BOARD OF HEALTH OF STURBRIDGE & others [FN1] vs. BOARD OF HEALTH OF SOUTHBRIDGE & another[FN2]

SUPREME JUDICIAL COURT OF MASSACHUSETTS

461 Mass. 548
962 N.E.2d 734; 2012 Mass. LEXIS 41

October 4, 2011, Argued
February 22, 2012, Decided

PRIOR HISTORY: Worcester. Civil action commenced in the Superior Court Department on July 8, 2008. A motion to dismiss was heard by Leila R. Kern, J., and the case was heard by Janet Kenton-Walker, J., on a motion for judgment on the pleadings. The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.
Town of Sturbridge Bd. of Health v. O'Leary, 2009 Mass. Super. LEXIS 358 (Mass. Super. Ct., 2009)

HEADNOTES

Practice, Civil, Appeal, Notice of appeal, Enlargement of time, Parties, Standing. Administrative Law, Intervention, Substantial evidence, Judicial review. Municipal Corporations, Board of health. Board of Health.

COUNSEL: Kirstie L. Pecci for twenty-eight ten-citizen groups.

Robert C. Kirsch for Southbridge Recycling and Disposal Park, Inc.

Sarah Turano-Flores, for board of health of Southbridge, was present but did not argue.
The following submitted briefs for amici curiae:

Christopher D. Ahlers, of Vermont, for Toxics Action Center.

Thomas A. Mackie for National Solid Wastes Management Association.

Martha Coakley, Attorney General, & Sookyoung Shin, Assistant Attorney General, for the Commonwealth.

Shanna Cleveland, Peter Shelley, & Margaret Van Deusen for Conservation Law Foundation & another.

JUDGES: Present: Ireland, C.J., Spina, Cordy, Botsford, Gants, Duffly, & Lenk, JJ.

OPINION BY: BOTSFORD

OPINION

[*549] BOTSFORD, J. In July of 2008, the plaintiffs filed an appeal in the Superior Court from a decision of the defendant board of health of Southbridge (board) approving a "minor modification" to the site assignment for an existing landfill and related processing facility in that town under *G. L. c. 111, § 150A* (§ 150A). **[FN3]** The plaintiffs brought their appeal pursuant to *G. L. c. 30A, § 14*. In response to a motion to dismiss, two judges in the Superior Court ruled that as parties before the board, the plaintiffs had standing to bring their complaint for judicial review to the Superior Court. However, the second judge (motion judge) concluded that the plaintiffs' challenges to the board's decision failed on the merits. Final judgment

entered on December 16, 2009, affirming the board's decision.

1 Twenty-eight ten-citizen groups formerly represented by Kirstie L. Pecci, Ann Fenwick-Beinema, Larry Beinema, Wil Gallien, James Sottile, Lynne Simonds, and John Pulawski.

2 Southbridge Recycling and Disposal Park, Inc.

3 The original plaintiffs in the Superior Court included the board of health of Sturbridge, the twenty-eight ten-citizen groups, and the individuals named in note 1, supra. Two weeks after the complaint was filed, the board of health of Sturbridge voluntarily dismissed its claims with prejudice and is not a party to this appeal. The plaintiffs indicate in their brief that Ann Fenwick-Beinema and Larry Beinema also are not parties to the appeal.

We transferred the plaintiffs' appeal from the judgment to this court on our own motion to consider in particular the issue of the plaintiffs' standing to seek judicial review in the Superior Court of the board's decision. However, there is a threshold issue whether the appeal must be dismissed because the plaintiffs' notice of appeal was not timely filed in the Superior Court. For the reasons we shall discuss, we conclude that the Superior [*550] Court judge had authority to allow the plaintiffs' motion to extend the time for filing their notice of appeal. With respect to the other issues raised, we conclude that on the record before the court, (1) the plaintiffs lacked standing to seek judicial review of the board's decision in the Superior Court; and (2) the plaintiffs' substantive challenges to the decision lack merit. [FN4]

4 We acknowledge the amicus briefs of the Attorney General, National Solid Wastes Management, Conservation Law Foundation, Toxics Action Center, and Charles River Watershed Association.

1. Background. The basic background facts are not in dispute. [FN5] The defendant Southbridge Recycling and Disposal Park, Inc. (SRDP), operates a landfill and an associated processing facility at 165 Barefoot Road in Southbridge. On February 27, 2008, SRDP filed an application for a minor modification of its existing site assignment with the board pursuant to § 150A and 310 Code Mass. Regs. §§ 16.00 (2001), the implementing regulations of the Department of Environmental Protection (department). At that time, SRDP was operating both the landfill and the processing facility under a site assignment decision of the board issued in April, 1999. [FN6] The minor modification SRDP requested had two components: (1) to reallocate a specified number of tons per year of waste from the processing facility to the landfill, thereby increasing the volume of waste accepted by the landfill and decreasing

by a corresponding amount the volume of waste accepted by the processing facility; and (2) to allow the landfill to accept waste from the processing facility regardless of its geographic origin.

5 The facts stated here are taken primarily from the decision of the second Superior Court judge (motion judge) on the plaintiffs' motion for judgment on the pleadings.

6 The decision had been appealed to the Superior Court, and the matter was settled pursuant to an agreement for judgment in June, 2000.

Between March 27 and May 21, 2008, the board held a public hearing on SRDP's modification request. On March 27, the first of what turned out to be eleven hearing dates, the hearing officer admitted the plaintiff ten-citizen groups (citizen groups) as "Parties" to the hearing with the right to participate fully in it. See 310 Code Mass. Regs. §§ 16.20(9), (10)(e). Through their counsel, the citizen groups did so by presenting and cross-examining witnesses, presenting and responding to motions, [*551] making opening and closing statements to the board's hearing officer, and submitting a proposed decision. At the hearing, approximately sixty witnesses testified, and seventy-two exhibits were admitted as well as seven chinks. The board issued its decision on June 9, 2008. It granted SRDP's application for a minor modification of the site assignment, but with fifty-eight specific conditions imposed. The plaintiffs timely filed a complaint for judicial review in the Superior Court on July 8, 2008, naming the board and SRDP as defendants. [FN7]

7 We set out additional background facts in connection with the specific issues discussed infra.

2. Timeliness of the plaintiffs' notice of appeal. a. Facts. The Superior Court judgment entered on December 16, 2009. Under *Mass. R. A. P. 4 (a)*, as amended, 430 Mass. 1603 (1999), the plaintiffs were required to file their notice of appeal in the Superior Court within thirty days of that date. [FN8] The plaintiffs apparently mailed their notice of appeal to the Superior Court on January 15, 2010, but the court did not receive or docket the notice until January 19 (January 18 was a holiday), more than thirty days after the date of the judgment.

8 *Rule 4 (a) of the Massachusetts Rules of Appellate Procedure*, as amended, 430 Mass. 1603 (1999), provides in relevant part: "In a civil case, unless otherwise provided by statute, the notice of appeal . . . shall be filed with the clerk of the lower court within thirty days of the date of the entry of the judgment appealed from . . ."

On February 3, 2010, SRDP and the board jointly moved to strike the notice of appeal as untimely filed. At

the hearing on the defendants' motion, held on March 23, the motion judge permitted the plaintiffs' counsel to make an oral motion to enlarge the time to file the notice of appeal under *Mass. R. A. P. 4 (c)*, as appearing in 378 Mass. 928 (1979). [FN9] On April 1, the motion judge allowed the motion to enlarge and denied the defendants' motion to strike. The plaintiffs' appeal was entered in the Appeals Court on May 14. On May 17, the defendants [*552] moved to dismiss the appeal based on what they claimed was the late filing of the notice of appeal. On June 4, 2010, a single justice of the Appeals Court entered an order denying the motion and stating that the untimely filing "may be raised as an issue in appellee's brief."

9 *Rule 4 (c) of the Massachusetts Rules of Appellate Procedure*, as appearing in 378 Mass. 928 (1979), provides: "Upon a showing of excusable neglect, the lower court may extend the time for filing the notice of appeal by any party for a period not to exceed thirty days from the expiration of the time otherwise prescribed by this rule. Such an extension may be granted before or after the time otherwise prescribed by this rule has expired; but if a request for an extension is made after such time has expired, it shall be made by motion with such notice as the lower court shall deem appropriate."

b. Discussion. SRDP and the board press their claim that the plaintiffs' appeal must be dismissed because the motion judge lacked authority to allow the plaintiffs' motion to enlarge the time for filing the notice of appeal. We reject that argument.

The judgment entered on December 16, 2009. To be timely under *Mass. R. A. P. 4 (a)*, the notice of appeal was required to be "filed with the clerk of the lower court" within thirty days, i.e., on or before January 15, 2010. The plaintiffs did not file their notice within that period. While it appears the notice was mailed on Friday, January 15, 2010, it was not received by the court, and therefore it was not "filed with the clerk," until January 19, 2010. [FN10] See *Garrett v. Director of Div. of Employment Sec.*, 394 Mass. 417, 420, 475 N.E.2d 1221 (1985) (filing and mailing are distinct concepts). It was therefore a few days late. Nonetheless, the motion judge was authorized by *Mass. R. A. P. 4 (c)*, "[u]pon a showing of excusable neglect . . . [to] extend the time for filing the notice of appeal . . . for a period not to exceed thirty days from the expiration" of the initial thirty-day appeal period. Because the plaintiffs filed their notice of appeal on January 19, they only required a four-day extension -- well within the judge's authority -- to render timely their notice of appeal filed on that date.

10 January 18, 2010, was a legal holiday.

The fact that the plaintiffs did not move to enlarge the time for filing their notice of appeal until March 23, 2010, [FN11] did not deprive the motion judge of her power to grant an enlargement of time to January 19. Nothing in our jurisprudence requires that a motion to enlarge time be made or filed within the time [*553] permitted for an extension under *rule 4*. [FN12] What is critical is that the actual notice of appeal is filed within that time. In other words, the limitation in *rule 4* is a limitation on the length of the extension of time that the judge is empowered to grant for filing the notice of appeal itself; the limitation does not restrict the period in which the judge may act or prescribe when a motion to enlarge time may be filed.

11 The plaintiffs argue in their reply brief that the late filing of the notice of appeal on January 19, 2010, acted as a motion to extend the time to file the notice of appeal under *rule 4 (c)*. That is incorrect. A notice of appeal, without more, is not a motion. Moreover, it is clear that the motion judge did not treat the plaintiffs' January 19 notice of appeal as a motion to enlarge the time for filing, because she asked the plaintiffs to make an oral motion to enlarge at the March 23 hearing.

12 It behooves an appellant to move under *rule 4 (c)* to extend the time for filing as promptly as possible after a timeliness issue comes to light. It would be for the motion judge hearing the motion to consider in the first instance whether deliberate delay in filing such a motion should be considered. We express no view on that point at this time.

While this case concerns the authority of a trial court judge to act, it is similar to the situation where a single justice of an appellate court is asked to extend the time for filing a notice of appeal. See *Mass. R. A. P. 14 (b)*. In *Commonwealth v. White*, 429 Mass. 258, 263-264, 707 N.E.2d 823 (1999), this court considered the authority of an appellate single justice, acting pursuant to *rule 14 (b)*, to enlarge the period for filing a notice of appeal. The rule prohibits a single justice from enlarging the period "beyond one year from the date of judgment or ordered appeal from." We concluded that, "[w]hile under *rule 14 (b)* the one-year anniversary of the order to be appealed terminates the defendant's right to file a notice of appeal, it does not terminate the jurisdiction of an appellate court to consider a motion to enlarge the time, nunc pro tunc." *Id.* at 263. We think there is no reasonable basis for giving a different construction to *rule 4 (c)*. Just as the date of filing the notice of appeal is the jurisdictional reference for an appellate single justice's authority under *rule 14 (b)* to enlarge the time, nunc pro tunc, it provides the same function for trial judges under *rule 4 (c)*. Contrast *Commonwealth v. Boutwell*, 21 Mass. App. Ct. 201, 202, 205, 486 N.E.2d 77 (1985) (where notice of appeal was

never filed, trial judge lacked authority to permit filing more than sixty days after guilty finding or imposition of sentence). [FN13], [FN14]

13 Dicta to the contrary in a rescript opinion of the Appeals Court, *Shaev v. Alvord*, 66 Mass. App. Ct. 910, 910, 848 N.E.2d 438 (2006), is an incorrect statement of the law.

14 Rule 4 (c) requires that a motion to file a late notice of appeal be predicated on a showing of excusable neglect. After a hearing, the motion judge found that there was excusable neglect in this case. The defendants have not challenged that finding on appeal.

Having concluded that the appeal is properly before us, we [*554] turn now to the question whether the plaintiffs qualify as "aggrieved" parties with standing to bring this appeal.

3. The plaintiffs' standing to seek judicial review. a. Facts. On or shortly before the first hearing date on SRDP's modification application, the plaintiffs filled out and submitted to the board registration forms entitled, "Registration of 10-Citizen Group." Each form contains an identical printed statement purporting to explain how the individuals signing the form as members of the citizen group would be affected by the proposed site assignment modification. [FN15] The hearing officer, whom we infer was acting pursuant to the department's site assignment regulations, admitted the citizen groups as full interveners in the matter, entitled to all rights of a party to call and cross-examine witnesses, introduce exhibits, and present arguments. See 310 Code Mass. Regs. § 16.20(9)(a), (c). [FN16]

15 The printed statement on each registration form reads: "STATEMENT OF HOW REGISTRANTS ARE SUBSTANTIALLY & SPECIFICALLY AFFECTED:

"We, the undersigned residents of Southbridge, Sturbridge, and Charlton, with good cause hereby register to be a Party and petition to be a Ten Citizen Group Intervener in the above-described proceeding and to be represented by the Authorized Representative named above. [The plaintiffs' counsel, Kirstie L. Pecci, is the listed Authorized Representative on each form.] We live in the vicinity of the Southbridge Landfill and are substantially and specifically affected by the expansion of the landfill and its conversion from construction and demolition (C&D) to

municipal solid waste (MSW) because it will: (a) cause an increase of noxious and foul smelling gases affecting residential areas for miles[;] (b) increase truck traffic on highways and side streets that emit strong odors, contaminated water and windblown litter causing a danger to public health & safety; (c) cause inevitable drinking water contamination[;] (d) devalue area homes. We make this statement under the pains and penalty of perjury."

16 The cited regulations, 310 Code Mass. Regs. § 16.20(9)(a) and (c), read as follows:

"(9) Intervention and Participation

"(a)

Intervention. Any Person who with good cause wishes to intervene in a public hearing shall file a written request (petition) for leave to intervene. Persons whom the Hearing Officer determines are specifically and substantively affected by the hearing shall be allowed to intervene. For the purpose of the Public Hearing the following persons shall be considered to be specifically and substantively affected by the hearing and shall be eligible to register as a Party to the hearing:

"1.

Abutters. Any abutter or group of abutters to the

proposed facility shall be a Party to the hearing by timely submission of a Party Registration Statement in accordance with 310 [Code Mass. Regs. §] 16.20(9)(b).

"2. Ten Citizens Groups. Any group of ten or more persons may register collectively as a Party to the public hearing in which damage to the environment, as defined in [G. L.] c. 214, § 7A, or public health and safety are or might be at issue; provided, however, that such intervention shall be limited to the issues of impacts to public health, safety and damage to the environment and the elimination or reduction thereof in order that any decision in the public hearing shall include the disposition of such issue.

". . .
"(c) Rights of Interveners. Any

person permitted to intervene shall have all rights of, and be subject to, all limitations imposed upon a Party, however, the Hearing Officer may exclude repetitive or irrelevant material. Every Petition to intervene shall be treated as a petition in the alternative to participate."

[*555] After the plaintiffs filed their complaint for judicial review in the Superior Court, SRDP and the board moved to dismiss, claiming that the plaintiffs were not persons "aggrieved" by the board's final decision, and therefore lacked standing to bring an action under *G. L. c. 30A, § 14*, and *§ 150A*. A Superior Court judge other than the motion judge denied the defendants' motion, reasoning that because the plaintiffs had been afforded full party status in the board's proceedings, they were entitled automatically to bring an action for judicial review of the board's decision as "aggrieved" persons. Later, in ruling on the plaintiffs' motion for judgment on the pleadings, the motion judge rejected the defendants' argument that the plaintiffs lacked standing for the same reason.

b. Discussion. To set a framework for consideration of the standing issue, we begin with a review of the pertinent statutory and regulatory provisions.

The siting and permitting of landfills and related facilities is governed by *§ 150A* and the department's site assignment regulations, *310 Code Mass. Regs. §§ 16.00*. Under *§ 150A*, a person seeking to operate a site for a new landfill (or processing) [*556] facility or to expand an existing facility must submit a site assignment application to the appropriate local board of health, which is required "to hold a public hearing satisfying the requirements of [G. L. c. 30A]." *Id.* An owner or operator of an existing facility requesting a "minor modification" of the site assignment is not required to submit a full site assignment application, but the board is required to hold a public hearing on the request. *310 Code Mass. Regs. § 16.22(3)*. The department's regulations include a section prescribing "public hearing rules" to govern the public hearing process. See *id.* at *§ 16.20*. One of these, *§ 16.20(9)(a)*, sets out requirements for party intervention in the proceeding before the board. This regulation provides that persons may intervene as parties if they make a

written request and are considered by the hearing officer to be "specifically and substantively affected." It goes on to state that any citizen group of ten or more persons (ten-citizen group) "shall be considered to be specifically and substantially affected" and entitled to register as a "party" to a public hearing where damage to the environment "is or might be at issue." See note 16, supra. [FN17], [FN18]

17 The participation rights of a "party" in a site assignment proceeding are not defined in *310 Code Mass. Regs. § 16.20(9)*, but are set out in § 16.20(10)(e) ("All Parties shall have the right to present evidence, cross-examine, make objections and make oral arguments").

18 As discussed infra, we read the provisions of *310 Mass. Code Regs. § 16.20(9)(a)* just described to mean that ten-citizen groups such as the plaintiffs are entitled to full party status in the board's proceeding solely by virtue of their citizen group status, with no requirement for an individualized determination of how the landfill facility that is the subject of the public hearing will affect any of the citizen groups' members.

The final relevant statutory provisions relate to appeals. *Section 150A* states that "[a]ny person aggrieved" by the board's siting decision may appeal pursuant to *G. L. c. 30A, § 14*, and "[f]or the limited purposes of such an appeal," the board's final decision "shall be deemed to be a final decision in an adjudicatory proceeding." *G. L. c. 111, § 150A. General Laws c. 30A, § 14*, in turn, provides that judicial review is available to "any person . . . aggrieved by a final decision of any agency in an adjudicatory proceeding." *G. L. c. 30A, § 14*. [FN19]

19 *Section 14* goes on to provide that "[a]ll parties to the proceeding before the agency shall have the right to intervene in the proceeding for review," (emphasis added), see *G. L. c. 30A, § 14 (2)*, but the right to bring the proceeding for review is restricted to a person "aggrieved" by the administrative agency's final decision. *G. L. c. 111, § 150A*.

[*557] As the statutory provisions just quoted indicate, understanding the meaning of the term "person . . . aggrieved" in *c. 30A, § 14*, is critical. "In order to maintain an action for review [under *c. 30A, § 14*], a party must be aggrieved in a 'legal sense' and show that 'substantial rights' have been 'prejudiced.'" *Group Ins. Comm'n v. Labor Relations Comm'n*, 381 Mass. 199, 202-203, 408 N.E.2d 851 (1980), quoting *Duato v. Commissioner of Pub. Welfare*, 359 Mass. 635, 637-638, 270 N.E.2d 782 (1971). [FN20] Cf. *Ginther v. Commissioner of Ins.*, 427 Mass. 319, 323-324, 693 N.E.2d 153 (1998) (participants in public hearing held on proposed insurance company merger did not have standing to seek judicial review because, inter alia, there

was no showing they suffered "direct and certain injury" from commissioner's decision and therefore were persons aggrieved).

20 The court further stated: "Not every person whose interests might conceivably be adversely affected is entitled to [judicial] review. '[I]n many, if not most, circumstances, the injury complained of may be too remote to make the party seeking review a "person aggrieved."'" (Citation omitted.) *Group Ins. Comm'n v. Labor Relations Comm'n*, 381 Mass. 199, 204, 408 N.E.2d 851 (1980), quoting *Boston Edison Co. v. Boston Redevelopment Auth.*, 374 Mass. 37, 46, 371 N.E.2d 728 (1977).

It is true that some of our decisions contain language suggesting an agency's designation of a person as an intervener with the right to participate fully as a party brings with it the right to seek judicial review of the agency decision as an "aggrieved person." See, e.g., *Save the Bay, Inc. v. Department of Pub. Utils.*, 366 Mass. 667, 672-673, 676, 322 N.E.2d 742 (1975) (*Save the Bay*). [FN21] However, in *Save the Bay*, the court was discussing intervention in an administrative agency's "adjudicatory proceeding" as defined in *G. L. c. 30A, § 1*, that is, an agency proceeding in which the rights of "specifically named persons" are adjudicated. Under *G. L. c. 30A*, an agency conducting an adjudicatory proceeding [*558] may "allow any person showing that he may be substantially and specifically affected by the proceeding to intervene as a party in the whole or any portion of the proceeding." *G. L. c. 30A, § 10 (4)*. As that language reflects, such a determination of intervening party status is based on individual facts establishing the "substantial and specific" effect that the proceeding may have on the individual or entity seeking to intervene. If an agency decides that a particular person is "substantially and specifically affected" by a proceeding to a degree warranting intervention as a party, it is likely the person also will be able to establish that he or she qualifies as a person "aggrieved" for purposes of obtaining judicial review of the agency's decision. [FN22]

21 The Superior Court judge who denied the defendants' motion to dismiss the complaint relied on *Save the Bay, Inc. v. Department of Pub. Utils.*, 366 Mass. 667, 322 N.E.2d 742 (1975), in concluding that persons such as the plaintiffs here, who have been granted full party status before the administrative agency, have standing to seek judicial review as "aggrieved person[s]." That judge, as well as the motion judge, also cited *Andover v. Energy Facilities Siting Bd.*, 435 Mass. 377, 378 n.3, 758 N.E.2d 117 (2001), for the same proposition. In the *Andover* case, the court noted that there was no challenge to the plaintiffs' standing, see *id.*, but

the court's opinion might be read as supporting the view that full party status before the administrative agency allows an intervener to appeal from the agency's decision as an aggrieved party or person.

22 At the same time, we have made the point that full intervention as a party in an adjudicatory proceeding does not translate automatically into being "aggrieved" by the agency's decision. See, e.g., *Boston Gas Co. v. Department of Pub. Utils.*, 368 Mass. 780, 805, 336 N.E.2d 713 (1975). See also *American Hoechst Corp. v. Department of Pub. Utils.*, 379 Mass. 408, 410-411, 399 N.E.2d 1 (1980) (while appellants were clearly "parties," not as clear they were "aggrieved" by challenged decision of agency; however, because they would be required to bear part of economic burden of agency's decision, court concluded they had standing to bring appeal).

The public hearing before the board, however, was not an adjudicatory proceeding, as 310 Code Mass. Regs. § 16.20(1) states explicitly, [FN23] and as the plaintiffs correctly acknowledge. Under the department's site assignment regulations, 310 Code Mass. Regs. § 16.20(9), citizen groups such as the plaintiffs acquire party status automatically, at least where, as here, there are claims of damage to the environment. See 310 Code Mass. Regs. § 16.20(9)(a); note 18, supra. In other words -- as is [*559] borne out by the record in this case -- the board makes no individualized determination of how the specific group or any of its members may be affected by the proceeding, but is directed by the regulation to treat the group as a full party simply because it is a citizen group.

23 A preamble to 310 Code Mass. Regs. § 16.20(1) states:

"Public Hearings' pursuant to [G. L.] c. 30A are not 'Adjudicatory Proceedings' within the meaning of [G. L.] c. 30A, § 1. See [G. L.] c. 30A, § 2. Pursuant to [G. L.] c. 111, § 150A [§ 150A], however, 'for the limited purpose of appeal from such public hearings, a local board of health shall be deemed to be a state agency under the provisions of said [c. 30A] and its proceedings and decision shall be deemed to be a final decision in an adjudicatory proceeding.' The public hearing process is designed to permit the flexibility and informality appropriate to the board of health proceeding, while

providing the board of health with procedural direction and the authority to create a record and render a decision within a limited time period which is amenable to the procedures and the standards of judicial review applicable under [G. L.] c. 30A, § 14."

The grant of full party status to citizen groups under 310 Code Mass. Regs. § 16.20(9) presumably is designed to enable the board to receive relevant information about environmental impacts of proposed siting decisions from a broad array of persons. But the regulation and its purpose do not themselves entitle the plaintiffs to seek judicial review of the board's final decision as persons "aggrieved." See *Ginther v. Commissioner of Ins.*, 427 Mass. at 324 ("Mere participation in the administrative process does not confer standing to raise a claim in the Superior Court"). [FN24] Rather, it is necessary to determine whether any of the plaintiff citizen groups, or, more particularly, any individual members of the citizen groups, have shown or even alleged prejudice to their own substantial rights. See *Duato v. Commissioner of Pub. Welfare*, 359 Mass. at 637. Put another way, have any of the citizen group members shown or alleged "substantial injury" to themselves that would result directly from the board's approval of the proposed site assignment modification? See *Ginther, supra* at 322, quoting *Harvard Law Sch. Coalition for Civ. Rights v. President & Fellows of Harvard College*, 413 Mass. 66, 69, 595 N.E.2d 316 (1992). See also *Goldberg v. Board of Health of Granby*, 444 Mass. 627, 631-632 n.8, 830 N.E.2d 207 (2005). [FN25]

24 In other contexts, we have recognized that participation in an administrative decision-making process that is not an adjudicatory proceeding, while enabling the administrative agency to receive information from a broad range of sources, does not necessarily give the participant the right to seek judicial review. See, e.g., *Enos v. Secretary of Env'tl. Affairs*, 432 Mass. 132, 137-139, 731 N.E.2d 525 (2000) (participation in environmental review before Secretary of Environmental Affairs encourages full disclosure of environmental impacts of proposed project, but does not allow participants to challenge Secretary's decision). See also *School Comm. of Hudson v. Board of Educ.*, 448 Mass. 565, 577-578, 863 N.E.2d 22 (2007) (charter school application process requires public hearing at which plaintiffs participated, but that fact did not entitle them to appeal from board's decision to grant charter; process allows public to be informed and to comment on application,

but final decision is legislative in nature and rests with board).

25 *Goldberg v. Board of Health of Granby*, 444 Mass. 627, 830 N.E.2d 207 (2005), was a case, like this one, involving a challenge to a board of health's landfill siting decision. The plaintiffs in the Goldberg case were not citizens groups but individuals who had participated in the administrative proceedings before the board of health. *Id.* at 627 n.1. The court discussed the need of the plaintiffs to establish that they were "aggrieved" by the board of health's decision within the meaning of *G. L. c. 30A, § 14*, but then assumed without deciding that the individual plaintiffs had done so because they were "close neighbors of the landfill, who complained of the negative impacts of an enlarged landfill on their health and property." *Id.* at 631-632 n.8.

The administrative record does not support a conclusion that [*560] any of the plaintiffs will suffer prejudice to their individual rights. The only record evidence on the issue is the set of registration forms. These reflect that the plaintiffs live in the "vicinity" of the landfill, although not necessarily in Southbridge itself. [FN26] But regardless of whether they live in Southbridge or a neighboring town, there is no indication of how close any of the members of the citizen groups may live to the landfill, and therefore, no indication as to what direct or specific impact the proposed modification of the landfill may have on any of them. The identical statement of how the plaintiffs are "substantially [and] specifically affected" on each of the registration forms (see note 15, supra) is essentially a general and collective assertion of injury. Because neither the registration form nor any other part of the record contains information describing the specific relationship of any plaintiff to the landfill -- whether by physical proximity or otherwise -- it is impossible to conclude that any of the plaintiffs may claim injury that is special to them and different from a generalized concern of the community. Contrast *Save the Bay*, 366 Mass. at 674-676 (although unincorporated association participating in agency proceeding could not be party to judicial appeal from agency decision, one of its members who owned property abutting facility at issue had standing as aggrieved party). Cf. *Standerwick v. Zoning Bd. of Appeals of Andover*, 447 Mass. 20, 27-28, 33, 849 N.E.2d 197 (2006) (discussing standing as "person aggrieved" under zoning and comprehensive permit statutes, *G. L. c. 40A* and *c. 40B*). [FN27] Cf. also *Harvard Law Sch. Coalition for Civ. Rights v. President & Fellows of Harvard College*, 413 Mass. at 68-69 [*561] (discussing requirements for establishing standing as "persons aggrieved" under *G. L. c. 151B, § 9*). [FN28]

26 In addition to Southbridge, some citizen group members live in Sturbridge, some in Charlton, and at least one in Brimfield.

27 The defendants state in their brief that this court "has expressly ruled that the aggrievement standard in site assignment cases reviewed under [G. L. c.] 30A follows the standard established in zoning appeals under [G. L. c.] 40A, § 17." That is not the case. Citation to two zoning cases for illustrative purposes in a footnote in *Goldberg v. Board of Health of Granby*, 444 Mass. at 631-632 n.8, does not reflect a holding that the determination whether one qualifies as a "person aggrieved" for purposes of bringing an appeal under *c. 30A, § 14*, is identical to deciding whether a person is "aggrieved" for purposes of appealing from a zoning decision under *G. L. c. 40A, § 17*. The Zoning Act, *G. L. c. 40A*, seeks to advance and protect interests different from *G. L. c. 111, § 150A*, and certainly judicial review of an agency decision under *§c. 30A, 14*, is very different from judicial review of a local zoning board's decision under *c. 40A, § 17*: review under *c. 30A, § 14*, is confined to the administrative record, and applies a substantial evidence test; *c. 40A, § 17*, requires the reviewing judge to hear evidence and find facts de novo, including facts related to standing. See *Kenner v. Zoning Bd. of Appeals of Chatham*, 459 Mass. 115, 117-120, 944 N.E.2d 163 (2011). See also *Marashlian v. Zoning Bd. of Appeals of Newburyport*, 421 Mass. 719, 721, 660 N.E.2d 369 (1996).

28 In her argument before the court, the plaintiffs' counsel adopted a position advocated by the amici Conservation Law Foundation and Charles River Watershed Association, to the effect that as citizen groups the plaintiffs had standing to appeal under *G. L. c. 30A, § 10A*. That section provides in pertinent part that "not less than ten persons may intervene in any adjudicatory proceeding as defined in [G. L. c. 30A, § 1], in which damage to the environment . . . is or might be at issue Any such intervenor shall be considered a party to the original proceeding for the purposes of notice and any other procedural rights applicable to such proceeding . . . including specifically the right of appeal." (Emphases added.) *Id.* The position now advanced by the plaintiffs must fail, however, because as discussed in the text, supra, the board's proceeding under *§ 150A* was not an adjudicatory proceeding, but rather involved a public hearing. The fact that under *§ 150A*, "[f]or the limited purposes" of an appeal, the board's final decision is "deemed to be a final decision in an adjudicatory proceeding," *id.*, does not change the nature or character of the board's proceeding itself.

To summarize: although, pursuant to *310 Code Mass. Regs. § 16.20(9)*, the plaintiffs qualified as interveners with full party status before the board, the record does not support their claim that they have standing to appeal to the Superior Court as persons "aggrieved." As interveners, the plaintiffs would have the right to intervene in an appeal brought by an aggrieved person whether or not they were aggrieved themselves, *G. L. c. 30A, § 14 (2)*, see note 21, *supra*, but on the present record they were not entitled directly to initiate an action for judicial review. The defendants' motion to dismiss the plaintiffs' complaint should have been allowed for lack of standing. Nevertheless, we turn briefly to the merits of the plaintiffs' challenge to the board's decision, because the parties have fully briefed and argued [*562] them, and it is appropriate to bring a final resolution to this case. See *Wellesley College v. Attorney Gen., 313 Mass. 722, 731, 49 N.E.2d 220 (1943)*.

4. Merits. At issue is the board's decision to grant SRDP a minor modification to its existing site assignment. [FN29] The burden is on the plaintiffs, as the challenging parties, to prove that the decision is not supported by substantial evidence, based on error of law, arbitrary or capricious, or an abuse of discretion. *G. L. c. 30A, § 14 (7)*. "In our review of administrative agency decisions, we generally defer to the experience, technical competence, specialized knowledge, and discretionary authority of the agency." *Heublein, Inc. v. Capital Distrib. Co., 434 Mass. 698, 705, 751 N.E.2d 410 (2001)*, citing *Seagram Distillers Co. v. Alcoholic Beverages Control Comm'n, 401 Mass. 713, 721, 519 N.E.2d 276 (1988)*.

29 The owner or operator of a landfill or other facility located on an existing assigned site may seek a major or minor modification of the site assignment. A major modification is one that expands the volume of waste disposed of at an existing facility, expands the site vertically beyond the previously approved limits, or requests a different use from the assigned solid waste activity, subject to a list of exceptions. See *310 Code Mass. Regs. § 16.22(2)*, citing § 16.21(1), (3). A minor modification includes a request to modify a site assignment that would not be considered a major modification or a modification due to a threat to public health, safety, or the environment. See *310 Code Mass. Regs. § 16.22(1), (3)*.

A request for a major modification requires that the applicant submit to the local board of health a new site assignment application and a positive site suitability determination by the department, and then participate in a public hearing conducted by the local board. See *310 Code Mass. Regs. §§ 16.22(2), 16.08, 16.20*. As stated earlier, an application for a minor

modification requires only that the board hold a public hearing on the request. See *id.* at § 16.22(3).

The plaintiffs assert that the board's decision should be reversed because it is based on two errors of law. In particular, they claim that the board (1) erroneously expanded the acreage that previously had been site assigned, based on SRDP's misrepresentation of that area in its application for a minor modification; and (2) incorrectly approved a modification for the processing facility even though that facility is not (a) located on land that was properly site assigned, or (b) a permitted accessory use of an existing site assigned area. These claims are without merit.

Contrary to the plaintiffs' repeated assertions, the record demonstrates that both the landfill and processing facilities are [*563] located on land that was site assigned either in 1979 or in 1999. The plaintiffs argue that only 20.6 acres of land was site assigned in the 1979 site assignment. However, that site assignment was not for a specifically delineated acreage, but for "a tract of land presently owned by George Corriveau in the Barefoot Road section of Southbridge." In 1979, before the town of Southbridge changed its boundaries (see *St. 1993, c. 210*), the tract in question was approximately sixty-four acres. The site assignment designated 20.6 acres of it for waste disposal, but the over-all site assignment was for the bigger tract, namely, the full sixty-four acres of land previously owned by Corriveau and located in Southbridge. [FN30] With respect to 1999, the plaintiffs similarly confuse the acreage designated for waste disposal with the entire portion of land being site assigned. [FN31] SRDP did not misrepresent the acreage of site assigned land in the 2008 request for minor modification at issue here, and the board did not make its decision based on an incorrect determination of that acreage.

30 In 2008, the department, in response to a request of the plaintiffs to undertake an enforcement action against SRDP, reviewed available historical material and determined that the entire sixty-four-acre parcel, not only the 20.6 acres north of Barefoot Road, was site assigned.

31 The plaintiffs claim that the board limited the actual site assignment made in 1999 to 32.2 acres, even though in connection with the 1999 site assignment application, the department had issued a site suitability report that approved an 82.2-acre expansion of the 1979 site assignment. In fact, however, the board's 1999 decision expressly incorporated the department's site suitability report approving 82.2 acres as suitable for assignment; the smaller 32.2-acre portion on which the plaintiffs focus represents

the specific portion of the site that would be used for waste disposal.

Turning to the plaintiffs' argument focused on the processing facility, to the extent it depends on the claim that the facility is not on site assigned land, it must fail because, as just discussed, both the landfill and processing facilities are located on land that was properly site assigned in 1979 and 1999. The plaintiffs' additional claim that "processing" is not a properly approved use of the site also must be rejected: the processing activity undertaken at this facility was and is a recognized exception to the general prohibition, spelled out in *310 Code Mass. Regs. § 16.21(3)*, against conducting a different solid waste activity on an area site assigned for a specific solid waste purpose. See [*564] *310 Code Mass. Regs. § 16.21(3)(a)* (1994) ("Recycling or composting may be approved at any assigned, permitted active disposal or handling facility without requiring a new or modified site assignment when such activity is integrated into the assigned solid waste management operation and the tonnage limits . . ."). [FN32] Substantial evidence in the record, including the department's site suitability report prepared in connection with the earlier, 1999 application for a major modification to the 1979 site assignment, shows that the processing facility was designed to increase recycling and would be integrated into the existing landfill facility. Furthermore, in connection with the review it undertook in 2008 (see note 30, supra), the department concluded that the board's approval of the name change for the landfill facility (see note 32, supra) was proper

and the processing facility was not operating without a valid site assignment.

32 Under *310 Code Mass. Regs. § 16.02*, a "Solid Waste Management Facility" may be used for processing directly related to solid waste activities. On November 16, 1998, the board unanimously voted to change the original name of the landfill facility involved in this case from "Existing Sanitary Landfill Facility" to "Solid Waste Management Facility," thereby bringing the facility within the express language of the regulation.

The plaintiffs' final argument is that the modification sought by SRDP in 2008 in substance was a "major" modification, and the board improperly treated it as a "minor" modification, thereby permitting SRDP to avoid the more rigorous review that § 150A and the department's regulations called for. The claim cannot succeed because it necessarily depends on acceptance of the plaintiffs' position that the landfill and processing facilities currently operate on land that has not properly been site assigned -- a position that we have rejected.

5. Conclusion. For the reasons discussed in this opinion, the judgment of the Superior Court is vacated, and the case is remanded to that court for entry of a judgment of dismissal for lack of standing.

So ordered.

BRIDGEWATER STATE UNIVERSITY FOUNDATION [FN1] vs. BOARD OF ASSESSORS OF BRIDGEWATER.

SUPREME JUDICIAL COURT OF MASSACHUSETTS

463 Mass. 154
2012 Mass. LEXIS 691

May 8, 2012, Argued
August 8, 2012, Decided

PRIOR HISTORY: Suffolk. Appeal from a decision of the Appellate Tax Board. After review by the Appeals Court, the Supreme Judicial Court granted leave to obtain further appellate review.

Bd. of Assessors v. Bridgewater State Univ. Found., 79 *Mass. App. Ct. 637*, 948 *N.E.2d 903*, 2011 *Mass. App. LEXIS 841* (2011)

HEADNOTES

Taxation, Real estate tax: charity, exemption, assessment, Exemption, Assessors, Judicial review, Appellate Tax Board: findings. Administrative Law, Judicial review. Statute, Construction. Charity.

COUNSEL: Michael R. Coppock for the taxpayer.

Mary C. Butler for board of assessors of Bridgewater.

Deirdre Heatwole, Kenneth A. Tashjy, Richard M. Bluestein, Janet S. Lundberg, & Jonathan A. Scharf, for University of Massachusetts & others, amici curiae, submitted a brief.

JUDGES: Present: Ireland, C.J., Spina, Cordy, Botsford, Gants, & Duffly, JJ.

OPINION BY: BOTSFORD

OPINION

[*154] BOTSFORD, J. A charitable organization is entitled to an exemption from local property taxes under *G. L. c. 59, § 5, Third*, for real property owned and occupied by the organization. In this case, we consider the exemption in the context of a public charitable foundation that operates exclusively for the benefit of a public university, and owns properties that are occupied and used in part by the foundation but in larger part by the public university. The Appellate Tax Board (board) decided that the Bridgewater State University Foundation (foundation) was entitled to the charitable exemption; on appeal by the board of [*155] assessors of the town of Bridgewater (assessors), the Appeals Court reversed. See *Assessors of Bridgewater v. Bridgewater State Univ. Found.*, 79 Mass. App. Ct. 637, 948 N.E.2d 903 (2011) (Bridgewater State Univ. Found.). We granted the foundation's application for further appellate review. [FN2] We conclude that the foundation is entitled to the exemption. Accordingly, we affirm the decision of the board.

1 Bridgewater State College is now a university. St. 2010, c. 189. Accordingly, the foundation changed its name from the Bridgewater State College Foundation to the Bridgewater State University Foundation.

2 We acknowledge the amicus brief submitted by the University of Massachusetts; the University of Massachusetts Foundation, Inc.; the Massachusetts Community College System; and the Massachusetts Charter Public School Association.

1. Background. The facts are set out in the Appeals Court's opinion. See *id. at 638-639*. We summarize them here. [FN3] The foundation is a public charitable trust, and it is "organized and operate[s] exclusively for the benefit of" Bridgewater State University (university) pursuant to *G. L. c. 15A, § 37*. [FN4] The foundation was established in 1984, and has qualified as a tax-exempt organization under § 501(c)(3) of the *Internal Revenue Code*. The university is an institution of public higher education. See *G. L. c. 15A, § 5*. There is an operating agreement between the university and the foundation with goals and policies the university certifies, in accordance with *c. 15A, § 37*, that the foundation is "organized and operated exclusively for the benefit of the [university]." In the agreement, the university certifies that the foundation is operating "in a manner consistent with" the university's goals and policies; the agreement further provides that the foundation "shall expend and apply [the monies and other assets it holds] solely for the benefit of the [university] and not otherwise."

3 The facts summarized here and in the Appeals Court's opinion are taken from a joint statement of facts submitted by the parties to the Appellate

Tax Board (board), and undisputed facts set out in the board's written decision.

4 *General Laws c. 15A, § 37*, concerns the establishment and operation of charitable organizations or public charitable trusts -- defined as "foundation[s]" -- that are "organized and operated exclusively for the benefit of an institution of public higher education" and are "certified by the board of trustees of the institution which [they] support[] [as] operating in a manner consistent with the goals and policies of the institution." *G. L. c. 15A, § 37(a)*. We understand from the statute's provisions that the purpose of these foundations is to assist public colleges and universities with fundraising. See *id. at § 37(e), (f)*.

The foundation owns three buildings and three undeveloped [*156] parcels of land (collectively, properties) in the town of Bridgewater. One of the buildings is occupied in part by the foundation for its offices and in part by the university's alumni office; another houses the university's political science department; and the third is used by the university as well as the foundation for receptions and fundraising. The three undeveloped parcels are used by university students for recreation and by university student groups. None of the properties is occupied or used exclusively by the foundation. At this juncture, the foundation permits the university to occupy and use all the properties free of charge.

At issue here are property taxes assessed against each of the six properties by the assessors for fiscal year (FY) 2007 and FY 2008. [FN5] The foundation appealed to the board after the assessors determined that the properties were not eligible for the exemption under *G. L. c. 59, § 5, Third*, and denied its applications for abatement. The board found that because the university's various uses of the properties "advanced the charitable educational mission of [the university], which was the sole purpose of the [foundation's] organization and operations," "the parcels at issue were exempt under [*G. L. c. 59, § 5, Third*], as they were owned and occupied by a charitable organization in furtherance of its charitable purpose."

5 The total taxes assessed for fiscal year (FY) 2007 was \$21,663.44; the total assessment for FY 2008 was \$22,618.23.

2. Standard of review. Decisions of the board are reviewed for errors of law. "Findings of fact by the board must be supported by substantial evidence." *Middlesex Retirement Sys., LLC v. Assessors of Billerica*, 453 Mass. 495, 498-499, 903 N.E.2d 210 (2009), and cases cited. While the parties dispute the Appeals Court's characterization of the matter before the board as a "case stated" (*Bridgewater State Univ. Found.*, 79 Mass. App. Ct. at 639) and how, if so, the

standard of review of facts would be affected, the issue does not appear to be material to resolution of this appeal. The central issue here is one of statutory construction: what does the phrase "owned . . . and occupied by" (emphasis added) a charitable organization in *G. L. c. 59, § 5, Third*, mean? At their core, questions of statutory construction are questions of law, to be reviewed de novo. See, e.g., *Atlanticare* [*157] *Med. Ctr. v. Commissioner of the Div. of Med. Assistance*, 439 Mass. 1, 6, 785 N.E.2d 346 (2003).

3. Discussion. *General Laws c. 59, § 5, Third*, exempts from local property taxation, inter alia:

"real estate owned by or held in trust for a charitable organization and occupied by it or its officers for the purposes for which it is organized or by another charitable organization or organizations or its or their officers for the purposes of such other charitable organization or organizations" (emphasis added).

The exemption provided thus is available to "a charitable organization [that] owns real estate and occupies it for its corporate purpose, or allows another charitable organization to occupy it for its purpose." *Assessors of Hamilton v. Iron Rail Fund of Girls Clubs of Am., Inc.*, 367 Mass. 301, 306, 325 N.E.2d 568 (1975). It is undisputed here that the six properties are owned by the foundation, and that the foundation is a charitable organization. We turn, therefore, to the interpretive issue raised: whether the foundation "occupied" the properties within the meaning of *c. 59, § 5, Third*, where the foundation did not itself physically occupy them (except in part), but in direct furtherance of its charitable purpose, permitted the university to use the properties to carry out the university's educational mission and goals.

The board concluded that "[o]ccupancy for the purposes of [*c. 59, § 5, Third*,] means use for the purpose for which the charity is organized," reasoning that "the fact that the property at issue may be inhabited or used by individuals or an entity other than [the foundation] does not defeat the claim for exemption, so long as such inhabitation or use is consistent with the purpose of the charitable organization that owns the property." The Appeals Court rejected this approach, concluding that the plain terms of *c. 59, § 5, Third*, "requires occupancy by the charitable organization claiming exemption . . . coupled with use for a purpose consistent with the charitable purpose of the occupying charitable organization[;] . . . the statutory requirements of occupancy by a charitable organization and use for its charitable purpose are plainly separate and conjunctive." *Bridgewater State Univ. Found.*, 79 Mass. App. Ct. at 640-641. We do [*158] not find it necessary

to choose between these conflicting views in order to resolve this case. [FN6]

6 There are decisions of this court that offer some support for the broader view of the word "occupied" taken by the board, as well as the more narrow interpretation adopted by the Appeals Court. Compare, e.g., *M.I.T. Student House Inc. v. Assessors of Boston*, 350 Mass. 539, 541-542, 215 N.E.2d 788 (1966) (plaintiff charitable organization owned house offering room and board to "needy students" attending university, but students lived in and managed property on their own; plaintiff found to "occup[y]" house and was entitled to exemption), and *Franklin Sq. House v. Boston*, 188 Mass. 409, 410, 74 N.E. 675 (1905) (comparable), with *Charlesbank Homes v. Boston*, 218 Mass. 14, 15-16, 105 N.E. 459 (1914) (charitable organization owned apartment building whose units it rented out to tenants in furtherance of charitable purpose of providing "wholesome and sanitary homes for working people and people of small means at moderate cost"; plaintiff not entitled to exemption because "there must be an actual occupation by the corporation or its officers before the purpose of that occupation can be considered"). On its facts, this case does not fit particularly well into either line of decisions just cited.

As a general matter, "where the language of the statute is plain, it must be interpreted in accordance with the usual and natural meaning of the words," a rule that "has particular force in interpreting tax statutes." *Gillette Co. v. Commissioner of Revenue*, 425 Mass. 670, 674, 683 N.E.2d 270 (1997), quoting *Commissioner of Revenue v. AMI Woodbroke, Inc.*, 418 Mass. 92, 94, 634 N.E.2d 114 (1994). However, it is also the case that "[w]e will not adopt a literal construction of a statute if the consequences of such construction are absurd or unreasonable. We assume the Legislature intended to act reasonably." *Attorney Gen. v. School Comm. of Essex*, 387 Mass. 326, 336, 439 N.E.2d 770 (1982). Consequently, "when a literal reading of a statute would be inconsistent with legislative intent, we look beyond the words of the statute," including "other statutes on the same subject." *Id.* at 336, 337. In addition, we "construe statutes that relate to the same subject matter as a harmonious whole and avoid absurd results." *Connors v. Annino*, 460 Mass. 790, 796, 955 N.E.2d 905 (2011), quoting *Canton v. Commissioner of the Mass. Highway Dep't*, 455 Mass. 783, 791-792 (2010).

In seeking to construe *c. 59, § 5, Third*, in this case, it helps to take a step back from the statute and to consider these counterfactual scenarios that furnish useful points of reference: (1) if the foundation

physically occupied and used the properties in question in the manner they were used by the university in FY [*159] 2007 and FY 2008, it would qualify for the exemption that clause Third provides; (2) if the university directly owned the properties and used them for the same purposes that it did in FY 2007 and FY 2008, it would be entitled to tax exemption under *c. 59, § 5, Second*, [FN7] because, as one of the nine State universities, see *G. L. c. 15A, § 5*, the university is an agency of the Commonwealth, see, e.g., *McNamara v. Honeyman*, 406 Mass. 43, 47, 546 N.E.2d 139 (1989); *Shocrylas vs. Worcester State College*, U.S. Dist. Ct., No. 06-40278-FDS, slip op. at 5, 2007 U.S. Dist. LEXIS 82890 (D. Mass. Oct. 29, 2007); [FN8] and (3) if the university were itself a charitable organization and using the foundation's properties in the same manner that the university used them, the foundation would be entitled to tax exemption because the properties would "occupied . . . by another charitable organization . . . for the purposes of such other charitable organization." *G. L. c. 59, § 5, Third*.

7 *General Laws c. 59, § 5, Second*, exempts from taxation "[p]roperty of the commonwealth," with exceptions not relevant here.

8 The Appeals Court agreed with these two points. See *Bridgewater State Univ. Found.*, 79 Mass. App. Ct. at 641 ("We recognize that our conclusion [that the foundation does not benefit from the tax exemption] has the effect of subjecting to taxation properties that would be exempt if occupied by the charitable organization that owns them, or if owned by the State university that occupies them").

We have discussed that, as required by *G. L. c. 15A, § 37*, the foundation is organized and operates for the exclusive benefit of the university, and is certified by the university to be operating consistently with the university's goals and policies. [FN9] Moreover, there is no question that the uses to which the six properties were put during the taxable years conform to these [*160] requirements, because use of these properties by the university to carry out its mission and goals is by definition fully congruent with the purpose for which the foundation was organized. In view of this, and keeping in mind the reference points set out in the previous paragraph, a literal construction of *c. 59, § 5, Third*, to mean that the properties owned by the foundation yet occupied by the university do not qualify for the exemption would lead to consequences that are "absurd or unreasonable." See *Attorney Gen. v. School Comm. of Essex*, 387 Mass. at 336. We will not adopt such a reading. Rather, we construe *c. 59, § 5, Third*, to apply to properties that are owned by a foundation established pursuant to *G. L. c. 15A, § 37*, and used by its affiliated public institution of higher education, and therefore to apply in this case.

9 We have not found legislative history that specifically relates to the enactment of *G. L. c. 15A, § 37*, inserted by St. 1992, c. 133, § 211, through an outside section to the State's general appropriations bill, but the words of the statute itself reflect its purpose of providing a means of assisting public universities and other "institution[s] of public higher education" with fundraising in particular. See note 4, supra. In this regard, the amici state that as tax-exempt entities that are not State agencies or subdivisions of the Commonwealth, see *G. L. c. 15A, § 37 (h)*, foundations such as the one here entitle donors making gifts to them to greater tax benefits under Federal law than the donors would receive by making gifts directly to educational institutions; and such foundations also are able to ensure that real property donated for the specific benefit of such institutions does not revert to the Commonwealth for general use.

This interpretation seems more in concert with the general intent of the exemption for property owned by charitable organizations in *c. 59, § 5, Third*. See *Mary Ann Morse Healthcare Corp. v. Assessors of Framingham*, 74 Mass. App. Ct. 701, 706, 910 N.E.2d 394 (2009) (rejecting construction of *G. L. c. 59, § 5, Third*, that would "penaliz[e] [the charitable organization taxpayer] for performing the charitable function that constitutes its mission"). [FN10] The construction also seems more in harmony with the Legislature's manifest intent in *G. L. c. 15A, § 37*, of providing for the establishment of foundations as a means of advancing the missions of affiliated institutions of public higher education. See *Attorney Gen. v. School Comm. of Essex*, 387 Mass. at 336-337 ("[W]hen a literal reading of a statute would be inconsistent with legislative intent, we look beyond the words of the statute . . . Such intent may be derived in part from other statutes on the same subject." [Citations omitted]). Perhaps most importantly, the interpretation seems the most reasonable and sensible in the circumstances. Cf. *Mailhot v. Travelers Ins. Co.*, 375 Mass. 342, 348, 377 N.E.2d 681 (1978) [*161] (where strict, literal interpretation of workers' compensation statute in accord with usually applicable rule of statutory interpretation "is seen . . . to lead to an awkward and even intolerable result, [it will be] abandoned for a more liberal or more encompassing approach").

10 In somewhat different contexts, this court and the Appeals Court have followed a functional approach in deciding whether taxpayers qualify for the charitable organization exemption in *G. L. c. 59, § 5, Third*. See, e.g., *Assessors of Boston v. Vincent Club*, 351 Mass. 10, 12-13, 217 N.E.2d 757 (1966) (considering whether organization functionally qualified as charitable organization for purposes of exemption in *c. 59,*

§ 5, Third); *H-C Health Servs., Inc. v. Assessors of S. Hadley*, 42 Mass. App. Ct. 596, 598-599, 678 N.E.2d 1339 (1997) (same). Our approach in this case is essentially functional as well.

4. Conclusion. For the reasons discussed, we affirm the decision of the Appellate Tax Board.

So ordered.

TOWN OF DARTMOUTH vs. GREATER NEW BEDFORD REGIONAL VOCATIONAL TECHNICAL HIGH SCHOOL DISTRICT & others. [FN1]

SUPREME JUDICIAL COURT OF MASSACHUSETTS

461 Mass. 366
961 N.E.2d 83; 2012 Mass. LEXIS 14

November 7, 2011, Argued
January 24, 2012, Decided

PRIOR HISTORY: Bristol. Civil action commenced in the Superior Court Department on February 6, 2008. A motion to dismiss was heard by David A. McLaughlin, J., and entry of judgment was ordered by him. The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

DISPOSITION: Judgments affirmed.

HEADNOTES

Practice, Criminal, Dismissal. Municipal Corporations, Special act, Standing to assert constitutional right. Education Reform Act. Commonwealth, Education, Financial matters. Constitutional Law, Education, Standing to question constitutionality, Home Rule Amendment.

COUNSEL: Anthony C. Savastano for the plaintiff.

Thomas P. Crotty for town of Fairhaven.

Jennifer Grace Miller, Assistant Attorney General, for Department of Elementary and Secondary Education.

John A. Markey, Jr., Assistant City Solicitor, for city of New Bedford.

Richard E. Burke, Jr., for Greater New Bedford Regional Vocational Technical High School District, was present but did not argue.

JUDGES: Present: Ireland, C.J., Spina, Cordy, Botsford, Gants, Duffly, & Lenk, JJ.

OPINION BY: SPINA

OPINION

[*367] SPINA, J. The present case concerns the way by which the costs of financing the Greater New Bedford Regional Vocational Technical High School District (school district) are apportioned among the city

of New Bedford, the town of Dartmouth, and the town of Fairhaven, which are the municipalities comprising the school district (collectively, the member municipalities). In February, 2008, Dartmouth commenced an action in the Superior Court against the school district, the Commissioner of Education (commissioner), New Bedford, and Fairhaven (collectively, the defendants), challenging the funding obligations imposed on the member municipalities by the Education Reform Act of 1993 (Education Reform Act), St. 1993, c. 71, § 32. [FN2] See *G. L. c. 70, § 6*. Fairhaven filed a cross claim against the school district, the commissioner, and New Bedford incorporating the averments of Dartmouth's first amended complaint and, additionally, asserting that the funding obligations imposed by the Education Reform Act were a disproportionate tax on property and income in violation of the Massachusetts Constitution. See Part II, c. 1, § 1, art. 4, of the Massachusetts Constitution; *art. 44 of the Amendments to the Massachusetts Constitution*. [FN3]

1 The Commissioner of Education, the city of New Bedford, and the town of Fairhaven.

2 Count I of Dartmouth's first amended complaint, alleging breach of contract, and Count III of the amended complaint, asserting a claim for promissory estoppel, were brought against the school district. Count II of the amended complaint, requesting a declaratory judgment that the funding obligations imposed by the Education Reform Act do not apply to the school district, was brought against all of the defendants. Count IV of the complaint, alleging the unconstitutional impairment of an agreement among the member municipalities, was brought against the commissioner (acting for the Commonwealth).

3 The Legislature is empowered "to impose and levy proportional and reasonable assessments, rates, and taxes, upon all the inhabitants of, and persons resident, and estates lying, within the . . . [C]ommonwealth." Part II, c. 1, § 1, art. 4, of the

Massachusetts Constitution. See *Opinion of the Justices*, 220 Mass. 613, 618-619, 108 N.E. 570 (1915). Article 44 of the Amendments to the Massachusetts Constitution states, in relevant part: "Full power and authority are hereby given and granted to the general court to impose and levy a tax on income in the manner hereinafter provided. Such tax may be at different rates upon income derived from different classes of property, but shall be levied at a uniform rate throughout the [C]ommonwealth upon incomes derived from the same class of property. The general court may tax income not derived from property at a lower rate than income derived from property, and may grant reasonable exemptions and abatements."

[*368] The school district and the commissioner each filed motions to dismiss Dartmouth's complaint and Fairhaven's cross claim pursuant to *Mass. R. Civ. P. 12 (b) (6)*, 365 Mass. 754 (1974), for failure to state a claim on which relief could be granted. Following a hearing, a judge allowed the motions. New Bedford then filed a motion to dismiss Dartmouth's complaint and Fairhaven's cross claim, based on the "law of the case" established by the judge's rulings on the prior motions to dismiss. [FN4] A different judge allowed the motion. Judgment entered on April 28, 2009, dismissing the complaint filed by Dartmouth and the cross claim filed by Fairhaven. Dartmouth and Fairhaven appealed, and we transferred the case to this court on our own motion.

4 "Where there has been no change of circumstances, a court or judge is not bound to reconsider a case, an issue, or a question of fact or law, once decided." *Peterson v. Hopson*, 306 Mass. 597, 599, 29 N.E.2d 140 (1940).

We now consider whether the public school funding obligations imposed on the member municipalities by the Education Reform Act supersede the funding provisions of an agreement among the member municipalities entered into pursuant to St. 1971, c. 428, which authorized the formation of the school district. We also consider whether the member municipalities, as political subdivisions of the Commonwealth, have standing to challenge the constitutionality of the Education Reform Act. For the reasons that follow, we conclude that the complaint filed by Dartmouth and the cross claim filed by Fairhaven were properly dismissed.

1. Background. Given that this is an appeal from a motion to dismiss, we summarize the pertinent facts as set forth in the complaint and the exhibits attached thereto. We begin with an overview of the legislative enactments at issue.

[*369] On June 25, 1971, the Legislature enacted St. 1971, c. 428, entitled, "An Act authorizing the formation of a vocational regional school district by the

city of New Bedford and the towns of Acushnet, Dartmouth, Fairhaven, Freetown, Lakeville, Mattapoisett and Rochester" (Special Act). Pursuant to the Special Act, New Bedford and each of the named towns were authorized to create a "vocational regional school district planning committee." St. 1971, c. 428, § 1. The planning committees from New Bedford and from any two or more of the named towns were authorized to "join together to form a vocational regional school district planning board," *id.*, the duty of which was "to study the advisability of establishing a vocational regional school district." *Id.* at § 2. Among other responsibilities, the planning board was required to "submit a report of its findings and recommendations" to the city council of New Bedford and the board of selectmen of each participating town. *Id.* If the planning board recommended the establishment of a vocational regional school district, then it was required to submit a proposed agreement setting forth details regarding the creation and operation of such a regional school district to an "emergency finance board," established under St. 1933, c. 49, § 1, and to the Department of Education. St. 1971, c. 428, § 3. Subject to their approval, the proposed agreement was to be submitted "to the several municipalities which are recommended to be included in the district, for their acceptance." *Id.* The Special Act stated that the proposed agreement should set forth, among other things, "[t]he method of apportioning the expenses of the regional school district . . ." *Id.*

The question whether to accept the terms of the Special Act, providing for the establishment of a vocational regional school district, then was to be presented to the voters of the participating municipalities. See *id.* at § 5. If a majority of the voters in each of those municipalities voted in the affirmative, then the Special Act would become fully effective, and the proposed vocational regional school district would be "deemed to be established forthwith in accordance with the terms of the agreement so adopted." *Id.* The Special Act provided that "[t]he powers, duties and liabilities of the regional school district shall be vested in and exercised by a regional district school committee," *id.* at § 7, [*370] which "shall annually determine the amounts necessary to be raised to maintain and operate the district school or schools during the next fiscal year, . . . and shall apportion the amount so determined among the several municipalities in accordance with the terms of the agreement." *Id.* at § 8. Further, the Special Act stated that "[n]o municipality in the regional school district shall be liable for any obligation imposed on any other municipality in said district by authority of this act, or of any agreement thereunder, any other provision of law to the contrary notwithstanding." *Id.* at § 12.

Municipal officials in New Bedford, Dartmouth, and Fairhaven followed the procedures set forth in the Special Act to establish the school district. A majority of

the voters in those municipalities then voted to accept the terms of the Special Act, and to approve the creation and operation of the school district in accordance with the provisions of an agreement among the member municipalities dated February 25, 1972 (regional agreement). The school located in the school district is "an occupational, technical, and vocational high school consisting of grades nine through twelve, inclusive." Extended courses of instruction beyond grade twelve may be provided in accordance with *G. L. c. 74, § 37A*. The regional agreement set forth the method for apportioning the capital costs and operating costs of the school district among the member municipalities. [FN5] All operating costs, except those described in the regional agreement as "special operating costs," were to be apportioned to the member municipalities "on the basis of each municipality's respective pupil enrollment in the regional district school." [FN6]

5 "Capital costs" were defined as "all expenses in the nature of capital outlay, such as the costs of acquiring land, the costs of constructing, reconstructing, or adding to a school building or buildings, the costs of remodeling or making extraordinary repairs to a school building or buildings, the cost of constructing sewerage systems and sewage treatment and disposal facilities, or the cost of the purchase or use of such systems with a municipality, and any other item of capital outlay for which a regional school district may be authorized to borrow." Capital costs also included "payment of the principal of and interest on bonds, notes, or other obligations issued by the district to finance capital costs." "Operating costs" were defined as "all costs not included in capital costs . . . , but including interest on temporary notes issued by the District in anticipation of revenue."

6 With respect to the formula for the apportionment of operating costs, the regional agreement provided that "[e]ach member municipality's share for each fiscal year shall be determined by computing the ratio which that member municipality's pupil enrollment in the regional district school on October 1 of the fiscal year next preceding the fiscal year for which the apportionment is determined bears to the total pupil enrollment in the regional district school from all the member municipalities on the same date."

[*371] Approximately twenty-two years later, on June 18, 1993, the Legislature enacted the Education Reform Act, see generally *G. L. cc. 69, 70, 71*, the purpose of which was "to provide immediately for the improvement of public education in the [C]ommonwealth." [FN7] St. 1993, c. 71, preamble. The Legislature declared that the Education Reform Act was intended to ensure "a consistent commitment of

resources sufficient to provide a high quality public education to every child," so that all children would have "the opportunity to reach their full potential and to lead lives as participants in the political and social life of the [C]ommonwealth and as contributors to its economy." *G. L. c. 69, § 1*. See *Hancock v. Commissioner of Educ.*, 443 Mass. 428, 432, 822 N.E.2d 1134 (2005) (Marshall, C.J., concurring) (Hancock). To that end, the Legislature sought "to assure fair and adequate minimum per student funding for public schools in the [C]ommonwealth by defining a foundation budget and a standard of local funding effort applicable to every city and town in the [C]ommonwealth" (emphasis added). *G. L. c. 70, § 1*.

7 The Education Reform Act, long under consideration by the Legislature, was enacted just three days after the issuance of our opinion in *McDuffy v. Secretary of the Executive Office of Educ.*, 415 Mass. 545, 615 N.E.2d 516 (1993), which held that the Commonwealth has a constitutional duty to provide a minimally adequate public education to all of its children, without regard to the financial resources of the community or district in which the children live. See *id. at 606, 621*. This court stated that the Commonwealth had failed to fulfil this obligation because it had delegated the responsibility for public school education to local communities, and the system of funding primary and secondary public education relied almost entirely on local property taxes. See *id. at 607, 610-617*. Such a funding system had left property-poor communities with insufficient resources to provide their students with educational opportunities comparable to those available to students in property-rich communities. See *id. at 614-617*.

Pursuant to the Education Reform Act, a "foundation budget" is established for every school district in Massachusetts, [FN8] *G. L. c. 70, § 3, [*372]* and is derived from a complex formula designed to account for the number and needs of children living in each district. See *G. L. c. 70, §§ 2 et seq.* See also *Hancock, supra at 437-438* (Marshall, C.J., concurring) (foundation budget has been described as Commonwealth's estimate of minimum funding needed in each district to provide adequate educational program). With respect to contributions by municipalities belonging to a regional school district, each municipality is required to appropriate annually, in addition to other specified appropriations, "an amount equal to not less than the sum of the minimum required local contribution, federal impact aid, and all state school aid and grants for education but not including equity aid, for the fiscal year." *G. L. c. 70, § 6*. As pertinent here, the commissioner establishes, on an annual basis, each municipality's minimum required

local contribution toward the operation of its public schools. See *G. L. c. 70, §§ 2, 6*. See also *Holden v. Wachusett Regional Sch. Dist. Comm.*, 445 Mass. 656, 659, 840 N.E.2d 37 (2005).

§ 8 *General Laws c. 70, § 2*, defines the "[f]oundation budget" as "the sum of the foundation payroll, foundation non-salary expenses, professional development allotment, expanded program allotment, extraordinary maintenance allotment, and book and equipment allotment." The "base year" for calculating the foundation budget was fiscal year 1993. *G. L. c. 70, § 2*. For subsequent fiscal years, the foundation budget was to be the "base year foundation budget, as adjusted for enrollment and for inflation," *id.*, pursuant to *G. L. c. 70, § 3*.

The formula used to calculate each municipality's minimum required contribution is wealth based, and requires more affluent municipalities to make larger contributions than less affluent municipalities. See *id.*, citing *G. L. c. 70, §§ 2, 6*. "As is the case with the Commonwealth as a whole, towns in regional school districts that have higher property values, higher income levels, and a greater ability to raise revenue have a relatively larger required contribution than towns in which the converse is true." *Holden v. Wachusett Regional Sch. Dist. Comm.*, *supra* at 659-660. See *Hancock, supra* (Marshall, C.J., concurring). The Commonwealth provides the funds to make up the difference between municipalities' mandatory funding obligations and their respective foundation budgets. See *G. L. c. 70, § 2; Hancock, supra* at 438 (Marshall, C.J., concurring). The Legislature specifically provided in the Education Reform Act that, "[n]otwithstanding the provisions of any regional school district agreement, each member municipality shall increase its contribution to the regional district each fiscal year by the amount indicated in that district's share of the municipality's minimum regional [*373] contribution in that fiscal year" (emphasis added). *G. L. c. 70, § 6*.

In accordance with the Education Reform Act, the school district sent an annual letter to the member municipalities setting forth the amount of each municipality's minimum required contribution. Such contribution was calculated based on the formula set forth in the Education Reform Act, not on the municipality's percentage of student enrollment as provided by the regional agreement. As a consequence of this change in the calculation of funding obligations, Dartmouth has been required to contribute to the school district, for the fiscal years 2003 through 2008, over \$3.7 million more than it would have been required to pay under the regional agreement, and Fairhaven has been required to contribute, for the same fiscal years, over \$3.3 million more than it would have been required to pay under the regional agreement. By contrast, New

Bedford has been required to contribute, for the fiscal years 2003 through 2008, almost \$7.1 million less than it would have been required to pay under the regional agreement. In fiscal year 2008, Dartmouth contributed approximately 29.45% of the school district's foundation budget, even though its students comprised only 10.09% of the student body.

In allowing the motions to dismiss Dartmouth's complaint and Fairhaven's cross claim, the Superior Court judge concluded that the text of the Education Reform Act indicated a specific intent to override contrary provisions of the Special Act or regional agreement. He stated that the Education Reform Act was enacted to address comprehensively and deal uniformly with subject matters of concern to the entire Commonwealth. The judge also concluded that Dartmouth and Fairhaven could not raise constitutional claims against the Commonwealth where the function at issue -- the funding of public education -- was a core governmental concern and was unaffected by the Home Rule Amendment, *art. 89 of the Amendments to the Massachusetts Constitution* (Home Rule Amendment).

2. Standard of review. In reviewing the allowance of a motion to dismiss under *Mass. R. Civ. P. 12 (b) (6)*, we examine the same pleadings as the motion judge and therefore proceed de novo. See *Curtis v. Herb Chambers I-95, Inc.*, 458 Mass. 674, 676, 940 N.E.2d 413 [*374] (2011). We accept as true the allegations in the complaint and draw every reasonable inference in favor of the plaintiff. See *Warner-Lambert Co. v. Execuquest Corp.*, 427 Mass. 46, 47, 691 N.E.2d 545 (1998). We consider whether the factual allegations in the complaint are sufficient, as a matter of law, to state a recognized cause of action or claim, and whether such allegations plausibly suggest an entitlement to relief. See *Iannacchino v. Ford Motor Co.*, 451 Mass. 623, 636, 888 N.E.2d 879 (2008). "Factual allegations must be enough to raise a right to relief above the speculative level . . ." *Id.*, quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007).

3. Effect of Education Reform Act on Special Act. Dartmouth and Fairhaven contend that the public school funding obligations enunciated in the Education Reform Act, see *G. L. c. 70, § 6*, did not repeal, by implication, the method set forth in the regional agreement for apportioning the expenses of the school district among the member municipalities. In their view, the Special Act, which permitted the creation of the school district in the first instance, is not so repugnant to, and inconsistent with, the Education Reform Act that both cannot stand. We disagree.

It is well established that "the provisions of a special act generally prevail over conflicting provisions of a subsequently enacted general law, absent a clear legislative intent to the contrary." *Boston Teachers Union, Local 66 v. Boston*, 382 Mass. 553, 564, 416

N.E.2d 1363 (1981). Our jurisprudence has not favored repeal of a statutory enactment by implication. See *Emerson College v. Boston*, 393 Mass. 303, 306-307, 471 N.E.2d 336 (1984) (Boston Zoning Code and Enabling Act, St. 1956, c. 665, not impliedly repealed by St. 1975, c. 808, codified at *G. L. c. 40A*, where both had coexisted without problems since 1976, and where zoning in Boston not intended to be governed by *c. 40A*); *Commonwealth v. Hayes*, 372 Mass. 505, 511-512, 362 N.E.2d 905 (1977); *Commonwealth v. Feodoroff*, 43 Mass. App. Ct. 725, 728-729, 686 N.E.2d 479 (1997). See generally 1A N.J. Singer & J.D. Shambie Singer, *Statutes and Statutory Construction* § 23:10 (7th ed. 2009) (discussing judicially created presumption against repeal of prior laws by implication). This strong presumption against implied repeal of a prior law is overcome only when the earlier statute "is so repugnant to and [*375] inconsistent with the later enactment covering the subject matter that both cannot stand." *Doherty v. Commissioner of Admin.*, 349 Mass. 687, 690, 212 N.E.2d 485 (1965). See *Commonwealth v. Bloomberg*, 302 Mass. 349, 352, 19 N.E.2d 62 (1939). "In the absence of irreconcilable conflict between an earlier special statute and a later general one the earlier statute will be construed as remaining in effect as an exception to the general statute." *North Shore Vocational Regional Sch. Dist. v. Salem*, 393 Mass. 354, 359, 471 N.E.2d 104 (1984). See *Haffner v. Director of Pub. Safety of Lawrence*, 329 Mass. 709, 714, 110 N.E.2d 369 (1953), quoting *Brown v. Lowell*, 8 Met. 172, 174, 49 Mass. 172, 8 Metc. 172 (1844) ("strong terms are required to show a legislative intent to supersede by a general act a special act which 'may be made in regard to a place, growing out of its peculiar wants, condition, and circumstances'").

We have stated that "[r]epugnancy and inconsistency may exist when the Legislature enacts a law covering a particular field but leaves conflicting prior prescriptions unrepealed." *Doherty v. Commissioner of Admin.*, *supra*. See *Homer v. Fall River*, 326 Mass. 673, 676, 96 N.E.2d 152 (1951), quoting *Doyle v. Kirby*, 184 Mass. 409, 411-412, 68 N.E. 843 (1903) ("the enactment of a statute which seems to have been intended to cover the whole subject to which it relates, impliedly repeals all existing statutes touching the subject and supersedes the common law"). "Where such a conflict does appear it is the court's duty to give effect to the Legislature's intention in such a way that the later legislative action may not be futile. The earlier enactment must give way." *Doherty v. Commissioner of Admin.*, *supra*. In such circumstances, "the legislative intent to supersede local enactments need not be expressly stated for the State law to be given preemptive effect." *Boston Teachers Union, Local 66 v. Boston*, *supra*. "Where legislation deals with a subject comprehensively, it 'may reasonably be inferred as intended to preclude the exercise of any local power or function on the same subject because otherwise the

legislative purpose of that statute would be frustrated.'" *Id.*, quoting *Bloom v. Worcester*, 363 Mass. 136, 155, 293 N.E.2d 268 (1973). See *Warr v. Hodges*, 234 Mass. 279, 281-282, 125 N.E. 557 (1920). "Thus, a statute designed to deal uniformly with a Statewide problem 'displays on its face an intent to supersede local and special laws and to repeal [*376] inconsistent special statutes.'" *Boston Teachers Union, Local 66 v. Boston*, *supra*, quoting *McDonald v. Superior Court*, 299 Mass. 321, 324, 13 N.E.2d 16 (1938). See *Boston Hous. Auth. v. Labor Relations Comm'n*, 398 Mass. 715, 719, 500 N.E.2d 802 (1986) (comprehensive nature of *G. L. c. 150E*, pertaining to public employee labor relations, must prevail over limitations on its applicability read into *G. L. c. 121B*, § 29, dealing with collective bargaining by public housing authorities). See generally 1A N.J. Singer & J.D. Shambie Singer, *Statutes and Statutory Construction*, *supra* at § 23:9 (discussing implied repeal where later legislation covers whole subject of earlier legislation and is intended as substitute).

The over-all purpose of the Education Reform Act, "from its billions of dollars in additional financial aid to local school systems, to its establishment of teacher performance standards, is to improve the education provided to the students in the classrooms of our public schools." *School Dist. of Beverly v. Geller*, 435 Mass. 223, 235, 755 N.E.2d 1241 (2001) (Cordy, J., concurring). See St. 1993, c. 71, preamble. To that end, the Education Reform Act "radically restructured the funding of public education across the Commonwealth based on uniform criteria of need, and dramatically increased the Commonwealth's mandatory financial assistance to public schools." *Hancock v. Commissioner of Educ.*, 443 Mass. 428, 432, 822 N.E.2d 1134 (2005) (Marshall, C.J., concurring). It fixed the central problem of public school funding that had been identified as unconstitutional in *McDuffy v. Secretary of the Executive Office of Educ.*, 415 Mass. 545, 621, 615 N.E.2d 516 (1993), by eliminating "the principal dependence on local tax revenues that consigned students in property-poor districts to schools that were chronically short of resources, and unable to rely on sufficient or predictable financial or other assistance from the Commonwealth." *Hancock*, *supra* at 437. See note 7, *supra*.

Simply put, the Education Reform Act is comprehensive legislation designed to improve public education in every school district throughout the Commonwealth by, among other things, better public school funding. See *Holden v. Wachusett Regional Sch. Dist. Comm.*, 445 Mass. 656, 656-657, 840 N.E.2d 37 (2005) (Education Reform Act established entirely new system for public school finance and governance in Commonwealth); *Massachusetts Fed'n of Teachers, AFT, AFL-CIO v. Board of Educ.*, 436 Mass. 763, 765, 767 N.E.2d 549 & n.3 [*377] (2002). The Education Reform Act embodies "the Legislature's determination

that wealthier towns in the Commonwealth pay a higher proportionate share of the costs of educating their students than less affluent towns." *Holden v. Wachusett Regional Sch. Dist. Comm.*, *supra* at 657. See *Horrigan v. Mayor of Pittsfield*, 298 Mass. 492, 499, 11 N.E.2d 585 (1937), quoting *Attorney Gen. v. Williams*, 174 Mass. 476, 481, 55 N.E. 77 (1899) ("the Legislature may require any of the political subdivisions of the Commonwealth 'to bear such share of the public burdens as it deems just and equitable,' and . . . '[v]ery wide discretion is left with the law-making power in this particular'").

The funding obligations imposed on the member municipalities by the regional agreement, based on each municipality's respective pupil enrollment, are wholly inconsistent with the public school funding obligations imposed by the Education Reform Act, see *G. L. c. 70, § 6*, and would frustrate the very purpose for which such comprehensive legislation was enacted. [FN9] In *Holden v. Wachusett Regional Sch. Dist. Comm.*, *supra* at 660, we opined that "[i]n instituting the new funding scheme, the Legislature specifically provided that the minimum required local contributions supersede the assessments as calculated under a regional school district agreement." The language of the Education Reform Act stating that "[n]otwithstanding the provisions of any regional school district agreement, each member municipality shall increase its contribution to the regional district each fiscal year by the amount indicated in that district's share of the municipality's minimum regional contribution in that fiscal year," *G. L. c. 70, § 6*, evidences an explicit intent by the Legislature to implement a new public school funding model for the entire Commonwealth, including the school district, irrespective of prior legislation, such as the Special Act, that included different provisions for school funding. [FN10]

9 Although the precise method of apportioning the expenses of the school district among the member municipalities was set forth in the regional agreement, the Special Act mandated the creation of such an agreement and specified the matters to be included therein.

10 The suggestion by Dartmouth and Fairhaven that the Education Reform Act and the Special Act can be construed harmoniously by concluding that the Education Reform Act establishes the minimum funding obligation for the school district as a whole, whereas the regional agreement governs how the member municipalities allocate that obligation among themselves, does not comport with either the language or the intent of the Education Reform Act. The Education Reform Act plainly states that "each member municipality" shall increase its contribution to the school district each fiscal year in an amount established by the

commissioner, *G. L. c. 70, § 6*, thereby suggesting that the minimum funding obligation for the member municipalities is not governed by the regional agreement. Further, the Education Reform Act is intended to "assure fair and adequate minimum per student funding for public schools in the [C]ommonwealth" by defining a standard of local funding "applicable to every city and town," not merely to every school district (emphasis added). *G. L. c. 70, § 1*. Only if the school district chooses to spend additional amounts in excess of the minimum required local contributions can such amounts be charged to the member municipalities according to the regional agreement. See *G. L. c. 70, § 6*; *Holden v. Wachusett Regional Sch. Dist. Comm.*, 445 Mass. 656, 660, 840 N.E.2d 37 (2005).

Continued adherence by the member municipalities to the [*378] funding terms of the regional agreement would impermissibly interfere with efforts by the Legislature to address deficiencies in the public education system by enacting comprehensive legislation to "standardize[] Statewide criteria of funding and oversight." *Hancock, supra* at 433-434. As is its purview, the Legislature has determined that implementation of a wealth-based formula to calculate each municipality's required contribution to its local school district is the appropriate mechanism to address substantial resource disparities so that children across the Commonwealth, including those from Dartmouth, Fairhaven, and New Bedford, can partake of the same educational opportunities. Accordingly, we conclude that the public school funding obligations imposed on the member municipalities by the *Education Reform Act* supersede the funding provisions of the regional agreement.

4. Standing to raise constitutional claims. Dartmouth and Fairhaven next contend that they have standing to challenge, on constitutional grounds, the public school funding obligations imposed on the member municipalities by the Education Reform Act. See *G. L. c. 70, § 6*. Dartmouth argues that these funding obligations have interfered with the operation of the regional agreement in violation of the contract clause of the United States Constitution. [FN11] Fairhaven asserts that such funding obligations are a disproportionate tax on the property and income of [*379] its residents in violation of the Massachusetts Constitution. See note 3, *supra*. We conclude that Dartmouth and Fairhaven do not have standing to challenge the constitutionality of the public school funding obligations imposed by the Education Reform Act.

11 Article I, § 10, cl. 1, of the United States Constitution provides, in relevant part: "No state

shall . . . pass any . . . law impairing the obligation of contracts . . ."

A town is a political subdivision of the Commonwealth. See *Daveiga v. Boston Pub. Health Comm'n*, 449 Mass. 434, 442, 869 N.E.2d 586 (2007); *Murphy v. Planning Bd. of Hopkinton*, 70 Mass. App. Ct. 385, 396, 874 N.E.2d 455 (2007). See also *Opinion of the Justices*, 303 Mass. 631, 639, 22 N.E.2d 49 (1939), quoting *Lee v. Lynn*, 223 Mass. 109, 112, 111 N.E. 700 (1916) (cities and towns of Commonwealth are divisions of government established in public interest). Apart from the limited exceptions discussed infra, a wide range of cases have held that governmental entities lack standing to challenge the "acts of their creator State." *Spence v. Boston Edison Co.*, 390 Mass. 604, 610, 459 N.E.2d 80 (1983) (Spence). See, e.g., *Massachusetts Bay Transp. Auth. v. Auditor of the Commonwealth*, 430 Mass. 783, 792-793, 724 N.E.2d 288 (2000) (statutorily created agency did not have standing to challenge constitutionality of State statute governing privatization contracts); *Clean Harbors of Braintree, Inc. v. Board of Health of Braintree*, 415 Mass. 876, 878-879, 616 N.E.2d 78 (1993) (municipal agency of town lacked standing to challenge constitutionality of amendment to State statute); *Trustees of Worcester State Hosp. v. The Governor*, 395 Mass. 377, 380, 480 N.E.2d 291 (1985) (unlawful takings claim barred because trustees of State hospital could not challenge constitutionality of State statutes); *Boston Water & Sewer Comm'n v. Commonwealth*, 64 Mass. App. Ct. 611, 615-616, 834 N.E.2d 1205 (2005) (government agency lacked standing to challenge special legislation that allowed taking by eminent domain of certain land owned by agency). See also *Trenton v. New Jersey*, 262 U.S. 182, 188, 43 S. Ct. 534, 67 L. Ed. 937 (1923) (city lacked standing to challenge State's imposition of fee for diverting water from Delaware River because "[t]he power of the State, unrestrained by the contract clause or the *Fourteenth Amendment* [to the United States Constitution], over the rights and property of cities held and used for 'governmental purposes' cannot be questioned"); *Hugo v. Nichols*, 656 F.3d 1251, 1257-1258 (10th Cir. 2011) (Supreme Court has made clear that United States Constitution does not contemplate rights of political subdivisions as against their parent States).

[*380] "The decisional law rests on the proposition that constitutional protections belong to 'persons,' including private corporations, who are generally considered independent of the Commonwealth." *Commissioners of Hampden County v. Agawam*, 45 Mass. App. Ct. 481, 483-484, 699 N.E.2d 826 (1998) (county commissioners, being governmental entities, did not possess constitutional rights of individual citizens and therefore lacked standing to challenge State statute directing commissioners to convey certain parcels of land to town, even though impact of statute could diminish or abrogate property

rights). See *Cote-Whitacre v. Department of Pub. Health*, 446 Mass. 350, 374, 844 N.E.2d 623 (2006) (Spina, J., concurring) (municipal clerks had no standing in official capacity to raise claim alleging unconstitutional selective enforcement of statutory scheme, but did have standing in individual capacity to raise such claim); *Horton v. Attorney Gen.*, 269 Mass. 503, 513-514, 169 N.E. 552 (1929) (only one whose personal interests are directly affected by operation of statute can challenge its constitutional validity). Dartmouth and Fairhaven, as political subdivisions of the Commonwealth that exist to carry out a public purpose, are not "persons" for purposes of challenging the constitutionality of the public school funding obligations imposed by the Education Reform Act. See *Spence*, supra at 608-609 (generally speaking, municipality may not be "person" for purpose of challenging constitutionality of State statute); *Commissioners of Hampden County v. Agawam*, supra.

Contrary to the assertion of Dartmouth and Fairhaven, our decision in *Brookline v. The Governor*, 407 Mass. 377, 553 N.E.2d 1277 (1990) (Brookline), does not provide authority for the proposition that they have standing to challenge the constitutionality of *G. L. c. 70, § 6*. There, the court concluded, among other things, that St. 1989, c. 240, § 6, which purported to limit the distribution of State lottery proceeds to cities and towns during the 1989 and 1990 fiscal years, was lawful. See *Brookline*, supra at 382. This court stated that, in light of its resolution of the case, it need not decide whether the plaintiffs had standing to argue that St. 1989, c. 240, § 6 "could not constitutionally replace the local aid distribution procedure described in the General Laws." *Id.* at 384. The language in *Brookline* on which Dartmouth and Fairhaven rely states: "If the plaintiff municipalities lack standing [*381] to challenge the lawfulness of § 6, no one else is likely to have any greater standing to do so. We would be reluctant to tolerate a situation in which allegedly unconstitutional conduct would be free from judicial scrutiny even on the request of an entity most directly affected by the alleged unlawful conduct." *Id.* at 384 n.10. This language is merely dicta, unnecessary to the holding of the case, and does not confer standing on Dartmouth and Fairhaven. See *Massachusetts Bay Transp. Auth. v. Auditor of the Commonwealth*, supra at 793 (declining to permit agency to challenge constitutionality of State statute based on "comment" in Brookline). See also *Tax Equity Alliance for Mass. v. Commissioner of Revenue*, 423 Mass. 708, 716, 672 N.E.2d 504 (1996) ("an unfounded assumption that, if the individual plaintiffs lack standing, no one will have standing to sue, is not a reason to find standing where none exists"). We add that in a concurring opinion in Brookline, Chief Justice Liacos stated that "neither the municipalities nor the individuals who are plaintiffs in their official capacities (such as selectmen, mayors, and school committee members) have standing to challenge

the constitutionality of the statutes at issue." *Brookline*, *supra* at 387 (Liacos, C.J., concurring).

We have recognized the existence of several limited exceptions to the "prohibition on constitutional challenges by governmental entities to acts of their creator State," *Spence*, *supra* at 610, but none provides a basis for relief to Dartmouth and Fairhaven. First, in *LaGrant v. Boston Hous. Auth.*, 403 Mass. 328, 331, 530 N.E.2d 149 (1988), we held that "agencies . . . have standing to challenge the constitutionality of a State statute when it is alleged that the statute represents legislative encroachment on judicial power in violation of art. 30" of the Massachusetts Declaration of Rights. See *Massachusetts Bay Transp. Auth. v. Auditor of the Commonwealth*, *supra* at 792-793; *Clean Harbors of Braintree, Inc. v. Board of Health of Braintree*, *supra* at 879. Neither Dartmouth nor Fairhaven has raised such an allegation.

Second, we have stated that a governmental entity may be a "person" for the purpose of challenging the constitutionality of a State statute "where the parties are both acting in a private capacity and where there is absolutely no 'public aspect' to the [*382] transaction." *Spence*, *supra* at 609, 610. "In such circumstances, 'the sovereign entity involved is acting not in its sovereign capacity but rather is engaging in commercial and business transactions such as other persons, natural or artificial, are accustomed to conduct.'" *Boston Water & Sewer Comm'n v. Commonwealth*, *supra* at 615, quoting *Spence*, *supra* at 609. Here, the member municipalities were not acting in a "private" capacity and engaging in a purely commercial or business transaction. Rather, they were acting in their public capacity and fulfilling the Commonwealth's obligation to provide an appropriate education to the children of the school district.

Finally, a municipality has standing to raise a claim that a legislative enactment violates the Home Rule Amendment, which restricts the Legislature's power to act in relation to cities and towns. [FN12] See *Clean Harbors of Braintree, Inc. v. Board of Health of Braintree*, *supra* at 880-881, and cases cited. "The Home Rule Amendment preserves the right of municipalities to self-government in 'local matters,' but preserves the Commonwealth's right to legislate with respect to State, regional, and general matters." *Id.* at 881. As such, the Home Rule Amendment is to be

construed narrowly, see *id.*, and it does not "preclude the Legislature 'from acting on matters of State, regional, or general concern, even though such action may have special effect upon one or more individual cities or towns.'" *Hadley v. Amherst*, 372 Mass. 46, 50, 360 N.E.2d 623 (1977), quoting *Opinion of the Justices*, 356 Mass. 775, 787-788, 250 N.E.2d 547 (1969). The comprehensive overhaul of public school education, including the mechanism by which public schools are funded, is a matter of State, regional, and general concern and falls within the ambit of retained legislative power. Therefore, Dartmouth and Fairhaven do not have [*383] standing to raise their constitutional claims pursuant to the Home Rule Amendment. [FN13]

12 Article 89, § 6, of the Amendments to the Massachusetts Constitution provides, in relevant part: "Any city or town may, by the adoption, amendment, or repeal of local ordinances or by-laws, exercise any power or function which the general court has power to confer upon it, which is not inconsistent with the constitution or laws enacted by the general court" Further, § 8 of art. 89 states, in pertinent part: "The general court shall have the power to act in relation to cities and towns, but only by the general laws which apply alike to all cities, or to all towns, or to all cities and towns, or to a class of not fewer than two"

13 In its complaint, Dartmouth asserted that the imposition of public school funding obligations on the member municipalities by the Education Reform Act resulted in an unconstitutional taking of Dartmouth's property without just compensation. Dartmouth has not pursued this argument in its appellate brief. Even if it had, the argument would fail for the reasons articulated with respect to Dartmouth's other constitutional claim.

5. Conclusion. In light of our resolution of the issues presented in this appeal, Dartmouth and Fairhaven have failed to state a claim on which relief may be granted. Accordingly, the complaint filed by Dartmouth and the cross claim filed by Fairhaven were properly dismissed.

Judgment affirmed.

DENVER STREET LLC vs. TOWN OF SAUGUS (and three companion cases [FN1]).

SUPREME JUDICIAL COURT OF MASSACHUSETTS

462 Mass. 651
970 N.E.2d 273; 2012 Mass. LEXIS 586

January 6, 2012, Argued
June 29, 2012, Decided

PRIOR HISTORY: Essex. Civil actions commenced in the Superior Court Department on November 8, 2005, December 9, 2005, and May 26, 2006. After consolidation, the cases were heard by Frances A. McIntyre, J. After review by the Appeals Court, the Supreme Judicial Court granted leave to obtain further appellate review.

Denver Street LLC v. Town of Saugus, 2009 Mass. Super. LEXIS 345 (Mass. Super. Ct., Mar. 16, 2009)

Denver St. LLC v. Town of Saugus, 78 Mass. App. Ct. 526, 939 N.E.2d 1187, 2011 Mass. App. LEXIS 17 (2011)

HEADNOTES

Constitutional Law, Taxation. Taxation, Sewer assessment. Municipal Corporations, Sewers, Fees. Sewer.

COUNSEL: Ira H. Zaleznik for town of Saugus.

James R. Senior for Denver Street LLC & others.

The following submitted briefs for amici curiae: John L. Davenport for Conservation Law Foundation, Inc.

Martha Coakley, Attorney General, & Louis Dundin, Assistant Attorney General, for the Commonwealth.

Ben Robbins & Martin J. Newhouse for New England Legal Foundation & another.

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

OPINION BY: IRELAND

OPINION

[*652] IRELAND, C.J. We granted the town of Saugus's (town's) application for further appellate review in these consolidated cases to determine whether a monetary charge imposed on the plaintiff developers (developers) for access to the town's sewer system is a lawful fee or an impermissible tax. After a bench trial, a Superior Court judge found that the charge was an unlawful tax. The Appeals Court affirmed. *Denver St. LLC v. Saugus*, 78 Mass. App. Ct. 526, 528, 533-534, 939 N.E.2d 1187 (2011). Because we conclude that the charge in this case has the requisite characteristics of a fee rather than an impermissible tax, we reverse the judgments and enter judgments for the town.

1 Paul DiBiase, trustee of Oak Point Realty Trustvs. Town of Saugus; Kevin Procopio, trustee of Vinegar Hill Estates Trustvs. Town of Saugus; and Central Street Saugus Realty, LLC vs. Town of Saugus.

Background. A recitation of the relevant legal principles is in order.

"A municipality does not have the power to levy, assess, or collect a tax unless the power to do so in a particular instance is granted by the Legislature." *Silva v. Attleboro*, 454 Mass. 165, 168, 908 N.E.2d 722 (2009), quoting *Commonwealth v. Caldwell*, 25 Mass. App. Ct. 91, 92, 515 N.E.2d 589 (1987). However, a fee lawfully may be charged. *Silva v. Attleboro*, *supra* at 168-169. There are two kinds of fees, "user fees based on the rights of the entity as proprietor of the instrumentalities used" and "regulatory fees," "founded on police power to regulate particular businesses or activities." *Emerson College v. Boston*, 391 Mass. 415, 424, 462 N.E.2d 1098 (1984) (Emerson College), citing *Opinion of the Justices*, 250 Mass. 591, 597, 602, 148 N.E. 889 (1925).

In *Emerson College*, this court stated that "the nature of a monetary exaction 'must be determined by its operation rather than its specially descriptive phrase.'" *Emerson College*, *supra*, quoting *Thomson Elec. Welding Co. v. Commonwealth*, 275 Mass. 426, 429, 176 N.E. 203 (1931). There are three "traits" that distinguish fees from taxes. Fees "[1] are charged in exchange for a particular government service which benefits the party paying the fee in a manner 'not shared by other members of society'[:]; . . . [2] are 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] . . . are collected not to raise revenues but to compensate the governmental entity providing the services for its expenses." *Emerson College*, *supra* at 424-425, quoting *National Cable Tel. Ass'n v. United States*, [*653] 415 U.S. 336, 341, 94 S. Ct. 1146, 39 L. Ed. 2d 370 (1974). The burden is on the party challenging the fee to prove it is not lawful. See *Nuclear Metals, Inc. v. Low-Level Radioactive Waste Mgt. Bd.*, 421 Mass. 196, 201, 656 N.E.2d 563 (1995). "Fees are not taxes," even if the only way to avoid payment is to relinquish the right to develop one's property. *Bertone v. Department of Pub. Utils.*, 411 Mass. 536, 549, 583 N.E.2d 829 (1992), citing *Southview Coop. Hous. Corp. v. Rent Control Bd. of Cambridge*, 396 Mass. 395, 402, 486 N.E.2d 700 (1985).

Facts and procedure. We summarize the essential facts taken from the judge's findings, supplemented by uncontested facts in the record, and reserve certain details for our discussion. *Millennium Equity Holdings, LLC v. Mahlowitz*, 456 Mass. 627, 630, 925 N.E.2d 513 (2010).

Since at least 1986, the town had a deteriorating sewer system. Defects allowed inflow and infiltration (I/I) [FN2] in the system. Certain rain storm or other "wet weather events" overwhelmed the system's capacity, causing sanitary sewer overflow (SSO). The

result was the release of untreated waste water and raw sewage, which contaminated the ocean and "river tributaries and wetlands," posing a "public health and environmental risk." Moreover, to avoid SSO onto residential property or into housing, the town had installed, without proper approval or permits, a bypass pump at one of its pumping stations that discharged raw sewage into the Saugus River (river), affecting it, as well as Rumney Marsh, an "area of critical environmental concern."

2 Infiltration is groundwater that leaks into a sewer system through defective pipes, pipe joints, and sewer connections. Inflow is extraneous water that enters a sewer system from public sources such as manhole covers and from private sources such as roof drains and sump pumps. Both infiltration and inflow increase the volume of liquid in a sewer system that can lead to overburdening and overflow.

In 2005, the town entered into an administrative consent order (ACO) with the Department of Environmental Protection (department). The ACO noted that the town had had an evaluation of its sewer system in 1997, which found "numerous deficiencies" including "leaking manholes, mainlines and service lines, . . . [and blocked] sewer pipes," as well as "illegal connections of sump pumps, driveway drains, and storm drains into the sewer system." These deficiencies "allegedly" went unaddressed by the town. The ACO further stated that the town's actions violated the [*654] Clean Water Act, *G. L. c. 21, §§ 43 and 44*, as well as regulations concerning surface water, and operation and management. See *314 Code Mass. Regs. § 3.03* (2003); *314 Code Mass. Regs. §§ 12.02-12.04* (1997).

In addition to being fined \$25,000 by the department, the town was required to pay fines for any violation of the terms of the ACO, until the town "correct[ed] the violation or complete[d] performance whichever is applicable." Under the ACO, the town was required to implement plans to identify and eliminate sources of I/I, and there was a moratorium on any new connection to the sewer system until the I/I problem was addressed. The town embarked on a ten-year, \$27 million dollar plan to repair the system that would result in the reduction of I/I (plan). Ratepayers were to finance the majority of the plan. By the time of trial in 2009, the town had expended approximately \$6.5 million to remove some 450,000 gallons of I/I from the sewer system. The funding came from a town bond issue and a loan from the State revolving fund, i.e., funds separate from the monies at issue here.

In order to allow new connections to the system while the I/I problem was being addressed incrementally under the plan, the ACO permitted the town to establish a "sewer bank," which was a mechanism for calculating, in gallons, when I/I

reduction was such that new flow into the system would be permitted. The town had to demonstrate that it had the "technical, financial and managerial capacity to operate" a sewer bank in order to obtain permission to establish it. To that end, the town had to create a sewer connection and extension policy for new users, such as the developers here, that had to be approved by the department (new connection policy).

Moreover, before any new connections would be allowed, the sewer bank had to have enough I/I reduction to accommodate the new flow. The ACO specified a formula to determine the ratio of gallons of I/I that had to be removed from the system in order for one gallon of new flow to be allowed into the system. For example, until the town made repairs that removed 250,000 gallons of I/I from the system, the town was allowed to add one gallon of flow for every ten gallons of I/I removed; when the town had removed 500,000 gallons of I/I, that ratio would be [*655] one gallon of flow added for every four gallons of flow removed. [FN3], [FN4] The ACO required that the net effect of any new flow had to be a decrease in flow, i.e., a one-to-one trade-off between gallons allowed and gallons removed would not be acceptable because the goal was to eliminate I/I.

3 In her written decision, the judge stated that the town "freely negotiated" the ten-to-one ratio. This contradicts several other findings and the stipulated facts, as well as the testimony of the engineer who stated that the ten-to-one ratio was imposed by the department. Although the administrative consent order (ACO) was negotiated between the town and the department, there is no indication that the department would have allowed anything less than a ten-to-one ratio because, as the judge herself found, the problem was so severe. Indeed the ACO states that "the Department shall allow" the town the ten-to-one ratio, as well as the reduced ratios, described above, as more gallons of I/I were removed. In addition, one of the agreed facts states that the department "allow[ed]" the town the ten-to-one ratio.

4 The town had removed 500,000 gallons by the beginning of 2006, and by December, 2007, the ratio was one gallon of new flow for every four removed. Apparently, the town began removing I/I before the ACO was signed so that the town was able "to keep a positive balance in the sewer bank."

In addition, the ACO stated that the department had "the right to disapprove any proposed addition of flow credit to the [s]ewer [b]ank" and that each time the town allowed any new flow, it was required to "reduce the [s]ewer [b]ank [b]alance by the approved design flow." There was testimony that the department did not always

agree with the town's measurement of the I/I reduction. See note 17, *infra*, and accompanying text.

The town requires all developed commercial or residential properties to connect to the sewer system. While it addressed the I/I problem, the town handled permits for new connections by requiring payment of a charge called an I/I reduction contribution (I/I charge). The amount of the I/I charge was calculated first by multiplying, by a factor of ten, the number of gallons of new flow proposed to be generated by a developer's project and discharged into the sewer.[FN5] As the town reduced the I/I flow through repairs, the factor by which the number of gallons of new flow was multiplied also decreased, so that by December, 2007, the factor was four. Although the ACO required the town to demonstrate that it had the financial capability to operate the [*656] sewer bank, and the sewer bank was the mechanism through which new connections to the system were allowed, the ACO did not require specific use of an I/I charge on new connections to finance the reduction of I/I for credit in the sewer bank.

5 Three dollars was the estimated cost of repairing leaks to the system sufficient to remove one gallon of I/I. The judge found that the real cost was higher than this amount, from some four dollars to four dollars and fifty cents per gallon to thirteen to fourteen dollars per gallon.

The developers were required to pay the I/I charge to connect their projects to the sewer system. They had paid a total of \$670,460 to accommodate new flow from the single-family houses and multifamily housing they constructed. They filed actions in the Superior Court alleging that the I/I charge was an illegal tax. The cases were consolidated for trial. We note that it is undisputed that the I/I charge is proprietary, not regulatory, in nature.

At trial, the town argued that, under *Emerson College*, the particular benefit the developers received for payment of the I/I charge was accelerated access to the sewer system. The judge's written decision and order set forth findings of fact, in part derived from stipulated facts. In analyzing whether the I/I charge was a fee or a tax, the judge applied the three factors from *Emerson College*. She also relied on the analysis of a sewer connection charge in *Berry v. Danvers*, 34 Mass. App. Ct. 507, 613 N.E.2d 108 (1993) (*Berry*), to conclude that the I/I charge provided no particularized benefit to the developers because the public also benefited from the I/I reduction. She found that the amount of the I/I charge was excessive compared to the regulatory costs involved. After determining that the I/I charge was a tax and not a fee, the judge ordered the town to refund the developers' I/I charges, as well as statutory interest, fees, and costs.[FN6] She denied the town's posttrial motions.

6 Concerning the second factor discussed in *Emerson College v. Boston*, 424-425, 462 N.E.2d 1098 (1984) (*Emerson College*), whether payment of the I/I charge was paid by choice, the parties agree that it was voluntary. Therefore, we do not address voluntariness, except to say that it is undisputed that the developers could have avoided the I/I charge by waiting until all repairs were done to the sewer system before connecting. We note, however, that in *Silva v. Attleboro*, 454 Mass. 165, 171-172, 908 N.E.2d 722 (2009), this court discussed the usefulness of voluntariness in assessing whether a charge is a fee or a tax. The court noted that other jurisdictions have found voluntariness unhelpful and stated that if the fee was regulatory as opposed to proprietary, voluntariness is of no relevance. *Id.* at 172, and cases cited. The *Silva* case left to another day whether voluntariness was useful where, as here, the fee is proprietary. *Id.* See generally *Nuclear Metals, Inc. v. Low-Level Radioactive Waste Mgt. Bd.*, 421 Mass. 196, 205, 656 N.E.2d 563 (1995) (*Nuclear Metals*) (choice realistically not "free choice").

[*657] Discussion. We begin by noting that the judge (and the developers) downplay the central role of the ACO in discussing whether the developers received a particularized benefit for the I/I charge. The ACO required a moratorium on new connections until the system was repaired, which was projected to take ten years to complete. Because of the impracticability of a moratorium, the department "allow[ed]" the town to create the sewer bank in order to permit new flow into the sewer system. Without the sewer bank, the moratorium would have remained in place. No new users would have been allowed to connect to the sewer system, and the developers here would have been unable to occupy or sell the housing they had built, until the town completed the repairs. These facts inform our discussion of the application of the *Emerson College* factors to this case.

1. "Sufficiently particularized" benefit. In her written decision, the judge rejected the town's arguments that the developers' particularized benefit was immediate permission to connect to the sewer system and that, because the ACO required a reduction in I/I to accommodate new users, the developers are the only users obligated to pay the I/I charge. She stated that the town's plan for reducing I/I was not designed to pay for any additional infrastructure to accommodate new connections or to cover the costs of physically connecting to the sewer system; the new connection policy provided no other source to finance the repairs to the sewer system except the I/I charge;[FN7] and, but for the town's failure to keep its sewer system repaired, the I/I problem would not exist. Relying on *Berry*, *supra*, she also stated that "the I/I reduction offered as much or greater benefit to the larger community, than

was afforded to the [developers]." She concluded that the entire purpose of the new connection policy was to reduce I/I flow for the town and, therefore, was not a particularized service being afforded to the developers.

7 It is not entirely clear, but we assume that the judge was referring to the fact that the cost of I/I reduction to allow new users access to the sewer system was paid by those users. As discussed, the ratepayers were financing the majority of the town's proposed \$27 million plan, and the first \$6.5 million had been financed through a bond and a loan.

The town argues, in essence, that the judge erred in finding [*658] that the I/I charge was an unlawful tax and not a legitimate fee, because the developers were paying a reasonable amount for a particularized benefit: accelerated access to the town's sewer system. The town also contends that the judge erred in relying on *Berry* and argues that, once a particularized benefit is identified, the first Emerson College factor is satisfied.

Berry concerned sewerage overflows due to I/I in Danvers, which levied a charge on new connections to its sewer system. *Id.* at 508-509. The charge was calculated based on predicted discharge into the sewer system and was used to remove two gallons of I/I from the system for each new gallon of flow added. *Id.* at 509. The Appeals Court determined that, although the "removal of I/I would theoretically benefit new users by freeing up additional capacity and allowing them to connect to the sewer system," the benefit was not "sufficiently particularized" when compared to the benefit I/I removal provided to current users. *Id.* at 510-511, 512.

The *Berry* case distinguished *Bertone v. Department of Pub. Utils.*, *supra* (*Bertone*), a case involving a fee for new users of a municipal lighting plant. *Berry* emphasized the fact that, at the time the fee was charged in *Bertone*, "the existing electrical system was capable of meeting the then-current load, and all necessary maintenance was covered by the rates charged all users for electricity," whereas in *Berry*, the financing was going to "repair problems inherent in the existing system." *Berry*, *supra* at 511-512. Moreover, as part of its analysis whether there was a sufficiently particularized benefit, the court quoted language from *Bertone* that weighed the benefits received by new users of the electrical system against the benefits derived by all customers. *Berry*, *supra* at 511, quoting *Bertone*, *supra* at 546. However, in the quoted portion of *Bertone*, the court was weighing benefits as part of its analysis whether the fee was discriminatory under *G. L. c. 164, § 58*, a statute governing operation of municipal lighting plants, not whether there was a sufficiently particularized benefit under Emerson College. *Bertone*, *supra* at 545-547, 549.

A precise balancing or weighing of public benefits against a particularized benefit is not part of the first Emerson College factor. In *Nuclear Metals, Inc. v. Low-Level Radioactive Waste [*659] Mgt. Bd.*, 421 Mass. 196, 202-205, 656 N.E.2d 563 (1995) (*Nuclear Metals*), the court held that an assessment levied against generators of low-level nuclear waste was a valid fee. In analyzing the first Emerson College factor, the court considered only whether the plaintiffs were receiving a government service, and because it determined that they were (i.e., disposal of the low-level radioactive waste in compliance with Federal law), the court then considered only whether the service was particularized "in a manner 'not shared by other members of society.'" *Nuclear Metals*, *supra* at 202, quoting *Emerson College*, *supra* at 424. Although the court noted that the public received a benefit because it was protected by the safe disposal of low-level radioactive waste, it nevertheless determined that the benefit was sufficiently particularized because it was "the plaintiff . . . that required access to disposal facilities." *Nuclear Metals*, *supra* at 204. Likewise, in *Silva v. Attleboro*, 454 Mass. 165, 171, 908 N.E.2d 722 (2009), the court held that a municipal burial permit charge was a fee because the particularized benefit was a well-regulated industry for the disposal of human remains, even though the court also acknowledged that the public benefited from the preservation of "public health, safety and welfare."

Although the *Nuclear Metals* and *Silva* cases involved regulatory fees, the Appeals Court has decided cases that involved proprietary fees like the I/I charge at issue here, which acknowledged a public benefit but did not weigh it against the particularized benefit. In *Morton v. Hanover*, 43 Mass. App. Ct. 197, 682 N.E.2d 889 (1997), the court held that a water rate surcharge, paid by abutters to construct a new water main in an expanding commercial zone, was a valid fee even though the major purpose of the water main was to provide adequate water to fire hydrants, because abutters received the particularized benefit of better water flow and pressure. *Id.* at 198, 201-20 & nn.6,72. In *Commonwealth v. Caldwell*, 25 Mass. App. Ct. 91, 94-96, 515 N.E.2d 589 (1987), the court held that a "slip fee" for mooring boats at a public waterfront was valid, where the particular benefit was safety and order provided by the harbormaster, and determined that the public also benefited from the harbormaster's duties.

To the extent that *Berry* established a rule that a court must weigh a particularized benefit against a benefit to the public in [*660] applying the first Emerson College factor, we do not follow it.[FN8] Emerson College focused on whether the services for which a fee was imposed "are sufficiently particularized as to justify distribution of the costs among a limited group . . . rather than the general public." *Id.* at 425. This inquiry does not involve an exact measuring or quantifying of the comparative economic benefits of the limited group and the general public. Instead, the

inquiry is whether the limited group is receiving a benefit that is, in fact, sufficiently specific and special to its members. *Id.* at 424 (service must benefit fee payer in manner "not shared by other members of society"). Once a sufficiently particularized benefit is found, then the first *Emerson College* factor is satisfied.[FN9]

8 *Nuclear Metals, supra* at 206 n.11, noted that *Berry v. Danvers*, 34 Mass. App. Ct. 507, 613 N.E.2d 108 (1993), also was not controlling authority in its analysis of the voluntariness requirement in the *Emerson College* factors.

9 The *Emerson College* case involved a statute allowing the city of Boston to levy a charge on owners of buildings of a certain size, construction, and use, to reimburse the city for the costs of additional fire fighting equipment and personnel. *Emerson College, supra* at 416. The court held that the charge was neither a tax nor a fee and affirmed the Superior Court judgment invalidating both the statute as well as the city ordinance. *Id.* at 419. The court stated that the charge was not sufficiently particularized because the calculation included not only the cost of fire fighting capacity to preserve an owner's particular building, but also the cost to safeguard the building's inhabitants and to prevent the fire from spreading to other buildings. *Id.* at 426. The court further noted that the charge was compelled. *Id.*

Here, by paying the I/I charge, the developers gained immediate access to the sewer system for their new connections, at a time when the town was required to reduce I/I under the ACO. We do not agree with the judge that the main purpose of the new connection policy was to reduce I/I for the entire town. As discussed, the new connection policy was established pursuant to the part of the ACO that specifically addressed the sewer bank, which was the mechanism that allowed new flow to enter the sewer system.[FN10] The value of the immediate access is related to the sewer bank, without which a moratorium on new connections would have been imposed because, as a witness from the department testified, the new connections would exacerbate the I/I problem. Furthermore, access to the sewer system for new [*661] connections was not a benefit shared by anyone other than those who paid the I/I charge. FN11]

10 The ACO required the town to create other plans to address I/I; they were not introduced in evidence at trial.

11 Under the ACO, certain entities were exempt from the sewer bank.

We also do not agree with the judge or the developers that the fact that the town would have had to pay for all repairs mandated by the ACO is relevant. The purpose of the moratorium on new connections, as well

as the sewer bank, was to prevent overwhelming an already impaired sewer system with new flow. The developers could have chosen to wait until those repairs were completed before connecting to the sewer system. We conclude that the I/I charge was sufficiently particularized to satisfy the first *Emerson College* factor.[FN12]

12 The judge concluded that certain other facts were relevant to whether a particularized service was provided in exchange for the I/I charge, and the developers emphasize them on appeal. They include that no new infrastructure was constructed; that the state of disrepair of the sewer system was not the fault of the developers; and that there were no administrative costs expended by the town. Emphasizing these facts confuses the facts in particular cases with requirements of *Emerson College*. See, e.g., *Silva v. Attleboro*, 454 Mass. 165, 166, 908 N.E.2d 722 (2009) (fees covered costs of municipal employees for administrative duties related to burial permits); *Bertone v. Department of Pub. Utils.*, 411 Mass. 536, 545-546, 583 N.E.2d 829 (1992) (electrical system in proper repair, new infrastructure built from fee charged for new hookups).

2. Purpose of I/I charges. In assessing the third *Emerson College* factor, whether the I/I charge was designed to compensate the town for its expenses rather than to raise revenue, "the critical question is whether the . . . charges [are] reasonably designed to compensate [the town] for anticipated expenses," *Southview Coop. Hous. Corp. v. Rent Control Bd. of Cambridge*, 396 Mass. 395, 404, 486 N.E.2d 700 (1985), or to reimburse a municipality for expenditures initially paid from a general fund. See *Bertone, supra* at 549-550. "[R]easonable latitude must be given to the agency in fixing [the amount of] charges," and such charges should "not be scrutinized too curiously even if some incidental revenue were obtained." *Southview Coop. Hous. Corp. v. Rent Control Bd. of Cambridge, supra* at 403, quoting *Opinion of the Justices*, 250 Mass. 591, 602, 148 N.E. 889 (1924).

Here, the judge found, in relevant part, that the monies collected from the I/I charge were placed in an account (I/I account), which was separate from the account that held monies collected from ratepayers, called the sewer enterprise fund. She [*662] also found that the I/I charge paid by the developers "reimbursed the [t]own for the monies previously expended by the [t]own to reduce I/I," concluding that "pay[ing] gallon for gallon for the creation of credit for the new flow . . . could be seen as reasonable," but that requiring the developers to pay the ten-to-one ratio was overcompensating the town. In addition, she stated, and the developers agree, that the charge of three dollars per

gallon was reasonable because the actual cost of one gallon of remediation was higher. See note 5, *supra*.

The judge also discussed that, at some point, the town transferred some \$440,000 from the I/I account into the sewer enterprise fund and, of that, \$100,000 was spent on a new pump at one of the town's pumping stations. This expenditure did not result in any I/I being credited to the sewer bank, but the new pump allowed the station to handle I/I that flowed from elsewhere in the system, thereby reducing the necessity of discharging SSO into the river. However, the judge concluded that the \$100,000 payment supported her conclusion that the I/I charge was a tax, stating that, as a percentage of the \$440,000 the developers paid, \$100,000 was a "substantial" amount diverted for general sewer repair, as opposed to direct I/I remediation. She concluded, "[W]hile the funds exacted from [the developers] have generally been put to the purpose of I/I reduction, the reality is that any repair to the dilapidated Saugus system could be so characterized. I am satisfied that the [t]own has already used the I/I [charge] as a source of funding for more general sewer repair."

The developers contend that the judge was correct to conclude that it was unreasonable for them to pay for the removal of ten gallons of I/I for each gallon of new flow they introduced, and that they should have paid only for what they introduced into the system. They also argue that if immediate access to the sewer bank was the particularized benefit, only costs incurred to allow that access, such as administrative costs, would be relevant.

We are not persuaded because, as discussed above, these arguments minimize the importance of the ACO. Pursuant to the terms of the sewer bank set forth in the ACO, the town was required to remove, at least initially, ten gallons of I/I for each gallon of new flow. Therefore, the town's requirement that the [*663] developers comply with that ten-to-one ratio was inherently reasonable. It also was reasonable for the developers to shoulder the entire financial burden involved in their adding new flow to an overburdened system before it was fully repaired, in exchange for immediate access to the sewer system.

The developers also claim that the judge was correct to conclude that, because the \$100,000 spent on the new pump did not result in a certain number of gallons of I/I being credited to the sewer bank, the I/I charge was a tax. We do not agree.

As discussed, the judge concluded that the I/I charge was used to reimburse the town for some of the monies it already had spent to remove I/I, so that the sewer bank could become operational. Because she determined that what the developers were paying for was not for immediate access to the sewer system, but for gallons of credit to the sewer bank, she analyzed whether the expenditure provided any direct I/I removal.

This was error. We conclude that the analysis of where the monies in the I/I account was spent should have ended when the judge found that the developers reimbursed the town for some of the monies already spent on I/I removal. See *Emerson College, supra at 425* (valid fee where monies "compensate the governmental entity providing the services for its expenses").

Moreover, although the \$100,000 was arguably "substantial" when compared to a total of \$440,000 the developers paid, it was incidental when compared to the \$6.5 million the town paid to remove enough I/I to allow the developers access to the sewer system by means of the sewer bank. In addition, the developers do not claim that they were denied access to the sewer system as a result of the installation of a new pump or that the new pump failed to help the pumping station handle I/I flow that originated elsewhere in the system.

Finally, the developers argue that, in any event, the town should have reduced the ratio of the number of gallons of I/I they had to pay to remove from ten to six gallons (and then to four) sooner than it did, pointing out that the issue whether the town should reduce the number of gallons of I/I removed was voted down by the board of selectmen, serving as sewer commissioners, several times. Although there was testimony that the commissioners did vote down reducing the ratio, no dates or minutes [*664] of these meetings are in the record.[FN13] In addition, the judge made no explicit findings concerning whether the ratios should have been reduced sooner. She stated only that the town achieved the reduction of 250,000 gallons of I/I removal "in approximately August of 2005" and 500,000 gallons in early 2006. The stipulated facts state that the developers paid their I/I charges through 2005 and 2006, before and after the town achieved its milestones under the ACO.[FN14] The town reduced the ten-to-one ratio to six-to-one on January 30, 2007, and to four-to-one on December 11, 2007.

13 The developers focus only on the deposition testimony of the town manager, who stated that the reason the sewer commissioners voted against a reduction in the ratio was to save taxpayers money, but the judge did not explicitly credit the testimony. There is deposition testimony of two members of the sewer commission, who testified to other reasons that they voted against a reduction in the ratio, see note 17, *infra*.

14 Denver Street LLC paid on October 4, 2005; Oak Point Realty Trust paid on November 9, 2005; and Central Street Saugus Realty, LLC, paid "on various dates" from May, 2005, through December, 2006. There was no evidence when Vinegar Hill Estates Trust paid its I/I charge, but it is uncontested that this trust benefited from reduced ratios.

The town argues that there is evidence that it did not lower its ratio right away because there were "clear difficulties" in estimating the actual amount of I/I removed due to any single repair. Therefore, it argues, given that the financial consequences were so high for violating the ACO, it should not be penalized for erring on the side of providing a "margin of safety." We agree.

Concerning when the town should have reduced its ratio from ten-to-one to six-to-one, we conclude that it should have done so within a reasonable time after it achieved the removal of the first 250,000 gallons of I/I. Therefore, as to the I/I charges paid before "approximately" August of 2005, there can be no question that the amount charged was reasonable. As to the I/I charges paid on October 4 and November 9, 2005, see note 14, supra, the developers have not demonstrated that the town's delay in reducing the ratio, at least through the end of 2005, was not "reasonably designed to compensate [the town] for anticipated expenses," because the town had achieved only the minimum results required to utilize the sewer bank. *Southview Coop. Hous. Corp. v. Rent Control Bd. of Cambridge*, 396 Mass. 395, 404, 486 N.E.2d 700 [*665] (1985). We conclude that it was rational for the town to require removal of ten gallons for every gallon of new flow the developers introduced, so that the new flow did not create a situation where the town was falling below the initial 250,000 gallons of I/I established by the ACO.

The question remaining is whether the developers have demonstrated that it was reasonable for the town to wait approximately eighteen months after the removal of 250,000 gallons of I/I to reduce the ratio to six-to-one, and approximately eighteen months after the removal of 500,000 gallons of I/I to reduce the ratio to four-to-one.

The facts that inform our analysis on this question are as follows. The three dollars per gallon charge was only a standard industry estimate of the costs of removing the I/I. The costs could not be "figure[d] . . . with any degree of accuracy," and depending on calculations not relevant here, the department would accept a figure as high as thirteen to fourteen dollars per gallon. Thus, as the judge found, the developers were not paying the true cost of removing each gallon of I/I, even if one accepts the lowest estimate of the actual cost of four dollars to four dollars and fifty cents. In addition, according to the testimony of the professional engineer[FN15] whose testimony the judge credited, one of the problems with estimating the number of gallons of I/I that was removed with each repair was due to groundwater migration. That is, when certain known leaks or defects were repaired in a pipe, I/I would travel further down the system where defects had not been evident in an initial inspection, and cause I/I overflow that also had to be repaired. He testified that, accordingly, the town may have thought it removed one

hundred gallons of I/I but eighty gallons would come back in a pipe one to two years later. He further stated that this groundwater migration was not part of the number of gallons of I/I the town estimated was removed from each repair. The engineer testified that, in his opinion, the ten-to-one ratio had a built-in safety factor because, after having been fined already, "the last thing the town would want" was another SSO event. Moreover, from the time the ACO was signed until the time of trial, there were [*666] instances where the town and the department disagreed over the number of gallons of I/I that had been removed, with the department always prevailing; the result was that the town was informed that it had not removed the number of gallons of I/I that it reported that it had.[FN16] For example, according to the town manager, thousands of gallons of I/I alleged removed between April and August, 2005, were disputed by the department and, by the time of the deposition in September, 2006, it had yet to be resolved.[FN17]

15 The town had hired the engineer's firm to assist, in part, in estimating the amount of I/I removal consistent with the ACO.

16 This may account for the testimony at the December, 2008, trial that, at that time, the town had removed approximately 450,000 gallons of I/I, yet the judge found that 500,000 gallons of I/I had been removed in early 2006.

17 One member of the sewer commission also addressed the department's disagreement with the town's estimate of the number of gallons of I/I that had been removed in 2005 and 2006. In addition, he stated that he voted against lowering the ratio in 2005 and 2006 because, as repairs that were being done, the estimate of the number of gallons of I/I in the sewer system went from approximately four to six million gallons to ten to fourteen million gallons. Therefore, removing 500,000 gallons meant that only five per cent of I/I had been removed when the town thought that ten per cent would have been removed, and he was concerned about the actual cost of the I/I removal. A second member of the sewer commission reiterated the decertification of gallons of I/I by the department in 2005, and stated that he voted against reducing the ratio because of "concerns about the gallonage, what the scope of the problem is; was the problem larger than we believed or how much it was going to cost to get it done and some [other members] wanted to see the gallonage larger before we made such a reduction."

Given these facts, as well as the financial consequences the town could suffer if it failed to meet its obligations under the ACO, the developers have not demonstrated that it was unreasonable for the town to postpone reducing its ratios for approximately eighteen

months, rather than risk violating the ACO. If the developers thought that the ratio of ten-to-one was too burdensome, they could have waited until the ratio was reduced before connecting their properties.

Conclusion. For the reasons set forth above, the judgments for the plaintiff developers are vacated. Judgments shall enter for the town in each of the four cases.

So ordered.

TOWN OF ESSEX vs. CITY OF GLOUCESTER.

APPEALS COURT OF MASSACHUSETTS

81 Mass. App. Ct. 1139
967 N.E.2d 651; 2012 Mass. App. Unpub. LEXIS 704

May 29, 2012, Entered

NOTICE: DECISIONS ISSUED BY THE APPEALS COURT PURSUANT TO ITS *RULE 1:28* ARE PRIMARILY ADDRESSED TO THE PARTIES AND, THEREFORE, MAY NOT FULLY ADDRESS THE FACTS OF THE CASE OR THE PANEL'S DECISIONAL RATIONALE. MOREOVER, *RULE 1:28* DECISIONS ARE NOT CIRCULATED TO THE ENTIRE COURT AND, THEREFORE, REPRESENT ONLY THE VIEWS OF THE PANEL THAT DECIDED THE CASE. A SUMMARY DECISION PURSUANT TO *RULE 1:28*, ISSUED AFTER FEBRUARY 25, 2008, MAY BE CITED FOR ITS PERSUASIVE VALUE BUT, BECAUSE OF THE LIMITATIONS NOTED ABOVE, NOT AS BINDING PRECEDENT.

SUBSEQUENT HISTORY: Related proceeding at *Bresnahan v. City of Gloucester, 2012 Mass. App. Unpub. LEXIS 921 (Mass. App. Ct., July 26, 2012)*

DISPOSITION: Judgment affirmed.

JUDGES: Katzmann, Rubin & Fecteau, JJ.

OPINION MEMORANDUM AND ORDER PURSUANT TO *RULE 1:28*

The town of Essex appeals from the allowance of summary judgment in favor of the city of Gloucester on its complaint alleging breach of contract and for declaratory judgment. The action was brought in connection with a contract between Essex and Gloucester whereby Essex pays Gloucester to pump Essex's sewage to Gloucester's treatment facility. Essex contends on appeal that, in separate rulings, two judges of the Superior Court misinterpreted the contract to conclude that a capital improvement project undertaken by Gloucester "affects" Essex's use and that Essex's increased fees do not constitute an illegal tax. Substantially for the reasons expressed in their thoughtful memoranda of decision, we affirm.

Gloucester operates a municipal sewage system which, as originally designed, "combines" both household and municipal waste and storm drainage in a single pipe that carried the combined effluent to Gloucester's treatment facility. The system would occasionally overload during times of wet weather or unusual storm or snow melt runoff and the system was designed to divert, on such occasions, a portion of the combined flow into Gloucester harbor to avoid sewage backing up into homes and businesses. In 1989, various State and Federal agencies filed suit in the Federal Court under the Federal Clean Water Act to stop the overflow into the harbor and other bodies of water. The case remained active for many years. In 2000, during the pendency of this suit, and with Essex being subject to similar legal pressures, Essex negotiated an agreement with Gloucester that permitted it to connect to Gloucester's sewage system and have its household/municipal wastes transported to and treated at the Gloucester treatment facility. Essex agreed to pay Gloucester's regular residential rate for the connection (with effluent measured by a flow meter located at the place where Essex connects to the Gloucester system).

Essex also agreed to pay for certain system improvements that this required. Significantly, the contract provided, in paragraph 18.1, that:

"In the event that the Gloucester Department of Public Works performs capital improvements on a portion of the City system affected by Essex effluent, or if Gloucester is directed or ordered by the EPA, DEP or any other Agency or Court of the state or federal government to provide a higher degree of treatment at the facility in the future, or otherwise to modify the process from that used or in place at the time of execution of this Agreement, the total cost of such replacement or additional facilities shall be apportioned between the parties as set

forth in paragraph 18.2 of this Agreement."

In 2005, Gloucester, Essex and the various agencies entered into a superseding consent decree in the Federal action that, in essence, obligated Gloucester to develop and implement a "CSO [Combined Sewer Overflow] Control Plan" (CSO project) which would improve the system by separating storm runoff wastewater from household effluent; while both components would ordinarily continue to be carried to the treatment facility, in times of excess runoff only the runoff would be diverted into the harbor. This overflow design met the satisfaction of the overseeing agencies, confirming that raw sewage would no longer be discharged into the harbor.

Considerable capital expense was incurred by Gloucester to improve the system. To pay for those improvements, Gloucester levied additional fees on all who used the system, including Essex; paying the increased fees under protest, Essex eventually brought this action essentially seeking a declaration that, by levying additional fees on Essex, Gloucester breached the contract. It alleges that it should not be charged for capital improvements made, pursuant to a consent decree, to Gloucester's sewage system; additionally, it claims the fees amount to an illegal tax. The gravamen of Essex's claims is that because the improvements to Gloucester's sewage system are physically "remote" from Essex's use -- i.e., the improvements are to parts of the system "downstream" from the town's connection to the sewage system -- and because it receives no particularized benefit from the system improvements, Essex has no obligation to pay for them.

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), citing *Mass.R.Civ.P. 56(c)*, 365 Mass. 824 (1974). An appellate court reviewing a grant of summary judgment must examine its allowance de novo and from the same record as the motion judge. *Matthews v. Ocean Spray Cranberries, Inc.*, 426 Mass. 122, 123 n.1, 686 N.E.2d 1303 (1997). The record is open to "independent consideration" on appeal, and the appellate court may make its own determination from the record to decide the ultimate questions of the correctness of summary judgment. *Ibid.*

Summary judgment is appropriate when the issue presented is one of contract interpretation because this issue raises only a question of law. *Cody v. Connecticut Gen. Life Ins. Co.*, 387 Mass. 142, 146, 439 N.E.2d 234 (1982). An interpretation of an unambiguous contract is a matter of law for the court. *Lawrence-Lynch Corp. v. Department of Env'tl. Mgmt.*, 392 Mass. 681, 682, 467

N.E.2d 838 (1984). The application of contract language to known facts also presents a question of law. *Kelleher v. American Mut. Life Ins. Co.*, 32 Mass. App. Ct. 501, 503, 590 N.E.2d 1178 (1992). Essex does not contend that the contract is ambiguous; rather, it contends that the judges' decisions read out of the contract important language of limitation.

Illegal tax. While Essex does not dispute that Gloucester has the authority to charge a user fee for the use of its common sewers, Essex contends that the capital improvement should be expensed separately from charges related to Essex's use of Gloucester's sewer system and hence the portion of the user fee relating to costs associated with the CSO project constitutes an unconstitutional tax, because (i) Essex receives no benefit from the capital improvements, and (ii) the "fees" are involuntary.

In the first summary judgment decision, the judge disagreed, concluding that Gloucester's fees did not constitute an illegal tax as considered under the applicable test of *Emerson College v. Boston*, 391 Mass. 415, 462 N.E.2d 1098 (1984). Significantly, the first judge ruled that while "ancillary benefits inur[e] to the public on occasions of wet weather in the form of cleaner beaches and greater variety of sea life," they were "de minimis compared to the primary benefit received by those sewer users paying the fee who receive a reliable sewer service." He discounted Essex's claim that no benefit has accrued to it. The judge ruled instead that because Gloucester was required to upgrade its system to avoid continued violation of the Clean Water Acts, and that its CSO project allows it to update the system to comply with the consent order, all of the users of the service are indeed benefiting from continued provision of sewer service.

The judge also decided that the second *Emerson* factor, voluntary payment, is satisfied because Essex voluntarily agreed to connect to Gloucester's sewer system after negotiating and agreeing to the residential rate, proportional to all other users of the system. He further noted that, at the time of the agreement, Essex was on notice of Gloucester's continuing obligation to comply with the first consent decree and with State and Federal laws, and of the likelihood that a separation of Gloucester's sewage and storm water systems would be required. On this motion record, the judge's decision on the issue of an alleged illegal tax was correct.

Breach of contract. Later, another Superior Court judge concluded, on a second motion record, that Gloucester's fees did not breach the contract. The second judge disagreed with Essex's contention that the CSO project is neither a capital improvement to a portion of the sewer collection system "affected by Essex effluent" nor an upgrade to the treatment facility. He interpreted the relevant portion of paragraph 18.1 of the contract, that allows costing to Essex its proportionate share of "capital improvements to a

'portion of the City (sewage collection) system affected by Essex effluent' or capital improvements to the Treatment Facility" to mean "to influence in some way."

Noting that Essex's effluent is not actually carried through that part of the sewer system being upgraded, he nevertheless concluded that Essex's effluent affects the entire sewer collection system because the system can only collect and process a finite amount of wastewater. While the Essex effluent originates separately from that collected in the downtown Gloucester area that is being upgraded, it still joins the effluent collected from that area of Gloucester upstream of the treatment facility at the main interceptor sewer. This additional flow from Essex thus requires Gloucester to "remove that much

more flow upstream [which includes the downtown area] to achieve the required . . . goals." Therefore, the judge properly concluded, on the record before him, that the additional effluent from Essex, when added to the sewer collection system, changes the amount of wastewater and storm water that the system is able to transfer and process and because the CSO project was on a "portion of the City system affected by Essex effluent" Gloucester could recover the costs of the CSO project by increasing the residential sewer rate to all customers.

Judgment affirmed.

By the Court (Katzmann, Rubin & Fecteau, JJ.),

FALMOUTH POLICE SUPERIOR OFFICERS ASSOCIATION & another[FN1] vs. TOWN OF FALMOUTH.

APPEALS COURT OF MASSACHUSETTS

80 Mass. App. Ct. 833
957 N.E.2d 1107; 2011 Mass. App. LEXIS 1442

September 8, 2011, Argued
November 22, 2011, Decided

SUBSEQUENT HISTORY: Review denied by *Falmouth Police Superior Officers Ass'n v. Town of Falmouth*, 461 Mass. 1106, 961 N.E.2d 590, 2012 Mass. LEXIS 94 (Mass., Feb. 2, 2012)

PRIOR HISTORY: Barnstable. Civil action commenced in the Superior Court Department on February 19, 2009. The case was heard by Gary A. Nickerson, J., on a motion for judgment on the pleadings.

HEADNOTES

Arbitration, Arbitrable question, Authority of arbitrator, Judicial review, Police. Civil Service, Applicability of provisions, Police. Labor, Arbitration, Civil service, Grievance procedure, Police. Police, Collective bargaining. Public Employment, Police, Termination. Contract, Arbitration.

COUNSEL: Andrew J. Gambaccini for the plaintiffs.

Tim D. Norris for the defendant.

JUDGES: Present: Kantrowitz, Graham, & Fecteau, JJ.

OPINION BY: GRAHAM

OPINION

[*833] GRAHAM, J. After being demoted and terminated from his position as a sergeant in the Falmouth Police Department, plaintiff Paul Driscoll

filed a grievance with his union, Falmouth Police Superior Officers Association (union), pursuant to a collective bargaining agreement (agreement) between the town of [*834] Falmouth (town) and the union. After pursuing the grievance process, the union demanded arbitration of Driscoll's claim. During the arbitration proceeding, the town raised as a threshold issue the arbitrability of Driscoll's claim, and the arbitrator concluded that the grievance was not subject to arbitration and thus declined to reach the merits of the claim.

1 Paul Driscoll.

The plaintiffs commenced an action to vacate the arbitrator's decision, see *G. L. c. 150C, § 11*, on the ground that the arbitrator exceeded the scope of his authority by ignoring the language of the agreement and violating the public policy favoring arbitration as a means to resolve labor disputes. A judge of the Superior Court affirmed the decision of the arbitrator. We affirm.

Background. Driscoll worked as a civil service employee for the Falmouth police department beginning in 1985, and in 1999 achieved the rank of sergeant. Driscoll's grievance arises out of a disciplinary process initiated in December, 2006, when the town issued a notice of contemplated discipline; an administrative hearing was convened on February 9, 2007, at the conclusion of which the hearing examiner closed the evidence. The town subsequently issued an amended notice to Driscoll that included additional charges, and a

second hearing was convened. The hearing officer issued a report in August, 2007, concluding that five of the charges against Driscoll had been substantiated. Driscoll was demoted and discharged from his employment with the police department. At all relevant times, Driscoll was a member of the union and the relevant agreement was in effect.

Driscoll then filed a grievance pursuant to the procedures outlined in the agreement,^[FN2] arguing that the town lacked just cause for the disciplinary action against him and that the hearing process suffered from procedural defects. The parties completed the grievance process and, in November, 2007, the plaintiffs requested arbitration of their claims. The parties selected an arbitrator and proceeded with arbitration, submitting to the arbitrator the question: "Did the Town of Falmouth violate the applicable collective bargaining agreement by discharging Paul Driscoll from employment? If so, what shall be the remedy?" The town argued, as a threshold matter, that Driscoll's claim was not subject [*835] to arbitration because it invoked the just cause provision of G. L. c. 31, rather than a separate term under the agreement, and that all prior disciplinary actions involving union members had been presented to the civil service commission (commission), rather than pursued through arbitration. The arbitrator deferred resolution of the issue of arbitrability and heard evidence on the merits of the claim. In an award issued January 16, 2009, the arbitrator concluded that Driscoll's claim was not arbitrable and declined to reach the merits of the claim.

2 Discussed infra.

The plaintiffs filed a complaint in Superior Court seeking to vacate the award. The judge denied the plaintiffs' motion for judgment on the pleadings and confirmed the arbitrator's award, concluding that the arbitrator did not exceed his authority or violate public policy. This appeal followed.

Discussion. The agreement in place between the union and the town establishes a multistep procedure for addressing grievances. The final step in the grievance procedure is to submit the dispute to arbitration by an arbitrator mutually agreeable to both parties or selected by the American Arbitration Association. Article 5.1B of the agreement defines a grievance as "any dispute alleged to be in violation of the terms of this Agreement." Article 5.2 confers on arbitrators "the authority to settle only grievances defined herein."

The town rests its argument against arbitrability on article 6.1 of the agreement, which provides: "The [town] and the [union] shall recognize and adhere to all provisions of the Massachusetts General Laws, Chapter 31, concerning Civil Service and particularly to the provisions relating to promotions, seniority, transfers, discharges, removal and suspensions." Chapter 31 governs civil service employment in the

Commonwealth. Of particular relevance here, *G. L. c. 31, § 41*, added by St. 1978, c. 393, § 11, provides that no civil service employee shall be discharged or suspended "[e]xcept for just cause." Pursuant to *G. L. c. 31, § 42*, amended by St. 1981, c. 767, § 19, civil service employees seeking to challenge an employer's actions under the previous section may file a complaint with the commission, but the commission may not address issues that have already been resolved through arbitration: "In the event the commission determines that the subject matter of such complaint [*836] has been previously resolved or litigated with respect to such employee, in accordance with the provisions of section eight of chapter one hundred and fifty E, or is presently being resolved in accordance with said section eight, the commission shall forthwith dismiss such complaint." *General Laws c. 150E, § 8*, amended by St. 1989, c. 341, § 80, in turn provides that public employees and employers "may include in any written agreement a grievance procedure culminating in final and binding arbitration to be invoked in the event of any dispute concerning the interpretation or application of such written agreement."

The arbitrator based his determination that the grievance was not arbitrable on two considerations: (1) the agreement lacks any language limiting the town's ability to discipline or discharge union members independent of the provisions of G. L. c. 31 in article 6.1, and (2) the agreement "imposes a reciprocal obligation on the Union to 'adhere to all provisions' of Chapter 31," which provides a mechanism for challenging an employer's decision to demote or discharge an employee. Because, the arbitrator reasoned, the agreement lacks additional "language providing for an election of remedies allowing a [union] member claiming to be demoted or removed without just cause to proceed either through arbitration or before the Civil Service Commission" (emphasis in original), union members may only address their complaints to the commission and do not have the option of proceeding to arbitration. The arbitrator also noted that all prior challenges to disciplinary action have been pursued before the commission, rather than through arbitration. On review, the Superior Court judge concluded that the arbitrator did not exceed his authority or violate public policy.

It is axiomatic that the power of the court to review the decision of an arbitrator is extremely limited. See, e.g., *Sheriff of Suffolk County v. AFSCME Council 93, Local 419*, 67 *Mass. App. Ct.* 702, 705, 856 *N.E.2d* 194 (2006). "Arbitration has long been viewed as a particularly appropriate and effective means to resolve labor disputes.... For this reason the Legislature has narrowly circumscribed the grounds to vacate arbitral awards." *School Comm. of Pittsfield v. United Educators of Pittsfield*, 438 *Mass.* 753, 758, 784 *N.E.2d* 11 (2003). If the dispute concerns a collective bargaining agreement with an arbitration provision, the

arbitrator's decision [*837] is subject to judicial review only as provided in G. L. c. 150C. *School Dist. of Beverly v. Geller*, 435 Mass. 223, 228, 755 N.E.2d 1241 (2001).

Courts "are bound by an arbitrator's findings and legal conclusions." *Ibid.* "Even a grossly erroneous decision is binding in the absence of fraud." *Trustees of the Boston & Me. Corp. v. Massachusetts Bay Transp. Authy.*, 363 Mass. 386, 390, 294 N.E.2d 340 (1973). The limited grounds on which a court may vacate an arbitral award are set forth in G. L. c. 150C, § 11, added by St. 1959, c. 546, § 1: "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 state or federal law." See *Duxbury v. Duxbury Permanent Firefighters Assn., Local 2167*, 50 Mass. App. Ct. 461, 464, 737 N.E.2d 1271 (2000) (court "look[s] only to determine if the arbitrator here exceeded his scope of reference, acted against clearly defined public policy, or ordered conduct prohibited by State or Federal law"). "[I]f, on review, the court finds that an arbitrator has exceeded his authority in fashioning an award, the court is required to vacate it.... The power and authority of an arbitrator is ordinarily derived entirely from a collective bargaining contract, and he violates his obligation to the parties if he substitutes his own brand of industrial justice for what has been agreed to by the parties in that contract.... [A]n arbitrator's award is legitimate only so long as it draws its essence from the collective bargaining agreement that he is confined to interpret and apply." *School Dist. of Beverly v. Geller*, *supra* at 228-229 (quotations and citations omitted).

Where this case concerns the conclusion by an arbitrator that a certain grievance is not arbitrable, rather than a decision on the merits of a grievance, our analysis stands in somewhat different stead from the typical judicial review of an arbitral award.[FN3] In this instance, we are concerned with an arbitral decision that [*838] conflicts with the broad public policy favoring the resolution of labor disputes through arbitration. See *Massachusetts Hy. Dept. v. American Fedn. of State, County & Mun. Employees, Council 93*, 420 Mass. 13, 16, 648 N.E.2d 430 (1995).

3 An arbitration award that offends public policy cannot be allowed to stand; courts, not arbitrators, resolve questions of public policy. See *Boston v. Boston Police Patrolmen's Assn.*, 443 Mass. 813, 818, 824 N.E.2d 855 (2005). A three-part analysis determines whether an arbitral award violates public policy. "First, the public policy must be well defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests." *Boston v. Boston Police Patrolmen's Assn.*, 74 Mass. App. Ct. 379, 381,

907 N.E.2d 241 (2009), quoting from *Sheriff of Suffolk County v. Jail Officers & Employees of Suffolk County*, 68 Mass. App. Ct. 903, 904, 860 N.E.2d 963 (2007), S.C., 451 Mass. 698, 888 N.E.2d 945 (2008). "Second, the conduct involved cannot be 'disfavored conduct, in the abstract.'" *Ibid.*, quoting from *Massachusetts Hy. Dept. v. American Fedn. of State, County & Mun. Employees, Council 93*, 420 Mass. 13, 17, 648 N.E.2d 430 (1995). "Third, 'the arbitrator's award reinstating the employee [must violate] public policy to such an extent that the employee's conduct would have required dismissal.'" *Ibid.*, quoting from *Bureau of Special Investigations v. Coalition of Pub. Safety*, 430 Mass. 601, 605, 722 N.E.2d 441 (2000).

We begin by observing that questions of "substantive arbitrability," that is whether a particular question falls within the scope of the agreement to arbitrate, are typically reserved for courts, not arbitrators. See *Sheriff of Suffolk County v. AFSCME Council 93, Local 419*, 75 Mass. App. Ct. 340, 341, 914 N.E.2d 124 (2009); Walsh, *A Judicial Guide to Labor & Employment Law*, § 19-3.32, at 442 (1990). Whether given parties have agreed to arbitrate a dispute is a matter of contract interpretation, and thus is normally for the court to decide. See *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582-583, 80 S. Ct. 1347, 4 L. Ed. 2d 1409 (1960); *Local No. 1710, Intl. Assn. of Firefighters, AFL-CIO v. Chicopee*, 430 Mass. 417, 420-421, 721 N.E.2d 378 (1999) (Local No. 1710). See also *Massachusetts Hy. Dept. v. Perini Corp.*, 444 Mass. 366, 375-376, 828 N.E.2d 34 (2005) (questions of "procedural arbitrability," such as whether a grievance procedure has been followed, to be decided by arbitrator). Though the town reserved the right to contest the arbitrability of the issue throughout the grievance process, it did not seek to stay arbitration by judicial means.

To evaluate the arbitrability of a grievance under a collective bargaining agreement, we look to the principles governing arbitration articulated by the United States Supreme Court. See *Local No. 1710, 430 Mass. at 420-421*; *Sheriff of Suffolk County v. AFSCME Council 93, Local 419*, 75 Mass. App. Ct. at 343. We are concerned here primarily with the principle that "where the contract contains an arbitration clause, there is a presumption of arbitrability in the sense that '[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an [*839] interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.'" [FN4] *Local No. 1710, supra* at 421, quoting from *AT&T Technologies, Inc. v. Communications Wkrs.*, 475 U.S. 643, 649, 106 S. Ct. 1415, 89 L. Ed. 2d 648 (1986). "[T]he presumption is successfully rebutted only if the

party resisting arbitration shows either (1) the existence of an express provision excluding the grievance from arbitration or (2) the 'most forceful evidence' of a purpose to exclude the claim from arbitration." *Sheriff of Suffolk County v. AFSCME Council 93, Local 419*, *supra* at 343-344, quoting from *Paper, Allied-Industrial, Chem. & Energy Wkrs. Intl. Union Local 4-2001 v. Exxon Mobil Ref. & Supply Co.*, 449 F.3d 616, 620 (5th Cir. 2006).

4 The other principles are "(1) 'a party cannot be forced to submit to arbitration [a] dispute which he has not agreed so to submit'; (2) whether an agreement presents a duty to arbitrate is a question to be resolved by a judge; (3) when determining whether the parties have agreed to submit a specific grievance to arbitration, a judge is not to rule on the merits of the grievance." *Sheriff of Suffolk County v. AFSCME Council 93, Local 419*, 75 Mass. App. Ct. at 343, quoting from *Local No. 1710,430 Mass. at 421*.

Under this agreement, the arbitrator has "the authority to settle only grievances defined herein," which consists of disputes "alleged to be in violation of the terms of this agreement." Since the agreement at issue here provides for arbitration only of grievances

that state a "violation" of the "terms" of the agreement, the arbitrator was required to limit his review of the town's actions to obligations contained within the four corners of the agreement.

Ultimately, the arbitrator had to determine whether a mention of the parties' adherence to civil service law imported into the agreement a just cause requirement. Just cause is a significant employment protection that should not be lightly imposed unless the parties have bargained it into their agreement. The agreement here provides no basis to conclude that the parties intended to allow the grievance and arbitration provisions to be an alternative option for disciplinary actions against employees otherwise subject to G. L. c. 31. The arbitrator properly determined that the lack of just cause language or election of remedies language meant that importation of a just cause requirement would require him to add language to the agreement that the [*840] parties had neither intended nor agreed to and thereby exceed the scope of his reference.

We conclude that the arbitrator did not exceed his authority nor did his decision violate public policy. Accordingly, the judgment of the Superior Court confirming the arbitrator's award is affirmed.

So ordered.

HAVERHILL RETIREMENT SYSTEM vs. CONTRIBUTORY RETIREMENT APPEAL BOARD & another. [FN1]

APPEALS COURT OF MASSACHUSETTS

82 Mass. App. Ct. 129
971 N.E.2d 330; 2012 Mass. App. LEXIS 214

March 12, 2012, Argued
July 11, 2012, Decided

PRIOR HISTORY: Essex. Civil action commenced in the Superior Court Department on August 12, 2010. The case was heard by Robert A. Cornetta, J., on a motion for judgment on the pleadings.

DISPOSITION: Judgment affirmed.

HEADNOTES

Retirement. Pension. Contributory Retirement Appeal Board. School and School Committee, Retirement benefits. Public Employment, Retirement benefits. Municipal Corporations, Retirement board, Pensions.

COUNSEL: Michael Sacco for the plaintiff.

Kirk G. Hanson, Assistant Attorney General, for the defendants.

JUDGES: Present: Kantrowitz, Milkey, & Sullivan, JJ.

OPINION BY: SULLIVAN

OPINION

[*129] SULLIVAN, J. This is an appeal arising from the erroneous enrollment of a municipal employee in the Haverhill Retirement System (HRS) rather than the Massachusetts Teachers' Retirement System (MTRS). The issue before us is whether the HRS may be required to make a statutorily defined reimbursement to MTRS for the period of time it received mistaken contributions once the employee, and his creditable service, were transferred [*130] to MTRS. This question turns on an issue of statutory construction, namely whether service "pertains" to a municipal retirement system within the meaning of *G. L. c. 32, § 3 (8) (c)*, as amended by St. 1987, c. 697, § 23, when an

employee has been erroneously enrolled in a municipal retirement system. The Contributory Retirement Appeal Board (CRAB) answered the question in the affirmative. The Superior Court judge concurred. We affirm.

1 Teachers' Retirement System.

Background. The administrative record reveals the following undisputed facts. The city of Haverhill (city) employed Albert Rosso as a school adjustment counsellor between 1995 and 1997. During those years Rosso was enrolled as a member of the HRS. Both his "regular deductions," *G. L. c. 32, § 1*, inserted by St. 1945, c. 658, § 1, also known as employee contributions, see *G. L. c. 32, §§ 1 & 22 (1) (b)*, and the city's employer contributions were paid to HRS.[FN2] Rosso's assignment to HRS was in error. By virtue of his position he should have been in the MTRS from the outset. In 1997 Rosso became a teacher and the contributions stopped. In 2003, the error was discovered, and Rosso's membership was transferred to MTRS. Thereafter, all of Rosso's ongoing deductions and the employer contributions were paid to MTRS.

2 A public employee's pension is made up of two components. The first component is "regular deductions," *G. L. c. 32, § 1*, also known as "employee contributions," *G. L. c. 32, § 22 (1) (b)*, inserted by St. 1945, c. 658, § 1, which are deducted from employee pay. The "regular interest" on those deductions, *G. L. c. 32, § 1*, see *G. L. c. 32, § 22 (6) (a) & (b)*, and the regular deductions comprise the employee's "accumulated total deductions." *G. L. c. 32, § 1*. The accumulated total deductions are then invested in an investment account. The second component is made up of the "employer contributions," see *G. L. c. 32, § 22(3)*, which are also invested. At retirement, the employee receives a "retirement allowance" consisting of an "annuity" funded by the accumulated total deductions, and a "pension," funded by employer contributions and earnings. *G. L. c. 32, § 1*.

MTRS wrote to HRS and requested that HRS transfer the accumulated total deductions that fund the annuity portion of the benefit to MTRS pursuant to *G. L. c. 32, § 3 (8) (a)*. In response, HRS forwarded to MTRS Rosso's accumulated total deductions in HRS. Chapter 32 does not, however, provide for the transfer of the employer contributions and related earnings for the pension portion of the benefit. Instead, *G. L. c. 32, § 3 (8) (c)*, as [*131] amended by St. 1960,[FN3] provides that, in certain circumstances, a transferor system may be required to transfer to the receiving system reimbursement for "such portion of the pension as shall be computed by the actuary." Relying on *G. L. c. 32, § 3 (8) (c)*, MTRS requested that HRS assume liability and reimburse MTRS for Rosso's pension for

the twenty months Rosso was mistakenly enrolled in the HRS. HRS declined, stating that it would not assume pension liability because the contributions had been made in error, and Rosso's service therefore did not "pertain" to HRS within the meaning of the statute.

3 This section provides in pertinent part, "[w]henever any retired member . . . receives a pension . . . from a system pertaining to one governmental unit in a case where a portion of such pension . . . is attributable to service in a second governmental unit to which another system pertains, the first governmental unit shall be reimbursed in full, in accordance with the provisions of this paragraph, by the second governmental unit for such portion of the pension as shall be computed by the actuary." (Emphasis supplied.)

MTRS requested a determination from the Public Employee Retirement Administration Commission, which found that HRS was responsible for the liability. HRS appealed. A division of administrative law appeals (DALA) magistrate determined that HRS was obligated to assume liability for the relevant period. CRAB affirmed, and the Superior Court judge upheld the CRAB determination.

Standard of review. "Appellate review under *G. L. c. 30A, § 14*, is limited to determining whether the agency's decision was unsupported by substantial evidence, arbitrary and capricious, or otherwise based on an error of law." *Arlington Contributory Retirement Bd. v. Contributory Retirement Appeal Bd.*, 75 Mass. App. Ct. 437, 441, 914 N.E.2d 957 (2009) (*Arlington*). Here we are presented with a pure question of law. Although questions of law are subject to de novo review, *Rosing v. Teachers' Retirement Sys.*, 458 Mass. 283, 290, 936 N.E.2d 875 (2010), "[w]e typically defer to CRAB's expertise and accord "great weight" to [its] interpretation and application of the statutory provisions it is charged with administering." *MacKay v. Contributory Retirement Appeal Bd.*, 56 Mass. App. Ct. 924, 925, 781 N.E.2d 1 (2002), quoting from *Lisbon v. Contributory Retirement Appeal Bd.*, 41 Mass. App. Ct. 246, 257 n.10, 670 N.E.2d 392 (1996).

Discussion. CRAB held that *G. L. c. 32, § 3 (8) (c)*, clearly [*132] mandates the transfer of the funds "[t]o protect the financial integrity of the system" and that the Legislature did not intend to permit a municipality to retain mistaken contributions while at the same time leaving another retirement system entirely responsible for the pension portion of the retirement benefit. HRS argues that because Rosso was ineligible, his service does not "pertain" to HRS.

Because the statute does not explicitly address the question of erroneous enrollment in a retirement system, we treat the statute as ambiguous and decide the case accordingly. See *Adams v. Boston*, 461 Mass. 602, 611,

963 N.E.2d 694 (2012). Compare *Boston Hous. Authy. v. National Conference of Firemen & Oilers, Local 3*, 458 Mass. 155, 935 N.E.2d 1260 (2010) (G. L. c. 150E, § 7, subsequently amended by St. 2011, c. 198). CRAB's case specific determination is entitled to "substantial deference." *Provençal v. Commonwealth Health Ins. Connector Auth.*, 456 Mass. 506, 514, 924 N.E.2d 689 (2010) "[A] [S]tate administrative agency in Massachusetts has considerable leeway in interpreting a statute it is charged with enforcing, unless a statute unambiguously bars the agency's approach." *Zoning Bd. of Appeals of Amesbury v. Housing Appeals Comm.*, 457 Mass. 748, 760, 933 N.E.2d 74 (2010), quoting from *Goldberg v. Board of Health of Granby*, 444 Mass. 627, 633, 830 N.E.2d 207 (2005) (determining the authority of State housing appeal committee). As CRAB noted in its decision, "[s]tatutory silence, like statutory ambiguity, often requires that an agency give clarity to an issue necessarily implicated by the statute but either not addressed by the Legislature or delegated to the superior expertise of agency administrators." *Goldberg v. Board of Health of Granby*, *supra* at 634 (upholding agency regulations).

"We interpret a statute to give effect to the Legislature's intent." *Boston Retirement Bd. v. Contributory Retirement Appeal Bd.*, 441 Mass. 78, 83, 803 N.E.2d 325 (2004). See *Adams v. Boston*, 461 Mass. at 611; *Arlington*, 75 Mass. App. Ct. at 442. The purpose of G. L. c. 32, § 3 (8) (a) and (c), with certain exceptions not applicable here, is to ensure that a member of multiple contributory retirement systems will receive a pension based on all the member's years of creditable service to the full extent permitted by those retirement systems. Towards that end, § 3 (8) (a) [FN4] [*133] provides that the accumulated total deductions which fund the annuity portion of the benefit may be transferred within ninety days, and § 3 (8) (c) provides that the retirement system that recognizes service in other contributory systems and that pays the pension portion of the benefit for all of the years of service must be recompensed in full for the portion of the pension benefit attributable to service in another contributory system.

4 HRS argues that it should not be penalized because it returned the accumulated total deductions, when it could have simply refunded the money to the employee in accordance with G. L. c. 32, § 20 (5) (c) (2). We do not decide, hypothetically, whether HRS could have expelled Rosso and returned the contributions pursuant to G. L. c. 32, § 20 (5) (c) (2), although we note that a direct refund of the accumulated total deductions to the employee, rather than a transfer to another participating retirement system, may have resulted in substantial and unnecessary tax consequences to the employee. See *IRC* § 3405; *Treas. Reg.* §§ 31.3405 (c)-1,

Q&A-1; 1.402 (c)-2, *Q&A-1* (b) (3); 1.403 (b)-2, *Q&A-2* (b). See also *Treas. Reg.* § 31.3405 (c)-1, *Q&A-2* (2006). Nor do we rest our decision on the fact that HRS complied with § 3 (8) (a) in this instance.

Most critical to the analysis here, G. L. c. 32, § 3(8)(c), provides that the method of computation for calculating the pension liability of the transferring fund shall be based on an actuarial computation which includes, among other things, all years of service in the transferring fund. The Legislature's choice of, and reliance on, the actuarial calculation of the cost of the pension benefit, rather than a simple reimbursement of employer contributions (with or without earnings due), reflects a legislative commitment to calculating the liability of the transferring fund in such a way that the receiving fund is fully compensated for the true actuarial cost of the pension benefit. As with the Veteran's Retirement Act, G. L. c. 32, § 59A, which contains analogous reimbursement provisions, the "Legislature has enabled governmental units that approve and pay pensions based on creditable service to units other than the paying unit to spread some of the cost of the pension to those other units." *Lexington v. Bedford*, 378 Mass. 562, 572, 393 N.E.2d 321 (1979).

It is against this backdrop that the CRAB decision must be reviewed. HRS argues that CRAB erred as a matter of law because Rosso was erroneously enrolled, and, therefore, his service did not truly "pertain" to HRS in its capacity as the retirement system of the second governmental unit [F5] under [*134] § 3 (8) (c). See generally *Arlington*, 75 Mass. App. Ct. 437, 914 N.E.2d 957. While Rosso was enrolled in error, he was nonetheless enrolled in HRS. HRS accepted the employer contributions made on his behalf, invested the money, and obtained the benefit of the investment earnings. For so long as HRS has use of the contributions and earnings (or losses), the other members of HRS obtain the benefit of his participation, and the employer contributions made on his behalf assist in funding the pensions of all HRS members, paying the benefits of HRS retirees, and the costs of HRS administration. *Id.* at 444. In this way, his participation "pertained" to HRS. Permitting HRS to retain the actuarial value of the pension portion of the benefit, while leaving MTRS to pay the full pension, including the benefit attributable to the period for which HRS received contributions, would be contrary to the purpose and mandate of § 3 (8) (c). Failing to require full funding of the retirement system which provides the pension benefit would defeat the statutory purpose of financial stability, would visit a windfall on the system that received contributions in error, and would discourage the detection and correction of errors in administration. In this "notoriously complex" area, see *Namay v. Contributory Retirement Bd.*, 19 Mass. App. Ct. 456, 463, 475 N.E.2d 419 (1985), we discern no

error in the Superior Court judgment affirming the CRAB decision.

5 To the extent that HRS argues, in the alternative, that § 3 (8) (c) requires that Rosso be employed by two different governmental units, that question has already been addressed in *Arlington*, 75 Mass. App. Ct. at 443. There we

held that although a member had been employed by only one governmental unit (Arlington), the member had participated in two different retirement systems, and that this dual participation satisfied the requirements of the statute.

Judgment affirmed.

LINDA INNIS, trustee,[FN1] vs. BOARD OF ASSESSORS OF SWAMPSCOTT.

APPEALS COURT OF MASSACHUSETTS

81 Mass. App. Ct. 1121

962 N.E.2d 763; 2012 Mass. App. Unpub. LEXIS 319

March 14, 2012, Entered

NOTICE: DECISIONS ISSUED BY THE APPEALS COURT PURSUANT TO ITS *RULE 1:28* ARE PRIMARILY ADDRESSED TO THE PARTIES AND, THEREFORE, MAY NOT FULLY ADDRESS THE FACTS OF THE CASE OR THE PANEL'S DECISIONAL RATIONALE. MOREOVER, *RULE 1:28* DECISIONS ARE NOT CIRCULATED TO THE ENTIRE COURT AND, THEREFORE, REPRESENT ONLY THE VIEWS OF THE PANEL THAT DECIDED THE CASE. A SUMMARY DECISION PURSUANT TO *RULE 1:28*, ISSUED AFTER FEBRUARY 25, 2008, MAY BE CITED FOR ITS PERSUASIVE VALUE BUT, BECAUSE OF THE LIMITATIONS NOTED ABOVE, NOT AS BINDING PRECEDENT.

DISPOSITION: Decision of Appellate Tax Board affirmed.

JUDGES: Kantrowitz, Trainor & Hanlon, JJ.

OPINION MEMORANDUM AND ORDER PURSUANT TO *RULE 1:28*

The sole beneficiary[FN2] of the Green Rock Nominee Trust (trust) brought an action against the town of Swampscott, which denied the trust's request for a tax abatement. The trust appealed the town's decision to the Appellate Tax Board (board) and lost on jurisdictional grounds due to a failure to timely pay a quarterly tax. On appeal, the trust essentially claims that the town was informed of its address change, but nonetheless mailed the bill to the old address.

1 Of the Green Rock Nominee Trust

2 The town initially claimed that the appeal should be dismissed because Jonathan Bedard, the current sole beneficiary of the trust, originally filed this appeal pro se. This issue was mooted by the filing of a motion to have the

trust's briefs treated as filed by the attorney who argued this case before us.

After the trust's initial request for an abatement was denied, it opted to appeal by means of an informal procedure before the board. In electing this option, the trustee signed a waiver of the trust's right to appeal the board's decision to this court "except on questions of law raised by the pleadings, or by an agreed statement of facts, or shown by the report of the board." The board dismissed the appeal on jurisdictional grounds because the trust had failed to make a timely payment on its last quarterly tax bill for the tax year at issue.[FN3]

3 *General Laws c. 59, § 64*, provides, in pertinent part: "if the tax due for the full fiscal year on a parcel of real estate is more than \$3,000, said tax shall not be abated unless the full amount of said tax due has been paid without the incurring of any interest charges on any part of said tax pursuant to section fifty-seven of chapter fifty-nine of the General Laws."

Before us, the trust claims that it was entitled to a hearing on the merits because it never received the tax bill, which was sent to a former address despite the town having notice of the move, and therefore it was unreasonable to expect the trust to make a timely payment. The town moved to strike all evidence of these facts from the trust's brief and record appendix.

While we are sympathetic to the trust's predicament, we agree with the town that these facts are not properly before us. Pursuant to the trust's election of the informal procedure and signed waiver of appeal, we are limited in our review to questions of law raised by the pleadings.[FN4] The town did not file an answer, and the only pleading in this case was the trust's complaint, or "Statement Under Informal Procedure," which concerned its factual allegations that the property

was overvalued. The statement itself did not provide sufficient information for us to review the dismissal.

4 We would also be able to review an agreed statement of facts and a report by the board. However, here, the board did not issue a report, and the trust concedes that its "Statement of Evidence" is not properly before us.

The trust claims that the town's motion to dismiss, the trust's opposition to the motion, and the attached documents are also "responsive pleadings" under the "Appellate Tax Board Rules of Practice and Procedure" (ATB rules), and are therefore also properly before us. The ATB rules provide, "In lieu of filing an answer, the appellee may file a motion to dismiss the appeal or other motions." *831 Code Mass. Regs. § 1.12* (2011). The trust argues that the title of the section, "Answers, Responsive Pleadings and Service Thereof," suggests that a motion to dismiss constitutes a "responsive pleading" within the meaning of the statute. We disagree. Generally, "'a motion to dismiss is not a 'responsive pleading' within [*Fed.R.Civ.P. 15(a)*], which is substantially the same as *Mass.R.Civ.P. 15[a]*" *National Equity Properties, Inc. v. Hanover Ins. Co.*, 74 *Mass. App. Ct.* 917, 918, 910 *N.E.2d* 392 (2009), quoting from *Keene Lumber Co. v. Leventhal*, 165 *F.2d* 815, 823 (1st Cir. 1948).

Additionally, under *831 Code Mass. Regs. § 1.14* (2011), "[p]arties may amend their pleadings at any time before the decision of the Board, by consent of the adverse party or by leave of the Board." Here, the trust was free to request leave to amend the complaint after receiving the town's motion to dismiss. By amending the pleading in the case, the trust could have preserved any additional issues of law for appeal, pursuant to its waiver under the informal procedure. Instead, the trust engaged in motion practice within the confines of the informal procedure it had elected and failed to modify the initial complaint. As such, the town's motion to dismiss, the trust's reply to that motion, and all attached documents were not pleadings. "With respect to the proceedings before the board all that we have before us is the pleading setting forth the facts alleged by the [trust] as the basis of its claim, and the decision of the board, without findings or rulings, in favor of the respondents. On such a record there is nothing for this court to review." *Milchen Furniture Co. v. Assessors of*

Quincy, 335 *Mass.* 767, 767, 140 *N.E.2d* 199, 140 *N.E.2d* 200 (1957).

Even if we were to consider the evidence, the trust would fare no better. The board did not err in concluding that when the trust had missed a timely payment, the board had no jurisdiction to consider the request for abatement. In *Stilson v. Assessors of Gloucester*, 385 *Mass.* 724, 732, 434 *N.E.2d* 158 (1982), the taxpayer complained that she had timely mailed the tax payment, but resubmitted it a few days late, with interest, when the town did not receive her earlier payment. Noting that the taxpayer was essentially arguing that she should be excused from the statutory requirement, the court held that the board had only the jurisdiction conferred on it by statute and "[a]dherence to the statutory prerequisites is essential to an effective application for abatement." *Ibid.* Similarly, in *Bible Baptist Church of Plymouth, Inc. v. Assessors of Plymouth*, 391 *Mass.* 1015, 1016, 462 *N.E.2d* 1368 (1984), the court held that the failure of the taxpayer to receive a tax bill did not cure the jurisdictional defect, as the statute requires only that a tax bill be sent, not that it be received.

The trust points to dictum in *Bible Baptist, supra*, which notes that "there is nothing unfair or unconstitutional about the statute as applied in these circumstances. The bill was not received because it was sent to the church's old address; it was sent to the old address because the pastor had not thought it necessary to inform the town of the church's new address." *Ibid.* Because, in contrast to *Bible Baptist*, the trust had notified the town of its address change, it claims that, as applied here, the statute unfairly violated the trust's procedural due process rights. However, we disagree that merely informing the town of an address change absolves the trust of all of its obligations to make timely payment of its bills. The trust had notice that tax bills were sent out quarterly and should have known that payment was due. Additionally, the trust could have effortlessly alerted the post office to forward its mail. Thus, while, as noted above, we have some sympathy for the trust, the law is clear as to the obligations of the trust. As a timely payment was not made, the board had no jurisdiction to rule on the merits of the case.

Decision of Appellate Tax Board affirmed.

By the Court (Kantrowitz, Trainor & Hanlon, JJ.),

EDWARD MARCUS vs. CITY OF NEWTON.

SUPREME JUDICIAL COURT OF MASSACHUSETTS

462 Mass. 148
967 N.E.2d 140; 2012 Mass. LEXIS 353

January 4, 2012, Argued
May 7, 2012, Decided

PRIOR HISTORY: Middlesex. Civil action commenced in the Superior Court Department on July 2, 2009. A motion for partial summary judgment was heard by Bonnie H. MacLeod-Mancuso, J. The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

HEADNOTES

Practice, Civil, Summary judgment, Interlocutory appeal, Execution. Governmental Immunity. Municipal Corporations, Governmental immunity. Negligence, Governmental immunity.

COUNSEL: Maura E. O'Keefe, Assistant City Solicitor, for the defendant.

Joan S. Amon for the plaintiff.

John J. Davis, Michael Leedberg, & Thomas J. Urbelis, for City Solicitors and Town Counsel Association, amicus curiae, submitted a brief.

Andrew M. Abraham, J. Michael Conley, Thomas J. Carey, Jr., & Thomas R. Murphy, for Massachusetts Academy of Trial Attorneys, amicus curiae, submitted a brief.

JUDGES: Present: Ireland, C.J., Spina, Cordy, Botsford, Gants, Duffly, & Lenk, JJ.

OPINION BY: BOTSFORD

OPINION

[*149] BOTSFORD, J. Edward Marcus was injured during a softball game on a public field owned by the city of Newton (city). We consider the city's appeal,[FN1] which we transferred from the Appeals Court on our own motion, from the denial of its motion for summary judgment, based on the ground that it was immune from suit pursuant to the recreational use statute, *G. L. c. 21, § 17C*. The city argues that the judge erred in denying its motion, and that it is entitled to immediate appellate review of the denial under the doctrine of present execution. Although we hold that the doctrine does not apply in the circumstances of this case, we nonetheless consider the merits of the city's appeal, and conclude the denial of its motion for summary judgment was appropriate.[FN2]

1 There are other defendants that are not parties to this appeal.

2 We acknowledge the amicus briefs filed by the City Solicitors and Town Counsel Association and the Massachusetts Academy of Trial Attorneys.

1. Background. a. Facts. In the summer of 2007, Marcus participated in a softball league organized by an organization called "Coed Jewish Sports." Marcus joined the league after mailing an application and an eighty-dollar registration fee to the organization. Payment of the registration fee entitled Marcus to participate in the league, receive a team T-shirt, and attend a cookout hosted by the league at the end of the season.

A payment of \$1,200 by Coed Jewish Sports to the city's parks and recreation department secured the league a permit. The permit in turn reserved for the league the use of McGrath Field, a property owned and maintained by the city, for eight two-hour blocks between June and August, 2007. Marcus had no knowledge of or participation in the permit application process undertaken by Coed Jewish Sports, and never applied directly to the city for any such permit. According to the city, the \$1,200 payment was used to defray approximately \$12,000 in annual maintenance and administrative costs that it incurred [*150] in operating McGrath Field in 2007, including grass cutting and trimming, fertilization, and aeration.

On July 8, 2007, while participating in a league game, Marcus was sitting in a grassy area watching the game and waiting for his turn at bat. The area was shaded by several nearby trees, which stood on adjacent property owned by Temple Shalom. Marcus heard a cracking sound and realized that a tree was falling in his direction. He was unable to avoid the falling tree, which struck him in the back. Marcus suffered two fractured vertebrae, shattered right and left shoulder blades, and various other injuries as a result of the tree's impact.

b. Procedural history. Marcus filed his complaint in the Superior Court against the city and the other defendants (see note 1, supra) on July 2, 2009. With regard to the city, he alleged that it had a duty to maintain McGrath Field in a careful, safe, and prudent manner; it was negligent in poorly maintaining the property and, specifically, allowing the allegedly rotten tree and its branches to overhang its property without proper maintenance; and as a result of the city's negligence, he suffered serious physical injuries. In its answer, the city denied liability and asserted that, in any event, it was immune from liability under the recreational use statute, *G. L. c. 21, § 17C*. On June 15, 2010, the city filed its motion for summary judgment in which it presented, inter alia, its claim of immunity from suit pursuant to *G. L. c. 21, § 17C*. After a hearing, a Superior Court judge denied the city's motion on the ground that there remained genuine issues of material fact. Its appeal followed.

c. Recreational use statute. The recreational use statute, *G. L. c. 21, § 17C* (§ 17C), provides that any person[FN3] "having an interest in land . . . who lawfully permits the public to use such land for

recreational, conservation, scientific, educational, environmental, ecological, research, religious, or charitable purposes without imposing a charge [*151] or fee therefor . . . shall not be liable for personal injuries or property damage sustained by such members of the public . . . while on said land in the absence of wilful, wanton, or reckless conduct by such person. Such permission shall not confer upon any member of the public using said land, including without limitation a minor, the status of an invitee or licensee to whom any duty would be owed by said person." § 17C (a). The statute further provides that "[t]he liability of any person who imposes a charge or fee for the use of his land by the public for [any of the above enumerated] purposes . . . shall not be limited by any provision of this section." § 17C (b). Section 17C applies with equal force to governmental and private landowners. See *Ali v. Boston*, 441 Mass. 233, 237 n.7, 804 N.E.2d 927 (2004); *Anderson v. Springfield*, 406 Mass. 632, 634, 549 N.E.2d 1127 (1990).

3 The statute defines "person" broadly to include "any governmental body, agency or instrumentality, a nonprofit corporation, trust, association, corporation, company or other business organization and any director, officer, trustee, member, employee, authorized volunteer or agent thereof." *G. L. c. 21, § 17C (b)*.

2. Discussion. The city contends that the doctrine of present execution entitles it to immediate review of the interlocutory order denying its motion for summary judgment.[FN4] The premise underlying its claim is that § 17C provides a landowner in its position with immunity from suit. We disagree.

4 Although the city did not address the doctrine of present execution in its initial brief to the Appeals Court, Marcus argued that the city was not entitled to immediate appellate review under the doctrine. In our order transferring the appeal from the Appeals Court to this court, we requested that the parties submit supplemental briefs on the issue whether *G. L. c. 21, § 17C*, "where applicable, provides an immunity from suit (as opposed to exemption from liability) such that the denial of a defendant's [dispositive motion] on the basis of the statute is immediately appealable under the doctrine of present execution." The city then filed its supplemental brief arguing that it is entitled to immediate appellate review under the doctrine, and Marcus filed a supplemental brief taking the opposite position.

a. Doctrine of present execution. As a general matter, "there is no right to appeal from an interlocutory order unless a statute or rule authorizes it." *Maddocks v. Ricker*, 403 Mass. 592, 597, 531 N.E.2d 583 (1988).

"The policy underlying this rule is that 'a party ought not to have the power to interrupt the progress of the litigation by piecemeal appeals that cause delay and often waste judicial effort in deciding questions that will turn out to be unimportant.'" *Fabre v. Walton*, 436 Mass. 517, 521, 781 N.E.2d 780 (2002), S.C., 441 Mass. 9, 802 N.E.2d 1030 (2004), quoting *Borman v. Borman*, 378 Mass. 775, 779, 393 N.E.2d 847 (1979). However, a "narrow exception" to this general rule lies in the [*152] doctrine of present execution, under which an immediate appeal is appropriate if the interlocutory ruling "[1] 'will interfere with rights in a way that cannot be remedied on appeal' from the final judgment, and [2] where the matter is 'collateral' to the merits of the controversy." *Elles v. Zoning Bd. of Appeals of Quincy*, 450 Mass. 671, 674, 881 N.E.2d 129 (2008), quoting *Maddocks v. Ricker*, *supra* at 597-600. See, e.g., *Fabre v. Walton*, *supra* at 520-522 (interlocutory appellate review appropriate to consider denial of motion to dismiss filed pursuant to "anti-SLAPP" statute, *G. L. c. 231, § 59H*); *Brum v. Dartmouth*, 428 Mass. 684, 688, 704 N.E.2d 1147 (1999) (interlocutory appellate review appropriate to consider Commonwealth's motion to dismiss based on claim of immunity from suit pursuant to Massachusetts Tort Claims Act, *G. L. c. 258, § 10*).

Under this rule, litigants claiming immunity may only avail themselves of the doctrine of present execution if § 17C provides immunity from suit, rather than merely an exemption from liability for ordinary negligence.[FN5] See *Breault v. Chairman of the Bd. of Fire Comm'rs of Springfield*, 401 Mass. 26, 31, 513 N.E.2d 1277 (1987), cert. denied sub nom. *Forastiere v. Breault*, 485 U.S. 906, 108 S. Ct. 1078, 99 L. Ed. 2d 237 (1988). This result obtains because, "[i]f . . . the asserted right is one of freedom from suit, the defendant's right will be lost forever unless that right is determined now," whereas "if the asserted right to immunity is but a right to freedom from liability . . . [the defendant's] right could be vindicated fully on appeal after trial." *Id.* See *Brum v. Dartmouth*, 428 Mass. at 688 (only orders denying immunity from suit enjoy benefit of present execution doctrine, because "[t]he right to immunity from suit would be 'lost forever' if an order denying it were not appealable until the close of litigation . . .").

5 We previously have allowed an interlocutory appeal from a denial of a motion for summary judgment based on government immunity from suit under 42 U.S.C. § 1983 (1982). See *Hopper v. Callahan*, 408 Mass. 621, 624, 562 N.E.2d 822 (1990). As a consequence, there is no merit to Marcus's claim that the city has essentially waived its right to appeal pursuant to the doctrine of present execution by not filing a motion to dismiss. We have never required this doctrine to be asserted at the earliest possible stage of litigation.

The city's motion for summary judgment asserted a claim of immunity from suit, but in other pleadings, the city claimed immunity from liability. The city has a right to interlocutory [*153] appeal only if § 17C provides immunity from suit, rather than merely an exemption from liability for ordinary negligence. In evaluating whether § 17C provides immunity from suit or merely an exemption from liability, we first examine the plain language of the statute. See *Commissioner of Revenue v. Cargill, Inc.*, 429 Mass. 79, 82, 706 N.E.2d 625 (1999). Section 17C provides that a landowner making land open to the public for recreational uses free of charge "shall not be liable for personal injuries or property damage sustained by such members of the public [unless there is wilful, wanton, or reckless conduct]" (emphasis added). In other words, where the landowner does not impose a fee or charge, § 17C merely provides an exemption from liability for ordinary negligence claims; it does not provide immunity from suit. Even if a landowner can claim the full scope of immunity available under the statute, that landowner will still be liable for "wilful, wanton, or reckless conduct," and thus is not immune from suit. See *G. L. c. 21, § 17C (a)*. We need go no further than the plain text of § 17C to conclude that the statute provides only immunity from liability. Thus, the city is not entitled to an interlocutory appeal from the denial of its motion for summary judgment under the doctrine of present execution.

b. Exemption from liability for negligence under § 17C. Nevertheless, we address the city's claim that in the circumstances of this case, it qualified for § 17C's exemption from liability for ordinary negligence as a matter of law, and that therefore, its motion for summary judgment should have been granted. We choose to do so because the claim has been briefed fully by the parties, it raises a significant issue concerning the proper interpretation of the recreational use statute, and addressing it would be in the public interest. See, e.g., *Boxford v. Massachusetts Highway Dep't*, 458 Mass. 596, 601 n.13, 940 N.E.2d 404 (2010), citing *Wellesley College v. Attorney Gen.*, 313 Mass. 722, 731, 49 N.E.2d 220 (1943).

i. Payment of fee. The city asserts it must be exempt from negligence liability because Marcus himself paid no admission fee or other charge to the city in exchange for playing softball on McGrath Field.[FN6] In support of the claim, the city points to a [*154] decision of this court and one of the Appeals Court where the plaintiffs had not paid entrance or admission fees to gain access to public recreational facilities although some kind of registration fee was paid to the public landowner in connection with the sports activities the plaintiffs had come to watch. See *Seich v. Canton*, 426 Mass. 84, 85-86, 686 N.E.2d 981 (1997) (Seich); *Whooley v. Commonwealth*, 57 Mass. App. Ct. 909, 910, 783 N.E.2d 461 (2003) (Whooley). These cases are very different on their facts from the instant case.[FN7]

6 There is no dispute that the city owns the land in question and that the plaintiff was engaged in a "recreational" activity as contemplated by the recreational use statute.

7 In *Seich v. Canton*, 426 Mass. 84, 686 N.E.2d 981 (1997) (Seich), the plaintiffs were the parents of a child who was participating in a basketball league organized by the town's recreation department. The parents had paid a sixty-five dollar registration fee to the town in order for their daughter to participate; the fee covered the basketball league's incidental costs. *Id.* at 84, 85 & n.3. In the plaintiffs' suit for damages relating to injuries sustained by the mother while she was watching her daughter's basketball game, this court affirmed the grant of summary judgment in favor of the town, concluding that the town was entitled as a matter of law to the exemption from negligence liability under § 17C. *Id.* at 86. We reasoned that the registration fee was a charge for participation in the basketball league itself, not for use of the school's gymnasium, *Id.* at 85, and the town charged no admission fee for the plaintiffs to be spectators at the game. *Id.* We quoted with approval the observation of the motion judge that "[w]hether or not the plaintiffs ever went to the school to watch their daughter, they still had to pay a fee for her to register with the basketball team. On the other hand, even if the plaintiffs did not register their daughter to play on the team, the plaintiffs, along with any other member of the public, could have gone to the school and observed the basketball game without paying a fee." *Id.* at 86.

In *Whooley v. Commonwealth*, 57 Mass. App. Ct. 909, 783 N.E.2d 461 (2003), the plaintiff went to an ice hockey rink owned by the Commonwealth to watch her grandson play ice hockey, and was injured in a fall on her way to the bleachers. *Id.* at 909. She claimed that the youth hockey league in which her grandson participated had paid a fee to use the rink, *id.* at 910, but she did not pay any fee to be a spectator. Following Seich, the Appeals Court concluded that the plaintiff was a spectator who, like any other member of the public, could enter the rink facility free of charge and watch any hockey game being played, and that in those circumstances, the town could claim exemption from negligence liability under *G. L. c. 21, § 17C*. *Whooley v. Commonwealth*, *supra*.

The statute, by its terms, focuses on whether the landowner "lawfully permits the public to use such land for recreational . . . purposes without imposing a charge or fee therefor." § 17C (a).[FN8] In other words, the issue is whether the landowner [*155] charges a fee for the particular use to which the plaintiff puts the land.

More specifically, and contrary to the city's apparent reading, § 17C does not provide an exemption from liability for ordinary negligence if the landowner imposes a charge or fee for a particular use of recreational land, but the user does not personally or directly pay the charge to the landowner.

8 The same focus is evident in *G. L. c. 21, § 17C (b)*, which provides in its first sentence that "[t]he liability of any person who imposes a charge or fee for the use of his land by the public for the purposes described in [*G. L. c. 21, § 17C (a)*,] shall not be limited by any provision of this section."

For present purposes, the salient point in *Seich, supra*,**[FN9]** and *Whooley, supra*, is that the landowners permitted members of the public to use the recreational facilities at issue to attend and watch youth athletic games free of charge, and the plaintiffs in both cases were, in fact, using the facilities in question in such a manner at the time each was injured: each had entered, free of charge, the particular facility (gymnasium or hockey rink) to watch a child (daughter or grandson) play in a game. That a payment was made in each case to the landowner to enable the child to participate in the game had no bearing on each injured plaintiff's own recreational use of the property in question, for which there was no charge. See *Seich, 426 Mass. at 86*; *Whooley, 57 Mass. App. Ct. at 910*. Here, in contrast, Marcus paid Coed Jewish Sports to be able to play in softball games on a field owned by the city, Coed Jewish Sports in turn paid a fee charged by the city in order to reserve the field for the softball games,**[FN10]** and Marcus was injured while he was participating as a player in one such game on the field. That Marcus did not pay directly to the city its permit fee to reserve McGrath Field is not material. What matters is that the city imposed this fee or charge for the exclusive use of the field during the reserved blocks of time; Coed Jewish Sports paid the fee on behalf of its league players, including Marcus; and he was injured while playing a game on the field during one of the reserved blocks of time. In the circumstances, Marcus was not participating in a recreational use of the city's property free of charge.

9 We discuss later in part 2.b.ii, *infra*, another aspect of the court's decision in *Seich, 426 Mass. at 86*.

10 The city disputed this at oral argument, describing the payment by Coed Jewish Sports as an unenforced "convenience" rather than as a confirmed reservation of the field. This is contrary to the affidavit of a city parks and recreation department employee, which stated that the fee paid by Coed Jewish Sports "allowed the league to reserve McGrath Field." At the least, these conflicting statements are enough to

create a genuine issue of material fact, making the case inappropriate for resolution on summary judgment.

[*156] ii. Purpose of payment. Finally, the city urges that because its charge to the league was not a "fee," but instead "represents administrative and operational costs," it is not divested of the exemption from liability for ordinary negligence under § 17C (a). The city reads *Seich, 426 Mass. at 86*, and the Appeals Court's decision in *Dunn v. Boston, 75 Mass. App. Ct. 556, 561-562, 915 N.E.2d 272 (2009)* (Dunn), to mean that if, as the city claims to be an undisputed fact, the monies paid by Coed Jewish Sports were used by the city merely to cover a portion of the operating and administrative costs associated with maintaining McGrath Field,**[FN11]** the city's exemption from negligence liability under § 17C remains intact.

11 In his affidavit, the employee averred that the \$1,200 fee from the league was used to "defray" part of the \$12,105.85 in costs incurred by the city for operating McGrath Field in 2007, including \$256.96 in administrative costs and \$11,848.89 in maintenance costs. Maintenance costs included grass cutting and trimming, fertilization, aeration, seed slicing, and irrigation repairs. Administrative costs included the time spent processing permit requests.

We disagree. The *Seich* and *Dunn* cases signify that when a landowner imposes a charge intended solely to reimburse it for marginal costs directly attributable to a specific user's recreational use of the property, the landowner remains exempt from ordinary negligence claims under § 17C. See *Seich, supra* (concluding that portion of town's youth basketball league registration fee that was used to pay custodians to keep gymnasium open for league games after regular hours "is not the equivalent of the town imposing a fee for the use of its land for recreational purposes"); *Dunn, supra* (where organization holding event on City Hall Plaza under one-time entertainment license paid city for security and janitorial services associated with event, payment "properly categorized as a reimbursement, rather than a 'charge or fee' within the meaning of [*§ 17C*]"; city therefore retained exemption from negligence liability).

On the record before us, the city has not established that the payment at issue is the type of reimbursement contemplated by *Seich, supra*, and *Dunn, supra*. We take as undisputed that the city dedicated the \$1,200 received from Coed Jewish Sports to the upkeep of McGrath Field -- that is, the payment became part of the \$12,105.85 the city spent in 2007 for the various purposes listed in note 11, *supra*. But the fact that the city used **[*157]** the permit fee received for general field upkeep is insufficient in itself to shield the city from ordinary negligence liability under § 17C (a). In other words, there is no evidence in the summary

judgment record to support the conclusion that the payment from Coed Jewish Sports was used to reimburse the city for marginal costs that it would not have incurred but for the league's particular use of McGrath Field during the summer of 2007. Consequently, summary judgment was properly denied on the city's claim that it was exempt from negligence liability as a matter of law.¹²

12 Although the city is not entitled to summary judgment, presumably it may attempt to prove at trial that the fee was used solely as reimbursement for marginal costs directly attributable to the league's particular use of McGrath Field; if it did so successfully, the exemption from liability for negligence would

apply. The city did admit at oral argument, however, that the money is not used "exclusively for the benefit of the league." Additional discovery may be needed on this issue. However, as explained in the text, showing only that the city budgeted the entirety of the fee paid by Coed Jewish Sports for administrative and maintenance costs associated with McGrath Field's general upkeep will not allow the city to claim exemption from negligence liability under *G. L. c. 21, § 17C*.

3. Conclusion. For the reasons stated, the city's appeal from the denial of its motion for summary judgment is dismissed.

So ordered.

DENISE MEGIEL-ROLLO vs. CONTRIBUTORY RETIREMENT APPEAL BOARD & another.[FN1]

APPEALS COURT OF MASSACHUSETTS

81 Mass. App. Ct. 317
962 N.E.2d 237; 2012 Mass. App. LEXIS 89

October 13, 2011, Argued
February 21, 2012, Decided

PRIOR HISTORY: Suffolk. Civil action commenced in the Superior Court Department on July 9, 2009. The case was heard by Peter M. Lauriat, J., on a motion for judgment on the pleadings.
Megiel-Rollo v. Contributory Ret. Appeal Bd., 2010 Mass. Super. LEXIS 171 (Mass. Super. Ct., 2010)

HEADNOTES

Contributory Retirement Appeal Board. Teachers' Retirement Board. Public Employment, Retirement benefits. School and School Committee, Retirement benefits.

COUNSEL: Suleyken D. Walker, Assistant Attorney General, for Teachers' Retirement System.

Nicholas Poser for the plaintiff.

JUDGES: Present: Kafker, Trainor, & Meade, JJ.

OPINION BY: TRAINOR

OPINION

[*317] TRAINOR, J. The defendant, Teachers' Retirement System (TRS), appeals from a judgment of the Superior Court vacating a decision of the Contributory Retirement Appeal Board (CRAB), and awarding termination benefits to the plaintiff, Denise Megiel-Rollo, under *G. L. c. 32 § 10(2)*.

¹ Teachers' Retirement System.

[*318] Facts.[FN2] Megiel-Rollo was a teacher at Bristol County Agricultural High School (Bristol) between 1982 and 2002.[FN3] In 1994, she filed a complaint against Bristol with the Massachusetts Commission Against Discrimination (MCAD) alleging discrimination. In 1997, the MCAD made a finding of probable cause on her claim. Four years later, in October 2001, Bristol and Megiel-Rollo entered into negotiations for a possible settlement to resolve the MCAD claim. Prior to entering settlement negotiations, Megiel-Rollo had never been notified or advised of any possibility or consideration of Bristol terminating her employment, and she had recently received a satisfactory performance evaluation for the 2000-2001 school year.[FN4] Early in October, 2001, Megiel-Rollo and Bristol entered into a settlement agreement intended to resolve her discrimination complaint.

² We take our facts from those found by the Division of Administrative Law Appeals (DALA) and adopted by CRAB. Megiel-Rollo does not dispute any of the facts as found by DALA, although she requested that CRAB add an additional finding that Bristol Agricultural High School insisted that she be terminated as a condition to its agreeing to settle her discrimination complaint. CRAB apparently declined to add the finding and concluded that it would not affect the result in any event.

³ She became a member of TRS in 1978, being employed at the Essex Agricultural and

Technology High School, and appears to have been a continuous member of TRS from 1978 to 2002, except for a period of time from September, 1990, to June, 1991, during which she was laid off.

4 The evaluation contained the following observation: "Ms. Megiel-Rollo is a teacher with professional status who continues to strive to achieve all standards under ed reform particularly in the accommodations of students' diverse learning styles employing a myriad of teaching strategies."

The parties agreed that immediately upon execution of the settlement agreement Megiel-Rollo would be placed on a paid leave of absence until June 30, 2002, a period of eight months. During the leave of absence she would continue to receive health insurance benefits, contractually accrued sick leave benefits, and retirement credits.[FN5] The settlement agreement provided that Bristol would forward a letter of termination notice to Megiel-Rollo on or about June 30, 2002, effective within five days of its mailing.[FN6] In addition, Bristol agreed to pay Megiel-Rollo a final cash payment of \$54,760.49. The [*319] settlement agreement required that upon its execution Megiel-Rollo would immediately leave the building and grounds of Bristol and never again enter the grounds or building.

5 Presumably increasing her sick leave buy back at the time of her retirement as well as increasing the amount of her retirement allowance.

6 The application for retirement form that retiring teachers must submit to CRAB states that an applicant must attach a copy of their "notice of termination" if they choose to apply for a termination allowance under *G. L. c. 32, § 10(2)*.

Megiel-Rollo was allowed twenty-one days to consider the settlement agreement and an additional seven days after execution within which to revoke it.[FN7] The agreement contained a provision that both parties acknowledged that they were entering into the agreement voluntarily. Both parties signed and executed the settlement agreement on October 10, 2002.

7 This provision is required by the Older Workers Benefit Protection Act, 29 U.S.C. § 626 (2000).

Megiel-Rollo applied for a termination allowance under *G. L. c. 32, § 10(2)*, shortly thereafter. The TRS sent Bristol a letter requesting information about the reason for Megiel-Rollo's departure and whether she had been terminated. Bristol responded that Megiel-Rollo had been terminated in order to "resolve litigation." The TRS then denied Megiel-Rollo's application for a termination allowance under *§ 10(2)*,

and she was instead awarded superannuation benefits under *G. L. c. 32, § 10(1)*.

Megiel-Rollo appealed the denial to CRAB, which assigned a Division of Administrative Law Appeals (DALA) magistrate to hold a hearing, after which the denial of *§ 10(2)* benefits was affirmed. Megiel-Rollo filed an objection with CRAB, which in 2009 affirmed the decision of the DALA magistrate on the basis that Megiel-Rollo's departure was voluntary. Megiel-Rollo sought judicial review of CRAB's decision in the Superior Court. A Superior Court judge vacated CRAB's decision, anchoring his own definition of "discharge" not on the distinction between "voluntary" and "involuntary" but on what the court referred to as "some action on the part of the employer to terminate the employee[']s employment." The judge held that Bristol "terminated Megiel-Rollo's employment . . . by sending her a notice of termination" and that "[s]he was therefore 'discharged' from her employment within the meaning of *G. L. c. 32, § 10(2)*." Judgment was entered in favor of Megiel-Rollo, CRAB's decision was vacated, and the case was remanded [*320] to CRAB for the entry of an order in favor of Megiel-Rollo. The TRS then filed this appeal seeking reversal of the Superior Court judgment.

We vacate the judgment of the Superior Court and affirm the decision of the Contributory Retirement Appeals Board.

Discussion. We review CRAB's decision to deny *§ 10(2)* benefits and award *§ 10(1)* benefits to determine whether Megiel-Rollo's rights have been prejudiced under the guidance of *G. L. c. 30A, § 14(7)*. [FN8] See *Tabroff v. Contributory Retirement Appeal Bd.*, 69 *Mass. App. Ct. 131, 134 n.2, 866 N.E.2d 954 (2007)*.

8 *Section 14(7) of G. L. c. 30A*, as amended by St. 1973, c. 1114, § 3, provides that an agency's decision can be set aside if it is determined to be:

- "(a) In violation of constitutional provisions; or
- (b) In excess of the statutory authority or jurisdiction of the agency; or
- (c) Based upon an error of law; or
- (d) Made upon unlawful procedure; or
- (e) Unsupported by substantial evidence; or
- (f) Unwarranted by facts found by the court on the record as submitted or as amplified under paragraph (6) of this section, in those instances where the court is constitutionally required to make independent findings of fact; or
- (g) Arbitrary or capricious, an

abuse of discretion, or otherwise not in accordance with law."

Our review of CRAB's decision is made "under a deferential standard and [we] will reverse only if [CRAB's] decision was based on an erroneous interpretation of law or is unsupported by substantial evidence." *Foresta v. Contributory Retirement Appeal Bd.*, 453 Mass. 669, 676, 904 N.E.2d 755 (2009). See *State Bd. of Retirement v. Contributory Retirement Appeal Bd.*, 77 Mass. App. Ct. 452, 455, 932 N.E.2d 277 (2010).

To the extent that an agency determination involves a question of law, it is subject to de novo judicial review. See *Bristol County Retirement Bd. v. Contributory Retirement Appeal Bd.*, 65 Mass. App. Ct. 443, 451, 841 N.E.2d 274 (2006); *Olsen v. Teachers' Retirement Bd.*, 70 Mass. App. Ct. 429, 431, 874 N.E.2d 492 (2007), quoting from *Bulger v. Contributory Retirement Appeal Bd.*, 447 Mass. 651, 657, 856 N.E.2d 799 (2006) ("we must overturn agency decisions that are not consistent with governing law").

To the extent that an agency determination is based on a finding of fact, under the substantial evidence standard, "we must give 'due weight to the experience, technical competence, and specialized knowledge of the agency, as well as to the discretionary authority conferred upon it'" *Ibid.* "[A] reviewing [*321] court is not empowered to make a de novo determination of the facts, to make different credibility choices, or to draw different inferences from the facts found by the [agency]." *Medi-Cab of Mass. Bay, Inc. v. Rate Setting Commn.*, 401 Mass. 357, 369, 517 N.E.2d 122 (1987).

General Laws c. 32, § 10, determines retirement allowances for members of the retirement system who resigned, failed reappointment, or were removed or discharged from service. We consider the textual differences between § 10(1) (right to a superannuation retirement allowance) and § 10(2) (right to a termination retirement allowance) in order to determine which paragraph, § 10(1) or § 10(2), is implicated by the facts and circumstances here.

Section 10(1), as amended through St. 2000, c. 123, § 24A, provides, in pertinent part, a retirement allowance for a member of the retirement system who (1) has completed twenty or more years of creditable service and who (2) "resigns or voluntarily terminates his service" or who (3) "fails of reappointment or whose office or position is abolished, or is removed or discharged from his office or position without moral turpitude on his part" [FN9]

9 Additionally, § 10(1) provides a retirement allowance for any member who has attained the age of fifty-five years, regardless of the number

of creditable years of service, under the same conditions as we list above, except that a "voluntary termination" is not included. Megiel-Rollo was not eligible for this option, in any event.

The retirement allowance for members retiring under the provisions of § 10(1) is calculated pursuant to the provisions of *G. L. c. 32, § 5*.

Section 10(2) provides, in pertinent part, a retirement allowance for a member of the retirement system who (1) "has completed twenty or more years of creditable service" and who (2) "fails of reappointment, or whose office or position is abolished, or is removed or discharged from his office or position without moral turpitude on his part" [FN10]

10 Additionally, § 10(2) provides the same retirement allowance to any member who has completed thirty or more years of creditable service, and who resigns his position while not having attained the age of fifty-five years. Megiel-Rollo was not eligible for this option either.

The retirement allowance for those retiring under the provision of § 10(2) is calculated within § 10(2).

As pertaining here, the single difference between the provisions [*322] of § 10(1) and § 10(2) indicates that a member who has twenty or more years of creditable service and who "resigns or voluntarily terminates his service" can only retire under the provisions of § 10(1). The remaining qualifications that a member "fails of nomination or re-election, or fails of reappointment, or whose office or position is abolished, or is removed or discharged from his office or position" appear in both § 10(1) and § 10(2). This statutory construction indicates that a member, so retiring, can choose to retire under the provisions of either § 10(1) or § 10(2), presumably depending on which retirement allowance calculation is more beneficial to their particular circumstances.

CRAB interprets the terms "removed or discharged" for the purposes of § 10(1) and § 10(2) eligibility as the involuntary discharge of an employee as distinct from a voluntary termination or resignation of an employee, who, as we discussed above, can only retire under the provisions of § 10(1).

The Superior Court judge determined, and Megiel-Rollo now argues, that the basis for eligibility for benefits under § 10(2) is the presence of "some action on the part of the employer to terminate the employee's employment," not whether the termination was involuntary. The trial judge reasoned that because Bristol sent a letter of termination, it discharged Megiel-Rollo for the purposes of § 10(2) regardless of

the section's larger context and the specific language contained in § 10(1). We do not agree with this reasoning.

First, this interpretation would render the phrase "voluntary termination" in § 10(1) meaningless. In every case a termination will ultimately be effectuated by an action of the employer in the form of a notice of termination and would automatically render the termination "involuntary." The phrase "voluntary termination" would have no meaning within the statute under that reasoning. We cannot read statutory language to be meaningless or superfluous, particularly where the phrase in question has a clear meaning within the statute's context. See *Wolfe v. Gormally*, 440 Mass. 699, 704, 802 N.E.2d 64 (2004), quoting from *Bankers Life & Cas. Co. v. Commissioner of Ins.*, 427 Mass. 136, 140, 691 N.E.2d 929 (1998) ("basic tenet of statutory construction requires that a statute 'be construed . . . so that no part will be inoperative or [*323] superfluous"); *Bulger v. Contributory Retirement Appeal Bd.*, *supra* at 661, quoting from *Commissioner of Rev. v. Cargill, Inc.*, 429 Mass. 79, 82, 706 N.E.2d 625 (1999) ("Where . . . the language of the statute is clear, it is the function of the judiciary to apply it, not amend it"). See also *Telesetsky v. Wight*, 395 Mass. 868, 872, 482 N.E.2d 818 (1985); *Sterilite Corp. v. Continental Cas. Co.*, 397 Mass. 837, 839, 494 N.E.2d 1008 (1986).

A review of the legislative history of *G. L. c. 32, § 10*, is consistent with this interpretation. When it was enacted in 1945, *G. L. c. 32, § 10*, allowed employees who resigned a superannuation allowance under § 10(1), but not a termination allowance under § 10(2). St. 1945, c. 658, § 1. The phrase "voluntary termination" appeared in neither section. In 1950, the Legislature added employees who resigned to those eligible for § 10(2) benefits but removed that eligibility one year later. St. 1951, c. 784, § 1. At the same time, the Legislature added the "voluntary termination" provision to § 10(1). The Legislature clearly and intentionally added the phrase "voluntary termination" as a concept related to, but distinguished from, the phrase "resignation." Cf. *Costello v. School Comm. of Chelsea*, 27 Mass. App. Ct. 822, 827, 544 N.E.2d 594 (1989) (legislative history of the addition and subtraction of certain terms to *G. L. c. 32, § 10*, "evinces an awareness that there is a difference between a 'removal or discharge' and 'failure of reappointment'").

In a similar context, the Supreme Judicial Court has addressed the "voluntariness" of a resignation in situations implicating the unemployment compensation statute, which, with some exceptions, denies benefits to employees who leave their job voluntarily. See *G. L. c. 151A, § 25(e)*. See, e.g., *Retirement Bd. of Attleboro v. School Comm. of Attleboro*, 417 Mass. 24, 26, 627 N.E.2d 899 (1994) (considering the meaning of the

word "removal" in *G. L. c. 71, § 43B* [1992 ed.], in interpreting the term "removal" in *G. L. c. 32, § 16(2)*).

In *Connolly v. Director of the Div. of Unemployment Assistance*, 460 Mass. 24, 25, 948 N.E.2d 1218 (2011), citing *White v. Director of the Div. of Employment Sec.*, 382 Mass. 596, 598-599, 416 N.E.2d 962 (1981), the Supreme Judicial Court held that "a resignation . . . will be deemed involuntary if the employee reasonably believed that his discharge was imminent." See *State St. Bank & Trust Co. v. [*324] Deputy Director of the Div. of Employment & Training*, 66 Mass. App. Ct. 1, 7-8, 845 N.E.2d 395 (2006). In *Connolly*, the plaintiff seeking benefits was held to have left voluntarily when "she was not compelled to apply [for a voluntary termination package], did not believe her job was in jeopardy, and left in part for personal reasons." *Connolly*, *supra* at 29.

In the case before us, the evidence substantially supported CRAB's conclusion that Megiel-Rollo could not have reasonably believed that her employment would soon be terminated if she did not sign the settlement agreement. She testified that she had not been told by anyone at Bristol that she was in danger of being terminated from her position, and her evaluation for the school year preceding the settlement negotiations was "largely positive." Further, a provision of the settlement agreement stated that Bristol "wished to enter this agreement solely for the purpose of avoiding costs of litigation."

Additionally, we must acknowledge the benefit of the bargain Megiel-Rollo received in the negotiation. While Bristol disposed of the discrimination suit, she received nine months' paid leave of absence while continuing to receive health insurance benefits and accrue sick time, as well as continuing to accrue retirement credits. At the end of this paid leave, she received a substantial cash award and a letter of termination, which was intended to qualify her for the retirement allowance provided by § 10(2). The provisions of this agreement do not evidence an "involuntary termination." [FN11]

11 The trial judge attached significance to the provision barring Megiel-Rollo from ever returning to the school grounds. Although the provision indicates some level of acrimony in the separation, it is not evidence that Megiel-Rollo reasonably believed that she would lose her job if the settlement negotiations failed.

There are additional public policy reasons to discourage the grant of a § 10(2) retirement allowance for terminations negotiated in the context of such a settlement agreement. In future settlement negotiations, or similar situations that arise between employees and their public employers, there is a danger that the parties would add a term to the settlement providing a

termination letter, even where the employee had no reasonable expectation of being fired and where termination would not have [*325] otherwise occurred. For the employee, the benefit of such a letter may result in receiving higher retirement benefits than the employee may otherwise have received, and such a letter could be a valuable bargaining chip of no detriment to the employer's financial bottom line. As the Contributory Retirement Fund in Massachusetts is made up solely of contributions from its members, those members would incur the cost of the higher termination allowance brought about by such a settlement. See, e.g., *Hoerner v. Public Sch. Employees' Retirement Bd.*, 546 Pa. 215, 225, 684 A.2d 112 (1996) (holding that the Pennsylvania retirement board, not the language of employee's negotiated termination agreement, had the power to determine benefits due under that State's retirement code).

We conclude that CRAB's determination, that to qualify for a termination allowance under *G. L. c. 32, § 10(2)*, the termination must be involuntary, was not an error of law. Also, there was substantial and sufficient evidence on the record supporting CRAB's finding that Megiel-Rollo was not "removed or discharged" under § 10(2) but rather was "voluntarily terminated" under § 10(1), and that, as the DALA magistrate found, by voluntarily signing the settlement agreement Megiel-Rollo "herself chose to leave her position at (Bristol)." We therefore vacate the judgment of the Superior Court and remand for the entry of judgment affirming CRAB's decision to award the plaintiff a superannuation allowance under *G. L. c. 32, § 10(1)*.

So ordered.

**SANDRA MURPHY & others,[FN1] beneficiaries,[FN2] & another,[FN3] vs. MASSACHUSETTS
TURNPIKE AUTHORITY.**

SUPREME JUDICIAL COURT OF MASSACHUSETTS

462 Mass. 701
971 N.E.2d 231; 2012 Mass. LEXIS 655

March 6, 2012, Argued
July 12, 2012, Decided

PRIOR HISTORY: Middlesex. Civil action commenced in the Superior Court Department on May 8, 2009. A motion to dismiss was heard by Herman J. Smith, Jr., J., and the case was reported by him to the Appeals Court. The Supreme Judicial Court granted an application for direct appellate review.

HEADNOTES

Massachusetts Turnpike Authority. Constitutional Law, Taxation.

COUNSEL: Donald M. Griswold (Orestes G. Brown with him) for the plaintiffs.

Kenneth W. Salinger, Assistant Attorney General, for the defendant.

Richard P. Schweitzer, of the District of Columbia, Richard Pianka & Prasad Sharma, of Virginia, & Mark K. Molloy, for American Trucking Associations, Inc., & others, amici curiae, submitted a brief.

JUDGES: Present: Ireland, C.J., Spina, Cordy, Botsford, Gants, Duffly, & Lenk, JJ.

OPINION BY: GANTS

OPINION

[*702] GANTS, J. The issue presented in this case is whether the Massachusetts Turnpike Authority (authority) lawfully was permitted to use toll revenues collected from users of tolled roads and tunnels in the Metropolitan Highway System (MHS) to pay for overhead, maintenance, and capital costs associated with the MHS's nontolled roads, bridges, and tunnels. We conclude that it was.[FN4]

1 Douglas J. Barth, Robert Ackley, and Joel A. Feingold.

2 Of the Massachusetts Turnpike Toll Equity Trust.

3 Jack Altshuler, trustee of the Massachusetts Turnpike Toll Equity Trust (trust).

4 We acknowledge the amicus brief jointly filed by the American Trucking Associations, Inc.; Massachusetts Motor Transportation Association; and National Private Truck Council.

Background. Before 1997, the authority owned and operated the Massachusetts Turnpike (turnpike), [FN5] the Boston extension of the turnpike, [FN6] and the Sumner and Callahan Tunnels, which cross under Boston Harbor to connect downtown Boston to the East

Boston section of Boston. In 1997, while the massive Boston Central Artery/Tunnel Project known as the "Big Dig" was underway, the Legislature placed within authority stewardship "the integrated system of roadways, bridges, tunnels," and other facilities known as the MHS, which included the Boston extension and the tunnels it had owned and operated before, as well as the central artery, the central artery north area (CANANA), [*703] and the Ted Williams Tunnel. *G. L. c. 81A, § 3.* [FN7] The authority was authorized to charge tolls "for transit over or through the [MHS] or any part thereof," and to fix and adjust the tolls so that, when supplemented by other revenues, [FN8] they pay all the expenses of the MHS. *G. L. c. 81A, § 10 (b).* The authority required drivers of vehicles traveling through the Sumner and Williams Tunnels, and the Weston and Allston-Brighton interchanges of the Boston extension, to pay a toll, but did not charge a toll to drivers traveling through the Callahan Tunnel, the central artery, or the CANANA.

5 The Massachusetts Turnpike includes the tolled portion of Interstate Route 90 that runs eastward from West Stockbridge to Weston, ending at its intersection with Route 128.

6 The Boston extension includes the tolled portion of Interstate Route 90 that runs eastward from Weston to Boston, ending at its intersection with Interstate Route 93.

7 General Laws c. 81A was enacted in 1997. St. 1997, c. 3, § 6. It was repealed in 2009. St. 2009, c. 25, § 75.

8 The Legislature provided that the Commonwealth would pay the Massachusetts Turnpike Authority (authority) \$25 million annually to defray the costs of the central artery. *G. L. c. 81A, § 12 (c).*

In May, 2009, the plaintiffs, each of whom is a Massachusetts resident who has paid tolls on the MHS for at least five years, filed suit against the authority, contending that tolls collected from drivers traveling on the Boston extension and through the tolled tunnels were unconstitutional to the extent they were spent on the nontolled portions of the MHS. [FN9] The plaintiffs allege that approximately fifty-eight per cent of toll revenues from the MHS were used to pay the costs of nontolled MHS facilities. [FN10] They claim that this percentage of "excess" toll revenues is an unconstitutional tax in violation of art. 2, § 7, of the Amendments to the Massachusetts Constitution; Part II, c. 1, § 1, art. 4, of the Massachusetts Constitution; and art. 30 of the Massachusetts Declaration of Rights, and of the *commerce clause of the United States Constitution*. They seek an accounting and disgorgement of all monies (estimated to exceed \$440 million) collected as an unlawful tax, to be paid to the Massachusetts Turnpike Toll Equity Trust (trust) on behalf on the putative class. The plaintiffs also [*704]

sought an injunction forbidding the authority's use of any future toll monies to pay for expenditures for nontolled facilities. [FN11]

9 The plaintiffs filed the action as representatives of a putative class of drivers who pay tolls to use the Metropolitan Highway System (MHS), but the class has not been certified.

10 Because we review the allowance of a motion to dismiss, we accept as true the factual allegations in the amended complaint. We note that the authority contends that the plaintiffs erred in their calculation of this percentage and that, assuming the plaintiffs' data are correct, the percentage is approximately forty-seven per cent.

11 In 2009, while this case was pending, the Legislature enacted new legislation that rendered the injunctive claim moot by requiring all revenue received from tolls to be "applied exclusively to" costs associated with tolled roads. *G. L. c. 6C, § 13 (c)*, inserted by St. 2009, c. 25, § 8. See St. 2009, c. 27, § 138, as amended by St. 2009, c. 32, § 2. In 2009, the Legislature repealed *G. L. c. 81A* (see note 7, *supra*), the act that established the authority, established the Department of Transportation (department) in its place, and transferred the authority's responsibilities and employees to the department. See St. 2009, c. 25, §§ 8, 75, 134, 137-139, 142-143, 147.

In January, 2011, the judge allowed the authority's motion to dismiss. He noted that "toll-paying MHS users benefit in a manner not shared by other members of society insofar as they alone are entitled to use the particular roadways on which the tolls are collected, and they receive the benefit of privileged access to the Central Artery from these roadways." Although he recognized that it was "not an easy issue," the judge concluded that the plaintiffs had no constitutional entitlement to the expenditure of toll revenues solely on tolled facilities. He declared: "Given the unique nature of an integrated highway system, with its ever-changing classes of users, the challenged toll scheme -- although clearly flawed -- does not appear to be an unreasonable way of dealing with the challenges of financing an interconnected series of roadways in the face of a severe shortage of funds." [FN12] The plaintiffs filed a timely notice of appeal and we granted their application for direct appellate review.[FN13] We now affirm the judge's allowance of the motion to dismiss.

12 The judge did not specifically address the commerce clause claim in dismissing the amended complaint, but the plaintiffs did not seek reconsideration.

13 The judge declared that he was "troubled as to whether evidence of 'free-riding' is a relevant consideration" and sought to report his decision under *Mass. R. Civ. P. 64 (a)*, 365 Mass. 831 (1974). But because he allowed the motion to dismiss as to all claims, and a judgment issued, the plaintiffs properly proceeded by entering an appeal from the judgment. See *Cusic v. Commonwealth*, 412 Mass. 291, 293, 588 N.E.2d 665 (1992).

Discussion. a. State constitutional claims. We have decided numerous cases where a charge that is characterized as a fee by a municipality or a State or local board is claimed to be an unconstitutional tax. See, e.g., *Denver St. LLC v. Saugus*, ante 651 (2012) (*Denver St.*) (town requires payment of inflow and infiltration charge to obtain permit for new sewer connections); **[*705]** *Silva v. Attleboro*, 454 Mass. 165, 908 N.E.2d 722 (2009) (*Silva*) (towns assess charge for issuance of burial permit); *Nuclear Metals, Inc. v. Low-Level Radioactive Waste Mgt. Bd.*, 421 Mass. 196, 656 N.E.2d 563 (1995) (State board responsible to ensure proper disposal of low-level radioactive wastes annually assesses persons licensed to possess, use, or transfer radioactive materials amount sufficient to defray board's annual costs); *Bertone v. Department of Pub. Utils.*, 411 Mass. 536, 583 N.E.2d 829 (1992) (municipal lighting plant's "hook-up charge" for new connections to system); *Southview Coop. Hous. Corp. v. Rent Control Bd. of Cambridge*, 396 Mass. 395, 486 N.E.2d 700 (1985) (city's rent control board assesses charge based on percentage of rents and capital improvements for landlord to file petition for rent adjustment); *Emerson College v. Boston*, 391 Mass. 415, 416, 419, 462 N.E.2d 1098 (1984) (*Emerson College*) (Legislature conferred on city authority to impose additional charge to property owners of buildings requiring "fire fighting capacity" that exceeds 3,500 gallons per minute for "augmented fire services availability"). In each of these cases, if the fee were truly a tax, it would be unconstitutional because the relevant governmental entity had not been authorized by the Legislature to levy, assess, or collect a tax, see, e.g., *Silva*, supra at 168-169; or because it would be a property tax that was not proportional or reasonable, see *Emerson College*, supra at 418 & n.5. In determining whether a charge functions as a fee rather than a tax, we recognize that there are two types of fees: user fees, where a fee is assessed for the use of the governmental entity's property or services; and regulatory fees, where a fee is assessed as part of government regulation of private conduct. See *Denver St.*, supra at 652; *Emerson College*, supra at 424-425. Where a charge is characterized as a user fee, we determine whether the charge satisfies three criteria: (1) it is charged "in exchange for a particular government service which benefits the party paying the fee in a manner 'not shared by other members of society,'" (2) it is "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) it is not collected "to raise revenues but to compensate the governmental entity providing the services for its expenses." *Denver St.*, supra, quoting *Emerson College*, supra.**[FN14]**

14 In *Silva v. Attleboro*, 454 Mass. 165, 172, 908 N.E.2d 722 (2009), we concluded that the second factor is "of no relevance" in determining whether a regulatory charge is a fee or a tax, and may retain relevance only where applied to user fees. See *Denver St. LLC v. Saugus*, ante [8-9] n.7 (2012) ("The *Silva* case left to another day whether voluntariness was useful where . . . the fee is proprietary").

[*706] Here, too, the plaintiffs claim that the MHS tolls are unconstitutional taxes. But the plaintiffs acknowledge that the Legislature authorized the authority "to charge and collect" tolls for travel on the MHS, *G. L. c. 81A, § 10 (b)*, and that these tolls are constitutional to the extent they are used solely to pay the costs of tolled roads and tunnels in the MHS. They contend that these tolls become an unconstitutional tax where they are used to pay the costs of the nontolled roads, tunnels, and bridges. In other words, according to the plaintiffs, the tolls are lawful user fees when applied to pay the expenses of the tolled roads and tunnels, but an unconstitutional tax when applied to pay the expenses of the nontolled roads, tunnels, and bridges.

To prevail, the plaintiffs' State constitutional claims must pass through two jurisprudential checkpoints. First, in collecting tolls on only certain parts of the MHS and using those toll revenues to pay the expenses of the entire MHS, the authority was doing precisely what the Legislature authorized it to do. In *G. L. c. 81A, § 10 (b)*, the Legislature authorized the authority to "charge and collect" tolls "for transit over or through the [MHS] or any part thereof" (emphasis added), thus allowing the authority to charge tolls on only part of the MHS. And the Legislature mandated that the authority fix and adjust the amount of the tolls so that, together with any other revenue collected, they yield an amount that will cover the costs of the entire MHS, not just the tolled portions, including principal and interest on bonds associated with the MHS. See *id.* ("Such tolls shall be so fixed and adjusted as to provide, at a minimum, a fund sufficient with other revenues, if any, to pay [a] costs incurred . . . related to the [MHS] including, but not limited to, the cost of owning, constructing, maintaining, . . . improving, . . . policing, [and] administering . . . the [MHS]; and [b] the principal . . . and the interest on notes or bonds relating to the [MHS]" [emphasis added]). Contrast *G. L. c. 6C, § 13 (c)*, inserted by St. 2009, c. 25, § 8 (effective July 1, 2009, tolls collected "shall be applied exclusively" for costs related to **[*707]** tolled infrastructure). That a governmental entity acts in accordance with the authority granted to it by the Legislature does not

resolve the constitutional challenge, because the legislative authority may itself be unconstitutional, see, e.g., *Emerson College*, *supra* at 428, but the "statute is presumed to be constitutional and every rational presumption in favor of the statute's validity is made." *Gillespie v. Northampton*, 460 Mass. 148, 152, 950 N.E.2d 377 (2011), quoting *Pielech v. Massasoit Greyhound, Inc.*, 441 Mass. 188, 193, 804 N.E.2d 894 (2004).

Second, art. 78 of the Amendments to the Massachusetts Constitution, as amended by art. 104 of the Amendments, provides that "revenue from fees, duties, excises or license taxes relating to . . . operation or use of vehicles on public highways" shall not be expended except to pay the various expenses of public highways and bridges, including the cost of construction, maintenance, and repair, "and mass transportation lines and . . . other mass transportation purposes."**[FN15]** Although art. 78 is phrased as a limitation on expenditures, we have recognized that embedded in such a limitation is a constitutional recognition of the Legislature's power to impose such fees and to allocate the revenues to any of the permitted purposes. See *Mitchell v. Secretary of Admin.*, 413 Mass. 330, 333-334, 597 N.E.2d 400 (1992) ("Article 78 requires only that art. 78 revenues be expended for certain transportation-related purposes, and contains a broad delegation of power to the Legislature to 'direct' the 'manner' **[*708]** in which this goal shall be attained"); *O'Brien v. State Tax Comm'n*, 339 Mass. 56, 64, 158 N.E.2d 146 (1959) ("art. 78 is a clear constitutional recognition of the Legislature's power" to impose excise taxes "in its efforts to provide revenues to meet the heavy and varied costs of government created by motor vehicles"). Under art. 78, there is no constitutional prohibition against toll revenues from certain highways and tunnels being used to pay the expenses of other highways and tunnels, or even mass transportation expenses. See, e.g., *Opinion of the Justices*, 370 Mass. 895, 896, 900, 352 N.E.2d 197 (1976) ("construction and maintenance of bikeways and bicycle parking facilities, to be paid for [in part by] one per cent of revenues and excises on motor vehicle use and fuel" held constitutional).

15 The full text of art. 78 of the Amendments to the Massachusetts Constitution, as amended by art. 104 of the Amendments, provides:

"No revenue from fees, duties, excises or license taxes relating to registration, operation or use of vehicles on public highways, or to fuels used for propelling such vehicles, shall be expended for other than cost of administration of laws providing for such revenue, making of

refunds and adjustments in relation thereto, payment of highway obligations, or cost of construction, reconstruction, maintenance and repair of public highways and bridges, and mass transportation lines and of the enforcement of state traffic laws, and for other mass transportation purposes; and such revenue shall be expended by the commonwealth or its counties, cities and towns for said highway and mass transportation purposes only and in such manner as the general court may direct; provided, that this amendment shall not apply to revenue from any excise tax imposed in lieu of local property taxes for the privilege of registering such vehicles."

Where, as here, the imposition of tolls on only some of the MHS roads and tunnels was authorized by the Legislature under *G. L. c. 81A, § 10 (b)*, as was the expenditure of these toll revenues to cover the expenses of the entire MHS, and where this use of toll revenues is well within the limitations of art. 78, the plaintiffs may prevail on their State constitutional claims only if they can demonstrate that the use of MHS tolls to pay expenses on nontolled MHS roads, tunnels, and bridges is prohibited by another constitutional provision. In their amended complaint, they identify three constitutional provisions, but none renders unconstitutional the expenditure of toll revenues that art. 78 approves as constitutional.

First, art. 2, § 7, provides that a city or town does not have the power to levy, assess, or collect taxes unless such power is granted by the Legislature in conformity with the Constitution. Even if, as the plaintiffs claim, the MHS tolls became a tax when the revenues were expended on nontolled roads and tunnels, the power to "tax" was granted by the Legislature, and their expenditure conformed with art. 78.

Second, Part II, c. 1, § 1, art. 4, provides that 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, and may "impose and levy reasonable duties and excises, upon any produce, goods, wares, merchandise, and commodities, whatsoever, brought into, produced, manufactured, or being within" the Commonwealth. If the MHS tolls were truly a "tax," they **[*709]** would not be a tax on real property, so the constitutional mandate that they be proportional and reasonable would not apply. See *Opinion of the Justices*, 378 Mass. 802, 802-803, 393 N.E.2d 306 (1979) (Part II,

c. 1, § 1, art. 4, places "constitutional constraints on taxation of real property" [emphasis added]). See also *Emerson College, supra at 418 n.5*. And if the tolls were a "tax," they could constitutionally be deemed an excise tax. In *Opinion of the Justices, 250 Mass. 591, 597, 148 N.E. 889 (1925)*, this court declared that, where tolls "are based on fair recompense for the public moneys expended for initial construction and for adequate maintenance, they do not involve the power of taxation," and are user fees, resting "on the rights of the Commonwealth as proprietor of the instrumentalities used." But where the revenue from such tolls is not applied to the maintenance and repair of highways but are retained without restriction, they are excise taxes. *Id.* The Legislature is empowered by Part II, c. 1, § 1, art. 4, to impose a highway toll as an excise tax. *Id. at 599* ("As matter of abstract principle we are of opinion that it is within the constitutional power of the General Court to levy an excise as a toll for the use of public ways by motor vehicles").[FN16] Art. 78, therefore, acts as a constitutional constraint on the legislative power under Part II, c. 1, § 1, art. 4, to establish tolls as excise taxes, limiting the use of such toll revenues to support public highways, bridges, and tunnels, and mass transportation.

16 In *Opinion of the Justices, 250 Mass. 591, 597, 148 N.E. 889 (1925)*, quoting *Portland Bank v. Apthorp, 12 Mass. 252, 256 (1815)*, the court noted that the "term 'excise' is of very general signification, meaning tribute, custom, tax, tollage, or assessment." The court added: "Toll -- at that time a word in common use in connection with turnpikes and bridges -- thus was mentioned more than one hundred years ago, in the first decision requiring a critical consideration of the meaning of the word 'commodities' in the Constitution, as an illustration of an excise." *Opinion of the Justices, supra at 598*.

Third, art. 30 provides that "the executive [department] shall never exercise the legislative . . . powers." The plaintiffs allege in their amended complaint that the Legislature did not authorize the authority to tax but that, even if the Legislature did attempt to delegate the power of taxation, "any attempted delegation was done invalidly, improperly and impermissibly as the rules of delegation were not followed." In *Commonwealth v. Clemmey, 447 Mass. 121, 135, 849 N.E.2d 844 (2006)*, quoting *Chelmsford Trailer [*710] Park v. Chelmsford, 393 Mass. 186, 190, 469 N.E.2d 1259 (1984)*, we noted that "[n]o formula exists for determining whether a delegation of legislative authority is 'proper' or not," but three factors "bear on our determination: (1) Did the Legislature delegate the making of fundamental policy decisions, rather than just the implementation of legislatively determined policy; (2) does the act provide adequate direction for implementation, either in the form of

statutory standards or, if the local authority is to develop the standards, sufficient guidance to enable it to do so; and (3) does the act provide safeguards such that abuses of discretion can be controlled?" Applying these factors, we see no impropriety in the legislative delegation to the authority, pursuant to *G. L. c. 6C, § 13 (a)*, to "fix and revise tolls" for travel in the MHS where the amount of the tolls was limited to the amount necessary, with other revenues, to pay all the costs of the MHS, including the interest and principal on bond notes, and where the authority was required to convene at least two public hearings before any proposed change in the MHS tolls, followed by a one-week comment period, and to submit an annual report to the Governor and Legislature with "a complete operating and financial statement." *G. L. c. 81A, § 20*. See *G. L. c. 81A, § 10 (b)* ("subject to provisions of [*G. L. c. 81A, § 4 (j)*]").[FN17]

17 We recognize that *G. L. c. 81A, § 10(b)*, provided that MHS tolls "shall be so fixed and adjusted as to provide, at a minimum, a fund sufficient with other revenues to pay" the entirety of MHS expenses, but we do not understand the phrase "at a minimum" to have given the authority free rein to set tolls above the amount necessary to pay MHS expenses. Rather, we understand that the phrase means that the authority was expected to act conservatively to ensure that the tolls were sufficient to meet MHS expenses and, if the tolls exceeded that amount, the overage was to be treated as reserves to be allocated to pay MHS expenses in the following year.

Although the MHS tolls would still pass State constitutional muster if they were a "tax," we conclude that, applying the traditional three-factor analysis first articulated in *Emerson College, supra at 424-425*, they were actually user fees. The plaintiffs concede that the second factor is satisfied, in that they had the option of not driving on tolled MHS roads and tunnels and thereby could avoid paying the tolls. The first factor is also met because those who paid the MHS tolls enjoyed a particularized benefit [*711] not enjoyed by those who only traveled on nontolled roads; only toll payers could travel on the Boston extension, and the Sumner and Williams Tunnels, and enter the nontolled central artery of the MHS through these roadways. In contrast, nontoll paying drivers must reach the central artery by other means, find an alternative to the route served by the Boston extension, and take a less direct route to travel from East Boston to Boston.

The MHS tolls satisfy the third factor, because they were collected to compensate the authority for the expenses incurred in operating the MHS (and limited by statute to the amount necessary to pay those expenses), not to raise revenues for the Commonwealth. Where, as here, a public authority manages an integrated system of roadways, bridges, and tunnels, and chooses to impose

tolls on only some of the roadways and tunnels in an amount sufficient to support the entire integrated system, its purpose does not shift from expense reimbursement to revenue raising simply because the toll revenues exceed the cost of maintaining only the tolled portions of the integrated system. See *Opinion of the Justices*, 250 Mass. 591, 597, 148 N.E. 889 (1925). Nor must every road, bridge, and tunnel in an integrated system of roadways, bridges, and tunnels be tolled to enable the tolls collected to support the expenses of the entire integrated system without being deemed taxes. [FN18]

18 Because the collection of tolls requires drivers either to stop or, with a "Fast Lane" or "E-ZPass" transponder, slow down, at a toll booth in a toll plaza, the authority was entitled to consider traffic patterns and the potential for traffic delay in deciding which roads, bridges, and tunnels within the MHS should be tolled. If we accepted the plaintiffs' logic, the authority's decision not to place toll booths at the entrance to the Callahan Tunnel in the North End section of Boston (which Boston residents use to travel to Logan International Airport in East Boston), and instead place toll booths in East Boston at the entrance to the Sumner Tunnel to collect tolls from those returning from the airport, would mean that Sumner Tunnel tolls could support maintenance and repair of the Sumner Tunnel but not the Callahan Tunnel, lest the tolls be deemed revenue-raising taxes.

Because we conclude that the tolls collected by the authority on the MHS were fees, and because we conclude that they would still be constitutional excise taxes even if they were taxes, we affirm the dismissal of the plaintiffs' State constitutional claims.

b. Federal constitutional claims. The commerce clause provides that "congress shall have power . . . to regulate commerce . . ." [*712] among the several states." *Art. I, § 8, cl. 3, of the United States Constitution*. The clause has long been understood to have a negative implication that "denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." *Perini Corp. v. Commissioner of Revenue*, 419 Mass. 763, 767, 647 N.E.2d 52, cert. denied sub nom. *Adams v. Perini Corp.*, 516 U.S. 822, 116 S. Ct. 83, 133 L. Ed. 2d 41 (1995). See *Department of Revenue of Ky. v. Davis*, 553 U.S. 328, 337, 128 S. Ct. 1801, 170 L. Ed. 2d 685 (2008) (*Davis*). See generally *Opinion of the Justices*, 428 Mass. 1201, 1203-1211, 702 N.E.2d 8 (1998). In determining whether there has been a violation of this "negative command, known as the dormant Commerce Clause," *Capital One Bank v. Commissioner of Revenue*, 453 Mass. 1, 10, 899 N.E.2d 76, cert. denied, 557 U.S. 919, 129 S. Ct. 2827, 174 L. Ed. 2d 553 (2009), quoting *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*,

514 U.S. 175, 179, 115 S. Ct. 1331, 131 L. Ed. 2d 261 (1995), we ask first whether the restriction on commerce is discriminatory, in that it treats in-State and out-of-State economic interests differently and benefits the former and burdens the latter. *Oregon Waste Sys., Inc. v. Department of Envtl. Quality of Or.*, 511 U.S. 93, 99, 114 S. Ct. 1345, 128 L. Ed. 2d 13 (1994). If discriminatory, "it is virtually per se invalid" and may survive judicial scrutiny only if "it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Id.* at 99, 101, quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278, 108 S. Ct. 1803, 100 L. Ed. 2d 302 (1988). See *Davis, supra* at 338. If nondiscriminatory, it is invalid only if it imposes a burden on interstate commerce that "is clearly excessive in relation to the putative local benefits." *Id.* at 338-339, quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970).

The plaintiffs do not allege that the authority's collection or use of MHS toll revenues discriminates against interstate commerce. Instead, they claim the tolls nonetheless violate the dormant commerce clause because they are "excess[ive]" and "do not represent a fair approximation of the benefits provided by the [authority]." The plaintiffs allege that they have been deprived of the "rights, privileges, and immunities" secured by the dormant commerce clause, and seek damages and attorney's fees under 42 U.S.C. § 1983 (2006). See *Dennis v. Higgins*, 498 U.S. 439, 450-451, 111 S. Ct. 865, 112 L. Ed. 2d 969 (1991) (violations of dormant commerce clause included in "rights, privileges, or immunities" protected by § 1983).

[*713] We need not address the more difficult issue whether the plaintiffs have standing to bring a dormant commerce clause claim in a putative class action where the putative class members are residents of Massachusetts, New Hampshire, or Rhode Island but the plaintiffs all reside in Massachusetts, and where the amended complaint does not allege that any plaintiff traveled on the MHS in interstate commerce, because we conclude that the amended complaint plainly fails to state a dormant commerce clause claim. It is "settled that a charge designed only to make the user of state-provided facilities pay a reasonable fee to help defray the costs of their construction and maintenance may constitutionally be imposed on interstate and domestic users alike." *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707, 714, 92 S. Ct. 1349, 31 L. Ed. 2d 620 (1972) (*Evansville*). Where a State imposes a reasonable toll that is "fixed according to some uniform, fair and practical standard," *id.* at 713, quoting *Hendrick v. Maryland*, 235 U.S. 610, 624, 35 S. Ct. 140, 59 L. Ed. 385 (1915), and that "is neither discriminatory against interstate commerce nor excessive in comparison with the governmental benefit conferred, it will pass constitutional muster." *Evansville, supra* at 717. See *Doran v. Massachusetts*

Turnpike Auth., 256 F. Supp. 2d 48, 55 (D. Mass.), aff'd, 348 F.3d 315 (1st Cir. 2003), cert. denied, 541 U.S. 1031, 124 S. Ct. 2107, 158 L. Ed. 2d 712 (2004) (dismissing dormant commerce clause challenge to "Fast Lane" transponder program providing discount on MHS tolls).

Here, the authority "need not demonstrate that the toll fee exactly equals the costs of maintenance or the benefits conferred; all that is required is that the tolls 'reflect a fair, if imperfect, approximation of the use of facilities for whose benefit they are imposed.'" *Cohen v. Rhode Island Turnpike & Bridge Auth.*, 775 F. Supp. 2d 439, 449-450 (D.R.I. 2011), quoting *Evansville*, *supra* (rejecting dormant commerce clause challenge to bridge tolls). Where the MHS tolls were required by statute to be used to pay the costs of the entire MHS integrated system of roads, tunnels, and bridges, and where there is no allegation that they were put to a use prohibited by the statute or that the toll revenues exceeded the total cost of the MHS, the tolls reflect a reasonable and

nonexcessive approximation of the value of use of the MHS. See *Wallach v. Brezenoff*, 930 F.2d 1070, 1072 (3d Cir. 1991) [*714] (rejecting dormant commerce clause challenge to toll increase where "tolls are not excessive in relation to the costs of the Port Authority's Interstate Transportation Network as a whole"); *Bridgeport & Port Jefferson Steamboat Co. v. Bridgeport Port Auth.*, 567 F.3d 79, 87 (2d Cir. 2009), cert. denied, 130 S. Ct. 1075, 175 L. Ed. 2d 887 (2010) ("user fee . . . may reasonably support the budget of a governmental unit that operates facilities that bear at least a 'functional relationship' to facilities used by the fee payers"). The plaintiffs' dormant commerce clause claim and its related § 1983 claim were properly dismissed.

Conclusion. We affirm the judge's dismissal of the amended complaint.

So ordered.

**NORTHEAST ENERGY PARTNERS, LLC vs. MAHAR REGIONAL SCHOOL DISTRICT;
CONSTELLATION NEWENERGY, INC., third-party defendant.**

SUPREME JUDICIAL COURT OF MASSACHUSETTS

462 Mass. 687

971 N.E.2d 258; 2012 Mass. LEXIS 652

April 3, 2012, Argued

July 9, 2012, Decided

PRIOR HISTORY: Suffolk. Certification of questions of law to the Supreme Judicial Court by the United States District Court for the District of Massachusetts.

HEADNOTES

Uniform Procurement Act. Electricity. Words, "Energy related," "Energy contract."

COUNSEL: Kelly T. Gonzalez for the defendant.

Scott A. Birnbaum (Anne Marie Longobucco with him) for the plaintiff.

Gordon P. Katz & Jessica Ragosta Early, for Amesbury Housing Authority & others, amici curiae, submitted a brief.

JUDGES: Present: Ireland, C.J., Spina, Cordy, Botsford, Gants, Duffly, & Lenk, JJ.

OPINION BY: DUFFLY

OPINION

[*687] DUFFLY, J. The Ralph Mahar Regional School District (Mahar), which serves several central Massachusetts towns, entered into a price watch agreement with Northeast Energy Partners, LLC (Northeast), a licensed broker of energy services based in Connecticut, pursuant to which Northeast would negotiate and secure contracts for the provision of Mahar's electricity from energy suppliers. Mahar did not enter into the agreement to obtain Northeast's services pursuant to the competitive bidding procedures contained in G. L. c. 30B. When Mahar questioned the validity of the agreement, Northeast filed a diversity action in the United States District Court for the District of Massachusetts seeking a declaratory judgment that its agreement [*688] with Mahar is valid and enforceable because, under *G. L. c. 30B, § 1 (b) (33)*, the agreement is exempt from the competitive solicitation and bidding procedures set forth in G. L. c. 30B. A judge of that court has certified to us the following questions of State law pursuant to *S.J.C. Rule 1:03*, as appearing in 382 Mass. 700 (1981):

"[1.] Is a contract between a school district and an energy broker for the procurement of contracts for electricity

exempt from the requirements of G. L. c.] 30B as a contract for 'energy or energy related services' pursuant to G. L. c. 30B, § 1 (b) (33)?"

"[2.] If [G. L. c.] 30B is interpreted to apply to a contract between a school district and an energy broker for the procurement of contracts for electricity, does this interpretation apply retroactively to 2004, to 2008, or only prospectively?"

"[3.] If [G. L. c.] 30B applies to the contract, does a provision providing for automatic renewal of the contract term with a public entity, without the public entity's affirmative approval, violate [G. L. c.] 30B?"

For the reasons discussed below, we answer the first certified question, "Yes"; we therefore need not reach the second or third questions.**[FN1]**

1 We acknowledge the amicus brief of the Amesbury Housing Authority; the cities of Beverly, Brockton, Easthampton, and Newburyport; the towns of Easton, Lexington, Natick, Sharon, Stoneham, and Sudbury; and Bay State Consultants, LLC, in support of the plaintiff.

1. Background. We assume the following facts, which we draw from the pleadings and other documents of record. Northeast is a broker of energy services that acts as an agent for clients in purchasing electricity from electricity suppliers. Northeast's clients include businesses and governmental entities, such as regional school districts. Through its "Price Watch Aggregation Program," Northeast negotiates pricing and other terms with electricity suppliers on behalf of a large group of customers; customers sign agreements authorizing Northeast to enter into multiyear, fixed-rate contracts for electricity, up to a **[*689]** specified maximum rate, on their behalf. Customers do not pay Northeast to participate in the price watch aggregation program. Northeast receives compensation for its services through commissions and other payments from electricity suppliers.

Northeast and Mahar entered into a price watch agreement in July, 2004. That agreement authorized Northeast to explore energy markets, negotiate pricing and other terms, and enter into contracts on Mahar's behalf for the supply of Mahar's electricity requirements for a period of between twelve and forty-eight months, at a price of \$0.0669 per kilowatt hour or less. The agreement specified that if Northeast were unable to obtain a contract to supply Mahar's requirements at or below that price, due to "market conditions," Northeast could propose a modification to the agreement to reflect

a higher authorized purchase price. The agreement provided also that, on receipt of a proposed higher authorized purchase price or length of term modification, Mahar had fifteen days to respond in writing that it accepted or rejected the proposed modification. If Mahar failed to reject the proposed modification in writing within fifteen days, the agreement would automatically be modified to incorporate the proposed change.**[FN2]**

2 The automatic modification provision provides, in relevant part:

"[D]uring the Price Watch Period, [Northeast] may propose, and [Mahar] may agree to increase the Authorized Purchase Price, if warranted by market conditions, and this Agreement will then be modified to reflect the new Authorized Purchase Price as follows. Upon [Mahar's] receipt of the proposed Authorized Purchase Price, [Mahar] shall have fifteen (15) days to respond to [Northeast] and accept the proposed Authorized Purchase Price, or reject same. [Mahar] agrees that if it does not provide a written rejection of the proposed Authorized Purchase Price within the allotted 15-day period, that this Agreement shall be modified to incorporate the Authorized Purchase Price as proposed."

The initial term of the price watch agreement was for one year, ending in July, 2005, but was subject to both extension and automatic renewal under the following circumstances. If Northeast were successful in executing an electricity supply agreement during the one-year period, the initial term would automatically extend to, and be coextensive with, the term of the electricity supply agreement. In addition, as long as Northeast obtained a new or renewal agreement with an electricity supplier, **[*690]** then Mahar's price watch agreement with Northeast would automatically be modified to incorporate the new rate and would renew for a term coextensive with that of the new electricity supply agreement, unless rejected in writing by Mahar within fifteen days.**[FN3]**

3 The automatic renewal provision provides, in relevant part:

"At any time during the renewal period, [Northeast] may

propose to modify the Authorized Purchase Price and/or term that will apply to new or renewal Electric Supply Agreements. Upon [Mahar's] receipt of the proposed Authorized Purchase Price and/or term, [Mahar] shall have fifteen (15) days to respond to [Northeast] and accept the proposed Authorized Purchase Price and/or term, or reject same. [Mahar] agrees that if it does not provide written notice of its intention to reject the proposed Authorized Purchase Price and/or term within the allotted 15-day period, that this Agreement shall be modified to incorporate the Authorized Purchase Price and/or term as proposed."

The agreement provides also that Mahar and Northeast shall each have "the right to cancel the automatic renewal" by providing advance notice "received by the other at least 180 days prior to the expiration of the Contract Period"; however, cancellation is not "effective until all Electric Supply Agreements entered into" by Northeast and Mahar have expired by their terms.

Northeast was unable to obtain a contract for Mahar at the \$0.0669 price authorized by the terms of the initial agreement. In January, 2005, Mahar and Northeast amended the price watch agreement, increasing the authorized purchase price to \$0.0792 per kilowatt hour for a term of forty-six months, beginning in March, 2005, and ending in December, 2008. Eileen M. Perkins, who was then Mahar's superintendent, signed the amendment to the price watch agreement to reflect the increased authorized purchase price. In February, 2005, Northeast, as agent for Mahar, entered into an energy service contract with an electricity supplier, Constellation NewEnergy, Inc. (Constellation), pursuant to which Constellation would supply Mahar with electricity at the fixed rate of \$0.0792 per kilowatt hour until December, 2008.

In anticipation of the December, 2008, expiration of the electricity supply agreement, Northeast negotiated a new contract with Constellation for electricity supply on Mahar's behalf. In July, 2008, Northeast sent Mahar a proposal for the new contract with Constellation, listing a price of \$0.1380 per kilowatt hour for a five-year term commencing in December, 2008, and ending in [*691] December, 2013.[FN4] Under the provisions of the amended price watch agreement then in effect, Mahar had until August 1, 2008, to decline the proposal.[FN5] When Mahar did not decline the proposal, Northeast, as

agent for Mahar, executed the electricity supply contract with Constellation on August 1, 2008.

4 The proposal was contained in a July 15, 2008, letter from Northeast to Raza Namin, who succeeded Eileen M. Perkins as superintendent of Mahar. In its suit in the United States District Court for the District of Massachusetts, Mahar asserts that the mailing had the appearance of an advertisement and failed adequately to notify Mahar of the proposed renewal terms. Namin did not respond to the letter.

5 Northeast's letter to Mahar states in relevant part:

"We are happy to inform you that we will be triggering the Price Watch Aggregation with Constellation NewEnergy as the chosen supplier. The fixed price will be .1380 per kWh [kilowatt hour] (Proposed Authorized Purchase Price) and will be fixed for 5 years beginning on your scheduled meter read in December 2008. The fixed price will apply to all accounts that you had enrolled into the Price Watch program."

"No action is required on your part to take advantage of this fixed rate. If you choose to decline this offering you must notify us in writing by August 1, 2008."

In 2009, Mahar's superintendent, Michael Baldassare, became concerned about the rate Mahar was paying for electricity, which he believed was in excess of that being paid in other Massachusetts school districts.[FN6] His attempts to negotiate a lower rate with Northeast were unsuccessful.

6 In its complaint for declaratory judgment, Northeast asserts that "[b]y the end of 2008 . . . market prices for electricity declined due to economic conditions, resulting in Mahar having an agreement to purchase electricity for what turned out to be higher than market rates."

By two letters sent in March and May, 2010, Mahar advised Northeast and Constellation that it believed the price watch agreement to be invalid and unenforceable because the agreement had not been subject to the competitive bidding procedures contained in G. L. c. 30B, and specifically that the automatic renewal provision violated G. L. c. 30B by renewing the agreement without Mahar's "affirmative approval." [FN7] The letters further advised that Mahar

would not be renewing the agreement, that [*692] Mahar intended to put out to bid "immediately" a contract for electricity services, and that Mahar would seek a declaratory judgment that its contracts with Northeast and Constellation were void.

7 The notification to Northeast was based in part on a letter Mahar received from the Inspector General in response to Mahar's inquiry regarding the validity of its agreement with Northeast; the letter set forth the Inspector General's opinion that the price watch agreement was not exempt from the competitive bidding requirements of G. L. c. 30B and that the automatic renewal provision violated G. L. c. 30B, § 12 (c) (5).

In July, 2010, Northeast filed the underlying declaratory judgment action in the United States District Court for the District of Massachusetts, and Mahar counterclaimed.[FN8] In December, 2010, Mahar filed a motion for a preliminary injunction in the Federal case, seeking to enjoin the enforcement of Mahar's contracts with Northeast and Constellation; Northeast and Constellation opposed the motion and filed cross motions for summary judgment on Northeast's claim that the agreements at issue are exempt from the requirements of G. L. c. 30B and therefore valid and enforceable. After a hearing, the judge issued an order certifying the questions now before us.[FN9]

8 Mahar asserted affirmative defenses and counterclaimed that the price watch agreement violated G. L. c. 30B and is therefore unenforceable. Mahar also filed a third-party complaint against Constellation, alleging breach of the implied covenant of good faith and fair dealing and violation of G. L. c. 93A, and seeking a declaratory judgment that the energy services contract between Northeast and Constellation violates G. L. c. 30B and is therefore void.

9 The judge stayed the Federal action pending our response to the certified questions.

2. Discussion. The first certified question asks that we determine whether an agreement between an energy broker and a regional school district for the procurement of a contract for electricity is a contract for "energy or energy related services" pursuant to G. L. c. 30B, § 1 (b) (33), that is exempt from the competitive bidding requirements of G. L. c. 30B. We conclude that it is.

"The starting point of our analysis is the language of the statute, 'the principal source of insight into Legislative purpose.'" *Simon v. State Examiners of Electricians*, 395 Mass. 238, 242, 479 N.E.2d 649 (1985), quoting *Commonwealth v. Lightfoot*, 391 Mass. 718, 720, 463 N.E.2d 545 (1984). We apply familiar principles of statutory construction, interpreting the

Legislature's intent "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 [*693] mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated." *Harvard Crimson, Inc. v. President & Fellows of Harvard College*, 445 Mass. 745, 749, 840 N.E.2d 518 (2006), quoting *Hanlon v. Rollins*, 286 Mass. 444, 447, 190 N.E. 606 (1934). "Statutes are to be interpreted, not alone according to their simple, literal or strict verbal meaning, but in connection with their development, their progression through the legislative body, the history of the times, prior legislation, [and] contemporary customs and conditions General expressions may be restrained by relevant circumstances showing a legislative intent that they be narrowed and used in a particular sense." *Simon v. State Examiners of Electricians*, supra at 243, quoting *Commonwealth v. Welosky*, 276 Mass. 398, 401-402, 177 N.E. 656 (1931), cert. denied, 284 U.S. 684, 52 S. Ct. 201, 76 L. Ed. 578 (1932).

a. Uniform procurement act. General Laws c. 30B, the Uniform Procurement Act (procurement act), is a public bidding statute "designed to prevent favoritism, to secure honest methods of letting contracts in the public interest, to obtain the most favorable price, and to treat all persons equally." *Phipps Prods. Corp. v. Massachusetts Bay Transp. Auth.*, 387 Mass. 687, 692, 443 N.E.2d 115 (1982). Unless a specific exemption exists, the procurement act applies "to every contract for the procurement of supplies, services or real property . . . by a governmental body." [FN10] G. L. c. 30B, § 1 (a). As is relevant here, the procurement act does not apply to "energy contracts entered into by a city or town or group of cities or towns or political subdivisions of the [C]ommonwealth, for energy or energy related services." G. L. c. 30B, § 1 (b) (33).[FN11] However, the term "energy related services" is [*694] not defined in the procurement act, and the parties advance substantially different definitions in support of their respective positions.

10 Many of these operative terms are defined in G. L. c. 30B (procurement act). A "contract" includes "all types of agreement for the procurement or disposal of supplies or services, regardless of what the parties may call the agreement"; "[s]upplies" are defined as "all property, other than real property, . . . including services incidental to the delivery, conveyance and installation of such property"; "[s]ervices" are defined as "the furnishing of labor, time, or effort by a contractor, not involving the furnishing of a specific end product other than reports"; and "[g]overnmental body" is defined to include a "regional school district." G. L. c. 30B, § 2.

11 As do the parties, for purposes of *G. L. c. 30B, § 1 (b) (33)*, we treat a regional school district as both a governmental body, *G. L. c. 30B, § 2*, and a political subdivision of the Commonwealth. See *Boylston Water Dist. v. Tahanto Regional Sch. Dist.*, 353 Mass. 81, 82, 227 N.E.2d 921 (1967).

To support its claim that the contract with Northeast is not one for energy related services, Mahar relies on a May 18, 2010, letter from the office of the Inspector General, which is charged with enforcing the public procurement laws. See *G. L. c. 12A, § 7*. According to that letter, energy related services are limited to those services "that are ancillary to the delivery of energy, such as reactive power and voltage control, loss compensation, and load following."**[FN12]** Northeast asserts that, based on the plain meaning of the term "related," its services of "identifying and selecting electricity suppliers, [and] negotiating and executing agreements," are "associated" with or connected by means of an established or discoverable relation" to the purchase of energy, and are therefore exempt under *G. L. c. 30B, § 1 (b) (33)*.

12 The term "[a]ncillary services" is defined by *G. L. c. 164, § 1*, as "those functions which support generation, transmission, and distribution, and shall include the following services: (1) reactive power or voltage control; (2) loss compensation; (3) scheduling and dispatch; (4) load following; (5) system protection service; and (6) energy imbalance service." This definition closely tracks one proposed by the Federal Energy Regulatory Commission, which described ancillary services under Federal law as "those services necessary to support the transmission of electric power from seller to purchaser." See *60 Fed. Reg. 17,662, 17,683-17,685 (1995)*.

To some extent, focusing on the phrase "energy related services" misses the point. The essential inquiry is whether the agreement at issue is of the type that the Legislature intended to exempt from the public bidding requirements of the procurement act. The exemption does not apply to energy related services as distinct from energy; rather, it applies to "energy contracts . . . for energy or energy related services." *G. L. c. 30B, § 1 (b) (33)*. The operative term in this sentence is "energy contracts." Although neither "energy contract" nor "energy related" are terms defined in the procurement act, a precise definition is unnecessary to resolve the question before us;**[FN13]** it is apparent from the statutory scheme that the agreement at issue is an energy contract that the **[*695]** Legislature intended to exempt from the requirements of the procurement act.

13 Department of Public Utilities (department) regulations reference "service . . . attributable to

electricity" with respect to the disclosures required of competitive suppliers. See *220 Code Mass. Regs. § 11.06(2)(b)(1)(d)(ii)* (2008) (where electricity is bundled with any other product or service, competitive suppliers offering generation service "may display the charge [as an] average price . . . assuming the entire price of the bundled service is attributable to electricity").

b. Restructuring act. In 1997, the Legislature enacted a comprehensive restructuring of the electric utility industry in Massachusetts, see St. 1997, c. 164 (restructuring act), changing it from a government-regulated monopoly to "a framework under which competitive producers will supply electric power and customers will gain the right to choose their electric power supplier."**[FN14]** St. 1997, c. 164, § 1 (c) (ii). Much of the legislation was codified as amendments to *G. L. c. 164*, but numerous other provisions of the General Laws were also affected, including sections of the procurement act. See, e.g., St. 1997, c. 164, § 58. Among its declared purposes, the restructuring act was intended to provide affordable electric service "to all consumers on reasonable terms"; to introduce "competition in the electric generation market" in order to "encourage innovation, efficiency, and improved service from all market participants" with resulting "reductions in the cost of regulatory oversight"; to achieve long-term reductions in energy costs by "allowing market forces to play the principal role in determining the suppliers of generation for all customers"; and to preserve and augment "consumer protections, full and fair competition in generation, and enhanced environmental protection goals." St. 1997, c. 164, § 1 (b), (f), (k), (l).

14 The restructuring act, "An Act relative to restructuring the electric utility industry in the Commonwealth, regulating the provision of electricity and other services, and promoting enhanced consumer protections therein," added or modified 344 sections of the General Laws. Adoption of the restructuring act followed similar changes in Federal law that created competition within the wholesale electric power industry. See National Consumer Law Center, *Access to Utility Service § 1.4.2.4* (1996 & Supp. 1998). The restructuring act reflects considerations underlying the department's earlier investigation: to "promote competition and economic efficiency" in the electric utility industry and to extend to customers "the option of choosing their own electricity suppliers." D.P.U. 95-30 at i, 4 (Aug. 16, 1995) (if "initiatives to restructure the electric utility industry require statutory change, the [d]epartment will coordinate with the Legislature in an effort to bring about change

that is in the public interest"). See D.P.U. 95-30 (Feb. 10, 1995).

The electric utility industry involves three general components: [*696] generation, transmission, and distribution. See *Shea v. Boston Edison Co.*, 431 Mass. 251, 253, 727 N.E.2d 41 (2000). Generation is "the act or process of transforming other forms of energy into electric energy or the amount of electric energy so produced." *G. L. c. 164, § 1*. "Transmission" is the delivery of electric power "from generating facilities across interconnected high voltage lines to where it enters a distribution system." *Id.* From there, electricity is distributed over lower voltage lines to customers.[FN15] *Id.* See *Shea v. Boston Edison Co.*, *supra*.

15 General Laws c. 164 and the regulations promulgated thereunder, 220 Code Mass Regs. §§ 11.00, use the term "customer" and "consumer" interchangeably to refer to end users of electricity. See, e.g., *G. L. c. 164, §§ 1, 1F*; 220 Code Mass. Regs. § 11.02 (2008). A "customer" may also refer to municipalities, which are not necessarily end users. See *G. L. c. 164, § 134*. For purposes of this decision, we use the terms customer and consumer interchangeably to refer to end users of electricity.

Prior to the restructuring act, the Massachusetts electric industry consisted of a "complex mosaic of exclusive service territories supported by electricity generation, transmission, and distribution assets under the individual ownership of eight discrete investor-owned utilities" as well as forty municipal utilities. D.P.U. 95-30 at 5 (Feb. 10, 1995). These companies controlled the entire process from the generation of electricity to its final distribution to customers. They owned the electric generation facilities, high-voltage transmission networks, and low-voltage distribution networks used to serve customers in their service territories. *Id.* at 4-6. See *Concord v. Boston Edison Co.*, 915 F.2d 17, 19 (1st Cir. 1990), cert. denied, 499 U.S. 931, 111 S. Ct. 1337, 113 L. Ed. 2d 268 (1991).

The restructuring act separated these three utility services and opened the supply of generation services to competition, recognizing that "the interests of consumers [could] best be served by an expedient and orderly transition from regulation to competition in the generation sector consisting of the unbundling of prices and services and the functional separation of generation services from transmission and distribution services." St. 1997, c. 164, § 1 (m). This functional separation of services, which limited a "company's ability to provide itself an undue advantage in buying or selling services in competitive markets," was regarded as a necessary first step in moving toward "a [*697] fully competitive

generation market based on customer choice." See D.P.U. 95-30 at 16 (Aug. 16, 1995).

In the competitive marketplace, consumers of electricity could choose among different suppliers of electricity services, while still receiving their electricity through the existing transmission and distribution networks. D.P.U. 95-30 at 9-10 (Feb. 10, 1995). Consumers could purchase electricity directly from a distribution company or through a "competitive supplier," an entity licensed by the Department of Public Utilities (department) to purchase wholesale power from generation companies for resale to end users. See 220 Code Mass. Regs. § 11.02 (2008). Consumers could also purchase electricity by utilizing the services of an "electricity broker," an entity that "facilitates or otherwise arranges for the purchase and sale of electricity and related services to [r]etail [c]ustomers, but does [not] sell electricity." [FN16] *Id.* The restructuring act also directed the department to promulgate rules and regulations that would "provide retail customers with the utmost consumer protections contained in the law" and govern licensing of "all generation companies, aggregators, suppliers, energy marketers, and energy brokers." *G. L. c. 164, § 1F*, inserted by St. 1997, c. 164, § 193.

16 There appears to be a scrivener's error in the definition of "electricity broker" in 220 Code Mass. Regs. § 11.02 ("Electricity broker means an entity . . . that facilitates or otherwise arranges for the purchase and sale of electricity . . . but does sell electricity") in that it omits the word "not" from the clause "but does sell electricity." The word "not" was included in the department's proposed regulations, see D.P.U./D.T.E. 96-100 at A-3 to A-4 (Jan. 16, 1998) (defining "[e]lectricity [b]roker" as entity that "does not produce, purchase, or otherwise take title to" electricity), and in emergency regulations promulgated prior to the notice and comment period. See D.P.U./D.T.E. 96-100 at A-1 (Jan. 9, 1998). In its order promulgating the final regulations, which omits the word "not," the department distinguished between suppliers and brokers as "entities that sell electricity and those that merely facilitate the sale." See D.P.U./D.T.E. 96-100 at 7 (Feb. 20, 1998). An electronic version, available through the department's Web site, contains the word "not." It is apparent from this history, as well as a plain reading of the regulation, that an electricity broker is an entity that "does not sell electricity."

A "[s]upplier" of electricity is defined as "a supplier of generation service to retail customers, including power marketers, brokers and marketing affiliates of distribution companies." *G. L. c. 164, § 1*. That "supplier[s]" are defined to include energy brokers recognizes that suppliers and brokers perform [*698]

functionally equivalent services that enable consumers to select and purchase electricity from an array of competitive sources. In directing the department to promulgate licensing regulations for the restructured industry, the Legislature also included brokers as a type of supplier. See *G. L. c. 164, § 1F (1)* (requiring department to license "all generation companies, aggregators, suppliers, energy marketers, and energy brokers," and referring to "energy brokers, energy marketers, and other suppliers"). It is apparent from the inclusion of energy brokers within the statutory scheme that the Legislature envisioned that such brokers, by facilitating the sale and purchase of electric energy from the suppliers of energy, would play an important role in "accommodat[ing] retail access to generation services and choice of suppliers by retail customers." *G. L. c. 164, § 1F*.

Although the department's regulations distinguish between competitive suppliers and electricity brokers, in that a broker does not own or sell electricity to a consumer and only "facilitates or otherwise arranges" for its purchase and sale, *220 Code Mass. Regs. § 11.02*, a broker is treated as equivalent to a supplier in the broader regulatory scheme.^[FN17] Consistent with the statutory language, brokers are explicitly enumerated in various regulatory definitions of "supplier." See *220 Code Mass. Regs. § 12.02* (2008) (defining "[n]on-affiliated [e]nergy [s]upplier" as any entity "engaged in marketing, brokering, or selling natural gas, electricity, or energy-related services to retail customers where such product or service is also provided by a Competitive Energy Affiliate"); *940 Code Mass. Regs. § 19.03* (1998) ("[r]etail [s]eller of [e]lectricity" is "any business, person or entity selling, offering to sell, arranging for the sale of, or engaged to market electricity or related products or services to [*699] consumers, including . . . to all entities which are regulated, or which are required to be licensed, by the [d]epartment for these purposes"). Suppliers and brokers are generally subject to the same requirements. See, e.g., *220 Code Mass. Regs. § 11.05* (2009) (establishing "requirements applicable to all Competitive Suppliers and Electricity Brokers").

¹⁷ In its order promulgating the regulations, the department notes that the restructuring act defines "supplier" to include entities such as brokers. D.P.U./D.T.E. 96-100 at 6 (Feb. 20, 1998). The department determined, however, that for purposes of documentation and disclosure, a distinction was needed between entities selling electricity and those that merely facilitate the sale. The department "requires somewhat different documentation from competitive suppliers than from electricity brokers"; "[t]he duty to disclose certain information resides with a competitive supplier, not with an electricity broker." *Id.* at 7. See, e.g.,

220 Code Mass. Regs. § 11.05(2)(b)(14) (2009) (documentation regarding supplier participation with New England Power Pool); *220 Code Mass. Regs. § 11.06* (2008) (disclosures, including price of generation services).

c. Application to the first certified question. At the same time that the Legislature created this newly competitive energy marketplace, it also exempted from the procurement act's complex public bidding requirements "energy contracts entered into by . . . political subdivisions of the commonwealth, for energy or energy related services." *G. L. c. 30B, § 1 (b) (33)*. There is no dispute that a contract for the purchase and sale of electricity entered into directly between a regional school district and an energy supplier is an "energy contract" within the meaning of the exemption. Because a broker that facilitates or arranges for the purchase and sale of electricity on behalf of a retail customer performs functionally the same service as an energy supplier, the Legislature could not have intended to require that such contracts with energy brokers be subject to the procurement act, while exempting agreements for the direct purchase of energy from energy suppliers.

In addition to including brokers within the statutory definition of suppliers, the Legislature required the licensing and regulation of both types of entities. See *G. L. c. 164, § 1F*. The regulations preclude competitive suppliers from using the services of "any entity to facilitate or otherwise arrange for the purchase and sale of electricity to [r]etail [c]ustomers, unless such entity has been licensed as an [e]lectricity [b]roker by the [d]epartment." *220 Code Mass. Regs. § 11.05(5)*. Furthermore, the Legislature established consumer protections for end users, including regional school districts, in the form of licensing requirements and customer authorization requirements applicable to both suppliers and brokers. See *G. L. c. 164, § 1F (1), (8) (a)*; *220 Code Mass. Regs. § 11.05(2), (4)*. The Legislature also put in place a mechanism for oversight of energy contracts entered into by cities, towns, and political subdivisions. A contract exempt from the procurement act pursuant to *G. L. c. 30B, § 1 (b) (33)*, must nevertheless be submitted to the department, the Department of [*700] Energy Resources, and the office of the Inspector General within fifteen days of signing, along with "a report of the process used to execute the contract."

These licensing and regulatory provisions guard against potential abuses in the new competitive environment, and support a determination that the Legislature intended to exempt from the requirements of the procurement act a contract for energy between a regional school district and an electricity broker, as well as between a regional school district and a competitive supplier of electricity. We therefore conclude that an agreement between a regional school district and an

energy broker to arrange for the purchase of electricity is an "energy contract" exempt from the requirements of the procurement act pursuant to *G. L. c. 30B, § 1 (b) (33)*.

3. Conclusion. We answer the first certified question, "Yes." Because of our answer to the first certified question, the second and third certified questions are not applicable, and we do not answer them.

The Reporter of Decisions is directed to furnish attested copies of this opinion to the clerk of this court. The clerk will transmit one copy, under the seal of the court, to the clerk of the United States District Court for the District of Massachusetts, as the answer to the questions certified, and will also transmit a copy to each party.

PUBLIC EMPLOYEE RETIREMENT ADMINISTRATION COMMISSION vs. EDWARD BETTENCOURT & others.[FN1]

APPEALS COURT OF MASSACHUSETTS

81 Mass. App. Ct. 1113
961 N.E.2d 620; 2012 Mass. App. Unpub. LEXIS 141

February 10, 2012, Entered

NOTICE: DECISIONS ISSUED BY THE APPEALS COURT PURSUANT TO ITS *RULE 1:28* ARE PRIMARILY ADDRESSED TO THE PARTIES AND, THEREFORE, MAY NOT FULLY ADDRESS THE FACTS OF THE CASE OR THE PANEL'S DECISIONAL RATIONALE. MOREOVER, *RULE 1:28* DECISIONS ARE NOT CIRCULATED TO THE ENTIRE COURT AND, THEREFORE, REPRESENT ONLY THE VIEWS OF THE PANEL THAT DECIDED THE CASE. A SUMMARY DECISION PURSUANT TO *RULE 1:28*, ISSUED AFTER FEBRUARY 25, 2008, MAY BE CITED FOR ITS PERSUASIVE VALUE BUT, BECAUSE OF THE LIMITATIONS NOTED ABOVE, NOT AS BINDING PRECEDENT.

PRIOR HISTORY: *Public Empl. Ret. Admin. Comm'n v. Bettencourt, 2010 Mass. Super. LEXIS 202 (Mass. Super. Ct., 2010)*

DISPOSITION: The judgment of the Superior Court is vacated and the case is remanded to the District Court for consideration of the defendant's Eighth Amendment claim.

JUDGES: Berry, Trainor & Hanlon, JJ.

OPINION MEMORANDUM AND ORDER PURSUANT TO *RULE 1:28*

On October 26, 2006, the defendant Edward Bettencourt, a former member of the Peabody police department (department), was convicted of twenty-one counts of accessing an unauthorized computer system, in violation of *G. L. c. 266, § 120F*. The same day, Bettencourt filed an application for voluntary superannuation retirement with the Peabody retirement board (board) under *G. L. c. 32, § 5*. After a hearing, the

board issued a decision approving Bettencourt's retirement, ruling that his convictions did not violate *G. L. c. 32, § 15(4)*,² because the board concluded that Bettencourt's conduct did not constitute "criminal activity connected with [his] office or position." In accordance with *G. L. c. 32, §§ 5(3)(d), 21(4)*, the board's decision was submitted to the Public Employee Retirement Administration Commission (PERAC) for approval. PERAC reversed the board's decision, concluding that Bettencourt's crimes were "per se . . . related to his . . . position." Bettencourt sought review in the District Court, arguing both that PERAC erroneously applied *G. L. c. 32, § 15(4)*, [FN2] and that pension forfeiture in this matter was an excessive fine in violation of the *Eighth Amendment to the United States Constitution*. On cross motions for summary judgment, a District Court judge overruled PERAC's decision. Following the District Court judge's decision, PERAC sought certiorari review in Suffolk Superior Court. See *G. L. c. 249, § 4*. Again on cross motions for summary judgment, a Superior Court judge affirmed the District Court judge's decision awarding benefits to Bettencourt.

1 Justices of the Peabody Division of the District Court Department of the Trial Court.

2 The statute, governing forfeiture of pension upon misconduct, reads in relevant part: "In no event shall any member after final conviction of a criminal offense involving violation of the laws applicable to his office or position, be entitled to receive a retirement allowance under the provisions of section one to twenty-eight, inclusive, nor shall any beneficiary be entitled to receive any benefits under such provisions on account of such member." *G. L. c. 32, § 15(4)*, inserted by St. 1987, c. 697, § 47.

PERAC filed a timely notice of appeal. We vacate the judgment, and remand the matter to the District Court for consideration of the Eighth Amendment issue.

Discussion. In this context we review the decision of the District Court judge "without giving the view of the Superior Court judge any special weight." *Doe v. Superintendent of Schs. of Stoughton*, 437 Mass. 1, 5, 767 N.E.2d 1054 & n.6 (2002). We must determine whether the District Court judge committed a "substantial error of law" in overturning PERAC's ruling denying Bettencourt pension benefits under *G. L. c. 32, § 15(4)*. See, e.g., *Woodward v. State Bd. of Retirement*, 446 Mass. 698, 703-704, 847 N.E.2d 298 (2006).

In determining whether a violation of *G. L. c. 32, § 15(4)*, has occurred, "[t]he substantive touchstone intended by the General Court is criminal activity connected with the office or position." *Gaffney v. Contributory Retirement Appeal Bd.*, 423 Mass. 1, 4, 665 N.E.2d 998 (1996). See *MacLean v. State Bd. of Retirement*, 432 Mass. 339, 341-342, 733 N.E.2d 1053 (2000); *State Bd. of Retirement v. Bulger*, 446 Mass. 169, 175, 843 N.E.2d 603 (2006); *G. L. c. 32, § 15(4)*. Not all convictions, but only "those violations related to the member's official capacity were targeted" by the statute. *Gaffney*, *supra* at 5. "Looking to the facts of each case for a direct link between the criminal offense and the member's office or position best effectuates the legislative intent of § 15(4)." *Ibid*.

We conclude that the commission of Bettencourt's crime was directly linked to his office or position, and that the District Court judge substantially erred in his ruling to the contrary. Bettencourt's crimes were not "mere personal transgressions wholly unrelated" to his office. *Bulger*, 446 Mass. at 174. The District Court judge acknowledged that "Bettencourt's criminal activity involved police equipment and targeted fellow police officers." He illegally accessed the files of the other officers while on duty in his official capacity as a watch commander, on department premises, and while

using a department computer.[FN3] Importantly, his job as a watch commander entailed the supervision of other officers, and he impersonated other officers on-line to facilitate his illegal access to the department computer system. Further, although no direct evidence was presented of exactly how Bettencourt obtained the Social Security numbers of the officers he impersonated, it strains credulity to suggest that he did not obtain at least some of this information through some official means. Based on the facts of this case we have no choice but to conclude that the direct link required by *Gaffney* and *Bulger* is present here.

3 Contrast *Scully v. Retirement Bd. of Beverly*, 80 Mass. App. Ct. 538, 543, 954 N.E.2d 541 (2011) (holding § 15[4] inapplicable where there was no evidence that the defendant used library computers to illegally access and store child pornography, and where the defendant did not "use his position to facilitate the crime of which he was convicted").

As the Commonwealth points out in its reply brief, any arguments "that the pension forfeiture statute is not calibrated to the gravity of an offense" are policy arguments that "are better addressed to the Legislature." *MacLean*, 432 Mass. at 340 n.2. "To the extent that there may be hardship" resulting from a particular application of *G. L. c. 32, § 15(4)*, "amelioration must be left to the Legislature." *Glass v. Lynn*, 49 Mass. App. Ct. 352, 355, 729 N.E.2d 1136 (2000).

As the District Court judge did not reach Bettencourt's claim that the forfeiture of his pension benefits constitutes an excessive fine in violation of the *Eighth Amendment*, we remand the case to the District Court for consideration of that issue.

The judgment of the Superior Court is vacated and the case is remanded to the District Court for consideration of the defendant's Eighth Amendment claim.

By the Court (Berry, Trainor & Hanlon, JJ.),

MARIA SERRAZINA vs. SPRINGFIELD PUBLIC SCHOOLS.

APPEALS COURT OF MASSACHUSETTS

80 Mass. App. Ct. 617
954 N.E.2d 1147; 2011 Mass. App. LEXIS 1277

April 7, 2011, Argued
October 12, 2011, Decided

SUBSEQUENT HISTORY: Review granted by *Serrazina v. Springfield Pub. Sch.*, 461 Mass. 1105, 961 N.E.2d 589, 2012 Mass. LEXIS 48 (Mass., Feb. 2, 2012)

PRIOR HISTORY: Hampden. Civil action commenced in the Superior Court Department on October 24, 2008. The case was heard by Peter A. Velis, J.

HEADNOTES

School and School Committee, Arbitration, Suspension from employment, Termination of employment, Compensation of personnel, Professional teacher status. Arbitration, School committee, Confirmation of award. Damages, Back pay. Labor, Arbitration.

COUNSEL: Timothy J. Ryan for the plaintiff.

Maurice M. Cahillane for the defendant.

JUDGES: Present: Wolohojian, Milkey, & Hanlon, JJ.

OPINION BY: WOLOHOJIAN

OPINION

[*617] WOLOHOJIAN, J. The plaintiff, a teacher in the Springfield public school system (school),[FN1] was suspended without pay and [*618] subsequently terminated because she was the subject (together with her parents and siblings) of Federal indictments charging corruption at the Springfield Housing Authority (SHA).[FN2] After the charges against the plaintiff were dismissed pursuant to an agreement with the Federal government, the plaintiff sought reinstatement and back pay. The defendant denied those requests and terminated the plaintiff's employment. The plaintiff filed a grievance challenging her termination, and an arbitrator subsequently issued an award ordering the plaintiff's reinstatement.

1 The plaintiff was employed by the defendant as a school adjustment counselor and held "professional teacher status" pursuant to *G. L. c. 71, § 41*.

2 The plaintiff's father, Raymond Asselin, Sr., served as executive director of the SHA from 1969 until his resignation in 2003.

The plaintiff then filed a complaint in the Superior Court, seeking confirmation of the award and back pay for the period from her suspension to her reinstatement. On cross motions for summary judgment, a Superior Court judge affirmed the award,[FN3] but ruled that the plaintiff was not entitled to back pay. The plaintiff appeals from that judgment, challenging the denial of her request for back pay. We affirm with respect to the period between the plaintiff's termination and her reinstatement, but reverse with respect to the period of her suspension.

3 The defendant did not oppose confirmation of the arbitration award. That ruling is not before us on appeal.

Background. Broadly summarized, Federal indictments accused members of the plaintiff's family with exploiting the SHA for personal gain through a long-running scheme of bribery, embezzlement, and fraud. The plaintiff herself was charged, among other things, with conspiring to receive gratuities and receipt of gratuities, *18 U.S.C. §§ 201, 371 (2006)*, and conspiracy to commit theft against the United States, *18 U.S.C. §§ 371, 641 (2006)*. The plaintiff does not dispute that she received a number of items for which she did not pay, including paint, wallpaper, an alarm system, a refrigerator, and the construction services of SHA employees who performed repairs on her home. She also does not dispute that Federal agents found a suitcase containing \$237,000 in cash in the attic of her home.

Citing the indictment, and acting pursuant to *G. L. c. 268A, § 25* (suspension statute), the school's superintendent suspended the plaintiff from her job as a school adjustment counselor.[FN4] The [*619] suspension statute, *G. L. c. 268A, § 25*, inserted by St. 1972, c. 257, provides, in pertinent part:

"An . . . employee of a . . . regional school district[] . . . may, during any period such . . . employee is under indictment for misconduct in such office or employment or for misconduct in any elective or appointive public office, trust or employment at any time held by him, be suspended by the appointing authority

"Any person so suspended shall not receive any compensation or salary during the period of suspension, nor shall the period of his suspension be counted in computing his sick leave or vacation benefits or seniority rights

"If the criminal proceedings against the person suspended are terminated without a finding or verdict of guilty on any of the charges on which he was indicted, his suspension shall be forthwith removed, and he shall receive all compensation or salary due him for the period of his suspension, and the time of his suspension shall count in determining sick leave, vacation, seniority and other rights, and shall be counted as creditable service for purposes of retirement."

4 The school did not invoke the statute generally applicable to employee suspensions, *G. L. c. 71, § 42D*, presumably because that statute limits the period of involuntary suspension to one month. We observe that *G. L. c. 71, § 42D*, unlike *G. L.*

c. 268A, § 25, incorporates the review procedures set forth in *G. L. c. 71, § 42*.

Approximately two years after her suspension, the plaintiff entered into a pretrial diversion agreement with Federal prosecutors. Under the terms of the agreement, the plaintiff "acknowledge[d] responsibility for her conduct" and "accepted and [took] responsibility for accepting" a number of goods and services from her father for which she did not pay. The plaintiff agreed that she "now underst[ood]" that those goods and services were improperly provided by and through the SHA. The plaintiff further agreed to pay \$20,000 in restitution to resolve "any potential claims" involving SHA resources, and to "waive any claim she might have" to the cash seized from her home and certain real property on Cape Cod. For their part, the Federal prosecutors agreed to seek a dismissal of the plaintiff's indictment at the end of an eighteen-month diversion period.

[*620] As the end of the diversion period approached, the plaintiff informed the defendant that her indictment would soon be dismissed and that she wished to return to work. In response, the defendant terminated her employment effective October 22, 2007, pursuant to *G. L. c. 71, § 42* (termination statute), citing "conduct unbecoming a teacher." [FN5] Approximately six months later, the Federal charges against the plaintiff were dismissed with prejudice in accordance with the terms of the diversion agreement.

5 The termination statute, *G. L. c. 71, § 42*, as appearing in St. 1993, c. 71, § 44, provides, in pertinent part:

"[S]ubject to the provisions of this section, the superintendent may dismiss any employee of the school district. . . .

"A teacher with professional teacher status . . . shall not be dismissed except for inefficiency, incompetency, incapacity, conduct unbecoming a teacher, insubordination or failure on the part of the teacher to satisfy teacher performance standards developed pursuant to section thirty-eight of this chapter or other just cause.

"A teacher with professional teacher status may seek review of a dismissal decision within thirty days after receiving notice of his dismissal by filing a petition for arbitration with the commissioner. . . .

"Upon a finding that the dismissal was improper under the standards set forth in this section, the arbitrator may award back pay, benefits, reinstatement, and any other appropriate non-financial relief or any combination thereof. Under no circumstances shall the arbitrator award punitive, consequential, or nominal damages, or compensatory damages other than back pay, benefits or reinstatement. In the event the teacher is reinstated, the period between the dismissal and reinstatement shall be considered to be time served for purposes of employment. . . . With the exception of other remedies provided by statute, the remedies provided hereunder shall be the exclusive remedies available to teachers for wrongful termination."

The plaintiff, pursuant to the termination statute, challenged her termination through arbitration. Although that statute permits an arbitrator to award back pay, the plaintiff did not request it, stating that she would seek that particular remedy "elsewhere." Accordingly, although the arbitrator ordered the plaintiff's reinstatement, [FN6] he ruled:

"Ms. Serrazina in this arbitration makes no claim for back [*621] pay, having indicated that she will pursue that remedy elsewhere. Therefore none is ordered, so long as reinstatement in accordance with this award occurs prior to the 2008-09 school year."

6 The arbitrator concluded that the plaintiff, in entering the pretrial diversion agreement, had not admitted to facts establishing conduct unbecoming a teacher. According to the arbitrator, the school improperly sought to "base a termination decision upon a claim that [the plaintiff] failed to proclaim her innocence with sufficient clarity and with sufficient precision and forcefulness as to meet the superintendent's liking."

After the arbitrator issued his decision, the plaintiff filed the underlying action seeking confirmation of the arbitration award, and back pay [FN7] pursuant to the suspension statute. A Superior Court judge allowed the school's motion for summary judgment, reasoning that the plaintiff waived her claim for compensation before

the arbitrator and could not now seek "duplicate" remedies under the suspension statute. As an alternate ground for his decision, the judge reasoned that the plaintiff was barred from collecting under the suspension statute because her pretrial diversion agreement amounted to a "finding or verdict of guilt[]" within the meaning of that statute.

7 Although the plaintiff's complaint states that she also is seeking other lost benefits, the plaintiff has now confined herself to a claim for back pay. (In her brief, she states: "Make no mistake, this case is a dispute only about the back pay suspension benefits.")

Discussion. We deal here with the operation of two distinct statutes: the suspension statute, *G. L. c. 268A*, § 25, and the termination statute, *G. L. c. 71*, § 42.

The suspension statute permits the suspension of county and municipal employees while they are under indictment for misconduct in office.[FN8] However, in the event that "the criminal proceedings against the person suspended are terminated without a finding or verdict of guilty on any of the charges on which he was indicted, his suspension shall be forthwith removed, and he shall receive all compensation or salary due him for the period of his suspension . . ." *G. L. c. 268A*, § 25, fifth par. [*622] (emphasis supplied). The "period of suspension" may be longer than the period the employee is under indictment. See *Brittle v. Boston*, 439 Mass. 580, 584, 790 N.E.2d 208 & n.10 (2003) (removal of suspension is not automatic upon termination of criminal proceedings; suspension remains in effect until employee is notified that suspension is removed).

8 In cases involving teachers, the suspension statute has been interpreted to reach a significant range of off-duty misconduct. See *Dupree v. School Comm. of Boston*, 15 Mass. App. Ct. 535, 537-539, 446 N.E.2d 1099 (1983); *Perryman v. School Comm. of Boston*, 17 Mass. App. Ct. 346, 349-351, 458 N.E.2d 748 (1983). "Except for cases involving teachers and police officers, [the statutory requirement of "misconduct in . . . office"] has been interpreted generally to exclude an employee's off-duty conduct." *Brittle v. Boston*, 439 Mass. 580, 594, 790 N.E.2d 208 (2003) (emphasis in original).

The termination statute governs the termination of tenured teachers. The statute "outlines an extensive and exclusive arbitration procedure for . . . performance-based dismissals." *School Comm. of Westport v. Coelho*, 44 Mass. App. Ct. 614, 618, 692 N.E.2d 540 (1998). If a tenured teacher is improperly terminated, the statute permits - but does not require - the arbitrator to award "back pay, benefits, reinstatement, and any other appropriate non-financial relief or any combination thereof." *G. L. c. 71*, § 42,

sixth par. The arbitrator is not permitted to "award punitive, consequential, or nominal damages, or compensatory damages other than back pay, benefits or reinstatement." *Ibid.* With the exception of any "other remedies provided by statute," the termination statute's remedies are "the exclusive remedies available to teachers for wrongful termination." *Ibid.*

In summary, the suspension statute applies to certain public employees who are suspended because they are under indictment. By contrast, the termination statute applies to teachers who are terminated for the performance reasons enumerated in that statute. The two statutory schemes do not overlap. One can be suspended or one can be terminated, but one cannot be understood to be both suspended and terminated at the same time.[FN9],[FN10] "[T]he plain language of [the suspension statute] means that a suspension is effective only as long as the person affected holds the office from which he was suspended." *Brown v. Taunton*, 16 Mass. App. Ct. 614, 619, 454 N.E.2d 488 [*623] (1983). Cf. *Caples v. Secretary of the Commonwealth*, 350 Mass. 638, 640-641, 216 N.E.2d 102 (1966) (resignation terminates suspension); *Massachusetts Bay Transp. Authy. v. Massachusetts Bay Transp. Authy. Retirement Bd.*, 397 Mass. 734, 738 n.7, 493 N.E.2d 848 (1986) (discharge from employment terminates suspension).

9 We reject, for this reason, the plaintiff's illogical argument that her suspension continued even after she was terminated and that, as a result, she is entitled to back pay under the suspension statute for the time period from the date of her termination until the date she returned to work. The plaintiff's suspension ended on October 22, 2007, the date of her termination.

10 We reject the defendant's equally illogical argument that the plaintiff could only seek remedies under the suspension statute while she was currently suspended. The suspension statute presumes that a remedy-seeking employee will have already had her suspension removed and the charges against her dropped. Indeed, until the suspension is removed, compensation "for the period of . . . suspension" cannot be fully measured.

We see nothing in either statute that would have required the plaintiff to seek, via arbitration, back pay for the period of her suspension. Arbitration is not required under the suspension statute, and appeals from suspensions made under that statute are ordinarily brought in the Superior Court. See *Brittle v. Boston*, 439 Mass. 580, 583, 790 N.E.2d 208 (2003); *Brown*, *supra* at 616-617. Although the termination statute requires arbitration, it does so only in cases of wrongful termination. The statute does not once mention the word "suspension" or any variant of it, and we are loath to extend its reach beyond what the Legislature has

expressed. See *Carmel Credit Union v. Bondeson*, 55 Mass. App. Ct. 557, 560, 772 N.E.2d 1089 (2002) (we interpret a statute according to its plain words and will "not add words to a statute that the Legislature did not put there").

Consequently, we conclude that the plaintiff did not waive her claim for back pay during the period of her suspension by choosing not to raise it in the arbitration brought pursuant to the termination statute. We reach a different conclusion, however, with respect to her claim for post-termination back pay. The termination statute contains an express Legislative directive that teachers' claims of wrongful termination be arbitrated and that the remedies for such termination be determined by the arbitrator:

"With the exception of other remedies provided by statute, the remedies provided hereunder shall be the exclusive remedies available to teachers for wrongful termination."

G. L. c. 71, § 42, sixth par. Because the plaintiff declined to ask the arbitrator for post-termination back pay, despite the availability of such relief under the termination statute (under which she invoked arbitration), her claim for post-termination back pay has been waived.

The remaining question is whether the plaintiff is substantively entitled to back pay under the suspension statute. The statute provides that a suspended employee "shall receive all compensation [*624] or salary due him for the period of his suspension," if the criminal proceedings against the employee are "terminated without a finding or verdict of guilty." The defendant argues that the disposition of the plaintiff's criminal case was "in substance a guilty plea" and constituted "a finding or verdict of guilty." We do not agree.

The Federal pretrial diversion agreement was not itself a "finding or verdict of guilty," nor was it equivalent to a "finding or verdict of guilty." [FN11] The plaintiff did not admit to the facts alleged in the indictment, nor did she admit to knowing at the time she accepted the goods and services that they came from the SHA. The plaintiff admitted only to accepting goods and services from her father, which she later learned came from the SHA. That the plaintiff agreed to pay restitution and waive claims to certain property certainly implies culpability on her part (or, at the very least, unjust enrichment), but the statute requires more: "a finding or verdict of guilty." [FN12]

11 Indeed, United States Department of Justice policies indicate that Federally indicted defendants enter into such agreements precisely

to avoid findings of guilt. See U.S. Dept. of Justice, United States Attorneys' Manual, Title 9, Criminal Resource Manual § 712(F) (1997) ("The diversion period begins upon execution of a Pretrial Diversion Agreement. The Agreement . . . outlines the terms and conditions of supervision and is signed by the offender, his/her attorney, the prosecutor, and either the Chief Pretrial Services Officer or the Chief Probation Officer. The offender must acknowledge responsibility for his or her behavior, but is not asked to admit guilt. The period of supervision is not to exceed 18 months, but may be reduced"). 12 The decision in *Brittle* is not to the contrary. The court in that case held that the term "criminal proceedings" as appearing in the last paragraph of *G. L. c. 268A, § 25*, includes indictments overlapping in time with and directly related to the original indictment. *Brittle, supra at 585-586*. Contrary to the defendant's argument, *Brittle* does not implicate the meaning of the term "finding or verdict of guilty" as appearing in the same paragraph.

The defendant in essence asks us to depart from the plain text of the suspension statute. The statute stresses that its purpose is to compensate the suspended employee when "no misconduct by him is established," *Brittle, 439 Mass. at 586*, and "upon his vindication," *Bessette v. Commissioner of Pub. Works, 348 Mass. 605, 608, 204 N.E.2d 909 (1965)*. We are not unsympathetic to the defendant's argument, but we are bound by the plain language of the statute. See *Pielech v. Massasoit Greyhound, Inc., 423 Mass. 534, 539, 668 N.E.2d 1298 (1996)*, quoting from *Rosenbloom v. Kokofsky, 373 Mass. 778, 781, 369 N.E.2d 1142 [*625] (1977)* ("We cannot interpret a statute so as to avoid injustice or hardship if its language is clear and unambiguous and requires a different construction"). We recognize that the result, here, is that the plaintiff will receive back pay from the public fisc for the period when she was rightfully suspended because she was the subject of Federal indictment. This, though, is the consequence of explicit and plain language used by the Legislature -- from which we cannot deviate, and which we are bound to apply.

Conclusion. The plaintiff is entitled to back pay, under *G. L. c. 268A, § 25*, for the period of her suspension beginning on August 10, 2004, and ending on October 22, 2007. The plaintiff is not entitled to back pay or lost benefits for any other period. The judgment of the Superior Court is reversed insofar as it denies the plaintiff compensation for the period of her suspension, the judgment is otherwise affirmed. The case is remanded for calculation of back pay.

So ordered.

CITY OF SOMERVILLE vs. SOMERVILLE MUNICIPAL EMPLOYEES ASSOCIATION.

APPEALS COURT OF MASSACHUSETTS

80 Mass. App. Ct. 686
955 N.E.2d 924; 2011 Mass. App. LEXIS 1331; 191 L.R.R.M. 3337

July 12, 2011, Submitted
October 25, 2011, Decided

SUBSEQUENT HISTORY: Review denied by *City of Somerville v. Somerville Mun. Emples. Ass'n*, 461 Mass. 1105, 959 N.E.2d 435, 2011 Mass. LEXIS 1196 (Mass., Dec. 21, 2011)

PRIOR HISTORY: Middlesex. Civil action commenced in the Superior Court Department on October 21, 2009. A motion to vacate an arbitration award was heard by Leila R. Kern, J.

DISPOSITION: Judgment affirmed.

HEADNOTES

Arbitration, Confirmation of award, Authority of arbitrator, Arbitrable question, Collective bargaining. Civil Service, Applicability of provisions, Collective bargaining

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

James F. Lamond for the defendant.

JUDGES: Present: Mills, Green, & Katzmann, JJ. GREEN, J. (dissenting).

OPINION BY: KATZMANN

OPINION

[*686] KATZMANN, J. The city of Somerville (city) appeals from a judgment entered by a judge of the Superior Court confirming an arbitration award in favor of the Somerville Municipal Employees Association (association). The judge ruled that the arbitrator did not exceed his authority when he found that the city had violated the collective bargaining agreement (CBA) with the association for failure to pay Lisa Ann Pefine out-of-grade pay. The city argues that the judge erred in denying its motion to vacate the arbitrator's award and that the award must [*687] be vacated because it orders conduct prohibited by civil service law, G. L. c. 31. We affirm.

Background. Since 2007, Pefine has held the position of inspectional coordinator II within the city's inspectional services department. She is a non-civil service member of the association in bargaining unit D. She works in a two-person office. Her coworker, Donna

Pickett, holds the position of administrative assistant, a higher-paying, civil service position, and is a member of the association in bargaining unit B. The positions held by both Pefine and Pickett are clerical in nature. Prior to February, 2008, when Pickett was not at work for a variety of reasons, such as sick leave and vacation, Pefine would be required to cover for Pickett, and Pefine would apply for "out-of-grade" pay based on the difference between her regular compensation and the regular compensation received by Pickett. On each such occasion she was awarded the out-of-grade compensation, which was paid pursuant to Article XX, § 7, of the CBA. Article XX, § 7, provides in relevant part:

"Employees who work in higher classifications (i.e. any classification that pays a higher rate of pay than the classification in which the employee regularly works) shall receive the rate of pay of the higher classification for all days so worked computed from the first day. In order to receive such pay, an employee must file an authorized request for payment form, to be provided by his supervisor, within seven calendar days after having worked in the higher classification.

"All work performed under this subsection must be approved in advance and in writing by the Mayor or his designee, and no employee shall be required to perform such work without such advance written approval."

Since February, 2008, Pefine's Article XX, § 7, requests for out-of-grade pay for work completed on behalf of her higher paid, bargaining unit B, civil service coworker were denied. In response to these denials, the association filed a grievance requesting out-of-grade compensation for Pefine. After exhausting the formal grievance procedure, the issue went to arbitration. The arbitrator found for the association and remanded the issue of remedy to the parties.

[*688] Discussion. "Because arbitration is a product of the parties' agreement to be bound by the decision of a nonjudicial neutral arbitrator, '[a] matter submitted to arbitration is subject to a very narrow scope

of review." *Duxbury v. Rossi*, 69 Mass. App. Ct. 59, 61-62, 865 N.E.2d 1200 (2007), quoting from *Plymouth-Carver Regional Sch. Dist. v. J. Farmer & Co.*, 407 Mass. 1006, 1007, 553 N.E.2d 1284 (1990). The court's review is "strictly bound by an arbitrator's findings and legal conclusions, even if they appear erroneous, inconsistent, or unsupported by the record at the arbitration hearing." *Lynn v. Thompson*, 435 Mass. 54, 61, 754 N.E.2d 54 (2001), cert. denied, 534 U.S. 1131, 122 S. Ct. 1071, 151 L. Ed. 2d 973 (2002). "Absent fraud, errors of law or fact are not sufficient grounds to set aside an award." *Ibid.*, quoting from *Plymouth-Carver Regional Sch. Dist. v. J. Farmer & Co.*, *supra*. The Superior Court shall, however, vacate awards if "the arbitrators exceeded their powers or rendered an award requiring a person to commit an act or engage in conduct prohibited by state or federal law." *G. L. c. 150C*, § 11(a)(3), inserted by St. 1959, c. 546, § 1. See *Fall River v. AFSCME Council 93, Local 3177, AFL-CIO*, 61 Mass. App. Ct. 404, 406, 810 N.E.2d 1259 (2004).

We take note of two basic principles regarding the arbitration of collective bargaining disputes. First, "[i]n accordance with the strong public policy favoring the arbitration of disputes, particularly in the context of collective bargaining agreements, . . . courts generally . . . follow[] the rule that the arbitrator's decision should be upheld." *Sheriff of Suffolk County v. Jail Officers & Employees of Suffolk County*, 451 Mass. 698, 700, 888 N.E.2d 945 (2008). Second, judicial "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" the asserted conflicting statute. *Somerville v. Somerville Mun. Employees Assn.*, 451 Mass. 493, 497, 887 N.E.2d 1033 (2008).

A provision in a collective bargaining agreement does not trump a contrary provision of the civil service law, *G. L. c. 31. Dedham v. Dedham Police Assn. (Lieutenants & Sergeants)*, 46 Mass. App. Ct. 418, 419-420, 706 N.E.2d 724 (1999). See *G. L. c. 150E*, § 7(d). Material conflicts between collective bargaining agreements and the civil service law "have been found where the 'award by the [*689] arbitrator forces the city to violate the procedures outlined in *G. L. c. 31* in regard to the appointment of qualified individuals to civil service vacancies,' thereby producing an appointment compelled by collective bargaining that is prohibited by civil service law." *Fall River v. AFSCME Council 93, Local 3177, AFLCIO*, 61 Mass. App. Ct. at 411, quoting from *Everett v. Teamsters, Local 380*, 18 Mass. App. Ct. 137, 140, 463 N.E.2d 1200 (1984). See *Somerville v. Somerville Mun. Employees Assn.*, 20 Mass. App. Ct. 594, 597, 599- 600, 481 N.E.2d 1176 (1985) (material conflict existed where arbitrator's award of out-of-grade pay for employees performing job functions of higher, vacant titles effectively promoted employees to higher positions in violation of

civil service law). Contrast *Dedham v. Dedham Police Assn. (Lieutenants & Sergeants)*, 46 Mass. App. Ct. at 421 (arbitrator did not exceed power by enforcing collective bargaining agreement provision concerning allocation of vacation and shifts by seniority when civil service law and commission's order were silent on that narrow issue, even though order addressed issue of seniority generally); *Fall River v. AFSCME Council 93, Local 3177, AFL-CIO*, *supra* at 410-411 (no conflict where collective bargaining agreement focused on provisional employee's right not to be discharged without justifiable cause until eligibility lists were prepared and civil service statute focused on name-clearing and future employment prospects of employees whose reputations were stained by their discharge). When possible, the court attempts to read the civil service law and the collective bargaining law, as well as the agreements that flow from the collective bargaining law, as a "harmonious whole." *Fall River v. AFSCME Council 93, Local 3177, AFL-CIO*, *supra* at 406, quoting from *Dedham v. Labor Relations Commn.*, 365 Mass. 392, 402, 312 N.E.2d 548 (1974).

The city argues that Article XX, § 7, of the CBA is in violation of *G. L. c. 31, § 71*, [FN1] of the civil service law, which [*690] prohibits compensation for services rendered in a civil service position to persons whose names do not appear on the appropriate roster for that position. [FN2] The city further claims that Pefine's compensation for work rendered in her coworker's position, in accordance with Article XX, § 7, of the CBA, functions effectively as compensation arising out of an improper original appointment or as a promotional appointment in violation of the civil service statute. We disagree.

1 *Section 71*, inserted by St. 1978, c. 393, § 11, states, in relevant part:

"The state treasurer, city or town treasurer, or other disbursing officer of the commonwealth or of a city or town with civil service positions shall not pay any salary or compensation for service rendered in any civil service position whether such payment is made by payroll or bill, or in any other manner, to any person whose name does not appear on the appropriate roster, as amended from time to time, as the person in such position" (emphasis added).

2 "[General Laws] c. 31, § 68, requires the appointing authority to report in writing to the administrator 'any appointment or employment,

promotion, demotion, transfer, change in duties or pay, reinstatement,' and a host of other employment changes not here relevant. Based upon these reports, *G. L. c. 31, § 71*, requires the administrator to prepare rosters of all civil service positions, and of all persons who are legally employed in such positions, whether on a temporary or a permanent basis. The administrator files a copy of each roster with the municipal officer responsible for paying the salaries of a municipality's civil service employees." *Somerville v. Somerville Mun. Employees Assn.*, 20 Mass. App. Ct. at 599.

The relevant question here, as first clearly formulated during oral argument, is whether Pefine received "salary or compensation for service rendered in any civil service position" in violation of *G. L. c. 31, § 71*. To determine whether Pefine was "in any civil service position," we consider whether she was appointed to a civil service position and whether the position that she was appointed to was vacant. See discussion *infra*.

A "civil service appointment" is defined as "an original appointment or promotional appointment made pursuant to the provisions of the civil service laws and rules." *G. L. c. 31, § 1*, inserted by St. 1978, c. 393 § 11. "The civil service law, *G. L. c. 31*, establishes a comprehensive plan for the appointment of individuals to civil service positions, whether on an original or a promotional basis, and whether permanent or temporary." *Somerville v. Somerville Mun. Employees Assn.*, 20 Mass. App. Ct. at 597. Here neither party argues that Pefine was eligible for an original appointment,[FN3] and absent an original appointment, she could not have received a promotional appointment. [FN4] See [*691] *G. L. c. 31, §§ 7-8*. Moreover, absent a civil service appointment, Pefine cannot be considered a "temporary employee." [FN5] Thus, Pefine was never appointed to a civil service position.

3 By statute, to be eligible for an "original appointment," an individual must take a civil service examination and be placed on the relevant roster or list for that appointment. *G. L. c. 31, §§ 1, 6*. If selected from the appropriate list, an individual's appointment must be authorized by the appropriate administrator. *G. L. c. 31, § 6*.

4 A "promotional appointment" is the appointment "of a person employed in one title to a higher title in the same or a different series, or to another title which is not higher but where substantially dissimilar requirements prevent a transfer," pursuant to the civil service rules. *G. L. c. 31, § 1*.

5 A "temporary employee" is defined as a "person who is employed in a civil service position, after a civil service appointment, for a

specified period of time or for the duration of a temporary vacancy." *G. L. c. 31, § 1*.

Although the civil service law does not define a minimum length of employment necessary for one to be considered a "temporary employee," we note that case law suggests that temporary appointments are generally longer than a day or week at a time. See *Eastham v. Barnstable County Retirement Bd.*, 52 Mass. App. Ct. 734, 738 n.9, 755 N.E.2d 1284 (2001) (seven-month period as acting town accountant referred to as a temporary appointment); *Boston v. Boston Police Superior Officers Fedn.*, 52 Mass. App. Ct. 296, 297, 753 N.E.2d 154 (2001) (temporary appointments were made of ten, three, and fifteen months in duration). Moreover, we note that the civil service law provides for emergency appointments for up to thirty working days, making it unlikely that the statute intended appointments for less than thirty days to be considered "temporary appointments." See discussion *infra*.

Original and promotional appointments also "presume the existence of a vacancy in the position to which the appointment is made." *Mayor of Lawrence v. Kennedy*, 57 Mass. App. Ct. 904, 906, 781 N.E.2d 5 (2003). See *Somerville v. Somerville Mun. Employees Assn.*, 20 Mass. App. Ct. at 600 ("When a vacancy occurs . . . the assignment of a person employed in one title to a higher title . . . constitutes a promotional appointment which may only be made in compliance with the procedures set forth in the civil service law. Otherwise, an employer could circumvent the requirements of the civil service law by simply assigning the duties of the vacant higher position to another employee for an indefinite period of time [emphasis added]). While "vacancy" is not defined in *G. L. c. 31*, see *Mayor of Lawrence v. Kennedy*, *supra*, we note that Pefine's coworker consistently occupied her civil service position, despite brief excusable absences. Thus, there was no vacant position to which Pefine could have been appointed. Contrast *Goldblatt v. Corporation Counsel of Boston*, 360 Mass. 660, 661, 277 N.E.2d 273 (1971) (vacancy created by retirement); *Callanan v. Personnel Administrator for the Commonwealth*, 400 Mass. 597, 598-599, 511 N.E.2d 525 (1987) (vacancies anticipated due to internal promotions); *Somerville v. Somerville Mun. Employees Assn.*, *supra* at 595 (vacancy created by retirement).[FN6]

6 Insofar as the city contends that the arbitrator's award, requiring Pefine to be paid at a higher rate, usurps the authority of the mayor as the civil service appointing authority "to make appointments and promotions," that claim must fail because there was no appointment or promotion here.

The arbitrator also rejected the city's claim under the CBA that out-of-grade pay was not owed to Pefine because the city's mayor had not approved the payment before she performed Pickett's duties. The arbitrator determined while that "[w]hile the [c]ity is free to require before-the-fact approval or tolerate after-the-fact approval, it is not free to require an individual to cover for an absent employee in a higher classification and then negate compensation based on the theory that no mayoral approval was obtained before the fact. . . . Section 7 requires out-of-grade compensation be paid that individual for that work in a higher classification. On appeal, the city does not argue that the CBA itself prohibited out-of-grade pay to Pefine. We thus do not address that contention.

[*692] In short, Pefine never received a civil service appointment and there was no vacant position to which she could have been appointed: she merely filled in temporarily for her coworker. This does not mean that she was thereby rendering service "in any civil service position." We discern no conflict between Pefine's position that under the CBA she was warranted in receiving the higher pay for the fill-in work performed in the absence of her higher classified, higher paid coworker, and that in so doing she was not rendering service in a civil service position where there was no vacant position to be occupied. Moreover, nowhere does the civil service statute stipulate how a non-civil service employee, temporarily filling in for a civil servant coworker who is sick or on vacation, should be compensated. In contrast, the CBA provides clear, unambiguous language for this exact situation. The CBA and the statute may be read harmoniously because they are designed to address different issues.[FN7]

7 Moreover, the payment of the out-of-grade compensation is not inconsistent with the tenor of civil service law provisions governing emergency appointments, which need not comply with the civil service requirements. "Under *G. L. c. 31, § 31*, an appointing authority, without submitting a requisition to the administrator and without complying with other provisions of the civil service law, may make an emergency appointment to a civil service position for not more than thirty working days during a sixty-day period, provided the circumstances necessitating the appointment could not have been foreseen and the public business would be seriously impeded by the time lapse incident to the normal appointment process. The appointing authority must, however, immediately notify the administrator in writing of the reasons for the appointment and its expected duration. *Section 31* also provides

that, with the administrator's consent, an emergency appointment may be renewed for an additional thirty working days but that no person is permitted to receive more than one emergency appointment or one such appointment and renewal in any twelve-month period (except in certain instances where the public health, safety or service would otherwise suffer)." *Somerville v. Somerville Mun. Employees Assn.*, 20 Mass. App. Ct. at 599 n.7.

[*693] We further note that the record does not reflect that the out-of-grade compensation here was designed to "circumvent the requirements of the civil service law." *Somerville v. Somerville Mun. Employees Assn.*, 20 Mass. App. Ct. at 602. Nor does the record reflect that the out-of-grade compensation here "breeds favoritism, which tends to undermine the purposes of the civil service law -- '[t]o secure the best qualified persons available for all positions in the state and local service, encouraging competition and offering an opportunity for all qualified persons to compete.'" *Ibid.*, quoting from *Sholock v. Civil Serv. Commn.*, 348 Mass. 96, 99, 202 N.E.2d 231 (1964). Here, there were only two people in the office performing clerical duties, and there were no other eligible employees who were bypassed when Pefine was required to fill in for her absent coworker, Pickett. Nor is this a situation where Pefine sought out opportunities to take over the duties of Pickett to earn more money; Pefine was required to take over the work of her colleague when that colleague was ill or on vacation. The subject of compensation for duties associated with a higher paid union position is a proper issue for collective bargaining. *Dedham v. Dedham Police Assn. (Lieutenants & Sergeants)*, 46 Mass. App. Ct. at 420-421. See *Secretary of Admn. v. Massachusetts Org. of State Engrs. & Scientists*, 408 Mass. 837, 839, 563 N.E.2d 1361 (1990) (nothing inherently unenforceable about pay term in collective bargaining agreement that regulates wages to be paid to someone directed to perform duties of higher-rated position). Moreover, the city agreed to the additional out-of-grade pay compensation for its union employees. See *Fall River v. AFSCME Council 92, Local 3177, AFL-CIO*, 61 Mass. App. Ct. at 409. If the city no longer wishes to pay additional out-of-grade pay as called for by Article XX, § 7, it may take up the issue when it renegotiates the CBA.

Permitting the association to arbitrate over the contractually agreed upon out-of-grade pay "supports the 'strong' public policies (1) 'favoring collective bargaining between the public employers and employees over the conditions and terms of [*694] employment,' and (2) encouraging arbitration." *Fall River v. AFSCME Council 92, Local 3177, AFL-CIO, supra* at 410 (citations omitted). This strong public "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 the objective of creating a collective bargaining agreement." *Somerville v. Somerville Mun. Employees Assn.*, 451 Mass. at 496.

In sum, the matter of Pefine's out-of-grade pay was properly arbitrable under the CBA. While the work performed by Pefine fell outside the scope of the civil service law, it was within the framework of the CBA. Taking into consideration our narrow scope of review of the arbitrator's decision and the strong policy favoring arbitration of collective bargaining agreements, the language of the civil service law, and the fundamental purpose of the relevant statutes, we conclude that the arbitrator's award does not intrude on the core concerns of the civil service law, nor is it in violation of binding precedent. The judge properly denied the motion to vacate the arbitration award.

Judgment affirmed.

DISSENT BY: GREEN

DISSENT

GREEN, J. (dissenting). I respectfully dissent. As the majority correctly observe, the scope of our review is exceedingly narrow. As the majority also correctly recognize, however, "[t]he civil service law is not one of the statutes identified in *G. L. c. 150E*, § 7(d), which may be 'superseded by a collective bargaining agreement[,] . . . [and] if the civil service law and the collective bargaining provisions conflict, then as matter of law, an arbitrator would act in excess of his powers in seeking to enforce those collective bargaining rights." *Fall River v. AFSCME Council 93, Local 3177, AFL-CIO*, 61 Mass. App. Ct. 404, 406, 810 N.E.2d 1259 (2004), quoting from *Fall River v. Teamsters Union, Local 526*, 27 Mass. App. Ct. 649, 651, 541 N.E.2d 1015 (1989).[FN1]

1 For purposes of this discussion, I accept the premise that the arbitrator acted within his authority in construing the collective bargaining agreement so as to excuse the absence of advance mayoral approval of the out-of-grade compensation sought by Lisa Ann Pefine in the present case, despite the language in the agreement appearing to require such approval.

In my view, the arbitrator's award conflicts with the express [*695] provisions of *G. L. c. 31*, § 71. That provision of the statute states, in relevant part, that "[t]he state treasurer, city or town treasurer, or other disbursing officer of the commonwealth or of a city or town with civil service positions shall not pay any salary or compensation for service rendered in any civil service position whether such payment is made by payroll or bill, or in any other manner, to any person whose name

does not appear on the appropriate roster, as amended from time to time, as the person in such position" (emphasis added). The majority frame the question posed by the quoted language as requiring determination whether Lisa Ann Pefine was appointed to a civil service position and whether the position to which she was appointed was vacant (ultimately concluding that Pefine was not appointed to any vacant position). However, that question falls outside the contours of § 71, which requires no formal appointment to a vacant position. Instead, the statute prohibits payment of compensation "for services rendered in any civil service position," and, as *Somerville v. Somerville Mun. Employees Assn.*, 20 Mass. App. Ct. 594, 597, 481 N.E.2d 1176 (1985), observes, "in filling any vacancy, even temporarily, the appointing authority is required to follow the carefully prescribed requirements set forth in c. 31." The majority attempt to dismiss the statutory violation by saying that Pefine did not "render[] service 'in any civil service position'; "she merely temporarily filled in for her coworker." But the fact remains that the position in which Pefine rendered service, and for which she seeks compensation, is a civil service position for which she did not appear on the appropriate roster.[FN2]

2 I note that the present case does not concern the ability or authority of the city of Somerville (city) to assign Pefine temporarily to fill in for an absent coworker. Instead, it simply concerns Pefine's entitlement to out-of-grade pay for her service, pursuant to the statute, and the authority of the arbitrator to award such pay in contravention of the statute.

In my view, the distinction proffered by the majority is one of degree rather than of character. Indeed, in seeking compensation for out-of-grade work Pefine is attempting to have it both [*696] ways; she describes her service as "work in [a] higher classification[]" in order to invoke the provisions of Article XX, § 7, of the collective bargaining agreement, but insists that she did not "render service in any civil service position" in order to avoid the obvious conflict with *G. L. c. 31*, § 71.[FN3]

3 Tellingly, in its brief the defendant union did not acknowledge or mention -- much less attempt to address -- the conflict with *G. L. c. 31*, § 71, even though that conflict was the centerpiece of the city's argument on appeal. At oral argument, the union declined, despite repeated requests, to offer any reconciliation of its position with the statutory language, suggesting only that *Somerville v. Somerville Mun. Employees Assn.*, *supra*, and *Secretary of Admn. v. Massachusetts Org. of State Engrs. & Scientists*, 408 Mass. 837, 839, 563 N.E.2d 1361 (1990) (MOSES), declined to declare that the

statute should apply to circumstances such as those in this case. But neither of those cases involved the circumstances of the present case; in MOSES the employees were seeking compensation for positions they formerly held prior to demotion, so that the conflict with § 71 simply did not arise, and my view that the arbitrator's award of out-of-grade pay to Pefine violates § 71 fits squarely within both the reasoning and the holding of Somerville.

Finally, to the extent that a purpose of the civil service statute is to prevent favoritism in public employment, see *Somerville v. Somerville Mun. Employees Assn.*, *supra* at 602, the concern arises

whenever an opportunity for higher compensation arises, whether it is merely temporary (such as service in a position temporarily vacant due to vacation or illness) or permanent. It does not appear from the record in the present case that other eligible employees were bypassed in order to provide Pefine with the out-of-grade service for which she seeks higher compensation, but the statutory prohibition does not depend on the actual presence, and bypass, of a competing eligible civil servant in a particular instance.

Because the arbitrator's award conflicts with the provisions of the civil service statute, it was beyond his authority. I would accordingly reverse the judgment and vacate the award.

BARRY THORNTON vs. CIVIL SERVICE COMMISSION & another.[FN1]

APPEALS COURT OF MASSACHUSETTS

80 Mass. App. Ct. 441
953 N.E.2d 735; 2011 Mass. App. LEXIS 1194

April 14, 2011, Argued
September 21, 2011, Decided

SUBSEQUENT HISTORY: Review denied by *Thornton v. Civil Serv. Comm'n*, 461 Mass. 1102, 958 N.E.2d 529, 2011 Mass. LEXIS 1119 (Mass., Nov. 30, 2011)

PRIOR HISTORY: Suffolk. Civil action commenced in the Superior Court Department on May 5, 2009. The case was heard by Regina L. Quinlan, J., on a motion for judgment on the pleadings.

HEADNOTES

Civil Service, Fire fighters, Decision of Civil Service Commission, Judicial review. Fire Fighter. Municipal Corporations, Fire department. Public Employment, Suspension. Administrative Law, Hearing. Statute, Construction.

COUNSEL: Michael C. Gilman for town of Andover.

William D. Cox, Jr., for the plaintiff.

The following submitted briefs for amici curiae: John M. Collins for Fire Chiefs Association of Massachusetts, Inc.

Brian Rogal for Professional Fire Fighters of Massachusetts.

Harold L. Lichten for Andover Fire Fighters Union Local 1658 IAFF.

JUDGES: Present: Kantrowitz, Brown, & Rubin, JJ. KANTROWITZ, J. (dissenting).

OPINION BY: RUBIN

OPINION

[*441] RUBIN, J. This case presents a question about the length of a suspension that may be imposed without a hearing under *G. L. c. 31, § 41*, a provision of the civil service statute.

1 Town of Andover.

[*442] Background. The plaintiff, Barry Thornton, was, at the relevant time, a lieutenant with the fire department (department) of the town of Andover (town). At the time of the events that gave rise to this action, he had been employed by the town for approximately twenty years. He had never been subject to any prior disciplinary action.

General Laws c. 31, § 41, provides tenured civil service employees, i.e., those who are not employed for a limited, specified period of time or on an initial probationary basis, with certain procedural protections before disciplinary action may be taken. In particular, a tenured employee shall not be "discharged, removed, suspended for a period of more than five days, laid off, transferred from his position without his written consent . . . , lowered in rank or compensation without his written consent, nor his position be abolished," except for "just cause" and without first being given written notice by the appointing authority and a hearing "before

the appointing authority or a hearing officer designated by the appointing authority." *G. L. c. 31, § 41*, inserted by St. 1978, c. 393, § 11.

Consistent with this language, there is an explicit exemption under which "[a] civil service employee may be suspended for just cause for a period of five days or less without a hearing prior to such suspension." *Ibid.* A series of procedural protections still attach after the imposition of such a suspension, including notice, delivery of a copy of certain sections of the civil service statute to the employee, and an entitlement to a prompt hearing upon request and a prompt decision after the hearing.[FN2] *Section 41* also provides that "Saturdays, Sundays and legal holidays shall not be counted in the computation of any period of time specified in this section." *Ibid.*

2 Thornton contended before the Civil Service Commission that a number of the procedural protections set out in the statute were not afforded him. He does not renew these objections on this appeal.

On May 3, 2008, Thornton and his crew, which consisted of two other firefighters, were dispatched to respond to a report of an elderly man having fallen down on a sidewalk. At the time of the call, an ambulance from North Andover was already responding. Upon arrival at the scene, Thornton and his crew were met by Andover police Officer Joseph Maggliozi, who [*443] had called for assistance after observing the man bleeding from his nose and hand. Maggliozi reported that the man had gone to a friend's office inside the building in front of which he had fallen. The man had refused treatment and insisted that he was fine.

Thornton and his crew went into the office building, carrying a medical jump bag, a defibrillator, and oxygen equipment, to try to locate the man who had fallen. After a search, they found him on the second floor in the office of his friend. Thornton's crew cleaned and bandaged the cuts on the man's hand, nose, and knee. Because the man refused transport to the hospital for his cuts and bruises, Thornton canceled the ambulance from North Andover that had been called to the scene. Shortly after the incident, Fire Chief Michael B. Mansfield received a telephone call from a relative of the man to thank the responding crew for their kindness to him.

When the department evaluates individuals and transports them to a medical facility, it assesses a charge that is then submitted to the individual's insurance carrier based on insurance information collected at the scene. During the time at issue, the medical response charge was seventy-five dollars.

Approximately five months before the date of the incident, Mansfield had issued a memorandum to all department personnel, including Thornton, that provided in part: "[e]ffective Sunday December 2, 2007,

all individuals who are evaluated by Andover Fire Rescue personnel and not transported to a medical facility shall continue to have a medical release signed by the patient." The memorandum made clear that the purpose of this policy change was to obtain reimbursement from insurance companies for all emergency medical services and generate additional revenue, including for calls where a citizen is not transported to the hospital. Members of the department are instructed to use a two-sided, multi-copy ambulance report form when documenting medical responses. The front side of the form is for documenting patient information, insurance information, observations from examining the patient, and a narrative statement. The back of the form, among other things, provides a place for a signature when the patient refuses medical transport.

A "citizen assist" by the department involves a situation [*444] where no medical treatment is required, such as assisting an individual who needs to be placed in a chair or helped from a car into a house. In "citizen assist" cases, the department does not assess a charge.

When the man involved in the May 3, 2008, incident refused an ambulance, a member of Thornton's crew wanted the man to fill out a patient refusal form. Thornton instructed the crew member not to have the form filled out.[FN3] Thornton subsequently filled out a fire incident report that stated that the incident was a "citizen assist." Thornton testified before the Civil Service Commission (commission) that he did not think the elderly man should be charged a fee for "some sterile water and gauze pads."

3 When Thornton, a twenty-year veteran of the department, was pressed by his crew on the way back from the incident about the paperwork, he responded with a profanity about "the Chief and his \$75." Mansfield had been with the department for only fifteen months prior to the incident.

When Mansfield received the telephone call seeking to thank the responding crew, he sought to put a letter of recognition in the employees' personnel file. He was, however, unable to locate a patient refusal form that matched the address at which the incident had taken place. Mansfield requested that Thornton and the two members of his crew each provide him with a written report as to what occurred.

The two members of Thornton's crew submitted written reports that referred to Thornton's decision not to have the man sign a patient refusal form.[FN4] On May 29, 2008, Mansfield suspended Thornton, citing eighteen violations of the department's rescue rules and regulations. Thornton's suspension commenced on June 22, 2008, at 8 A.M., and concluded on July 7, 2008, at 8 A.M. Thornton's work schedule operated on an

eight-day cycle. Thornton was on duty for twenty-four hours beginning at 8 A.M., then off duty for a twenty-four hour period, then on duty for another twenty-four hour period, then off duty for five twenty-four hour periods. Consistent with this schedule, during the time of his suspension Thornton was scheduled to work four twenty-four hour shifts, each running from 8 A.M. to [*445] 8 A.M., on June 22 to 23, June 28 to 29, June 30 to July 1, and July 6 to 7, 2008. His suspension thus prohibited him from working four scheduled twenty-four hour shifts, spread over eleven week days, which included one holiday, and five weekend days, during a sixteen-day period. Ordinarily firefighters like Thornton are permitted to work on fire or police details on their days off as overtime or private duty. During the suspension period, however, Thornton was also expressly prohibited from working any fire or police details during his off-duty hours, including on the many days that he was scheduled to be entirely off.

4 Thornton did not deny this, but claimed that he did not have a recollection of the call and that his narrative contained in the incident report indicated that it was a citizen assist.

Thornton was entitled to request a hearing before what § 41 describes as the "appointing authority," in this case the town manager, and on May 29, 2008, the day he received notice of the suspension, he did so. On August 6, 2008, the town manager upheld Thornton's suspension.

Thornton filed procedural and substantive appeals with the commission. Pursuant to *G. L. c. 31, § 43*, Thornton argued that the town did not have just cause to suspend him from the department. Pursuant to *G. L. c. 31, § 42*, he argued that the town had failed to hold a timely hearing, to provide him with a copy of *G. L. c. 31, §§ 41 through 45*, as required by § 41, and to provide proper notice, and that Mansfield lacked the authority to issue the suspension because Mansfield had not properly been delegated the authority to suspend him and because the suspension was effectively for more than five days thereby requiring a presuspension hearing.

By a three-to-two vote, the commission after a hearing concluded that there was just cause for the suspension. On the issue of the length of the suspension, the commission stated that *G. L. c. 31, § 41*, "appears to speak to 'calendar' work days." The commission majority then concluded that the suspension imposed by the town was a four-day suspension and therefore a hearing was not required prior to the issuance of the suspension. The three-commissioner majority, however, decided to reduce Thornton's period of suspension to two days after finding that the town had "overreached" and "piled on" by charging Thornton with eighteen violations.

Thornton sought judicial review in the Superior Court, pursuant [*446] to *G. L. c. 31, § 44*, of the commission's decision denying his claims for relief. In her decision on a motion for judgment on the pleadings, a judge concluded that the statutory phrase "five days or less" in § 41 means five calendar days, that is, "the space of time that elapses between two successive midnights." The judge found that Thornton's suspension period began at 8 A.M. on June 22, 2008, and lasted until 8 A.M. on July 7, 2008, and that Thornton was "prohibited from working any details [on his days off.] which would otherwise have been available."

The judge counted all the days in the suspension period, which she concluded amounted to sixteen days. She then subtracted Saturdays, Sundays, and legal holidays that occurred within that period, pursuant to the language in *G. L. c. 31, § 41*, that states "Saturdays, Sundays and legal holidays shall not be counted in the computation of any period of time specified in this section." The judge concluded that the suspension period was for a duration of ten days, that a suspension of such a length could not be imposed without a hearing under § 41, and that the suspension was imposed in violation of the statute. The judge ordered that Thornton be reinstated without loss of compensation. The town now appeals.

Discussion. Having examined *G. L. c. 31, § 41*, and its structure, we conclude that the words "a period of five days" must be read essentially as the Superior Court judge read them, to describe a single, continuous period covering five twenty-four hour days. The Legislature used the singular noun "period" to describe suspensions that could be imposed without a hearing. The most natural reading of that word is a continuous interval of time, not an amount of time encompassed by a series of nonconsecutive calendar days calculated without regard to the total amount of time that elapses from the first to the last suspension day.

This reading is bolstered by language elsewhere in the civil service statute. The only other place within that statute where the Legislature used the "period of [a specified number of] days" formulation is in *G. L. c. 31, § 38*, which addresses unauthorized leaves of absence. *Section 38*, inserted, as § 41 was, by St. 1978, c. 393, § 11, provides that "unauthorized absence shall mean an absence from work for a period of more [*447] than fourteen days for which no notice has been given." *Section 38* has no language requiring that weekends and holidays not be counted.

The most natural way to read the formulation as it is used in § 38 is that the Legislature had in mind a two-week period, i.e., absence during a continuous period of fourteen days, not an absence from fourteen consecutive days of work spread over an indefinite period. The identical phrase in § 41, adopted in the same statute as the language in § 38, must be read in the same

way -- to indicate a consecutive period of the specified number of days.

Further, § 41 provides that "Saturdays, Sundays and legal holidays shall not be counted in the computation of any period of time specified in this section." That language both suggests that a "period" of time specified in § 41 should be read to be continuous and, in its application to the rule for suspensions without a hearing, ensures that for individuals working a traditional five-day, Monday-through-Friday work week, the maximum suspension period is not undermined if it runs across a weekend. Indeed, the practical effect of the weekend and holiday provision is to allow imposition without a hearing of a suspension lasting a seven-day week (eight in the case of holidays), covering, in the case of the traditional forty-hour work week, five work days.[FN5]

5 Despite our dissenting brother's suggestion to the contrary, we do not read five days to mean a seven-day week. We read five days to mean five days. Because of the express language of § 41, weekend days and legal holidays are not counted in the computation of the five-day period. In light of our conclusion, we may leave for another day whether the maximum period must run on calendar days (i.e., from midnight to midnight), or whether it may run for any consecutive five-day period (e.g., noon to noon).

The town argues, and our dissenting brother concludes, that *G. L. c. 31, § 41*, allows suspension of an employee without a hearing for up to five "calendar work days." It contends that because of the firefighters' unusual schedule, this is the only way to ensure that such a suspension falls on five work days, not on a period including several days off.

To begin with, the plain language of § 41 will not bear this reading. As described above, § 41 only allows suspensions without a hearing that are for "a period of five days or less" [*448] (emphasis added), which is most naturally read as a continuous interval of time. Moreover, § 41 does not refer to "work days," but to "days." Whether a "day" is a calendar day or a twenty-four hour day, unless modified by the word "work," it is not a "work day" (or a calendar work day). Finally, the exclusion of weekends and holidays would be incomprehensible if the "period" covered only calendar work days.

The dissent argues that under our reading a firefighter suspended for two days might not be suspended for any work days at all given a firefighter's eight-day work schedule. However, nothing in § 41 prohibits a fire chief from initiating a suspension on the day of his or her choosing, in order to ensure that a firefighter is not able, because of his or her particular work schedule, to avoid the effects of the suspension.

And, as the dissent notes, due to an unusual aspect of work as a firefighter, the calendar work day reading is problematic. Because of the possibility of a firefighter doing detail work on days off, the suspension for five scattered scheduled work days that the dissent would allow might not serve the purpose of punishment that the Legislature intended. The firefighter may simply be able to do detail work on the days off between the dates of the five days on which he or she is suspended. The "suspended" firefighter thus might be able to make as much in a work week as he or she otherwise would. While the dissent itself demonstrates that reasonable minds can differ, it appears to us that it is our dissenting brother's reading under which, after a five-day suspension, it might wind up being "as if nothing had happened." Post at . By contrast, our reading, in addition to being faithful to the text and structure of § 41, ensures that some actual punishment may be meted out without a hearing, which is what the Legislature intended.

The town's position is that to address the problem of detail work, it must be able, without a hearing, to suspend an employee like Thornton from working not only on five scattered calendar work days, but also from working details on the days in between. The commission did not address this aspect of the case. While there is some logic to the town taking the position it does -- it is apparently necessary if the calendar work day rule is to have any real financial consequence -- the result of its reading would [*449] be to allow suspensions for more than five days to occur without a hearing, like the sixteen-day one imposed on Thornton in this case. Whatever a suspension of "a period of five days or less" is, it is not a suspension under which an employee may not work for sixteen days.

The reading we adopt does not allow the avoidance of penalty that the dissent's five scattered work day reading would. The fixed period of time allowed for a suspension without a hearing would be roughly equitable. For a firefighter like Thornton, a five-day period of suspension without a hearing that, because of the weekend-day exclusion, spans seven calendar days will encompass, at most, two scheduled twenty-four hour work periods, what most fire departments denominate as two ten-hour daytime shifts and two fourteen-hour overnight shifts. Although the firefighter would be suspended for a calendar week, he or she would lose forty-eight work hours and would not be able to work all the other days that week in which he or she might otherwise have made up the lost time through doing paid detail work for the fire department.[FN6] This is roughly equivalent to the suspension that may be imposed without a hearing on a nine to five civil service employee.

6 We express no opinion whether a firefighter suspended without a hearing under § 41 may be

prohibited as part of his suspension, as the plaintiff was here, from working police details.

Our dissenting brother argues that the five calendar work day reading is a "long-accepted practice[]" and long-standing commission construction of the statute. Post at . If it were, and if it were reasonable, it would be, as he properly notes, due substantial deference. In particular, where the commission is closer to the practicalities of work schedules among various civil servants, its expertise, expressed in a thoughtful and long-standing construction of the statute it administers, entitles it to such deference.

But the town does not argue, and there is no evidence, that the calendar work day reading represents a long-standing, consistent commission construction, or, indeed, that it reflects any long-accepted practice. This precise statutory language has been on the books since 1978. See St. 1978, c. 393, § 11. Yet the dissent can point only to a single 2006 commission case that [*450] has adopted the calendar work day construction, albeit without discussion or elaboration. See *Ouillet v. Cambridge*, 19 Mass. Civ. Serv. Rep. 299, 303 (2006). The second commission case cited by the dissent, *Baldasaro v. Cambridge*, 10 Mass. Civ. Serv. Rep. 134 (1997), does not adopt that reading; the only reference to calendar work days appears, rather, in the administrative magistrate's recommended decision that was rejected by the commission, but was included as an appendix to the commission's decision for its description of the facts of the case. The amicus brief quoted in the dissenting opinion refers to "hundreds" of cases, but it cites, and our research has revealed, none. See post at note 7.

Further, while the commission in this case appears to have construed § 41 to mean five calendar work days, each of which consists of up to a twenty-four hour period, it did not directly address the fact that Thornton was not allowed to work on the days in between what it determined were four work days -- the dissenting opinion cites only the town's assertion that these days are irrelevant. "A reviewing court accords due weight and deference to an agency's reasonable interpretation of a statute within its charge, but [t]he duty of statutory interpretation is for the courts." *Police Commr. of Boston v. Cecil*, 431 Mass. 410, 413, 727 N.E.2d 846 (2000) (citations omitted). Construing the sixteen-day prohibition on Thornton's working as a four-day suspension, one that requires no presuspension hearing because it is for "a period of five days or less," is not a reasonable way of reading the statutory language.

In any event, we are not free to ignore the language adopted by the Legislature; nor is our reading "absurd or unreasonable" such that we might be persuaded to follow our dissenting brother by taking the controversial tack of declining to "adopt a literal construction of [the] statute." See post at note 4. To be sure, one can imagine instances in which the rule adopted by the Legislature

may lead to anomalous or inequitable results depending on the nature of a particular individual's work schedule. While we express no opinion on the way in which *G. L. c. 31, § 41*, must be applied in the face of different methods for calculating employee compensation, an employee working a sixty-hour week may suffer graver consequence from a five-day [*451] suspension than one working only forty hours per week. But, again, if this is so, it is the consequence of the Legislature choosing a measure of days. Indeed, the same problem would exist under the town's reading of the statute: the penalty imposed would be harsher or less harsh depending upon the number of hours per day worked by the employee. And of course, under our reading, the town remains free to suspend its civil service employees for longer than five days. All it need do is hold a presuspension hearing.

Because the suspension in this case exceeded five days, the town could not properly impose it without a holding a hearing first. Consequently, the judgment is affirmed.

So ordered.

DISSENT BY: KANTROWITZ

DISSENT

KANTROWITZ, J. (dissenting). Perhaps indicative as to how entrenched the understanding was that five days meant five work, not calendar, days, Barry Thornton primarily wished only to be allowed to work details during the time he was suspended.[FN1] The lower court judge took a different path by ruling that five days meant five calendar days. The majority travels a somewhat similar route and holds essentially that five days means one seven-day week.

1 In his brief, Thornton claims that what he "lost during the period of suspension was the opportunity to accept additional overtime and detail shifts due to his 'temporary withdrawal or cessation from public work.'"

I start with the oft quoted rule, bypassed here, that an "administrative agency's interpretation of a statute within its charge is accorded weight and deference." *Eastern Cas. Ins. Co. v. Commissioner of Ins.*, 67 Mass. App. Ct. 678, 683, 856 N.E.2d 872 (2006) (citation omitted). This should be especially so in areas in which the work week is at odds with not only the traditional nine-to-five one, but the very number of days in the week itself. Thornton worked an eight-day work week.[FN2]

2 His eight-day week consisted of twenty-four hours on, twenty-four hours off, twenty-four hours on, and five twenty-four hour periods off. This apparently is what the firefighters bargained for.

The majority opinion recognizes, implicitly at least, the problem with the lower court's decision, which would result in [*452] the following scenario. If an individual is suspended for, say, two days when that person is not scheduled to work, there is in reality no suspension at all. The individual would arrive at work his next scheduled shift as if nothing had happened (which would be true, as nothing had). The same could be true for working details.[FN3] Such outcomes hinder order, morale, and discipline.[FN4]

3 In fact, a person with overtime pay for working details could make more while being suspended for two days than actually going to work (which explains Thornton's original concern).

4 "We will not adopt a literal construction of a statute if the consequences of such construction are absurd or unreasonable. We assume the Legislature intended to act reasonably." *Champigny v. Commonwealth*, 422 Mass. 249, 251, 661 N.E.2d 931 (1996), quoting from *Attorney Gen. v. School Comm. of Essex*, 387 Mass. 326, 336, 439 N.E.2d 770 (1982).

The majority now imposes a different interpretation, saying essentially that a five-day suspension should be meted out over a seven-day week. Similar problems arise, the most troublesome one being that the majority's opinion interferes with a fire chief's ability to appropriately discipline those he commands, in that fire chiefs are now prohibited from suspending a recalcitrant employee for five work days (including all details in between).

As for Thornton's original complaint, that he was being prohibited from working details, suffice it to say that details and overtime are not considered part of one's base salary. See *Selectmen of Framingham v. Municipal Ct. of Boston*, 11 Mass. App. Ct. 659, 660-661, 418 N.E.2d 640 (1981); *White v. Boston*, 57 Mass. App. Ct. 356, 360, 783 N.E.2d 467 (2003) ("Statutory salaries are not based on an assumption of extra-duty pay").[FN5]

5 The motion judge wrote, "The appointing authority also found that the prohibition on the plaintiff performing details during that period did not implicate Civil Service since compensation from details was not considered regular earnings."

Lastly, not every work week is a Monday-to-Friday, forty-hour one and not every work

day consists of eight hours. This is especially so in the world of firefighters and police officers. The firefighters here bargained for their contract, their eight-day work week and their twenty-four hour work days. Thornton was aware of a "regular workday"[FN6] and the scheduling needs of firefighters -- eight-day schedules of twenty-four hours on, [*453] twenty-four hours off, twenty-four hours on, and five twenty-four hour periods off. Each department and agency has different scheduling needs, and it is only fair and consistent for the Civil Service Commission (commission) to define "days" as the days for which a person has negotiated, is scheduled to work, and receives pay, i.e., "work days." The work schedule that benefits a worker may at times also burden him.

6 The Civil Service Commission held in *Ouilette v. Cambridge*, 19 Mass. Civ. Serv. Rep. 299, 303 (2006), that a work day is a work day regardless of whether it is eight hours or 13.3 hours (or, if I might add, twenty-four hours as in our case).

It makes eminent sense that "day," as used in *G. L. c. 31, § 41*, means a work, not calendar, day. It appears that this is the long-term interpretation of the commission, to which we ordinarily give deference; for years the commission has apparently disciplined workers using "work days." See, e.g., *Ouilette v. Cambridge*, 19 Mass. Civ. Serv. Rep. 299 (2006), citing *Baldasaro v. Cambridge*, 10 Mass. Civ. Serv. Rep. 134 (1997).[FN7]

7 That there is little case law on the issue is perhaps due to the fact that it was so widely accepted. As is stated in the amicus brief submitted by the Fire Chiefs Association of Massachusetts, Inc., in this case, "The only common sense interpretation of the legislature's intention was to have the five-day limit on a department head's ability to impose a suspension apply to a 'work day.' That is precisely how the Civil Service Commission interpreted it in hundreds of cases over the years." That this court is so uncertain on this very point indicates why we should give deference to the commission.

As the majority's decision appears to depart from long-accepted practices and a reasonable interpretation of the statute at issue, I respectfully dissent.

CHARLES H. TURNER & others[FN1] vs. CITY OF BOSTON & others.[FN2]

SUPREME JUDICIAL COURT OF MASSACHUSETTS

**462 Mass. 511
969 N.E.2d 695; 2012 Mass. LEXIS 476**

February 6, 2012, Argued
June 15, 2012, Decided

SUBSEQUENT HISTORY: Subsequent civil proceeding at *United States v. Turner*, 2012 U.S. App. LEXIS 14204 (1st Cir. Mass., July 11, 2012)

PRIOR HISTORY: Suffolk. Certification of a question of law to the Supreme Judicial Court by the United States District Court for the District of Massachusetts.
Turner v. City of Boston, 760 F. Supp. 2d 208, 2011 U.S. Dist. LEXIS 11462 (D. Mass., 2011)

HEADNOTES

Municipal Corporations, Removal of public officer, City council, Charter. Public Officer. Conflict of Interest.

COUNSEL: Chester Darling for the plaintiffs.

Lisa A. Skehill Maki, Assistant Corporation Counsel, for the defendants.

JUDGES: Present: Ireland, C.J., Spina, Cordy, Botsford, Gants, Duffly, & Lenk, JJ.

OPINION BY: BOTSFORD

OPINION

[*511] BOTSFORD, J. Charles H. Turner, an elected Boston city councillor, was convicted of attempted extortion and other Federal crimes on October 29, 2010. On December 1, 2010, before Turner had been sentenced on the convictions, the city council of Boston (city council, or council) voted to remove Turner from his office of city councillor pursuant to Rule 40A (rule 40A) of the Rules of the Boston City Council (rules), a rule adopted in 2009 by that body. On December 30, 2010, Turner, joined by several residents from his city council district, brought suit under 42 U.S.C. § 1983 (2006), in the United States District [*512] Court for the District of Massachusetts against the city of Boston (city), the city council, and eleven of the city councillors (collectively, defendants), alleging, inter alia, that the council's vote to remove him was void, and seeking declaratory and injunctive relief as well as damages. The District Court judge subsequently certified the following questions to this court pursuant to *S.J.C. Rule 1:03*, as appearing in 382 Mass. 700 (1981):

"[1]. Did the Charter of the City of Boston, or any other provision of the laws of the Commonwealth of Massachusetts, authorize the Boston City Council to promulgate Rule 40A of the Rules of the Boston City Council and employ it to remove an incumbent

Councillor from office before he was sentenced and removed automatically by operation of *M.G.L. c. 279, § 30*?

"[2]. If so, is Rule 40A a civil or a criminal provision of law?"

Turner v. Boston, 760 F. Supp. 2d 208, 215 (D. Mass. 2011).

1 Jeanne Ackerly; Ernest R. Coston; Diane Dujon; Olga Dummont; Louis Elisa; Alma Finneran; Michael Heichman; Frederick C. Johnson; Karl Jones; Franco Marzurki; Carolyn Jupiter-McIntosh; Isaura Mendes; Judith Richards; M. Daniel Richardson, III; and Sarah-Ann Shaw.

2 The city council of Boston and eleven of its thirteen members.

In answer to the first question, we conclude that the city council was authorized to promulgate rule 40A but did not have the authority, under the Charter of the City of Boston (city charter) or under any provision of State law, to employ the rule to remove Turner from office. In light of this answer, we need not provide an answer to the second question.

Background.

In a November 19, 2008, criminal complaint filed in the United States District Court, Turner was charged with extortion, 18 U.S.C. § 1951 (2006), and making false statements to a Federal official, 18 U.S.C. § 1001(a)(1) (2006). On November 24, 2008, the then-president of the city council removed Turner from his positions as chairman of the council's committee's on education and on human rights.[FN3] In a superseding indictment dated December 9, 2008, Turner was charged with several felonies, including one count of attempted extortion under color of official right, in violation of 18 U.S.C. § 1951, [*513] and three counts of making false statements to Federal officials, in violation of 18 U.S.C. § 1001. A second superseding indictment dated April 7, 2009, contained identical charges against Turner.

3 In their brief, the plaintiffs represent that Turner was removed from council leadership positions on this date. Although the record contains no information about this event, its occurrence is not contested by the defendants.

On January 25, 2009, the council adopted rule 40A. The rule authorizes the council president to refer a matter to the council on the president's determination that a councillor "engaged in conduct unbecoming a member of the Boston City Council or may be

unqualified to sit on the body," and mandates such a referral by the council president "upon a felony conviction [of a city councillor] by any state or federal court."**[FN4]** Turner voted to adopt rule 40A.

4 See note 8, *infra*, for the text of Rule 40A (rule 40A) of the Rules of the Boston City Council.

On October 29, 2010, at the conclusion of Turner's criminal trial in the District Court, the jury found him guilty on all charges then pending against him; sentencing was scheduled for January 25, 2011. On December 1, 2010, in an eleven-to-one vote, the city council voted to remove Turner, claiming that it was authorized to do so under the city charter and rule 40A. The council then scheduled a special preliminary election for February 15, 2011, and a special final election for March 15, 2011, for the purpose of filling the council seat that Turner had held.

On December 30, 2010, Turner and several constituents from the city council district that he had represented filed suit against the city, the city council, and the eleven councillors who had voted for his removal. The plaintiffs sought a declaratory judgment that the council lacked authority under State law to expel Turner from that body, that the expulsion violated their rights under the *First* and *Fourteenth Amendments to the United States Constitution*, and that rule 40A constituted an *ex post facto* punishment in violation of art. I, § 10, of the United States Constitution. The plaintiffs also sought damages for the alleged deprivations of their constitutional rights.

On January 10, 2011, the plaintiffs filed a motion for a preliminary injunction or, in the alternative, for summary judgment, in which they sought to enjoin the city from holding the February 15, 2011, special preliminary election and the March **[*514]** 15, 2011, special final election. On January 25, 2011, Turner was sentenced to three years in Federal prison. As noted by the District Court judge, the parties agree that once Turner was sentenced to prison, his city council seat was vacated by operation of State law pursuant to *G. L. c. 279, § 30*.**[FN5]** On February 7, 2011, the District Court judge denied the plaintiffs' motion for a preliminary injunction.

5 *General Laws c. 279, § 30*, provides:

"If a convict sentenced by a court of the commonwealth or of the United States to imprisonment in the state prison or by a court of the United States to a federal penitentiary for a felony holds an office under the constitution or laws of the commonwealth at the time of sentence, it shall be vacated from

the time of sentence. If the judgment against him is reversed upon writ of error, he shall be restored to his office with all its rights and emoluments; but, if pardoned, he shall not by reason thereof be restored, unless it is so expressly ordered by the terms of the pardon."

Concluding that resolution of the plaintiffs' Federal claims "depend[ed] entirely" on whether the city council, in removing Turner from his office of city councillor, exceeded its authority under Massachusetts law, the District Court judge certified to this court the questions quoted at the outset.**[FN6]**

6 We presume that resolution of these legal questions is relevant to the issue of damages. In the complaint, Turner has alleged, *inter alia*, that he suffered emotional distress and was entitled to income lost for the time period between his December 1, 2010, removal by the council and his January 25, 2011, lawful removal under *G. L. c. 279, § 30*.

Discussion.

The first certified question contains two separate inquiries: whether the city council had authority to promulgate rule 40A, and whether it could employ rule 40A to remove an incumbent councillor, an elected official. We consider them in order.

1. Authority to promulgate rule 40A.

The defendants argue that the council was authorized to enact rule 40A pursuant to the city charter. **[FN7]** The city charter is "a series of State statutes and not a single code," *City Council of Boston v. Mayor of Boston*, 383 Mass. 716, 719, 421 N.E.2d 1202 (1981), but as a charter, it "contains **[*515]** the basic provisions which establish the form, structure and organization of [Boston's] government, and the powers and duties of various officials." D.A. Randall & D.E. Franklin, *Municipal Law and Practice* § 2.3, at 35 (5th ed. 2006). Section 17 of the city charter expressly authorizes the city council "from time to time [to] establish rules for its proceedings." St. 1948, c. 452, § 17, as appearing in St. 1951, c. 376, § 1. Rule 40A authorizes the council president to "refer a matter to the council upon his/her determination that any member has engaged in conduct unbecoming a member of the Boston City Council or may be unqualified to sit on the body," and requires such a referral "upon a felony conviction of any [councillor] by any state or federal court." Under the terms of the rule, any action taken by the council in response to the council president's referral requires a two-thirds majority and "will be in

accordance with local, state and federal law"; the rule itself does not define what actions the council might take.[FN8]

7 The plaintiffs do not challenge the council's authority to promulgate rule 40A, and at the oral argument of this case, they conceded that the council had authority to promulgate the rule. They focus their challenge on the council's use of the rule to remove Turner. See Part 1.b, *infra*.
8 Rule 40A provides:

"Pursuant to the city charter and in accordance with the open meeting law, the council president may refer a matter to the council upon his/her determination that any member has engaged in conduct unbecoming a member of the Boston City Council or may be unqualified to sit on the body. A member may be unqualified by violating federal or state law, or any conditions imposed by the city's charter, which includes violating any provisions of the three oaths of office.

"The council president shall automatically refer a matter to the council upon a felony conviction of any member by any state or federal court.

"Any action by the council taken in response to any referral shall require a two-thirds (2/3) majority roll call vote and will be in accordance with local, state and federal law."

Rule 40A provides a means of referring matters concerning the conduct of councillors to the full city council for action. In this regard, rule 40A is similar to other procedural rules governing council proceedings and adopted by the council pursuant to § 17 of the city charter. See, e.g., rule 1 (meeting time); rule 12 (agenda); rule 23 (committee assignment and action); rule 35 (committee action); rule 36 (committee appointment, structure, and role). As a procedural directive that provides a means of referring matters to the council, rule 40A clearly falls within the [*516] scope of the rulemaking authority that the city charter vests in the council. Consequently, the council was empowered to adopt this rule.[FN9]

9 We add this caveat, however. In concluding that the city council had authority to adopt rule 40A, we do not intend to suggest that the rule

itself authorizes the council to take any particular action once a matter is referred to it by its president. As the discussion that follows in the text indicates, there are limitations on the types of action available to the council to take. In particular, that the rule authorizes referral of a matter to the council involving conduct by a councillor that in the council president's view may make the councillor "unqualified to sit on the body" does not mean that once the referral for action is made, the council necessarily is authorized to remove the councillor. See note 22, *infra*, for a discussion of possible council actions that may be appropriate.

2. Use of rule 40A to remove a councillor.

We turn to the second part of the first question, that is, whether the council could employ rule 40A to remove a councillor from that body. Historically, the rule has been that municipalities in Massachusetts have "no power to remove public officers except that which is given by the statutes." *Attorney Gen. v. Stratton*, 194 *Mass. 51, 53, 79 N.E. 1073 (1907)*. The election, removal, and replacement of public officers are "subjects of elaborate legislation," and "[i]n the absence of any . . . provision [for their removal] . . . they cannot be removed by a vote of the town, either with or without a hearing before the town or a committee thereof." *Id. at 56*. See *Del Duca v. Town Adm'r of Methuen*, 368 *Mass. 1, 7, 329 N.E.2d 748 (1975)* ("a municipality cannot ordinarily remove members of a board or agency established pursuant to a general law, even where there exists cause for removal, unless the general law itself explicitly or implicitly authorizes such removal").[FN10]

10 It is true that in contrast to the plaintiffs in *Del Duca v. Town Adm'r of Methuen*, 368 *Mass. 1, 329 N.E.2d 748 (1975)*, who were members of the town's planning board established pursuant to *G. L. c. 41, § 81A*, Turner did not hold an office that was established under a general law but, rather, served as an elected city councillor under the terms of the city charter. However, the city charter itself consists entirely of provisions enacted by the Legislature over time in various special acts, and it currently does not contain any provision that authorizes the removal of an incumbent councillor. With respect to this last point, it should be noted that, under the city charter, the council acts as "the judge of the election and qualifications of its members." *St. 1948, c. 452, § 17*, as appearing in *St. 1951, c. 376, § 1*. Although the record indicates the defendants originally may have viewed § 17 of the city charter as a source of authority for the removal of Turner, they now appear to recognize that this provision does not permit the city

council to "exclude or expel a member for a cause which as matter of law is not a disqualification." *Caba v. Probate Court for the County of Hampden*, 363 Mass. 132, 136, 292 N.E.2d 867 (1973) (*Caba*), citing *Powell v. McCormack*, 395 U.S. 486, 89 S. Ct. 1944, 23 L. Ed. 2d 491 (1969). Nor, in any event, does § 17 appear to apply when the council is acting to remove or expel a sitting and serving councillor. See *Caba*, *supra*.

The defendants agree that rule 40A is simply a procedural [*517] rule, and at this juncture they appear to accept that the substantive authority to remove Turner must derive from a statutory source, that is, a law enacted by the Legislature.[FN11] They point to the Commonwealth's conflict of interest statute, G. L. c. 268A, as that source. In particular, they argue that G. L. c. 268A, § 23 (e), "specifically authorized" the council to remove Turner, and that rule 40A merely supplied the procedural means of enforcing this statutory provision.[FN12] We turn to the specific language of this statute.

11 The defendants assert in their brief that the council was authorized to promulgate and use rule 40A because of the expanded powers vested in municipalities as a result of the Home Rule Amendment, art. 89, § 6, of the Amendments to the Massachusetts Constitution, ratified in 1966. The court in *Del Duca v. Town Adm'r of Methuen*, 368 Mass. at 7, raised but had no reason there to answer the question whether the Home Rule Amendment may have modified the traditional rule that a city or town cannot remove a public officer, even when cause exists, unless a statute expressly or implicitly authorizes such action. There also is no reason to reach the question in this case. The Home Rule Amendment expands the independent authority of cities and towns when they are acting through "the adoption, amendment, or repeal of local ordinances or by-laws." Home Rule Amendment, art. 89, § 6. See G. L. c. 43B, § 13 (Home Rule Procedures Act). As conceded by the defendants, in removing Turner from office, the city council acted pursuant to an internal procedural rule, not an ordinance. Rule 40A is conceptually distinct from an ordinance. See *Oleksak v. Westfield*, 342 Mass. 50, 52, 172 N.E.2d 85 (1961) ("an ordinance is a legislative enactment of a city effective only within its own boundaries"). See also *Armitage v. Fisher*, 26 N.Y.S. 364, 367, 74 Hun 167 (Sup. Ct. Gen. Term 1893) ("rules adopted by a legislative or municipal body cannot be deemed ordinances. Such bodies adopt rules for their guidance in making ordinances or laws. A rule is defined to be 'the regulation adopted by a deliberative body

for the conduct of its proceedings.' The word 'ordinance,' as applicable to the action of a municipal corporation, should be deemed to mean the local laws passed by the governing body"). The Home Rule Amendment, therefore, is not relevant to resolution of the certified questions.

12 In their brief, the defendants also contended that Turner's removal was mandated by G. L. c. 268A, § 2 (b) and (d), which are provisions in the statute that proscribe various corrupt acts by public officials and provide for automatic removal from office on conviction. However, at oral argument the defendants abandoned this argument. Their decision to do so was appropriate because Turner was convicted of Federal crimes; he was not convicted under G. L. c. 268A, § 2. Although the defendants continue to advance the point that G. L. c. 268A, § 2 (d), did not grant Turner an affirmative right to remain in office, our inquiry focuses on whether the council had statutory authority to remove Turner from office on conviction and before sentencing, not whether Turner had an affirmative right to remain in office.

[*518] *General Laws c. 268A, § 23* (§ 23), establishes standards of conduct for public employees, including municipal officers and employees.[FN13] See § 23 (a) ("In addition to the other provisions of this chapter, and in supplement thereto, standards of conduct, as hereinafter set forth, are hereby established for all state, county, and municipal employees"). The specific components of the standards of conduct are detailed in § 23 (b) and (c); of particular relevance are § 23 (b) (2) (i) and (3) (prohibiting public officers and employees from receiving "anything of substantial value" because of their official positions, and from acting in a manner that would cause a reasonable person to believe they can be improperly influenced).[FN14] *Section 23 (e)* provides:

"Where a current employee is found to have violated the provisions of [§ 23] appropriate administrative action as is warranted may also be taken by the appropriate constitutional officer, by the head of a state, county or municipal agency. Nothing in this section shall preclude any such constitutional officer or head of such agency from establishing and enforcing additional standards of conduct." (Emphasis added.)

13 As an elected city councillor, Turner was a "municipal employee" within the meaning of G. L. c. 268A and subject to its provisions. See G. L. c. 268A, § 1 (g) (defining "[m]unicipal employee" in relevant part as "a person

performing services for or holding an office, position, employment or membership in a municipal agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent, or consultant basis").

14 *General Laws c. 268A, § 23 (b) (2) (i)*, provides that a municipal employee shall not "solicit or receive anything of substantial value for such officer or employee, which is not otherwise authorized by statute or regulation, for or because of the officer or employee's official position"; *G. L. c. 268A, § 23 (b) (3)*, provides in part that a municipal employee shall not "act in a manner which would cause a reasonable person, having knowledge of the relevant circumstances, to conclude that any person can improperly influence or unduly enjoy his favor in the performance of his official duties, or that he is likely to act or fail to act as a result of kinship, rank, position or undue influence of any party or person."

[*519] The defendants claim that, because Turner's convictions establish that he violated § 23 (b) (2) (i) and (3), his removal by the council was therefore authorized as an "appropriate administrative action" under § 23 (e).**[FN15]**

15 In fact, the defendants assert that Turner's removal was the "only" appropriate administrative action that the city council could have taken after Turner's conviction of attempted extortion, because a failure to remove him until he was sentenced to prison arguably would have placed the city council itself in violation of *G. L. c. 268A, § 23 (b) (3)*, by "giving the public the impression that members of [the council] can be improperly influenced."

This court has held previously that the elected municipal board or council is the appropriate body to enforce the provisions of § 23 in relation to the conduct of one of its members. See *Selectmen of Avon v. Linder*, 352 Mass. 581, 583, 227 N.E.2d 359 (1967). See also *District Attorney for the Hampden Dist. v. Grucci*, 384 Mass. 525, 529, 427 N.E.2d 743 (1981). Therefore, the defendants are correct that § 23 (e) authorized the city council to take "appropriate administrative action" in relation to Turner if he was found to have violated the standards of conduct set forth in § 23. We also agree with the defendants that having been convicted of the Federal crime of attempted extortion, Turner may be deemed to have been "found to have violated the provisions of" § 23, and of § 23 (b) (2) (i) and (3), in particular (see note 14, supra). As we next discuss, however, we do not agree that the council's removal of Turner as an elected city councillor fits within the

permissible scope of "appropriate administrative action" authorized by § 23.

The phrase "appropriate administrative action" is not defined in *G. L. c. 268A*. Nevertheless, the other provisions and structure of the statute indicate clearly that such "action" is distinguishable from criminal prosecution, see, e.g., *G. L. c. 268A, §§ 2-5*, and the types of damages and restitution that the State Ethics Commission is empowered to order a municipal employee, see *G. L. c. 268A, § 21 (b)*.**[FN16]** As a source of interpretative guidance, the defendants point to the final report of the special **[*520]** commission that was appointed pursuant to St. 1961, c. 610, § 2, to study and recommend legislation relating to conflict of interests and ethics in government.**[FN17]** The special commission, which drafted the legislation enacted as *G. L. c. 268A*, took the view that "appropriate administrative action" against a public employee found to have violated the standards of conduct might include discharge, and the defendants appear to rely on the view of the commission's members, as the drafters of the legislation, as an accurate reflection of legislative intent.**[FN18]** Cf. *Halebian v. Berv*, 457 Mass. 620, 630, 632, 633, 931 N.E.2d 986 (2010) (in construing meaning of particular provision of Massachusetts Business Corporations Act, *G. L. c. 156D*, court considered commentary of expert task force that drafted act); *New Bedford v. New Bedford, Woods Hole, Martha's Vineyard & Nantucket S.S. Auth.*, 330 Mass. 422, 429, 114 N.E.2d 553 (1953) (in construing meaning of particular statute, court may rely on report and recommendations of special commission on whose report statute was based).

16 *General Laws c. 268A, § 21 (b) and (c)*, authorizes the State Ethics Commission (commission), on a finding that a person has violated particular sections of *c. 268A*, to assess civil penalties to require the violator to make restitution to an injured third party, and to order payment of damages. *Section 21 (b)* also authorizes the commission to bring a civil action to recover damages if it determines damages exceed \$25,000.

17 See Final Report of the Special Commission on Code of Ethics, 1962 House Doc. No. 3650 (Final Report).

18 In the Final Report, supra at 17, the special commission, discussing the section that now appears as § 23, stated, "This section establishes certain standards of conduct. No criminal penalties are involved, but it is expressly provided that violation of these standards may be the basis of appropriate administrative action. This may range from warning to discharge, as the case may be."

The argument goes too far. As noted by then-Professor Robert Braucher, one of the members of

the special commission (who also served on the three-member subcommittee assigned to draft the proposed legislation), although § 23 establishes a code of conduct and permits "appropriate administrative action" to be taken for violations of that code, proceedings for the suspension or removal or other discipline of municipal employees "must follow the usual procedures," meaning procedures laid out in specific statutes such as those governing, for example, civil service employees, teachers, and police. R. Braucher, *Conflict of Interest in Massachusetts*, in *Perspectives of Law, Essays for Austin Wakeman Scott* 35-36 & n.99 (R. Pound, E. Griswold, A. Sutherland eds. 1964).

More importantly, we take from both the Massachusetts Constitution and the General Laws that the removal or suspension [*521] of a public officer requires specific constitutional or legislative authorization. Our Constitution specifies that "officers of the Commonwealth" may be removed from office only by compliance with its specific impeachment provisions set out in Part II, c. 1, § 2, art. 8, of the Massachusetts Constitution. See *Matter of Dugan*, 418 Mass. 185, 187, 635 N.E.2d 246 (1994).[FN19] "Judicial officers" may only be removed by compliance with the address provisions in Part II, c. 3, art. 1, of the Massachusetts Constitution. See *id.* at 187-188. The Legislature has directed that clerks of court and certain other court officials, as well as county commissioners, county treasurers, sheriffs, and district attorneys, be subject to removal by this court. See *G. L. c. 211, § 4*. In *G. L. c. 279, § 30*, the Legislature has mandated specifically that one who holds public office, including one who holds municipal office, is automatically removed from office only when he or she is sentenced to prison on a felony conviction in State or Federal court.

19 "[O]fficers of the Commonwealth" include "a person elected by the people at large, or holding an office provided for in the Constitution for the administration of matters of general or State concern." *Matter of Dugan*, 418 Mass. 185, 187, 635 N.E.2d 246 (1994), citing *Opinion of the Justices*, 308 Mass. 619, 623-624, 33 N.E.2d 275 (1941). As a Boston city councillor, Turner does not qualify as an "officer of the Commonwealth."

Legislative authorization also is required with respect to suspensions of public officers and employees while under indictment for criminal offenses. *General Laws c. 30, § 59*, sets out specific provisions and procedures that authorize and govern the suspension of an appointed or elected officer or employee of the Commonwealth or of any State agency, department, board, commission, or authority while under indictment for misconduct in office; *G. L. c. 268A, § 25*, similarly authorizes and prescribes specific procedures for the suspension of county and municipal officers and

employees "by the appointing authority" when any such officer or employee has been indicted for misconduct in office.[FN20] When considered against the backdrop of these constitutional provisions and statutes, the terse and [*522] general phrase "appropriate administrative action" in § 23 (e) cannot be read as a specific grant of permission to a municipal body such as the city council to remove one of its members as a sanction for violating the standards of conduct in § 23.[FN21]

20 This court has held that an attempt to suspend a county sheriff under indictment for alleged misconduct in office cannot stand where the suspension does not comply with the specific terms of *G. L. c. 268A, § 25*. In *McGonigle v. The Governor*, 418 Mass. 147, 149-150, 634 N.E.2d 1388 (1994) (*McGonigle I*), we held that the Governor did not have authority to suspend a sheriff under indictment because the Governor was not the "appointing authority" of the elected sheriff, and under *c. 268A, § 25*, only the appointing authority is authorized to suspend. Accordingly, the Governor's purported suspension was invalid. Contrast *The Governor v. McGonigle*, 418 Mass. 558, 559-560, 637 N.E.2d 863 (1994) (Supreme Judicial Court may suspend sheriff under indictment pursuant to *G. L. c. 211, § 4*, because authority to remove conferred by that statute includes authority to suspend).

We note that *McGonigle I* makes clear the city council could not have suspended Turner pursuant to *G. L. c. 268A, § 25*, while he was under indictment, because as an elected official, Turner, like a county sheriff, had "no 'appointing authority.'" *McGonigle I*, 418 Mass. at 149-150. 21 Turner's status as an elected municipal officer is particularly significant. His removal by the city council meant that the voters of the council district that he represented lost the councillor that they had voted into office. In a sense, the council's action served as a disavowal or restriction of their voting rights. "Restrictions on the right to vote are to be read narrowly." *Cepulonis v. Secretary of the Commonwealth*, 389 Mass. 930, 933, 452 N.E.2d 1137 (1983), citing *Boyd v. Registrars of Voters of Belchertown*, 368 Mass. 631, 633, 334 N.E.2d 629 (1975).

For the above reasons, we conclude that the city charter does not provide the requisite authority for the city council's removal of Turner from office before he was sentenced to prison, and further that such authority cannot be found in *G. L. c. 268A, § 23 (e)*, or any other Massachusetts statute.[FN22] Accordingly, we answer the first certified question, "No." There is no need to answer the second question.

22 Although it did not have the power to remove Turner before he was sentenced to prison, the council was not powerless to impose sanctions on Turner or take other action under § 23 (e). The action taken by the city council president in 2008 to remove Turner as chairman of two council committees would qualify as one such sanction that the council itself might have imposed under rule 40A, but there are others as well, certainly including a vote of censure and

perhaps restrictions on Turner's participation in the official work of the council as a body.

The Deputy Reporter of Decisions is directed to furnish attested copies of this opinion to the clerk of this court. The clerk in turn will transmit one copy, under the seal of the court, to the clerk of the United States District Court for the District of Massachusetts, as the answer to the questions certified, and will also transmit a copy to the parties.

VERIZON NEW ENGLAND INC. vs. BOARD OF ASSESSORS OF BOSTON & others.[FN1]

APPEALS COURT OF MASSACHUSETTS

81 Mass. App. Ct. 444
963 N.E.2d 1210; 2012 Mass. App. LEXIS 157

November 9, 2010, Argued
March 19, 2012, Decided

SUBSEQUENT HISTORY: Later proceeding at *Verizon New Eng. v. Bd. of Assesors of Boston*, 462 Mass. 1104, 2012 Mass. LEXIS 371 (2012)

PRIOR HISTORY: Suffolk. Appeal from a decision of the Appellate Tax Board. *Verizon New Eng. inc. v. Bd. of Assessors of Newton*, 81 Mass. App. Ct. 457, 963 N.E.2d 1205, 2012 Mass. App. LEXIS 156 (2012)

HEADNOTES

Telecommunications. Telephone Company. Public Utilities, Telecommunications, Value. Taxation, Assessors, Corporation, Value, Personal property tax: public utility, value. Value. Real Property, Poles and wires, Tax.

COUNSEL: William A. Hazel for the taxpayer.

Anthony M. Ambriano for board of assessors of Boston & another.

Martha Coakley, Attorney General, Daniel J. Hammond, Assistant Attorney General, & Daniel A. Shapiro, for Commissioner of Revenue, submitted a brief.

JUDGES: Present: McHugh, Sikora, & Fecteau, JJ.[FN2]

OPINION BY: McHUGH

OPINION

[*445] McHUGH, J. Verizon New England Inc. (Verizon) appeals from a decision of the Appellate Tax

Board (board) holding that poles and wires (which the parties refer to as "aerial plant") erected on public ways, as well as construction work in progress (CWIP), are subject to taxation by the cities of Boston and Newton for fiscal year (FY) 2003 through FY 2009. For the reasons that follow, we vacate the board's order.

1 Board of assessors of Newton and the Commissioner of Revenue (commissioner). Before the Appellate Tax Board (board), the commissioner argued that neither "aerial plant" (i.e., poles and wires) over public ways nor construction work in progress (CWIP) was taxable. Here, however, the commissioner does not join Verizon New England, Inc. (Verizon), in its appeal on that issue. Instead, the commissioner argues only that a procedural issue Verizon raises on appeal is now moot. We discuss that issue in note 4, infra.

2 Justice McHugh participated in the deliberation on this case and authored the opinion prior to his retirement

Background. The record, significant portions of which are based on an agreed statement of facts and allied exhibits, reveals that Verizon is a New York corporation. Verizon has been authorized to do business in the Commonwealth since 1884, initially as the New England Telephone & Telegraph Company and later under its current name. Verizon provides telephone, telegraph, and other telecommunications services throughout the Commonwealth and owns, wholly or in combination with others, poles, wires, conduits, machinery, and other equipment in many, if not all, of the Commonwealth's cities and towns.

The Newton and Boston boards of assessors (collectively, assessors), like their counterparts across

the Commonwealth, are charged with assessing personal property for purposes of local taxation. To ensure uniformity in valuation of similar property that telephone and telegraph companies own in many different cities and towns, *G. L. c. 59, § 39*, as appearing in St. 1955, c. 344, § 1, requires the Commissioner of Revenue (commissioner) to determine annually the "valuation at which the machinery, poles, wires and underground conduits, wires and pipes of all telephone and telegraph companies shall be assessed."

To facilitate compliance with § 39, telephone and telegraph companies annually provide the commissioner with a list, on a form the commissioner issues in accordance with *G. L. c. 59, § 41*, stating the original cost of the personal property the commissioner indicates is subject to central valuation.[FN3] The commissioner [*446] then values the property described on the forms and, by May 15 of each year, certifies those values to the assessors of cities and towns where the property is located. *G. L. c. 59, § 39*. Subject to any changes that occur as the result of appeals, the values so certified are the values the assessors must use to assess and tax the property for the fiscal year beginning the following July.

3 The form is designated "State Tax Form 5941." See *Matter of the Valuation of MCI WorldCom Network Servs., Inc.*, 454 Mass. 635, 637 n.4, 912 N.E.2d 920 (2009).

The commissioner's form contains instructions that, among other things, describe the property the companies must list. For the years in question, the forms stated that "corporations . . . will be valued only on poles and wires over private property, underground conduits, wires and pipes in public or private property, and machinery used [for particular purposes] *G. L. c. 59, § 39*; *G. L. c. 59, § 5, cl. 16(1)*; *G. L. c. 59, § 18(5)*." [FN4] Accordingly, when Verizon filed the required forms, it did not list the cost of its aerial plant over public ways or its CWIP.

4 The forms for FY 2004 through FY 2008, with inconsequential differences as to punctuation and capitalization, contained the quoted language. Although the text in the FY 2003 form differed from that in the other forms, the meaning did not. The FY 2003 form stated: "companies are taxable on poles, wires, underground conduits, wires and pipes . . . excluding poles and wires over public ways" [emphasis in original].

Newton filed a timely appeal from the values the commissioner had assigned for FY 2003 through FY 2008, and Boston and Verizon filed appeals from the values the commissioner had assigned for FY 2005 through FY 2009. Among the questions raised in all of the appeals was whether aerial plant over public ways and CWIP were taxable.

The board bifurcated the appeals. Phase one dealt with several issues other than valuation, including whether aerial plant over public ways was taxable. Phase two focused on valuation and other discrete issues, including whether CWIP was taxable. After hearings, the board issued its phase one order on March 3, 2008, ruling that aerial plant over public ways was taxable.[FN5] On August 4, 2009, the board issued a decision that CWIP was [*447] taxable.[FN6] On October 1, 2009, the board issued its findings of fact and report on both phases. This appeal followed in timely fashion.

5 Verizon moved for an interlocutory report to this court of the phase one order. The board denied the motion on grounds that it had no power to make such a report, rejecting in the process Verizon's suggestion that the power to do so existed by analogy to *G. L. c. 214, § 30*. That statute authorized Superior Court judges to report interlocutory rulings under circumstances now embodied in *Mass.R.Civ.P. 64*, as amended, 423 Mass. 1410 (1996). But § 30 was repealed in 1973, see St. 1973, c. 1114, § 62, and, in any event, the board stated that it would not have exercised its discretion to make a report even if it had the power to do so. Under those circumstances, and even if Verizon's discussion of the point amounts to an appellate argument, see *Mass.R.A.P. 16(a)(4)*, as amended, 367 Mass. 921 (1975), we decline to consider the question of power Verizon has raised.

6 In March, 2008, a week after issuing the phase one ruling in this case, the board decided a case called *In re: MCI Consolidated Central Valuation Appeals: Boston & Newton*, 34 Mass. App. Tax Bd. Rep. 128, 155 (2008) (MCI), in which it held for the first time that CWIP was taxable. That ruling did not play a role in the subsequent appeal from the board's decision and the Supreme Judicial Court's opinion makes no mention of it. See *Matter of the Valuation of MCI WorldCom Network Servs., Inc.*, 454 Mass. 635, 912 N.E.2d 920 (2009). The industry and all parties to this appeal knew that the MCI appeal was pending before the board and treated it as a test case. Accordingly, many valuation appeals relating to the property of more than a dozen telephone and telegraph companies were filed at the board while that appeal was in progress. On May 30, 2007, the board issued orders consolidating and bifurcating for trial all of what were by then 970 appeals filed by Verizon, the Boston assessors, the Newton assessors, and the boards of assessors of various other municipalities, for FY 2003 through FY 2007. Thereafter, only the Boston and Newton assessors took an active role in the proceedings

and the board's final valuation order pertained to Verizon's property only in those two cities.

Discussion. a. Aerial plant over public ways. The board based its conclusion that aerial plant over public ways is taxable primarily on *G. L. c. 59, § 18, First*. Chapter 59, § 18, is one of three sections of the General Laws that together provide the broad framework for taxing real and personal property within the Commonwealth.[FN7] The First clause, as amended through St. 1978, c. 581, § 4, reads as follows:

"First, All tangible personal property, including that of [*448] persons not inhabitants of the commonwealth . . . shall, unless exempted by [*G. L. c. 59*] section five, be taxed to the owner in the town where it is situated on January first." [FN8]

7 The board also relied on the other sections that form the framework. The first of those is *G. L. c. 59, § 2*, a broad taxing provision stating in material part that "[a]ll property, real and personal, situated within the commonwealth, and all personal property of the inhabitants of the commonwealth wherever situated, unless expressly exempt, shall be subject to taxation" The other section, *G. L. c. 59, § 5*, deals with exemptions from taxation. *Section 5, Sixteenth (1)*, contains what is known as the corporate utility exemption, which excludes from taxation all property owned by, among others, a utility corporation except for "real estate, poles, underground conduits, wires and pipes, and machinery used in manufacture or in supplying or distributing water." For the reasons set out in *Warner Amex Cable Communications Inc. v. Assessors of Everett*, 396 Mass. 239, 240, 485 N.E.2d 177 (1985), however, unless Verizon is within the class of taxpayers embraced by § 18, *First*, the sections just described by themselves create no power to tax.

8 The First clause is preceded by a general provision stating that "[a]ll taxable personal estate within or without the Commonwealth shall be assessed to the owner in the town where he is an inhabitant on January first, except as provided in . . . the following clauses of this section." This general provision, on which no party relies, is of ancient vintage and represents the view that "movables follow the person" or *mobilia sequuntur personam*. See generally Nichols, *Taxation in Massachusetts* 276-280 (3d ed. 1938); *Bellows Falls Power Co. v. Commonwealth*, 222 Mass. 51, 60-62, 109 N.E. 891 (1915). The First clause represents a transition to the more modern view that, in general, personal property is to be taxed where it

is located. Nichols, *supra* at 278. Other clauses in § 18 have completely supplanted the general provision and it no longer has any independent force and effect.

In the board's view, then, the broad language of § 18, *First*, created a general rule that all tangible personal property, including Verizon's poles and wires on public ways, is subject to property taxation. Verizon's argument to the contrary proceeds as follows. In a number of cases decided long ago, the Supreme Judicial Court held that personal property owned by corporations is not taxable without explicit statutory authorization. *Chapter 59, § 18, First*, is not an explicit statutory authorization because it does not mention corporate property. Only two other clauses in § 18 explicitly mention corporate property and neither authorized taxation of aerial plant over public ways during a fiscal year at issue in these proceedings.[FN9]

9 The first of the two is *G. L. c. 59, § 18, Second*, which currently provides:

"[m]achinery employed in any branch of manufacture or in supplying or distributing water, including machines used or operated under a stipulation providing for the payment of a royalty or compensation in the nature of a royalty for the privilege of using or operating the same, and all tangible personal property within the commonwealth leased for profit, or, in the case of business corporations subject to tax under section 39 of chapter 63, machinery used in the conduct of the business, shall be assessed where such machinery or tangible personal property is situated to the owner or any person having possession of the same on January first."

The second is *G. L. c. 59, § 18, Fifth*, which currently provides:

"[u]nderground conduits, wires and pipes laid in public ways, except such as are owned by a street railway company, and poles, underground conduits and pipes, together with the wires thereon or therein, laid in or erected upon private property or in a railroad location by any corporation, except poles, underground conduits, wires and

pipes of a railroad corporation laid in or erected upon the location of such railroad, and except poles, underground conduits, wires and pipes laid in or erected upon any right of way owned by a street railway company, shall be assessed to the owners thereof in the towns where laid or erected. Poles, underground conduits, wires and pipes of telecommunications companies laid in or erected upon public or private ways and property shall be assessed to their owners in the cities or towns where they are laid or erected. For purposes of this clause, telecommunications companies shall include cable television, internet service, telephone service, data service and any other telecommunications service providers."

The italicized language, which is discussed later in this opinion, was added by St. 2009, c. 27, § 25, and was made effective as of January 1, 2009, to "apply to property taxes assessed for fiscal years beginning on or after July 1, 2009." St. 2009, c. 27, § 149.

[*449] Urging that the board's approach is correct, the assessors argue that, although Verizon's reading of the statutes and the cases is essentially accurate, the rationale on which the cases rested has been undercut by an evolution in the Commonwealth's approach to corporate taxation. That evolution, in the assessors' view, effectively broadened the reach of *G. L. c. 59, § 18, First*, and justifies the result the board reached here. Principally for three reasons, we do not agree.

First of all, *G. L. c. 59, § 18, First*, has been in existence in one form or another for more than 150 years and the Supreme Judicial Court has uniformly construed the word "owner" as appearing in that clause to exclude corporations. See *Boston & Sandwich Glass Co. v. Boston*, 4 Met. 181, 183-186, 45 Mass. 181, 4 Metc. 181 (1842) (construing Rev. Stats. 1836, c. 7, and subsequent amendment, St. 1839, c. 139, § 1); *Middlesex R.R. v. Charlestown*, 90 Mass. 330, 8 Allen 330, 333 (1864) (construing Gen. Stats. 1860, c. 11, § 12, First). As the court observed in *Worcester v. Board of Appeal in Tax Matters*, 184 Mass. 460, 464, 69 N.E. 330 (1904):

"In a word, the general provisions of law for taxation of personal property were not applicable to corporations. Except as to machinery, which is

specially mentioned [in what is now § 18, *Second*], the personal property was reached through the shareholders. . . . And this interpretation [*450] [of the taxing statutes] . . . was adopted . . . plainly and simply upon the ground that the opposite interpretation would result in a form of double taxation."

To be sure, when those cases were decided, the predecessor to the current § 18, *First*, was narrower and imposed a tax only on "goods, wares, merchandise, and other stock in trade . . . including stock employed in the business of manufacturing or of the mechanic arts," as the provision appeared in Gen. Stats. 1860, c. 11, § 12, *First*, or "goods . . . or other stock in trade, including stock employed in manufactories," as the language appeared in the statute the court discussed in *Amesbury Woollen & Cotton Mfg. Co. v. Amesbury*, 17 Mass. 461, 462 (1821). But the focus of those cases was on the scope of the word "owner," a word, the cases held, that did not include corporations. By 1918, when the Legislature broadened § 18, *First*, to reach "all tangible personal property," as it does today, see St. 1918, c. 129, § 1, [FN10] that construction of "owner" had been in place for nearly one hundred years. Neither the 1918 legislation nor anything the Legislature has done since changed, qualified, or expanded that term. See *Boston v. Mac-Gray Co.*, 371 Mass. 825, 828, 359 N.E.2d 946 (1977) ("In matters of taxation [the court] should follow the pattern of [its] decisions, leaving to the Legislature the opportunity to make responsive adjustments in the scope of the tax statutes").

10 The 1918 amendment "mark[ed] the final step in the change of the principle of situs in taxing tangible personal property from the old rule of *mobilia sequuntur personam* by which the situs of all personal property was deemed to be at the domicile of the owner to the present practice of basing situs almost wholly on the physical location of the property." Nichols, *Taxation in Massachusetts* 278 (3d ed. 1938).

That the word "owner" remains unchanged and unqualified cannot be attributed to legislative oversight. In 1937, a special legislative commission composed of a Senator, several Representatives, and several individuals appointed by the Governor was charged with analyzing the Massachusetts tax system and recommending changes. In its report, the commission stated that "[s]ince [1813,] real estate of a corporation and its machinery (from 1832 to 1936) has [sic] been subject to local taxation, but all other forms of personal property belonging [*451] to corporations have been wholly free from direct taxation." 1938 House Doc. No. 1703, at 45 (Report of the Special Commission on Taxation and Public Expenditures: Part III, The Tax Structure). Thirty-two years later, another special commission, similarly composed, said essentially the

same thing. See 1971 Senate Doc. No. 1281, at 73-74 (Second Report of the Special Commission to Develop a Master Tax Plan Relative to the Massachusetts Revenue Structure). The Legislature made no change to *c. 59, § 18, First*, in response to either report.

The second reason for our conclusion that the general terms of *§ 18, First*, do not reach aerial plant on public ways rests on the care and precision the Legislature has used in other sections dealing with taxation of wires and poles. The Legislature first addressed the subject in 1902 when it enacted *G. L. c. 18, Tenth*, which read in material part as follows:

"Underground conduits, wires and pipes laid in public streets by any corporation . . . shall be assessed to the owners thereof in the cities and towns in which they are laid."

St. 1902, c. 342, § 1. Seven years later, it added the power to tax aerial plant erected on private property, revising the section so that it read:

"[u]nderground conduits, wires and pipes laid in public streets, and poles, underground conduits and pipes, together with the wires thereon or therein, laid in or erected upon private property . . . by any corporation . . . shall be assessed to the owners thereof in the cities or towns in which they are laid or erected."

St. 1909, c. 439, § 1. See *Assessors of Springfield v. Commissioner of Corps. & Taxn.*, 321 Mass. 186, 194, 72 N.E.2d 528 (1947) ("It is to be noted that the statute makes no provision for the taxation of poles with the wires thereon erected on public ways but taxes only those located on private property"). That is essentially the way the material portion of the statute read from 1909 to 2009 when the Legislature changed the language to reach aerial plant on public as well as private property. See St. 2009, c. 27, § 25, and note 9, supra. Where the Legislature has devoted explicit [*452] and careful attention to imposition of taxes in one statutory section, we are loath to assume that it has covered the same subject elsewhere by implication. In fact, to do so would run counter to the settled principle that the "right to tax must be found within the letter of the law and is not to be extended by implication. It is a 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) (citation omitted).[FN11]

11 The assessors' suggestion that the 2009 amendment to *§ 18, Fifth*, amounted to a

legislative affirmation of the board's March, 2008, decision finds no support in the record or in any legislative history the assessors have cited. Moreover, the suggestion runs afoul of the proposition that all statutes affecting substantive rights are prospective in operation unless an intention for retroactivity appears by unequivocal language or necessary implication. *Hanscom v. Malden & Melrose Gas Light Co.*, 220 Mass. 1, 3, 107 N.E. 426 (1914). See, e.g., *Paraboschi v. Shaw*, 258 Mass. 531, 533, 155 N.E. 445 (1927); *Old Colony Trust Co. v. Commissioner of Corps. & Taxn.*, 343 Mass. 613, 619-620, 180 N.E.2d 97 (1962); *City Council of Waltham v. Vinciullo*, 364 Mass. 624, 626, 307 N.E.2d 316 (1974); *Sentry Fed. Sav. Bank v. Co-operative Cent. Bank*, 406 Mass. 412, 414, 548 N.E.2d 854 (1990). No unequivocal language appears. On the contrary, the amending statute expressly stated that the amendment was only to apply prospectively. See St. 2009, c. 27, § 149

Third and finally, we have grave doubts about judicial power to alter an established construction of a statute under circumstances like those this case presents and about the wisdom of doing so even if the power exists. In so saying, we acknowledge that judicial decisions excluding corporations from *G. L. c. 59, § 18, First*, originated in a desire to avoid double taxation. At the time the current statute's predecessors were enacted, shareholders were taxed on the value of corporate shares they owned. Those taxes were assessed in the town where the shareholder lived and, the theory was, double taxation would result if the corporation were also taxed on its personal property in the town where the property was located. See, e.g., *Salem Iron Factory Co. v. Danvers*, 10 Mass. 514, 516-518 (1813).

Shareholders are no longer taxed on the value of their shares, see *G. L. c. 59, § 5, Twenty-fourth*, so the precise basis for excluding corporate property from *§ 18, First*, has disappeared. That change in circumstances, however, does not necessarily empower a court or agency to revisit a statutory construction that has been in existence for 150 years. Construction of a statute [*453] is an exercise in determining legislative intent, not an exercise in freelance rule making. See *Carpenter's Case*, 456 Mass. 436, 446, 923 N.E.2d 1026 (2010), quoting from *Board of Educ. v. Assessor of Worcester*, 368 Mass. 511, 513, 333 N.E.2d 450 (1975) (a "statute must be interpreted according to the intent of the Legislature"). If a court misjudges the underlying intent, the Legislature can change the statute to clarify its intention, see *Nei v. Burley*, 388 Mass. 307, 315, 446 N.E.2d 674 (1983) (if the court's construction of a statute "does not reflect the mind of the Legislature, it is free to change the law"), and, on occasion, it has done so. See, e.g., *Swift v. AutoZone, Inc.*, 441 Mass. 443, 449-450, 806 N.E.2d 95 (2004) ("Lest there be any

doubt as to legislative intent in 1960, the 2003 amendment to permit crediting was swift legislative action in the wake of the Superior Court judge's ruling to the contrary in this case. That action is strongly suggestive of the Legislature's intent in 1960" [footnote omitted]). But a court's power to decide that changed conditions require a new construction of a statute it construed long ago is, at best, quite limited.[FN12] The only basis for doing so would be to make the statute consistent with the court's view of what the Legislature would do were it to look anew at the subject of the legislation. To do that, however, is to legislate, not to construe, and the power to legislate lies exclusively in the Legislature's domain. See, e.g., *Commonwealth v. Vickey*, 381 Mass. 762, 767, 412 N.E.2d 877 (1980) ("[W]hen the statute appears not to provide for an eventuality, there is no justification for judicial legislation"); *Massachusetts Bay Transp. Authy. v. Massachusetts Bay Transp. Authy. Retirement Bd.*, 397 Mass. 734, 740, 493 N.E.2d 848 (1986); *Leopoldstadt, Inc. v. Commissioner of the Div. of Health Care Fin. & Policy*, 436 Mass. 80, 92, 762 N.E.2d 824 (2002); *Commonwealth v. Gillis*, 448 Mass. 354, 364, 861 N.E.2d 422 (2007).

12 The limitation is particularly powerful where, as here, the construction in question is that of the Supreme Judicial Court. See generally *Commonwealth v. Dube*, 59 Mass. App. Ct. 476, 485-486, 796 N.E.2d 859 (2003).

The principles just described have a special grip here because, as the legislative approach to corporate taxation has evolved over the years, the Legislature itself has explicitly dealt with the issue of double taxation. When it first permitted cities and towns to tax corporate machinery, the Legislature was careful to require deduction of the value of the taxed machinery from the value of the shares taxable to the shareholders. See St. 1832, [*454] c. 158, § 2. See also Rev. Stats. 1836, c. 7, § 10, Second.[FN13] In 1864, the Legislature moved from a local tax on corporate shares paid by shareholders to an excise tax on the market value of all shares paid by the corporation, collected centrally and distributed to cities and towns. In making that change, the Legislature was careful to exclude real estate and machinery taxed locally from the value on which the excise was levied. See St. 1864, c. 208, §§ 5, 8, 15. After it authorized local taxation of certain pipes, conduits, and wires, the Legislature added those items to the list of exclusions from the value subject to the excise. See St. 1909, c. 490, § 41, Third. It did so again in 1919 when it revised the corporate taxation scheme to include a tax on corporate income. See St. 1919, c. 355, §§ 1(3)(a), 2(1), 15(1). The same legislative focus on the interplay between the subjects of local taxation and the value on which an excise is levied is evident in the statutes governing corporate taxation today. See *G. L. c. 62C*, § 12; *G. L. c. 63*, § 55. Under those circumstances, there is

simply no basis for judicial or agency refinement of the Legislature's handiwork. See generally, e.g., *Molesworth*, 408 Mass. at 581 ("The right to tax must be found within the letter of the law and is not to be extended by implication").[FN14]

13 The statute excluded the value of the real estate owned by the corporation because taxes on that value had "always been paid exclusively to the town in which [the real estate was] situated." *Salem Iron Factory Co.*, 10 Mass. at 517. See *Worcester*, 184 Mass. at 463.

14 The assessors point out that Verizon is classified as a utility corporation and that its annual State taxes are based solely on its Massachusetts income. See *G. L. c. 63*, § 52A(2); *Tenneco, Inc. v. Commissioner of Rev.*, 57 Mass. App. Ct. 42, 42 n.2, 781 N.E.2d 33 (2003). Compare *G. L. c. 63*, § 39. In their view, therefore, imposition of local taxes on personal property owned by utility corporations cannot possibly result in double taxation. Perhaps that is so. But the point is that the Legislature has paid careful attention to the question of double taxation as it has decided which tax revenues flow directly to localities and which are to be a component of general revenues. That careful attention leaves no room for inferring a legislative intent to allow local taxation of utility corporations because that local taxation, unlike local taxation of other corporations, creates no risk of double taxation. Nothing in a particular statute or in the legislative scheme as a whole supports such an inference, which, in any event, would wade far too deeply into the policy-making process to be justified as an exercise in statutory construction.

Nothing the Supreme Judicial Court said in *RCN-BecoCom, LLC v. Commissioner of Rev.*, 443 Mass. 198, 820 N.E.2d 208 (2005) (RCN), on [*455] which the assessors rely, leads us to a contrary conclusion. There the court said that *G. L. c. 59*, § 18, *First*, and § 18, *Second*, were not mutually exclusive, with the consequence that certain machinery owned by the taxpayer, but not taxable under § 18, *Second*, could be taxed under § 18, *First*. Twice during the course of its opinion, however, the court noted that the taxpayer was not a corporation. *Id.* at 200, 206. The observation had consequences, for the taxpayer's lack of corporate status made it ineligible for the exemption from taxation contained in *G. L. c. 59*, § 5, *Sixteenth*. *Id.* at 207. Here, we are not faced with a question regarding the interplay between § 18, *First*, and § 18, *Second*. Instead, the applicability of § 18, *First*, to corporations is the issue, and Verizon is undeniably a corporation. RCN, therefore, does not contain a rule of decision applicable to this case.[FN15]

15 Nor do *Warner*, 396 Mass. at 241 n.3, or *Nashoba Communications, Ltd. Partnership v. Board of Assessors of Danvers*, 429 Mass. 126, 127 n.1, 706 N.E.2d 653 (1999), assist the assessors. Insofar as is here material, *Warner*, supra at 240-241, dealt with the scope of G. L. c. 59, § 18, Second, and *Nashoba*, supra at 127-128, with the reach of c. 59, § 18, Fifth. In both, the court observed that the assessors had made no argument that aerial plant on public ways could be taxed under the introduction to c. 59, § 18, or under § 18, First. *Id.* at 127 n.1. But an observation that an argument has not been made is just that. It is not an opinion that the argument is sound.

b. Construction work in progress. Given what we have said thus far, the issue of construction work in progress, or CWIP, can be dealt with more quickly. For the reasons expressed, we do not think that CWIP is taxable to corporations pursuant to c. 59, § 18, First. That leaves c. 59, § 18, Fifth, as a source of taxing power. To the extent that CWIP consists of

"[u]nderground conduits, wires and pipes laid in public ways, . . . and poles, underground conduits and pipes, together with the wires thereon or therein, laid in or erected upon private property," it is taxable for the years in question. The meaning of the statutory terms presents a question of law, see *Commonwealth v. Vega*, 449 Mass. 227, 230, 866 N.E.2d 892 (2007) ("Statutory interpretation is a question of law. . . . As with any question of statutory interpretation, our starting point is the statutory text"), and nothing in the statute suggests that the poles, wires, or conduits must be "in service" before the taxing power attaches. Because the [*456] board approached the issue more globally, its findings are insufficient to allow us to determine whether and to what extent the valuation is limited to taxable components of Verizon's over-all CWIP.

The decision of the appellate tax board is vacated and the case is remanded for further proceedings consistent with this opinion.

So ordered.

VERIZON NEW ENGLAND INC. vs. BOARD OF ASSESSORS OF NEWTON & others.[FN1]

APPEALS COURT OF MASSACHUSETTS

81 Mass. App. Ct. 457

963 N.E.2d 1205; 2012 Mass. App. LEXIS 156

November 9, 2010, Argued

March 19, 2012, Decided

SUBSEQUENT HISTORY: Related proceeding at *Verizon New Eng. Inc. v. Bd. of Assessors of Boston*, 81 Mass. App. Ct. 444, 963 N.E.2d 1210, 2012 Mass. App. LEXIS 157 (2012)

Review denied by *Verizon New Eng. Inc. v. Bd. of Assessors*, 2012 Mass. LEXIS 456 (Mass., May 3, 2012)

PRIOR HISTORY: Suffolk. Civil action commenced in the Supreme Judicial Court for the county of Suffolk on August 21, 2009. After transfer to the Superior Court Department, the case was heard by Thomas E. Connolly, J., on motions for summary judgment.

HEADNOTES

Telecommunications. Telephone Company. Public Utilities, Telecommunications, Value. Taxation, Assessors, Appellate Tax Board: final decision, Corporation, Personal property tax: public utility, Personal property tax: value. Value. Real Property, Poles and wires, Tax.

COUNSEL: James F. Ring for the plaintiff.

Anthony M. Ambriano for the defendants.

JUDGES: Present: McHugh, Sikora, & Fecteau, JJ. [FN2]

OPINION BY: McHUGH

OPINION

[*457] McHUGH, J. Verizon New England Inc. (Verizon) appeals from a Superior Court judgment dismissing a complaint designed to obtain a declaration that the boards of assessors of the cities [*458] of Newton and Boston and the treasurers/collectors of those cities (collectively, the defendants or assessors) prematurely demanded payment of property taxes on Verizon's construction work in progress (CWIP) as well as some of the poles and wires it used in the conduct of its business. We agree that the defendants' collection efforts were premature and that Verizon was entitled to a judgment so declaring.

1 Treasurer and collector of Newton, commissioner of the assessing department of Boston, board of review of the assessing department of Boston, and treasurer and collector of Boston.

2 Justice McHugh participated in the deliberation on this case and authored the opinion prior to his retirement.

a. Background. A common set of facts gave rise to this appeal, which focuses on a matter of procedure, and to an appeal on the merits we also decide in an opinion issued today.[FN3] To place the procedural issues in context, on March 3, 2008, the Appellate Tax Board (board) issued an order ruling, for the first time, that Verizon was taxable, pursuant to *G. L. c. 59, § 18*, First, for certain categories of its poles and wires. On August 4, 2009, based on the same statutory provision, the board issued a decision holding, again for the first time, that Verizon's CWIP also was taxable. Accordingly, the board ruled that the property at issue should have been valued by the Commissioner of Revenue (commissioner) as part of the annual valuation process in which she engages pursuant to *G. L. c. 59, § 39*.[FN4] The board's decision increased Verizon's Boston and Newton taxes by a total of \$7,492,533.88.

3 Verizon New England, Inc. v. Assessors of Boston, ante (2012) (Verizon I).

4 The valuation process is discussed in detail in Verizon I, supra. Briefly, though, *c. 59, § 39*, as appearing in St. 1955, c. 344, § 1, directs the commissioner to determine annually the valuation of each telephone and telegraph company's "machinery, poles, wires and underground conduits, wires and pipes" wherever located in the Commonwealth. The commissioner certifies this valuation to the taxpayer and to the board of assessors (assessors) in the municipality where the property is subject to taxation. The taxpayer and assessors may appeal the commissioner's valuation to the board. The board's decision is "final and conclusive," except as provided in *G. L. c. 58A, § 13*, which permits a party aggrieved by the board's decision to appeal the board's legal rulings to the Appeals Court. *G. L. c. 59, § 39*, as appearing in St. 1955, c. 344, § 1. The commissioner did not include the property in question in her valuation because she did not believe that the property was taxable.

In its decision, the board stated that the defendants were "authorized to assess additional taxes . . . based on the increases to the [commissioner's] valuations established by the Board." The defendants did so on August 7, 2009, and demanded payment of the increased taxes by September 8, 2009. Verizon paid [*459] the taxes under protest.[FN5] It also took an appeal to this court from the board's decision and commenced an action in the Supreme Judicial Court seeking a declaration that the assessment was premature and an injunction ordering return of the money it had paid under protest. A single justice of the Supreme Judicial Court remanded the case to the Superior Court where a

judge of that court, after receiving briefs and conducting a hearing, ordered entry of summary judgment dismissing the case "for the reasons stated in the defendants' [brief]."[FN6]

5 See *G. L. c. 60, § 98* ("No action to recover back a tax shall be maintained, . . . unless commenced within three months after payment of the tax nor unless such tax is paid . . . after . . . a written protest signed by" the taxpayer).

6 The defendants contend that the Superior Court judge made a discretionary determination to decline jurisdiction of the case and that we should review that decision solely for abuse of discretion. But the power to decline jurisdiction in cases like this exists only when the taxpayer has an adequate administrative remedy. See *Sydney v. Commissioner of Corps. & Taxn.*, 371 Mass. 289, 294-295, 356 N.E.2d 460 (1976); *DeMoranville v. Commissioner of Rev.* 457 Mass. 30, 34-35, 927 N.E.2d 448 (2010). The existence of such a remedy in this case is unclear at best, for Verizon is challenging the timing of the assessment, not the power to make an assessment at the proper time. The defendants, not the board, made the timing decision. Our research reveals no administrative path for challenging that decision and the defendants have pointed to none. Beyond that, the decision below does not evince an intent to make a purely jurisdictional determination. On the contrary, it has all the earmarks of a decision on the merits. Among those earmarks is note 1 in the judge's memorandum of decision in which he said: "[i]nitially this case had been assigned for a trial on the merits. However, all parties now agree that there are no questions of facts in dispute and the issues are straight questions of law for the Court to decide. Therefore, all parties agree that this case can and should be decided on cross-motions for summary judgment." Accordingly, we proceed to the merits.

b. Discussion. At the heart of this appeal is the appropriate construction of the term "final decision" as it appears in *G. L. c. 59, § 39*. In pertinent part, § 39, as amended by St. 1978, c. 514, § 83, requires assessors to assess a telephone company's personal property

"at the value determined by the commissioner[,] . . . provided, however, that in the event of a final decision by the appellate tax board or of the supreme judicial court under the preceding paragraph establishing a different valuation, the assessors shall grant an abatement, or assess and commit to the collector with their warrant for collection [*460] an additional tax, as the case

may be, to conform with the valuation so established by such final decision."

The "preceding paragraph" establishes a right to appeal pursuant to *G. L. c. 58A, § 13. Section 13*, inserted by St. 1998, c. 485, § 2, provides, again in pertinent part, that "[f]rom any final decision of the board . . . an appeal as to matters of law may be taken to the appeals court by either party to the proceedings before the board so long as that party has not waived such right of appeal."**[FN7]**

7 Before 1985, § 13 provided a right of appeal to the Supreme Judicial Court, which synchronized the language of that statute with the language of *c. 59, § 39*. In September of that year, however, the Legislature changed the language of *c. 58A, § 13*, to direct appeals to the Appeals Court, see St. 1985, c. 314, § 1, but made no corresponding change in *c. 59, § 39*.

All parties agree that *c. 59, § 39*, requires that the assessors make a tax assessment in the following circumstances: (1) upon the commissioner's initial valuation;**[FN8]** (2) if the board issues a decision altering the commissioner's valuation but neither party appeals from the decision within the time permitted; and (3) after the court issues a final decision on an appeal challenging the decision. They disagree, though, about the power of the assessors to make an assessment under the circumstances present here, i.e., after the board issues a decision altering the commissioner's valuation but before the time for taking an appeal from that decision has expired. Verizon argues that the assessors have no such power because no "final decision" exists as long as a party has time to appeal the board's decision pursuant to *c. 58A, § 13*. The assessors counter that each "decision" the board issues constitutes the requisite "final decision." Indeed, they suggest, § 13 itself permits appeals only from "final" decisions.

8 In fact, the assessors made such an assessment here and Verizon paid the amount assessed.

We review de novo decisions granting summary judgment. *Siebe, Inc. v. Louis M. Gerson Co.*, 74 Mass. App. Ct. 544, 549, 908 N.E.2d 819 (2009). Standing alone, the plain text of *c. 59, § 39*, which is the starting point for interpretive analysis, see *Fleet Natl. Bank v. Commissioner of Rev.*, 448 Mass. 441, 448, 862 N.E.2d 22 (2007); *Wheatley v. Massachusetts Insurers Insolvency Fund*, 456 Mass. 594, 601, 925 N.E.2d 9 (2010), can credibly support either reading. However, "our respect for the Legislature's considered judgment dictates that **[*461]** we interpret the statute to be sensible, rejecting unreasonable interpretations unless the clear meaning of the language requires such an interpretation." *Bednark v. Catania Hospitality Group, Inc.*, 78 Mass. App. Ct. 806, 811, 942 N.E.2d 1007 (2011). See *Commonwealth v. Dodge*, 428 Mass. 860, 865, 705 N.E.2d 612 (1999), quoting from *Beeler v.*

Downey, 387 Mass. 609, 616, 442 N.E.2d 19 (1982) ("[W]e must read the statute in a way to give it a sensible meaning"). When we consider the practical effect of the parties' respective positions, we think that a sensible interpretation requires the approach Verizon advances.

Were we to accept the assessors' argument, taxpayers and municipalities would face an unsettled series of assessments and abatements in any fiscal year. In addition to paying the commissioner's initial valuation, a taxpayer would be required to pay an additional, contested valuation if a board decision so required. Likewise, the municipality would be required to abate a collected tax if a board decision reduced the assessors' valuation or otherwise so ordered. Then, depending on the action of the court on appeal, another round of assessments or abatements could occur. As a result, a taxpayer like Verizon could potentially pay the initial assessment, obtain a refund upon a board decision and then be required to repay the refund upon a judicial decision. Municipalities would face a similar merry-go-round.

Verizon's construction of *c. 59, § 39*, is further buttressed by the Supreme Judicial Court's interpretation, albeit in dictum, of a prior version of the statute in *State Tax Commn. v. Assessors of Haverhill*, 331 Mass. 306, 118 N.E.2d 745 (1954). Though the tax disputes in Haverhill were ultimately disposed of as moot, the court stated that until the time for appeal from a board decision expired or the court decided any pending appeal, "there has been no final determination by the board, since its decision may have to be modified as the result of the appeal. And we do not think that an assessment before that time can be validated, if the action of the board should subsequently be sustained in this court." *Id. at 309*.

Lastly, the provisions of *c. 58A, § 13*, allowing appeals to the court only from "final" decisions of the board do not mean that those decisions are also "final" for purposes of the abatement and assessment provisions of *c. 59, § 39. Chapter 58A, § 13, [*462]* contains provisions for seriatim issuance of a decision and "findings and report," all of which must be completed before a decision is "final" and the appellate clock begins to run. Moreover, the "final" decision provisions of the statute mirror the "final" judgment provision of the Massachusetts Rules of Civil Procedure, which likewise permit appeals only from "final" judgments, though it is clear that many of those "final" judgments have no force and effect until the time for appeal has expired or the appeal is resolved. See *Mass.R.Civ.P. 54(a), 54(b), & 62(d)*, 365 Mass. 820, 829 (1974), & *62(a)*, as amended, 423 Mass. 1409 (1996). The well-established appellate structure**[FN9]** contained in the rules cannot have been unfamiliar to the Legislature. In that regard, it is noteworthy that *c. 58A, § 13*, as amended through St. 1998, c. 485, § 2, ends with the following two sentences:

"For want of prosecution of an appeal in accordance with the provisions of this section the board, or, if the appeal has been entered in the appeals court, a justice of that court, may dismiss the appeal. Upon dismissal of an appeal, the decision of the board shall thereupon have full force and effect."

If, as the defendants suggest, the board's decision were effective upon its issuance, we would have to conclude that the last sentence was unnecessary surplusage. That is the kind of conclusion we almost never reach, see, e.g., *Ropes & Gray LLP v. Jalbert*, 454 Mass. 407, 412, 910 N.E.2d 330 (2009) ("A statute should be construed so as to give effect to each word, and no word shall be regarded as surplusage") and we do not reach it here.

9 That structure existed long before the current rules were adopted. See, e.g., *Russia Cement Co. v. Le Page Co.*, 174 Mass. 349, 354, 55 N.E. 70 (1899) ("The phrase 'final judgment' has two meanings. It may indicate the judgment which, if not reversed or modified, will end the litigation in which it is entered, but which may be reversed or modified by a superior tribunal, and which therefore gives to the party aggrieved the right to invoke the action of the higher court.

The phrase may also mean that judgment which in fact does end the litigation, by an order of the court in which the cause was begun, or of some higher court to which it is carried, entered in the cause itself, and by virtue of the process by which the suit was commenced"). Moreover, the Legislature's express reference to the Rules of Appellate Procedure in *c. 58A, § 13*, suggests that it was familiar with the framework for appeals the Rules of Civil Procedure contain.

[*463] The judgment of the Superior Court is vacated and the case is remanded for entry of a judgment declaring that the assessments the defendants made on August 7, 2009, were premature and that those assessments and the resulting tax bills are invalid.**[FN10]**

10 The board's statement in its decision that the defendants were "authorized to assess additional taxes . . . based on the increases to the [commissioner's] valuation established by the Board" does not alter our analysis. That authorization, like the rest of the board's decision, became effective only when the decision was final.

So ordered.